



Department of Public Health and Human Services

EXHIBIT 5

DATE 2/16/15

HB 448

Steve Bullock, Governor

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House Judiciary Committee
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HB 448

Montana Code Annotated § 2-3-221 currently allows district court judges the discretion to award costs and reasonable attorney fees to plaintiffs who prevail in actions to enforce their rights of the plaintiff under Article II, Section 9 of the Montana Constitution, which reads:

No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

HB 448 removes the discretion of the district court to award costs and fees, and requires the awarding of costs and fees if a plaintiff obtains relief at any stage:

Section 1. Section 2-3-221, MCA, is amended to read:

"2-3-221. Costs to plaintiff in certain actions to enforce constitutional right to know. A plaintiff who prevails and obtains relief at any stage in an action brought in district court to enforce the plaintiff's rights under Article II, section 9, of the Montana constitution ~~may~~ must be awarded costs and reasonable attorney fees."

Under the proposed amendment, the awarding of costs and attorney fees to a plaintiff is mandatory if the plaintiff "prevails and obtains relief at any stage". This language doesn't require that plaintiffs prevail and obtain relief on all parts of a claim, however, and appears to entitle plaintiffs to an award even if they prevail on the smallest part of their claim.

The Department does not suggest that Montana citizens can or should be denied their rights under Article II, Section 9. We do, however, urge that the committee vote "No" on HB 448.

The amendments in HB 448 are inequitable and unreasonable.

- (1) HB 448 removes the discretion of the court in determining whether to award attorney fees and costs, and requires such awards for petitioners who prevail, it does not provide for the same mandatory award when agency actions are proven to have been correct, thus subjecting governmental agencies to mandatory financial risk without subjecting a petitioner to a similar risk, in even the most frivolous of circumstances.
- (2) HB 448 requires the awarding of attorney fees and costs even in cases in which a plaintiff ultimately loses. Generally, the party who ultimately prevails in any legal action is the party who is entitled to recover attorney fees and costs, if any party at all may. HB 448 turns that on its head.
 - HB is so vaguely written that its requirement that attorney fees and costs be paid to a plaintiff who "obtains relief at any stage" may be susceptible to an interpretation requiring attorney fees and costs be paid upon obtaining any relief, even the smallest relief, at any stage, even if plaintiffs do not prevail on the major parts of their petitions.
 - HB 448 requires that a plaintiff who prevails at district court, but who loses on appeal to the Montana Supreme Court, must nevertheless be awarded attorney fees and costs.
 - HB 448 is so vaguely written that it can be read to require that a plaintiff who prevails at the district court level only to be overturned at the Supreme Court level may nevertheless be awarded attorney fees and costs not only at the district court level, but for fees and costs incurred during the appeal. HB 448 does not clearly state otherwise.

From the point of view of petitioners and their attorneys, HB 448 presents a framework tilted entirely toward the plaintiff, subjecting plaintiffs to no risk that they or their attorneys would ever have to pay attorney fees and costs, while requiring governmental agencies such as DPHHS to pay attorney fees even in cases in which the agencies ultimately prevail, or prevail in all but the smallest aspects of disputes. This is inequitable, especially when considering the complexity of issues related to an agency's response to public records requests.

In responding to public records requests, agencies such as DPHHS must determine whether the records sought from and held by the agency are public records at all, and whether they are subject to any other competing constitutional or legal right which prevents their disclosure even under a plaintiff's claim pursuant to Article II, Section 9.

Agencies, for example, possess many documents which are not public records, including medical records of patients at its institutions, or records of persons which are subject to constitutional protections, such as the right of privacy. Agencies also possess documents which other entities might claim as protected proprietary information, or which state or federal law require them not to disclose. Determining which documents an agency can disclose as a public record is often difficult when the agency must weigh other legal and even constitutional rights.

Under the current statute, a court has the discretion to consider whether any mistake an agency might make in weighing such factors in its response to a public records request is sufficiently egregious so as to justify the awarding of attorney fees and costs. Under the proposed amendment, any mistake at all appears to subject the agency to mandatory payment of all attorney fees and costs. The proposed amendment would expose state agencies to steep mandatory payments of attorney fees and costs in cases in which their responses to public records requests are substantially in compliance with Article II, Section 9, but are not perfect. It is not unreasonable to anticipate that one of the major results of putting into statute such an unbalanced scheme for awarding attorney fees and costs would be to increase public records litigation, with even minor disputes regarding whether an agency could disclose some document resulting in the mandatory award of attorney fees.

We recommend that the committee maintain the discretionary authority allowed the courts under MCA § 2-3-221, and that the committee members vote "No" on HB 448.