

1 HOUSE BILL NO. 272

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9 A BILL FOR AN ACT ENTITLED: "AN ACT REVISING LAWS REGARDING LEGISLATIVE PRIVILEGE OVER
10 CERTAIN PUBLIC INFORMATION; PROVIDING THAT LEGISLATIVE BILL DRAFTING FILES ARE PUBLIC
11 RECORDS; PROVIDING THAT THE LEGISLATIVE PRIVILEGE ESTABLISHED BY THE SPEECH OR
12 DEBATE CLAUSE IN THE MONTANA CONSTITUTION IS A PROTECTION AGAINST CERTAIN
13 PROSECUTIONS BUT IS NOT A COMPLETE PROTECTION FROM DISCLOSURE UNDER PUBLIC
14 RECORDS LAWS; PROVIDING THAT AN INDIVIDUAL LEGISLATOR'S PRIVATE WRITINGS OR
15 DOCUMENTS ARE PROTECTED FROM DISCLOSURE UNDER PUBLIC RECORDS LAWS; PROVIDING
16 THAT AN INDIVIDUAL LEGISLATOR'S COMMUNICATIONS WITH THE LEGISLATOR'S PERSONAL STAFF
17 ARE PROTECTED FROM DISCLOSURE UNDER PUBLIC RECORDS LAWS; PROVIDING THAT A
18 LEGISLATOR WAIVES THE PROTECTION FROM DISCLOSURE BY SHARING WRITINGS, DOCUMENTS,
19 OR COMMUNICATIONS WITH ANOTHER PERSON; PROVIDING DEFINITIONS; AND PROVIDING AN
20 IMMEDIATE EFFECTIVE DATE."

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22 WHEREAS, Montana has a deeply rooted commitment to the transparency and accountability of
23 government, as demonstrated by the protections offered by the right to know in Article II, section 9, and the
24 right of participation in the operations of government agencies in Article II, section 8, of the Montana
25 Constitution; and

26 WHEREAS, the Montana Constitution has enshrined access to public information in the right to know in
27 Article II, section 9, which states that "No person shall be deprived of the right to examine documents or to
28 observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in

1 cases in which the demand of individual privacy clearly exceeds the merits of public disclosure"; and

2 WHEREAS, the right of participation in Article II, section 8, of the Montana Constitution also ensures
3 that the public must be given a reasonable opportunity to participate in the operation of government agencies
4 prior to the final decision as may be provided by law; and

5 WHEREAS, these fundamental rights are the foundation on which every Montanan is able to exercise
6 the power to hold elected officials accountable for their actions and decisions; and

7 WHEREAS, in recognition of its commitment to the principles of transparency and accountability, the
8 Montana Legislature has had a long-standing policy of allowing public access to the information collected in
9 legislative bill drafting files; and

10 WHEREAS, restoring and maintaining public access to bill drafting files will encourage the public's
11 assertion of the right to know and facilitate more meaningful participation under the right of participation in the
12 legislative process; and

13 WHEREAS, the Speech or Debate clause in Article V, section 8, of the Montana Constitution states
14 that a legislator "shall not be questioned in any other place for any speech or debate in the legislature"; and

15 WHEREAS, providing access to the public to a bill drafting file in furtherance of the right to know and
16 the right of participation as protected in the Montana Constitution does not in and of itself involve questioning a
17 legislator's speech or debate; and

18 WHEREAS, the Speech or Debate clause provides a legislator the privilege from having records or
19 communications regarding legitimate legislative acts used against the legislator, but the clause does not create
20 a privilege in the disclosure of the legislator's communications to another person, and therefore the materials
21 disclosed in a bill drafting file may not be used to prosecute a legislator, either criminally or civilly, for the
22 legislator's legitimate legislative acts; and

23 WHEREAS, no other privilege can exist to protect communications between a legislator and a bill
24 drafter because legal privileges are waived when the privilege-holder voluntarily discloses the privileged
25 information to another person, including a bill drafter, and because the bill drafter is a third party employed by
26 the Legislative Branch and not employed by the individual legislator; and

27 WHEREAS, bill drafting files often contain communications between a bill drafter and parties that are
28 not legislators, which are clearly not protected from disclosure under the Montana Constitution, whether or not a

1 legislator is included in the communications; and

2 WHEREAS, the heart of the Speech or Debate clause is to protect a legislator's legitimate legislative
3 acts from undue prosecution or harassment from either the Executive Branch or the Judicial Branch of
4 government, with which the Legislative Branch is a co-equal branch of government; and

5 WHEREAS, the Legislature deems it appropriate to strike a balance between the public's right to know
6 and the individual legislator's immunities under the Speech or Debate clause by providing access to bill drafting
7 files while protecting a legislator against prosecution for legitimate legislative acts that would otherwise be
8 constitutionally protected.

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

11

12 NEW SECTION. **Section 1. Legislative bill drafting files -- privileged content -- definitions.** (1)

13 Legislative bill drafting files are public records as defined in 2-6-1002 and must be provided upon request
14 pursuant to Title 2, chapter 6, part 10.

15 (2) A legislative bill drafting file contains the history of the drafting, preparation, and process from
16 request to introduction of a bill draft. The contents of a bill drafting file may include but are not limited to:

17 (a) draft versions of a bill prior to introduction;

18 (b) bills or laws from other states;

19 (c) uniform acts or model legislation from any source;

20 (d) reports, articles, papers, or any other research conducted on the topic of the bill draft;

21 (e) legal analysis;

22 (f) e-mails and other communications between the legislator and the bill drafter;

23 (g) e-mails and other communications between the bill drafter and any third party, whether or not
24 the legislator was included in those communications; and

25 (h) any other resources or materials collected or compiled during the course of drafting the bill.

26 (3) (a) The legislative privilege granted under Article V, section 8, of the Montana constitution to a
27 legislator is an immunity from prosecution in a criminal or civil action for the legislator's legitimate legislative
28 acts. The records, including communications, contained in a legislative bill drafting file may not be used as

1 evidence of legislative acts in a judicial proceeding against a legislator.

2 (b) The legislative privilege granted under Article V, section 8, of the Montana constitution to a
3 legislator as it pertains to legislative bill drafting files does not create a privilege of confidentiality against
4 disclosure under Article II, section 9, of the Montana constitution and Title 2, chapter 6, parts 10 through 12, for
5 any communications or other records that are generated in the course of drafting a bill, shared with another
6 person, or preserved in the legislative bill drafting file.

7 (c) A legislator is entitled to assert legislative privilege to prohibit disclosure of writings or
8 documents that are kept private by the legislator and not shared with another person. A legislator waives that
9 privilege if the legislator voluntarily provides the writings or documents related to a bill drafting file to another
10 person.

11 (d) A legislator is entitled to assert legislative privilege to prohibit disclosure of communications or
12 documents that are exchanged between the legislator and the legislator's personal staff when the legislator has
13 an expectation of privacy. A legislator waives that privilege if the legislator voluntarily provides communications
14 or documents related to a bill drafting file to a third party.

15 (e) Legislative privilege does not apply to communications between a legislator and chamber staff
16 or legislative branch staff and does not prevent those communications from being disclosed pursuant to a
17 public records request because the chamber staff and legislative branch staff are employed by the legislature in
18 its entirety and not by an individual legislator.

19 (4) For the purposes of this section, the following definitions apply:

20 (a) "Chamber staff" means the staff of the house of representatives and the staff of the senate as
21 provided for in 5-2-221 and legislative rules.

22 (b) "Legislative branch staff" means the staff of the:

23 (i) legislative services division provided for in 5-11-111;

24 (ii) legislative fiscal division provided for in 5-12-301; and

25 (iii) legislative audit division provided for in 5-13-301.

26 (c) "Personal staff" means a legislative aide employed by an individual legislator and designated
27 pursuant to legislative rules.

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1 NEW SECTION. Section 2. Severability. If a part of [this act] is invalid, all valid parts that are
2 severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications,
3 the part remains in effect in all valid applications that are severable from the invalid applications.

5 NEW SECTION. **Section 3. Codification instruction.** [Section 1] is intended to be codified as an
6 integral part of Title 2, chapter 6, part 10, and the provisions of Title 2, chapter 6, part 10, apply to [section 1].

8 NEW SECTION. **Section 4. Effective date.** [This act] is effective on passage and approval.

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