

Amendment - 1st Reading/2nd House-blue - Requested by: Ed Stafman - Free Conference Committee on SB 40

- 2025

69th Legislature 2025

Drafter: Rachel Weiss,

SB0040.003.007

SENATE BILL NO. 40

INTRODUCED BY G. HERTZ

BY REQUEST OF THE SENATE SELECT COMMITTEE ON JUDICIAL OVERSIGHT AND REFORM

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING PUBLIC RECORD LAWS RELATING TO THE SUPREME COURT AND EXECUTIVE BRANCH; REQUIRING THE RECORDING OF A CLOSED JUDICIAL DELIBERATION MEETING; PROVIDING FOR THE DISCLOSURE OF JUDICIAL DELIBERATIONS AND CASE INFORMATION AFTER A CASE IS FINAL; NARROWING THE SCOPE OF EXECUTIVE EXCEPTIONS TO PUBLIC RECORDS REQUESTS; PROVIDING FOR A LIMITED EXECUTIVE EXEMPTION OVER CERTAIN DOCUMENTS; PROVIDING THAT THE EXECUTIVE EXEMPTION EXPIRES AFTER A CERTAIN TIME; REVISING DEFINITIONS; AMENDING SECTIONS 2-3-203, 2-3-212, AND 2-6-1002, AND 90-1-105, MCA; AND PROVIDING AN EFFECTIVE DATEDATES."

WHEREAS, THE RIGHT TO KNOW CLAUSE FOUND IN ARTICLE II, SECTION 9, OF THE MONTANA CONSTITUTION FORMS THE BASIS OF THIS BILL, AND ARTICLE II, SECTION 9, OF THE MONTANA CONSTITUTION DOES NOT CONTAIN A JUDICIAL EXCEPTION; AND

WHEREAS, THE MONTANA CONSTITUTION'S GRANT OF THE GENERAL "LEGISLATIVE POWER" TO THE MONTANA STATE LEGISLATURE IS SUBJECT TO THE PEOPLE'S RIGHTS OF INITIATIVE AND REFERENDUM. IT IS CLEAR THAT PART OF THE LEGISLATIVE POWER IS THE AUTHORITY TO ADOPT LAWS PROTECTING THE INDIVIDUAL RIGHTS LISTED IN THE MONTANA CONSTITUTION; and

WHEREAS, the Montana constitution has enshrined access to public information in the Right to Know in Article II, section 9, which states that "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"; and

WHEREAS, the Right of Participation in Article II, section 8, of the Montana Constitution also ensures that the public must be given a reasonable opportunity to participate in the operation of governmental agencies prior to the final decision as may be provided by law.

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BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 2-3-203, MCA, is amended to read:

"2-3-203. Meetings of public agencies and certain associations of public agencies to be open to public -- exceptions. (1) All meetings of public or governmental bodies, boards, bureaus, commissions, agencies of the state, or any political subdivision of the state or organizations or agencies supported in whole or in part by public funds or expending public funds, including the supreme court, must be open to the public.

(2) All meetings of associations that are composed of public or governmental bodies referred to in subsection (1) and that regulate the rights, duties, or privileges of any individual must be open to the public.

(3) The presiding officer of any meeting may close the meeting during the time the discussion relates to a matter of individual privacy and then if and only if the presiding officer determines that the demands of individual privacy clearly exceed the merits of public disclosure. The right of individual privacy may be waived by the individual about whom the discussion pertains and, in that event, the meeting must be open.

(4) (a) Except as provided in subsection (4)(b), a meeting may be closed to discuss a strategy to be followed with respect to litigation when an open meeting would have a detrimental effect on the litigating position of the public agency.

(b) A meeting may not be closed to discuss strategy to be followed in litigation in which the only parties are public bodies or associations described in subsections (1) and (2).

(5) (a) The Subject to subsections (5)(b) and (5)(c), the supreme court may close a meeting that involves judicial deliberations in an adversarial proceeding.

(b) All closed meetings of the supreme court must be recorded by electronic means with the recording constituting the official record of the meeting. A written record of the meeting must also be made and must include the information specified in 2-3-212(2) and (3), including all documents considered by the supreme court.

(c) The electronic recording and written record provided for in subsection (5)(b) must be available for inspection by the public after the case that was subject to closed judicial deliberations becomes final. The

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1 supreme court may redact confidential information when the demands of individual privacy of a party or witness
2 clearly exceed the merits of public disclosure.

3 (6) Any committee or subcommittee appointed by a public body or an association described in
4 subsection (2) for the purpose of conducting business that is within the jurisdiction of that agency is subject to
5 the requirements of this section.

6 (7) A case becomes final after the time to appeal FOR ANY FURTHER REVIEW OF the supreme court's
7 order to the United States supreme court has expired. If an appeal is pursued, a case becomes final when all
8 the issues on appeal are settled and no other issues can be appealed to any other court. If the supreme court
9 remands a case in whole or in part to a lower court, the case becomes final when all the issues on appeal are
10 settled and no other issues can be appealed to any other court. OR THE TIME FOR ANY FURTHER REVIEW BY ANY
11 OTHER COURT WITH SUBJECT-MATTER JURISDICTION OVER THE CASE HAS EXPIRED. IF ANOTHER COURT UNDERTAKES
12 REVIEW OF THE CASE, IT BECOMES FINAL WHEN ALL THE ISSUES REVIEWED ARE SETTLED AND NO OTHER ISSUES CAN BE
13 REVIEWED FURTHER IN ANY OTHER COURT."

14

15 **Section 2.** Section 2-3-212, MCA, is amended to read:

16 **"2-3-212. Minutes of meetings -- public inspection.** (1) Appropriate minutes of all meetings
17 required by 2-3-203 to be open must be kept and must be available for inspection by the public. If an audio
18 recording of a meeting is made and designated as official, the recording constitutes the official record of the
19 meeting. If an official recording is made, a written record of the meeting must also be made and must include
20 the information specified in subsection (2).

21 (2) Minutes must include without limitation:

22 (a) the date, time, and place of the meeting;

23 (b) a list of the individual members of the public body, agency, or organization who were in
24 attendance;

25 (c) the substance of all matters proposed, discussed, or decided; and

26 (d) at the request of any member, a record of votes by individual members for any votes taken.

27 (3) If the minutes are recorded and designated as the official record, a log or time stamp for each

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1 main agenda item is required for the purpose of providing assistance to the public in accessing that portion of
2 the meeting.

3 (4) Any time a presiding officer closes a public meeting pursuant to 2-3-203, the presiding officer
4 shall ensure that minutes taken in compliance with subsection (2) are kept of the closed portion of the meeting.
5 ~~The~~ Except as provided in 2-3-203(5)(c), the minutes from the closed portion of the meeting may not be made
6 available for inspection except pursuant to a court order."

7

8 **Section 3.** Section 2-6-1002, MCA, is amended to read:

9 **"2-6-1002. Definitions.** As used in this chapter, the following definitions apply:

10 (1) "Confidential information" means information that is accorded confidential status or is prohibited
11 from disclosure as provided by applicable law. The term includes information that is:

12 (a) constitutionally protected from disclosure because an individual privacy interest clearly exceeds
13 the merits of public disclosure;

14 (b) related to judicial deliberations in adversarial proceedings of any court other than the supreme
15 court;

16 (c) necessary to maintain the security and integrity of secure facilities or information systems
17 owned by or serving the state; and

18 (d) designated as confidential or prohibited from disclosure by statute or through judicial decisions,
19 findings, or orders holding that the information is confidential under one of the provisions of (1)(a) through
20 (1)(d); and OR

21 (e) related to judicial deliberations in adversarial proceedings of the supreme court until the case at
22 issue becomes final as provided in 2-3-203(7).

23 (2) "Constitutional officer" means the governor, lieutenant governor, attorney general, secretary of
24 state, superintendent of public instruction, or auditor, who are the constitutionally designated and elected
25 officials of the executive branch of government.

26 (3) "Constitutional officer record" means a public record prepared, owned, used, or retained by a
27 constitutional officer.

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- 1 (4) "Essential record" means a public record immediately necessary to:
- 2 (a) respond to an emergency or disaster;
- 3 (b) begin recovery or reestablishment of operations during and after an emergency or disaster;
- 4 (c) protect the health, safety, and property of Montana citizens; or
- 5 (d) protect the assets, obligations, rights, history, and resources of a public agency, its employees
- 6 and customers, and Montana citizens.
- 7 (5) "Executive branch agency" means a department, board, commission, office, bureau, or other
- 8 public authority of the executive branch of state government.
- 9 (6) "Historic record" means a public record found by the state archivist to have permanent
- 10 administrative or historic value to the state.
- 11 (7) "Local government" means a city, town, county, consolidated city-county, special district, or
- 12 school district or a subdivision of one of these entities.
- 13 (8) "Local government records committee" means the committee provided for in 2-6-1201.
- 14 (9) "Permanent record" means a public record designated for long-term or permanent retention.
- 15 (10) "Public agency" means the executive, legislative, and judicial branches of Montana state
- 16 government, a political subdivision of the state, a local government, and any agency, department, board,
- 17 commission, office, bureau, division, or other public authority of the executive, legislative, or judicial branch of
- 18 the state of Montana.
- 19 (11) "Public information" means information prepared, owned, used, or retained by any public
- 20 agency relating to the transaction of official business, regardless of form, except for confidential information that
- 21 must be protected against public disclosure under applicable law. The term includes information prepared,
- 22 owned, or retained by the supreme court, regardless of form, relating to an adversarial proceeding after the
- 23 case at issue becomes final as provided in 2-3-203(7).
- 24 (12) "Public officer" means any person who has been elected or appointed as an officer of state or
- 25 local government.
- 26 (13) (a) "Public record" means public information that is:
- 27 (a)(i) fixed in any medium and is retrievable in usable form for future reference; and

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1 ~~(b)~~(ii) designated for retention by the state records committee, judicial branch, legislative branch, or
2 local government records committee.

3 (b) The term includes judicial deliberations of the supreme court pursuant to 2-3-203(5).

4 (14) "Records manager" means an individual designated by a public agency to be responsible for
5 coordinating the efficient and effective management of the agency's public records and information.

6 (15) "State records committee" means the state records committee provided for in 2-6-1107."

7
8 **Section 4.** Section 90-1-105, MCA, is amended to read:

9 **"90-1-105. Functions of department of commerce -- economic development.** The department of
10 commerce shall:

11 (1) provide coordinating services to aid state and local groups and Indian tribal governments in the
12 promotion of new economic enterprises and conduct publicity and promotional activities within the state,
13 nationally, and internationally in connection with new economic enterprises;

14 (2) collect and disseminate information regarding the advantages of developing agricultural,
15 recreational, commercial, and industrial enterprises within this state;

16 (3) serve as an official state liaison between persons interested in locating new economic
17 enterprises in Montana and state and local groups and Indian tribal governments seeking new enterprises;

18 (4) aid communities and Indian tribal governments interested in obtaining new business or
19 expanding existing business;

20 (5) (a) study and promote means of expanding markets for Montana products within the state,
21 nationally, and globally; and

22 (b) provide training and assistance for Montana small businesses and entrepreneurs to expand
23 markets for made-in-Montana products;

24 (6) encourage and coordinate public and private agencies or bodies in publicizing the facilities and
25 attractions of the state;

26 (7) in collaboration with the state-tribal economic development commission, tribal governments,
27 and other partners, develop a system for the gathering of data allowing the department to quantify on an

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ongoing basis the economic contributions of the tribes in Montana. The department may execute data sharing and use agreements with each tribal government. The department shall update the state-tribal relations committee on this effort and, beginning no later than December 1, 2024, and in a manner beneficial to tribal governments, policymakers, and the public, make aggregate data on the economic contributions of the tribes in Montana readily available on an ongoing basis. Disaggregated data provided by a tribal government pursuant to a data sharing and use agreement with the department and identified by the tribal government as confidential must be considered "confidential information" as defined in 2-6-1002~~(1)(d)~~. The department may accept contributions and donations from individuals and organizations for the purposes of this subsection.

(8) explore the use of cooperative agreements, as provided in Title 18, chapter 11, part 1, for the promotion and enhancement of economic opportunities on the Indian reservations in Montana; and

(9) assist the state-tribal economic development commission established in 90-1-131 in:

(a) identifying federal government and private sector funding sources for economic development on Indian reservations in Montana; and

(b) fostering and providing assistance to prepare, develop, and implement cooperative agreements, in accordance with Title 18, chapter 11, part 1, with each of the tribal governments in Montana."

NEW SECTION. Section 5. Limited executive exception -- expiration of exemption. (1) The governor may assert an executive exemption to withhold specific public information from a request for public information under 2-6-1003 and 2-6-1006 only when the governor's individual privacy interest clearly outweighs the merits of public disclosure.

(2) The governor does not have an individual privacy interest in public information pertaining to policy, politics, or legislative matters.

(3) The assertion of an executive exemption must be narrowly tailored to apply to only the specific information in which the governor is claiming a privacy interest. The information for which the governor is asserting the executive exemption may be redacted, but only to the narrowest extent possible. A person who received public information with redaction may bring an action pursuant to 2-6-1009 alleging that the application of an executive exemption is overly broad. The court shall review the redacted information and assess whether

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the individual privacy interest clearly outweighs the merits of public disclosure.

(4) (a) The duration for which the executive exemption lasts is only as long as the protection of the exempted information serves its underlying purpose.

(b) For exempted information that is not challenged in court or for which a court upholds the executive exemption, then the exemption expires no later than the time at which the underlying issue is resolved.

(c) The executive exemption is waived at the time the information is voluntarily disclosed to a third party to whom the executive exemption does not apply.

(b) The executive exemption is waived at the time the information is voluntarily disclosed to a third party to whom the executive exemption does not apply.

(5) For the purposes of this section, an individual privacy interest clearly outweighs the merits of public disclosure as provided in 2-6-1002(1) only if the public information requested is confidential information under the provisions of 2-6-1002(1)(a) through (1)(e).

NEW SECTION. Section 6. Codification instruction. [Section 5] is intended to be codified as an integral part of Title 2, chapter 6, part 11, and the provisions of Title 2, chapter 6, part 11, apply to [section 5].

NEW SECTION. Section 7. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 8. Effective date. (1) Except as provided in subsection (2), [This this act] is effective October 1, 2025 on passage and approval.

(2) [Sections 1 and 2] are effective October 1, 2025.

- END -