

March 30, 2005

Re: Opposition to HB 794 creating criminal and civil penalties for violations of *Right to Know*

Honorable House Judiciary Members:

The purpose of this letter is to express opposition to HB 794 creating criminal and civil penalties for violations of *Right to Know* and providing that the employing government entity is not required to defend or indemnify an employee violating *Right to Know* in public record instances "in which an individual right to privacy does not clearly exceed the public's right to know." (Emphasis added.)

HB 794 proposes that when privacy is not clear the *Right to Know* prevails which is inconsistent with the Montana Supreme Court balancing test for competing constitutional rights between the Mont. Const. Art. II *Right of Privacy* and the *Right to Know*. Pursuant to HB 794 if it is a close call the record is to statutorily be a public record and potentially expose the government entity to civil liability for violating an individual's Constitutional *Right to Privacy*. The Montana Supreme Court balancing test requires government "to determine whether a person has a constitutionally protected privacy interest; whether the person involved had a subjective or actual expectation of privacy and whether society is willing to recognize that expectation as reasonable." *Missoulia v. Board of Regents* (1984) 207 Mont. 513, 675 P.2d 962 citing *Montana Human Rights Division v. City of Billings* (1982) 199 Mont. 434, 649 P.2d 1283. Further, the Montana Supreme Court stated the "right of privacy turns on the reasonableness of the expectation which may vary, even regarding the same information and the same recipient of the information." Sometimes the factual circumstances make it difficult for government to apply the Montana Supreme Court balancing test to but because the Constitutional *Right to Privacy* is not clear does not equate to the Constitutional *Right to Privacy* not existing.

There are numerous areas of potential confidentiality such as employee personnel records, criminal justice information pursuant to Mont. Code Ann. § 44-5-103(3) and § 44-5-303, motor vehicle accident reports pursuant to Mont. Code Ann. § 61-7-114, Federal Health Insurance Portability and Accountability Act of 1996 (HIPPA); etc.

HB 794 is not only unreasonable it is mean spirited and its penalties are punitive and malicious against government employees if they do not decide in favor of public record when making difficult decisions between the competing Constitutional rights of the *Right to Know* and the *Right to Privacy*.

Sincerely,

OFFICE OF THE CITY ATTORNEY

/s/ Jim Nugent

Jim Nugent
City Attorney

cc: Missoula County Representatives; Mike Kadas, Mayor; City Council; Janet Stevens, CAO; Alec Hansen, Montana League of Cities & Towns; Bob Weaver, Chief of Police; Gail Verlanic, Human Resource Director; Marty Rehbein, City Clerk