

HOUSE BILL NO. 794

TESTIMONY OF THE MONTANA PUBLIC SERVICE COMMISSION

Some people have observed that it might be difficult for agencies, the legislature, and the courts to do things that have the appearance of hindering the right to know. However, given the information and time to consider it, people have the opportunity to understand that the right to know is neither simple nor an absolute and proper implementation of the right to know and actions affecting it must be seriously considered.

HB 794 is not a bill that appears to have been given the consideration that bills implementing the right to know or any constitutional provision should be given.

HB 794 begins in with ambiguity regarding violation of one or both of the two right-to-know provisions in Article II, Section 9, of the Montana Constitution. Article II, Section 9, provides a right to know through both examination of documents and observation of deliberations of public agencies. HB 794 is internally inconsistent regarding this point. For example the title, last sentence of Section 1, and last sentence of Section 2 speak of violations of the right to know in total, but the first sentence in Section 1 deals only with the right to examine public documents. This ambiguity should be clarified, as it may become legally problematic.

The primary intent of HB 794 seems to be that a state officer must defend herself or himself in the event of violation of the right to know, under the declaration that the officer is acting outside the scope of employment by the agency when violating the right to know. The provision is not logical. An event like an employee erupting into a frenzy and assaulting a citizen or fellow employee is properly categorized as acting

outside of the scope of employment and, as a result, the employee can fairly be excluded from employer indemnity. An event like an employee whose job duties, maybe even primary purpose, is to manage, distribute, and provide public records cannot fairly be excluded from employer indemnity for the exact thing the employee is directed to do -- the management, distribution, and provision of public records.

This is particularly so because of the complexity of the constitutional right to know. The constitutional right to know has an expressly stated exception -- the right of individual privacy at Article II, Section 10, trumps the right to know if the demands of privacy exceed the demands of public disclosure. In addition, case law and Montana statutes include other exceptions to the right to know, all based on equally important constitutional provisions. In Public Service Commission operations trade secrets are the predominant type of information for which the law requires protection from uncontrolled public disclosure. Trade secrets are property rights protected under Article II, Section 17, of the Montana Constitution and can trump the right to know.

HB 794 does not properly recognize that determining whether documents subject to multiple and conflicting constitutional rights can be freely distributed to the public requires a consideration of important opposing interests. Consideration of conflicting interests at the constitutional level is not a simple thing. There have been many court cases regarding the right to know and privacy and trade secret, which is a strong indication that the law is not simple to administer. HB 794 provides for no period of time to apply the procedures and tests required in determining conflicting right to know interests. The PSC has experienced instances when the public has requested documents at the time of filing if not before filing. HB 794 may create situation in which

an employee is reluctant to conduct a complete balancing because of the risk of litigation and no indemnity. In some instances courts have changed the law from previous judicial declarations related to the right to know its relationship to other constitutional provisions, which further complicates matters. In its present form HB 794 actually undermines the Constitution by chilling the careful balancing that is necessary to properly implement the Constitution.

HB 794 should be amended to allow a reasonable time for an agency to evaluate a right to know request and allow for the proper balancing of competing constitutional interests.

HB 794 should also be amended to indemnify employee costs and attorney fees, which could be overwhelming, of a good faith employee defense of litigation regarding a law that is complex and uncertain. If the legislature chooses to burden an employee with her or his own defense, then at least the legislature should provide that costs and attorney fees must be awarded to the employee, if the employee prevails.

HB 794 also skirts the legislative obligation. Instead of a relatively easy punishment approach, the legislature should do a meaningful education and guidance approach, including by making laws that clearly reflect exactly what public employees must do when faced with a right to know claim in which other constitutional provisions are involved.

The PSC is committed to open government, but the PSC must follow all of the laws that apply and laws require a meaningful balancing of interests, which take time to complete. The laws are not PSC creations, but the Constitution itself, legislation, and court orders.

The legislature might also consider whether HB 794 is necessary at all. As the law exists already a rogue public employee is already subject to prosecution under the official misconduct section of Title 45, MCA.

Thank you.

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