

OFFICE OF THE GOVERNOR
STATE OF MONTANA

GREG GIANFORTE
GOVERNOR



KRISTEN JURAS
LT. GOVERNOR

May 19, 2023

The Honorable Jason Ellsworth
President of the Senate
State Capitol
Helena, MT 59620

The Honorable Matt Regier
Speaker of the House
State Capitol
Helena, MT 59620

Dear President Ellsworth and Speaker Regier:

The Montana Constitution directs that I, as governor, “see that the laws are faithfully executed.” While I, with the Legislature, fully support government transparency and the public’s right to know, I must also ensure those interests are properly pursued in light of countervailing, constitutionally mandated obligations. Senate Bill 73 fails to do so.

Senate Bill 73 revises a statute that addresses the interplay of two constitutional considerations: the authority of the Legislature to supervise post-audit duties, and the right of Montanans to have their individual privacy protected. This intersection is not unique to the audit context. All constitutional officers must protect privacy of Montanans where individual privacy interests are clearly paramount. Even the public’s constitutional Right to Know expressly yields in such circumstances.

Montana courts agree. A Helena district court in April protected the privacy of Montanans over the Right to Know, holding in that case that “there should be no dispute that public employees possess privacy interests in relation to personnel matters.” In reaching this holding, the court quoted the Montana Supreme Court to state that “the competing right to privacy and right to know interest ‘must be balanced in the context of the facts of each case ...’” and that “it is the courts’ duty to balance the competing rights at issue”

Senate Bill 73 flies in the face of this settled approach. Senate Bill 73 concludes the balance is always in favor of an unelected bureaucrat, the legislative auditor. Senate Bill 73 gives the legislative auditor plenary review of any and all government documents, in any context, by any

means, at any time, without notice or consent, leaving it up to the auditor to determine if and how to protect a state agency's confidential information.¹

Giving an unelected bureaucrat such unfettered authority, especially without safeguards for Montanans' privacy interests, is unacceptable.

As the auditor's own counsel has acknowledged, state agency information belongs, and always belongs, to the agency. The legislative auditor is solely responsible to the Legislature. MCA § 5-13-303. So the state agency, not the legislative auditor, must necessarily oversee and facilitate the handling of its own confidential information, as it is accountable for the well-keeping of its own information.²

Indeed, it must be so. To require, as Senate Bill 73 does, that state agencies turn over confidential information unquestioned to the auditor—or subject the agency, including those that oversee the agency, to fines, jail, and unemployment³—fails to take into account the state agency's obligation under the Montana Constitution to ensure that confidential information is

¹ During this very legislative session, the auditor attempted to secure electronic information held by a cabinet agency for another agency without the knowledge or consent of the unsuspecting agency. It is only because the cabinet agencies take their confidentiality obligations seriously that this did not occur.

² This is consistent with other statutes governing audits involving the private sector. *See e.g.*, MCA § 50-16-529 (authorizing a health care provider to disclose patient information without patient authorization “to a person who obtains information for purposes of an audit” only “if that person agrees in writing to: (a) remove or destroy, at the earliest opportunity consistent with the purpose of the audit, information that would enable the patient to be identified; and (b) not disclose the information further, except to accomplish the audit or to report unlawful or improper conduct involving fraud in payment for health care by a health care provider or patient or other unlawful conduct by a health care provider; ...”).

³ Senate Bill 73 provides that a state agency “has a duty to aid” the legislative auditor, thereby expressly subjecting the entire agency to the official misconduct statute. *See* MCA § 47-7-401. This mandate is in tension with MCA § 5-13-314, which protects a state employee “who provides information to the committee, the legislative auditor, or the legislative auditor's authorized designee” from “any penalties, sanctions, retaliation, or restrictions in connection with the employee's or contractor's employment as a result of the disclosure of information unless the employee or contractor disclosing the information has violated state law.” Employees that comply with Senate Bill 73 can run afoul of MCA § 5-13-314 and lose their job, or comply with MCA § 5-13-314 and run afoul of Senate Bill 73 and lose their job. Indeed, disclosing confidential information protected by the Montana Constitution, even to the auditor, could also be construed as official misconduct. *See* MCA § 45-7-401(1)(b) (stating that a public servant commits the offense of official misconduct when he or she “knowingly performs an act in an official capacity that the public servant knows is forbidden by law.”).

adequately protected.⁴ The legislative audit serves as an appropriate check on the other branches of government, but so does the ability of state agencies to ensure the information sought is both lawfully sought⁵ and properly protected. And where there is an impasse as to which constitutional right wins the day, it is the judiciary, as the final arbiter of the meaning of the Constitution, that is the tie breaker, not an unelected bureaucrat.

Senate Bill 490, which I signed into law today, bears this out. In Senate Bill 490, even when duly-elected legislators subpoena information from a person (including an agency), the subpoena must identify a legitimate legislative purpose, and the person subpoenaed may deny producing

⁴ See, e.g., MCA § 2-6-1002(11) (defining “public information” to mean “information prepared, owned, used, or retained by any public agency relating to the transaction of official business, regardless of form, except for confidential information that must be protected against public disclosure under applicable law.”).

⁵ The Legislative Audit Act, found in Title 5, Chapter 13, lays out the parameters of an audit. MCA § 5-13-101(2) generally states:

Because the legislature is responsible for authorizing the expenditure of public money, designating the sources from which money may be collected, and shaping the administration to perform the work of state government and is held finally accountable for fiscal policy, the legislature should also be responsible for the audit of books, accounts, activities, and records so that it may be assured that its directives have been carried out.

And MCA § 5-13-304 specifically states:

The legislative auditor shall:

(1) conduct a financial and compliance audit of every state agency every 2 years covering the 2-year period since the last audit, unless otherwise required by state law;

(2) conduct an audit to meet the standards and accomplish the objectives required in 5-13-308 whenever the legislative auditor determines it necessary and shall advise the members of the legislative audit committee;

...

(8) have the authority to audit records of organizations and individuals receiving grants from or on behalf of the state to determine that the grants are administered in accordance with the grant terms and conditions. Whenever a state agency enters into an agreement to grant resources under its control to others, the agency shall obtain the written consent of the grantee to the audit provided for in this subsection.

See MCA § 5-13-308 (identifying “[t]he objectives of financial compliance, performance, and information system audits”); see also MCA § 5-13-321 (authorizing the auditor to participate in joint audits).

confidential information in the same way a records request could be denied under the Right to Know. Senate Bill 73, then, gives an unelected bureaucrat unfettered access to confidential information that neither the public under the constitutional Right to Know nor even the Legislature itself has access.

In the attached letters, you will find what officials with the Departments of Administration, Labor and Industry (DLI), Natural Resources and Conservation, and Public Health and Human Services, as well as the Montana Federation of Public Employees, have identified as citizens' private information that Senate Bill 73 puts squarely in jeopardy. The disclosure of some of this private, confidential information could result in violations of federal law and regulation and could be very costly to Montana taxpayers. The following is a noncomprehensive list of what these officials provided my office so I could better understand what privacy interests and citizens' private, confidential information are at risk with Senate Bill 73:

- Protected health information, including medical conditions, medical histories and medical treatments;
- Tax information;
- Social Security information;
- Financial and banking information, including financial and bank statements;
- Confidential personnel files containing private information about personal health and family matters;
- Confidential litigation information, even amid pending or ongoing litigation; and
- Confidential information kept by DLI's Human Rights Bureau.

Furthermore, Senate Bill 73 substitutes the will of Montanans for that of an unelected legislative auditor by unprecedentedly allowing elected officials to be categorically removed from office for failing to produce constitutionally protected documents. Even in the face of outright election fraud, the removal of an elected official is only successful if the fraud proved in court is so prevalent as to render the outcome of the election uncertain. This is true across the country, and the rationale is clear: the will of the voters is paramount and, without compelling reason of the highest order, must be honored. If audit interference should rise to the level of removal, Montana law already provides adequate procedures, such as impeachment or recall, which reserve that ability squarely with the people and the people's elected representatives.

Finally, providing an auditor with sweeping, unchecked authority, as Senate Bill 73 does, runs counter to efforts in other states to rein in auditors' overreach and protect citizens' personal, private information. Most recently, in response to an elected state auditor accessing citizens' confidential, private information, including medical records, the Iowa Legislature passed a bill to limit the state auditor's access to personal information. Under the bill, the auditor would maintain access to de-identified, redacted information to protect citizens' privacy. In Iowa, the Legislature restricted overreach from an elected auditor and protected citizens' privacy; conversely in Montana, Senate Bill 73 expands the potential for overreach from an unelected auditor and undermines citizens' privacy.

For these reasons, in accordance with the power vested in me as Governor by the Constitution and the laws of the State of Montana, I hereby veto Senate Bill 73: "AN ACT CLARIFYING AN AGENCY'S DUTY TO PERMIT INSPECTION, EXAMINATION, AND REPRODUCTION OF RECORDS FOR LEGISLATIVE AUDIT PURPOSES; PROVIDING THAT AUDIT MATERIALS ARE CONFIDENTIAL PRIOR TO PRESENTATION OF THE AUDIT REPORT TO THE LEGISLATIVE AUDIT COMMITTEE; PROVIDING THAT FAILURE TO COMPLY WITH DUTY CONSTITUTES OFFICIAL MISCONDUCT; AMENDING SECTIONS 2-18-816 AND 5-13-309, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

Sincerely,



Greg Gianforte
Governor

Enclosures

cc: Legislative Services Division
Christi Jacobsen, Secretary of State



Montana Department of
LABOR & INDUSTRY

May 1, 2023

Ms. Anita Milanovich
General Counsel
Office of the Governor
PO Box 200801
Helena, MT 59620-0801

Dear Anita:

The Department of Labor & Industry (DLI) understands Senate Bill 73, as amended, has been passed by the legislature and awaits action by the Governor. DLI urges the Governor to veto this legislation, which unnecessarily puts confidential data pertaining to DLI operations and investigations at risk.

The Department recognizes the value of legislative audits and understands the Legislative Auditor's duty to ensure taxpayer resources are being used appropriately and effectively. The Department welcomes such audits, which can both identify failures in internal controls and recommend improvements to processes to better serve our customers. But Senate Bill 73 goes too far, providing the Legislative Auditor with authorities far beyond what is necessary to perform audit functions.

Specific concerns include:

- Attorney-client privilege is waived by disclosure to a third party. Enabling the Legislative Auditor to access privileged information would waive that privilege in potential litigation.
- The Legislative Auditor would have access to confidential personal health information of licensees, including those struggling with substance abuse issues, through its access to the confidential files of the Medical Assistance Program.
- The Legislative Auditor would also have access to confidential litigation information during the pendency of litigation. This could leave to unproven facts becoming part of a public record
- Confidential information kept by the Department's Human Rights Bureau would be at risk of publication as the bill removes restrictions on how and when the Legislative Auditor can access case files.

For these reasons, among others, the Department believes Senate Bill 73 does not advance the principles of transparency and accountability. Instead, the legislation puts at risk sensitive Department data and functions. The Department urges a veto of this legislation.

Sincerely,

Laurie Esau
Commissioner
Montana Department of Labor & Industry



**MONTANA
DEPARTMENT OF
ADMINISTRATION**

Director's Office

Greg Gianforte, Governor

Misty Ann Giles, Director

May 18, 2023

Ms. Anita Milanovich

General Counsel

Office of Governor Greg Gianforte

PO Box 200801

Helena, MT 59620-0801

Re: Senate Bill 73 – Clarifying agency's duty to permit inspection for legislative audit purposes

Dear Ms. Milanovich:

The Department of Administration has significant legal concerns with SB 73, and I am writing to ask that you, as Governor Gianforte's chief lawyer, share our concerns with the Governor as he considers this pending legislation. While the department generally prefers not to comment on matters of policy, leaving such issues to the elected officials in the legislative and executive branches, we find it necessary to object to SB 73 for the reasons we raised in our testimony in committee and restated below.

Our primary concern is preserving the confidentiality and privacy of the vast amount of sensitive information entrusted to the department. Our records include confidential personnel files containing private information about personal health and family matters, performance and disciplinary records, tax and social security information, and application materials. We hold confidential criminal justice information. We are in possession of financial and banking information, including personal financial and bank statements, loan files, and other confidential financial information about individuals and financial institutions. For good reason, we must meet strict standards to maintain our access to such information, and our ability to disclose it to others is limited by law, including federal law and the Montana Constitution.

Protected health information (PHI) is among the most sensitive records we maintain. Primarily through the state health plan, the department is in possession of detailed information about medical conditions, treatments, and procedures of state employees, officials, retirees, legislators, and their families. Use and disclosure of this information is highly regulated and restricted by law, including the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) and Health Information Technology for Economic and Clinical Health Act of 2009 (HITECH). These laws prescribe when and how PHI may be shared between a covered entity, such as the health plan, and third parties.

During testimony before the committees, the Legislative Auditor raised the possibility that PHI could be shared under an exception to federal law that allows sharing for the purposes of audit. However, this provision (45 C.F.R. § 164.512(d)(1)) applies only to a "health oversight agency" such as the Centers for Medicare and Medicaid Studies (CMS) at the United States Department of Health and Human Services. It does not create an exception for legislative audits under state law.

There are, however, circumstances when the department could share PHI with others, including the auditor, and we have utilized these procedures before. One of the mechanisms for sharing PHI with a third-party is entering into a sharing agreement that meets HIPAA and HITECH requirements, including requirements for redaction and deidentification of personal information. In the past, the department has entered into such agreements with the Legislative Auditor to allow the auditor access to health plan PHI. In addition, every two years, a third-party contractor performs a financial audit of the health plan as required by section 2-18-816, MCA. The department and contractor negotiate and sign a sharing agreement under the requirements of HIPAA and HITECH. SB 73 was amended by the House of Representatives to require a form of deidentification of claims when health plan information is provided directly to the Legislative Auditor. Unfortunately, the form of deidentification permitted by SB 73 and the deidentification required under HIPAA and HITECH are not the same. Consequently, the department could only share health plan PHI with the auditor as it has in the past —by entering into a sharing agreement and deidentifying personal information as specified under federal law.

This illustrates our concern. The department must comply with federal law when sharing PHI with the auditor, and the department must negotiate a sharing agreement and properly deidentify information in the manner specified by federal law in order to do so. Under SB 73, the department would find itself at odds with the Legislative Auditor if the parties are unable to agree on terms or if the auditor insists the department provide PHI without an agreement under the deidentification method specified in the bill.

Under SB 73, an agency's failure or refusal to provide access to information requested by the auditor is considered a crime, "official misconduct," which means the department director could be removed from office, fined, and imprisoned for up to six months. There is no exception for the director's good faith or good cause refusal to provide information as required to uphold the agency's other legal obligations.

If enacted, SB 73 would require agencies to provide information to the Legislative Auditor "whenever" he requires. This represents a significant departure from current statutory language which requires agencies aid and assist in auditing as provided in the legislative audit act. This could give rise to potential overreach, allowing the auditor to access information that is not necessary for the performance of legislative audit functions. A public official or agency head should not be subject to criminal penalties for refusing to provide information that is not necessary for the performance of an audit. The disclosure of confidential information, without the underlying necessity of fulfilling audit functions, places agencies at greater legal risk. Even if the Legislative Auditor limits the scope of his activities to auditing, as stated previously, SB 73 will create conflict between the duties of agencies to provide information to the auditor and their obligations under other laws, including the Constitution. Unless these issues are resolved by agreement, these conflicts will necessarily have to be resolved by the courts, as public officials cannot willingly violate the law.

None of this is necessary. The legislative audit act was enacted over 50 years ago and predates the Montana Constitution. The Legislative and Executive Branches have worked cooperatively to ensure the Legislature can exercise its oversight and lawmaking responsibilities. The department has oversight responsibilities of its own and is respectful and appreciative of the necessity and benefits of audits. We have always provided information to the Legislative Auditor when requested, using all of the tools at our disposal to protect only the information that cannot be shared and provide access to everything else.

During his testimony in committee, the Legislative Auditor expressed concern about the timeliness of receiving information from some agencies and the problems this creates in the audit process. We believe such problems could easily be resolved through dialogue and agreement. For instance, we can begin immediately to negotiate sharing agreements with the auditor so that when an audit occurs, the department and auditor will have already agreed to procedures for sharing confidential information and there is no delay.

The Department of Administration is committed to providing the Legislative Auditor timely access to information,

as we have in the past, in any manner that does not infringe upon personal privacy or create conflict with our other legal obligations as stewards of confidential information. We respectfully request that the Governor consider the issues raised in this letter and in our testimony before the Legislature when deciding whether to sign SB 73, and in the meantime, we will continue to work with the Legislative Auditor in the same spirit of cooperation as we have in the past.

Sincerely,



Don Harris
Chief Legal Counsel

Cc: Misty Ann Giles, Director

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION



GREG GIANFORTE, GOVERNOR

1539 ELEVENTH AVENUE

STATE OF MONTANA

DIRECTOR'S OFFICE: (406) 444-2074
FAX: (406) 444-2684

PO BOX 201601
HELENA, MONTANA 59620-1601

May 18, 2023

Governor Greg Gianforte
P.O. Box 200801
Helena, MT 59620-0801
Via email only

Governor Gianforte:

I write you to express my concerns with Senate Bill 73 on behalf of the Department of Natural Resources and Conservation (DNRC), its employees, and the private citizens it serves. DNRC is the custodian of confidential and privileged information records related to healthcare, mental health, personnel matters, attorney client communications, attorney work product, and personal identifying information (PII) for state employees and private citizens. Internal mechanisms within DNRC limit access to that information and protect that information from disclosure consistent with state and federal law.

Under the law as it existed prior to SB 73, DNRC was required to "aid and assist" a legislative auditor and to allow an auditor to "examine" agency records. This process provided DNRC with the opportunity to take necessary steps to protect confidential and privileged information in DNRC's custody from disclosure. I am not aware of any instance in which a legislative auditor was denied the opportunity to examine records necessary for an audit.

Senate Bill 73 expands the authority of "the legislative auditor, or the auditor's designee" and significantly erodes DNRC's ability to fulfill its obligations to protect confidential and privileged information. For example, subsection 2(a) authorizes an auditor to "reproduce" records in DNRC's custody at any time. This gives an auditor the absolute right to copy and walk out of the building with confidential and privileged information. Once those records leave the building, DNRC has no ability to protect them from disclosure.

Although subsection 2(a) provides that production of records to an auditor is not a

waiver of privilege, it does not address confidential information. Moreover, subsection 2(b) only protects the confidentiality of documents “prior to presentation of an audit report to an audit committee.” It provides no specific protection of those documents after the report is final. Ultimately, preservation of a claim to privilege or confidentiality is of little value once that information is released to the public.

Subsection 2(d) provides that the failure, refusal, interference, or obstruction of an appointed official to allow for the inspection and reproduction of documents in her possession, custody, or control constitutes official misconduct. The redaction of PII or mental health information from a document or delay in production of records to obtain a legal opinion could be construed as official misconduct. This places a DNRC official at risk of being charged with official misconduct for taking steps to protect privileged and confidential records of state employees and private citizens.

Finally, DNRC routinely issues grants to Montana citizens, businesses, and entities. These grant recipients are subject to legislative audits pursuant to 5-13-304, MCA. It is noteworthy that an auditor’s authority to reproduce privileged and confidential records applies equally to private citizens and businesses that receive grants from DNRC pursuant to SB 73.

DNRC takes its responsibility to protect confidential and privileged records in its custody from disclosure and its responsibility to aid and assist legislative auditors very seriously. Prior to passage of SB 73, the law provided space for DNRC to fulfill its obligations to state employees and private citizens, while at the same time providing information necessary for legislative audits. SB 73 creates an intractable conflict between these responsibilities.

Sincerely,



Amanda Kaster
Director, Montana Department of Natural
Resources and Conservation



Department of Public Health and Human Services

Director's Office ♦ PO Box 4210 ♦ Helena, MT 59620 ♦ (406) 444-5622 ♦ Fax: (406) 444-1970
dphhs.mt.gov

Greg Gianforte, Governor
Charles T. Brereton, Director

May 4, 2023

Governor Greg Gianforte
Office of the Governor
1301 E 6th Ave.
Helena, MT 59601

Re: Senate Bill 73

Dear Governor Gianforte:

I write to share the Department of Public Health and Human Services's (DPHHS) concerns with Senate Bill 73, "Clarify agency's duty to permit inspection for legislative audit purposes," sponsored by Senator Tom McGillvray. DPHHS fully supports transparency and complete compliance with audit and other legal requirements. However, SB 73 appears, at best, to be a solution in search of a problem. Although the intention of SB 73 is apparent, it will likely impede our ability to achieve the very mission we have been charged with fulfilling on behalf of the citizens of Montana. It also allows for risks to and breaches of individual privacy, which result in violations of federal law and regulation that could be very costly to Montana taxpayers. On behalf of DPHHS, I would respectfully request consideration of a veto.

DPHHS notes that the reference in the bill's title to "legislative audit purposes" understates the scope of the bill: Section 2 of the bill requires state agencies to aid and assist the Legislative Audit Division (LAD) not just with respect to auditing, but "whenever the legislative auditor requires the inspection, examination, or audit of books, accounts, activities, and records." DPHHS also notes that the bill requires the production of privileged information, providing that examination or production of such information "is not a waiver of any privilege provided by law." While the Legislature may have the authority to legislate on whether such disclosure constitutes a waiver of state-law privileges, it likely does not have the authority to prevent such disclosures from constituting a waiver of privileges under federal law or in federal courts.

Under my leadership, DPHHS has enjoyed a successful partnership with LAD and has consistently found a way to provide the division with the information needed to fulfill its mission, while simultaneously protecting the privacy of personal information concerning the Montanans served by our programs and meeting the specific, technical, and demanding requirements imposed by the federal laws, regulations, and programs with which we must comply.

DPHHS routinely deals with sensitive, private information concerning the Montanans we serve in a myriad of programs. A few examples of these programs:

- DPHHS health care facilities handle sensitive protected health information concerning the physical and mental health of some of the most vulnerable Montanans at:
 - Montana State Hospital
 - Montana Mental Health Nursing Care Center
 - Montana Chemical Dependency Center
 - Intensive Behavior Center
 - Montana Veterans Home
 - Eastern Montana Veterans Home
 - Southwest Montana Veterans Home.
- DPHHS's Human and Community Services Division handles sensitive personal information on income, resources, and other personal issues to make eligibility determinations for our public assistance programs, including:
 - Montana Medicaid and Healthy Montana Kids (HMK) Programs
 - Temporary Assistance for Needy Families (TANF)
 - Supplemental Nutrition Assistance Program (SNAP)
 - Low Income Home Energy Assistance Program (LIHEAP).
- DPHHS's Medicaid and HMK Programs handle protected health information on the physical and mental health of beneficiaries received through the process of providing coverage for health care services to these low-income Montanans.
- DPHHS's Disability Employment and Transitions Division receives and uses protected personal information to make disability determinations for the U.S. Social Security Administration.
- DPHHS's Child Support Services Division receives personal and confidential employment and income information while providing child support services, including enforcing child support orders.
- DPHHS's Child and Family Services Division has confidential information on children and families arising from its Child Protective Services, adoption, and foster care responsibilities.
- DPHHS's Public Health and Safety Division receives reports containing sensitive health information on individuals who have been diagnosed with sexually transmitted diseases, HIV, and other diseases. The Division's Office of Vital Records also maintains birth and death information, which may include changes of name, adoption status, and confidential familial relationships, as well as reports of suicides, and other sensitive causes of death.

Most of these programs are subject to strict federal (and state) law requirements to protect the privacy and confidentiality of the protected health information (PHI) and other personally identifiable information, including:

- HIPAA Privacy and Security Rules, 45 C.F.R. Parts 160 and 164, federal regulations implementing certain requirements in the Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191.
- Confidentiality of Substance Use Disorder Patient Records, federal regulations protecting the privacy and confidentiality of substance use disorder patient records, 42 C.F.R. Part 2.
- Montana Uniform Health Care Information Act, Title 50, Chapter 16, Part 5, MCA.
- Montana Government Health Care Information Act, Title 50, Chapter 16, Part 6, MCA.
- U.S. Internal Revenue Service and state Department of Revenue requirements protecting the confidentiality of federal and state income tax returns and related information.
- U.S. Department of Health and Human Services Office of Child Support Enforcement requirements concerning the use of information in the National Directory of New Hires.

May 4, 2023

Page 3

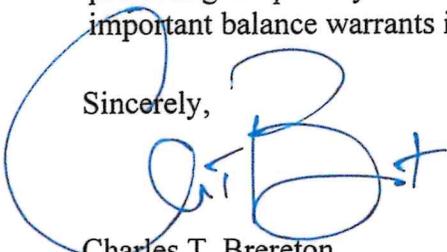
- U.S. Social Security Administration requirements on the privacy and confidentiality of information used to make disability determinations for Social Security disability benefits.
- U.S. Department of Health and Human Services Centers for Medicare & Medicaid Services requirements on State Medicaid plans requiring safeguards to limit disclosure to purposes directly connected to the administration of the plan. 42 U.S.C. § 1396(a)(7)(A)(i); 42 U.S.C. §§ 431.300 and 431.302.

On a daily basis, DPHHS obtains, uses, and discloses these and various other types of statutorily and constitutionally protected private information, in strict compliance with the applicable federal and state laws and regulations, to operate our programs and to help Montanans become self-sufficient and healthy.

SB 73 would require DPHHS to provide unnecessary, unlimited access to the myriad of sensitive private information entrusted to us. This would expose Montanans' sensitive private information to uses, disclosures, and risks that are not necessary for the performance of LAD's mission, as evidenced by our history of sharing complete but deidentified information that meets LAD's requirements. The mandated complete disclosure of sensitive private information would also, in many cases, constitute a direct violation of the federal laws and program regulations mentioned above, exposing DPHHS and the State of Montana to potential for substantial liability, penalties, and fines. In consideration of our commitment to the citizens of Montana to protect the information they have entrusted to us, performing our mission efficiently and with common sense, this exposure of sensitive information and substantial risk of liability is simply unnecessary. While we will continue to timely share all necessary information for LAD to perform its audits and fulfill its mission, a review of past practices in the context of the implications of SB 73, including where LAD has been granted user access to DPHHS systems (CHIMES, etc.), has caused me to reconsider whether this practice established by past administrations may be inappropriate, regardless of whether LAD agrees to comply with associated requirements.

DPHHS remains steadfastly committed to the people of Montana. I am sensitive to the unfortunate circumstances that have led to this bill. But, if signed into law, SB 73 could bring severe, unintended consequences, which are likely to do more harm than good. The current laws and requirements, when upheld and implemented in good faith, as I will continue to do with LAD, are adequate for all parties and purposes. DPHHS looks forward to a continued productive relationship with LAD, one that allows both entities to strike the balance of accomplishing our respective missions while fully honoring and protecting the privacy and resources of our state's citizens. SB 73's unnecessary disruption of that important balance warrants its veto.

Sincerely,



Charles T. Brereton
Director

Montana Federation of Public Employees

1232 E 6th Ave | Helena, MT 59601

Tel: 406.442.4250 | 800.398.0826

Fax: 406.443.5081



April 28, 2023

Governor Greg Gianforte
Office of the Governor
PO Box 200801
Helena, MT 59620-0801

Dear Governor Gianforte,

On behalf of MFPE members who are employed by the State of Montana and the Montana University System, I am writing to request that you veto Senate Bill 73 that is now on your desk for either signature or veto.

Senate Bill 73, if signed into law will allow the Legislative Audit Division to collect private and protected health information of individual health plan members and dependents from both the state and university health plans. Both plans fall under the audit division for the purposes of auditing. While we don't disagree with the value of auditing these plans to ensure appropriate use of public dollars, we do disagree that the actual name of a plan member must be attached to a specific claim in order to appropriately and accurately conduct an audit. To date, neither plan has ever provided identifiable health claims to the audit division. Despite that fact, there have been no failed audits by either the audit division or the third party contractor who actually conducts the audit for the division. (The administrator of the audit division admitted in public testimony that the division staff do not possess the technical skill set to conduct a health plan audit and therefore use a third party.)

It is MFPE's position that our member's personal health information should be protected to every extent possible. Allowing this bill to go into law will create additional sets of hands and eyes on confidential information which will in turn create even more risk for that information to be compromised. We respectfully request that you veto this bill and continue to protect the privacy rights of your employees who carry out the important work for the State of Montana.

Your consideration of this request is greatly appreciated.

Sincerely,

A handwritten signature in black ink that reads "Amanda Curtis". The signature is written in a cursive style.

Amanda Curtis
President