MINUTES

MONTANA SENATE
58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON STATE ADMINISTRATION

Call to Order: By **CHAIRMAN JOHN COBB**, on January 17, 2003 at 3:10 P.M., in Room 335 Capitol.

ROLL CALL

Members Present:
Sen. John Cobb, Chairman (R)
Sen. Mike Sprague, Vice Chairman (R)
Sen. Kelly Gebhardt (R)
Sen. Carolyn Squires (D)
Sen. Mike Wheat (D)

Members Excused: None.

Members Absent: None.

Staff Present: Pat Murdo, Legislative Branch
Mona Spaulding, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:
Hearing(s) & Date(s) Posted: SB 149, 12/30/2002; SB 132, 12/30/2002; SB 142, 12/30/2002; SB 9, 1/9/2003; SB 117, 12/30/2002;
Executive Action: None.

HEARING ON SB 149

Sponsor: SENATOR GREGORY BARKUS, SD 39, Kalispell

Proponents: None.

Opponents: Scott Crichton, American Civil Liberties Union-Montana (ACLU-MT)

Opening Statement by Sponsor: **SEN. GREGORY BARKUS, SD 39,** said SB 149 may appear to be controversial, but it really is not. It is an effort to assist those people making appointments to boards and commissions, allowing them more latitude. Previously, the statute required that the State be divided into four districts which geographically pointed to the four corners of the State. SB 149 proposes a division of two districts. This allows the appointment to be made from a much broader area, which is particularly germane to the Redistricting Commission. **SEN. BARKUS** gave as an example: If the majority leader of the Senate wanted to select a person from the Flathead, and the minority leader of the Senate had someone in mind from Lake County, it would not be possible to select both. The second person would have to be selected from one of the other three divisions of the State. **SEN. BARKUS** noted the changes that would be made to the affected boards and commissions.

Proponents' Testimony: None.

Opponents' Testimony: **Scott Crichton, Executive Director, ACLU-MT,** said he was concerned about the composition of the Reapportionment Commission. In reducing the variable, diversity is diluted. Now, the pool is pulled from the four corners of the state. **Mr. Crichton** likes that image: That people would be on the Commission who understand the plains, the mountains, the hi-line and the southern part of Montana. It is healthy for a Commission that is going to look at how to divide the State for the next decade to be diverse. He pointed out that the Commission doesn't meet every week, or even every year. It meets once every decade to determine who is going to be represented by whom. Generically, **Mr. Crichton** said, it is the best interest of the State to keep the gene pool as diverse as possible.

Questions from Committee Members and Responses: **SEN. MICHAEL WHEAT** said he shared the concern of the previous witness. He asked if the effect of SB 149 didn't allow for more concentration in one geographic region of the State, when what was needed is more diversity. **SEN. BARKUS** said it didn't, because currently appointments could be made where districts coalesced. If those making appointments were concerned about geographical diversity, they would take that into consideration. SB 149 gives them the option of choosing the best people, wherever they live.

SEN. MIKE SPRAGUE said the concern had been raised that people might be selected from geographic areas right next to each other on a county or district line. Looking at the old map, theoretically that could be done now. To be politically correct, the people doing the choosing need to be sensitive to geographic distribution. **SEN. SPRAGUE** said that appointments could be made that did not reflect geographic diversity under the current

system. **SEN. BARKUS** agreed. SB 149 does not change the process much. It does allow the best choice, as opposed to taking geographic diversity over best choice.

SEN. CAROLYN SQUIRES was concerned about isolating people. A greater percentage of people now live in the west. In the past there have been east v. west difficulties. A four-area selection process helps to maintain diversity. **SEN. BARKUS** said his response was the same one made to **SEN. WHEAT**. It is the responsibility of those making appointments to consider diversity.

Closing by Sponsor: **SEN. BARKUS** said he appreciated a good hearing.

HEARING ON SB 132

Sponsor: **SENATOR WALTER MCNUTT, SD 50, SIDNEY**

Proponents: **Jeff Brandt, Department of Administration; Drew Dawson, 9-11 Advisory Council; Mike Strand, CEO/General Council, Montana Independent Telecommunications Systems (MITS)**

Opponents: None.

Opening Statement by Sponsor: **SEN. WALTER MCNUTT, SD 50,** said SB 132 is a housekeeping bill. In 1985, 911 legislation was passed. This bill is designed to give the Department of Administration (DOA) rulemaking authority, in order to be in compliance. **SEN. MCNUTT** said proponents would explain in more detail.
EXHIBIT(sts10a01) EXHIBIT(sts10a02)

Proponents' Testimony: **Jeff Brandt, Deputy Chief Information Officer, Department of Administration (DOA),** said SB 132 is a basic housekeeping bill clarifying the DOA's responsibility for rulemaking authority in both the basic and enhanced 911 systems. By statute the DOA is required to assist in the development of these systems, and monitor funds. Current statute does not specifically grant the DOA rulemaking authority. It is anticipated that additional rules will need to be written. Without specific rulemaking authority in statute, the ability to up-date rules might be challenged. Rulemaking authority puts the State and the 911 Advisory Council in a position to ensure that all public safety officials, County Commissioners and emergency service providers are provided sound decision-making tools in their respective districts. The authority will allow DOA to write rules to establish procedures, to evaluate, make determinations on requests for the basic or enhanced 911 systems, establish evaluation criteria, estimate requirements for program

participation by public and private safety agency, estimate guidelines for distribution of funds, and specify any reporting requirements that may be needed. The 911 Advisory Council has undertaken this effort, and has already looked at some of the guidelines. See EXHIBIT (2) The guidelines provide 911 PSAPs-or public safety answering points; you might know them as dispatch centers-with enforceable guidelines to ensure appropriate expenditure of 911 funds according to Montana statute. SB 132 does not change any current funding for emergency services. **EXHIBIT(sts10a03)**

Drew Dawson, Chair, 9-11 Advisory Council, said the Council was comprised of members of the Highway Patrol, emergency medical services organizations throughout the state, telephone companies, associated public safety communicators, the Department of Emergency Services, police and sheriff departments, and local citizens. Current statute requires the Council to provide input. That has been done through administrative guidelines. **Mr. Dawson** said there was a need to have a force and effect of rule. The 911 Advisory Council had looked at SB 132, and strongly endorsed support.

Mike Strand, CEO/General Council, Montana Independent Telecommunications Systems (MITS), said he represented rural telephone companies and cooperatives. He has been a member of the 911 Advisory Council for eight years. During that time, steady progress has been made bringing basic and enhanced 911 emergency services to land-line telephone customers. The first efforts are now being made at creating an efficient and effective wireless 911 system. The events of 9-11 have emphasized the importance of maintaining the highest possible quality 911 system possible, consistent with limited financial resources. Many jurisdictions are struggling with issues like dispatcher training and burn out; understanding how to comply with federal regulatory mandates; and how to deal with complex technological issues, such as installing equipment compatible with that of neighboring jurisdictions. Giving rulemaking authority to the DOA will make it possible to establish guidelines to help maintain an effective and efficient 911 system.

Opponents' Testimony: None.

Questions from Committee Members and Responses: **SEN. KELLY GEBHARDT** asked if there were already stringent guidelines for the 911 system, and if more money was really needed. **Mr. Brandt** said there is rule established; the dilemma is that rulemaking authority is very vague in the statute as originally written. SB 132 gives clarification to provide additional guidance to local jurisdictions as to allowable expenses. **Mr. Brandt** said his

office collects quarters from phone bills, and distributes them to local jurisdictions, working with the 911 Advisory Council. SB 132 will not add bureaucracy; just provide better information with which to make decisions.

Closing by Sponsor: **SEN. MCNUTT** thanked the Committee.

HEARING ON SB 142

Sponsor: **SENATOR WALTER MCNUTT, SD 50**

Proponents: **Tom Beck, Chief Policy Advisor to Governor Martz; Jeff Brandt, Department of Administration (DOA); Maggie Bullock; Administrator, Internal Policy and Services Division, Department of Public Health and Human Services (DPHHS); Janice Doggett, Chief Legal Council, Secretary of State; Jim Greene, Administrator, Disaster & Emergency Services (DES), Chairman, Governor's Homeland Security Task Force (HLSTF); SENATOR MCGEE, SD 11, Homeland Security Task Force; Joan Miles, Health Officer, Lewis & Clark County, HLSTF; Gordon Morris, Montana Association of Counties (MACO); Dal Smilie, Attorney, (DOA); Chris Tweeten, Chief Civil Council, Office of the Attorney General (OAG)**

Opponents: **Scott Crichton, ACLU/MT; Jim Fall, Montana Newspaper Association (MNA); Bob Gilbert, Rosebud County; Patrick Judge, Montana Environmental Information Center (MEIC); Matthew Leow, Montana Public Interest Research Group (MT-PIRG); John Shontz, Montana Newspaper Association (MNA); Al Smith, Montana Trial Lawyer's Association (MTLA); Linda Stoll, Missoula County**

Opening Statement by Sponsor: **SENATOR WALTER MCNUTT, SD 50,** said he and **CHAIRMAN COBB** decided to look at SB 142 again. **SEN. MCNUTT** has conferred with **Greg Petesch, Director, Legal Services Office. Mr. Petesch** drafted amendments to SB 142. (SB014201.agp)

SEN. MCNUTT said Montana's Constitution provides for a broad "Right to know" in Article II, Section 9. It also provides a strong "Right of privacy" in Article II, Section 10. The events of 9-11 have made us all aware of threats to our way of life and personal safety. The Governor has created a Homeland Security Task Force (HLSTF). It is critical the Legislature find that there is a compelling State interest to protect information for personal privacy and safety. **SEN. MCNUTT** said he had **Greg Petesch, Director, Legal Services Office,** prepare a gray bill **EXHIBIT(sts10a04)** to make obvious what is stricken. What remains, is on Page 3. Lines 11-20 are the proposed amendments. "Critical infrastructure" has been struck. **SEN. MCNUTT** thinks rightly so; but it has created quite a "buzz" around the State. The concern

is that there might be some information that is public and probably should not be protected or divulged. In particular, **SEN. MCNUTT** is getting calls and letters from Missoula about what happened on Milltown Dam. ***{Tape: 1; Side: B}*** The basic concern is for the privacy or physical safety of elected officials and government employees. Judges have expressed their concerns. **SEN. MCNUTT** said proponents would explain in more depth.

CHAIRMAN COBB told the Committee and Proponents that the amendment to SB 142 made many changes. The Committee is primarily interested in the bill as amended. Basically, the amendment strikes Section 1, removing "critical infrastructure." The whole bill is about Page 3.

Proponents' Testimony: **DAL SMILIE, Attorney, Department of Administration,** said SB 142 as amended, does two important things: 1) It protects critical public safety information; 2) It protects privacy rights for a limited group of people, mostly those necessary for continuity of government. SB 142 is intended to be a narrow, moderate bill. Many have looked at the bill; it was vetted by three committees. Having the bill out for comment and discussion has resulted in a more moderate bill yet. The "Right to know" is key in Montana. The "Right to privacy" is also very important. The public has a "Right to know" almost all information the Governor holds. SB 142 seeks to protect some information related to public safety.

Mr. Smilie referred to **EXHIBIT(sts10a05)**, **Justice Leaphart's** concurring opinion in the Tribune v. Day case. It concerns public procurement, and whether jail plans need to be given to prisoners. There is language where **Justice Leaphart** talks about privacy interests. When talking about public safety, **Judge Leaphart** relates that to privacy rights. **Mr. Smilie** has highlighted comments relevant to that relationship in EXHIBIT (6). He said there were other cases, concluding that public safety relates to privacy: Some "Right to know" can be shielded in that way.

Mr. Smilie said with 9-11, we all know there could be threats to our way of life nationwide. The Governor has appointed a Homeland Security Task Force (HLSTF). There will be proponents from HLSTF. **Jim Greene** will elucidate; but **Mr. Smilie** understands that Montana is having some trouble getting full cooperation from the FBI and the U.S. Attorneys. The concern is that Montana's Constitution requires so much information to be public, that really critical public safety information can't be shielded at all. **Kim Kradolfer, Attorney General's Office,** and **Mr. Smilie** made a "Right to know" presentation to HLSTF; they thought that critical information could be shielded. Later, **Sheri**

Heffelfinger, Legislative Services Division, rendered an opinion to HLSTF at **SENATOR**, then Speaker, **DANIEL W. MCGEE's** request. She held that none of this information could be protected without a Constitutional amendment. A Constitutional amendment affecting "Right to know" is problematic. **Mr. Smilie** said the HLSTF asked the Governor to expand the Special Session to consider a Constitutional amendment; it was not expanded.

Mr. Smilie said **SEN. MCGEE** has a bill draft request seeking a Constitutional amendment, LC1024, to promote discussion. A Constitutional amendment is not as narrow and moderate as SB 142. Another aspect of SB 142 deals with protecting privacy and safety interests of certain public officers and parts of the Judiciary: their addresses, travel plans, security plans. This was initiated by a local judge. The Department of Administration put together an ad hoc committee including the **Supreme Court Administrator, Chris Tweeten, Judge Dorothy McCarter, Stu Kirkpatrick, Scott Darkenwald** and **Mr. Smilie.** At the time, there was concern about the safety of public and state-wide elected officials because, in Montana, they all drive their own cars, go about their business without handlers, and frequent high-profile public locations such as airports. At issue was whether it was necessary to give information that would reveal security gaps, travel plans, or certain addresses. SB 142 is the result of several people considering the issue-including **Chris Tweeten, Greg Petesch, Janice Doggett** and **Mr. Smilie.** The HLSTF created a Subcommittee on Data Security. That group included **Mr. Smilie, Chair; Joan Miles, Pam Bucy** and **Ali Bovingdon** from the Attorney General's Office; **Jim Moran** from the Division of Military Affairs; **Jim Greene, SEN. MCGEE,** and others. SB 142 is also a product of all these groups. Over time, and with more input, improvements have been made. It is the opinion of the HLSTF that a Constitutional Amendment is not necessary; that critical public safety issues can be protected under the present Constitution with SB 142. The bill says that the Legislature finds compelling State interest in protecting certain information when it relates to public safety and privacy: That should be enough. This is a moderate, narrow approach.

Jim Greene, Administrator, Disaster & Emergency Services (DES), Chairman, Governor's Homeland Security Task Force (HLSTF), said DES is a proponent for one reason: "If you were to ask me what are the ten most vulnerable sites in Montana for terrorism, I could not tell you." He said the holders of that information would not disclose it, and that DES is reluctant to develop the information themselves. If a list were made, and plan developed to minimize risks or provide security, it would be available to anyone who asked for it. It would be a prioritized target list, telling anyone who wanted to know how to best accomplish destroying a target. As a result, the State does not have the

information it needs to protect itself. However, Federal agencies and private companies have part, or all, of the information. It is important to consider how local government can gather information to protect communities, where the first responders are. **Mr. Greene** said our rights were very important to us; but so is public safety. Others have information which the State, that needs it most, does not.

Mr. Greene referred to **EXHIBIT (5), Ms. Heffelfinger's** position paper. Proposed solutions were to seek a Constitutional Amendment (LC1024 by **SEN. MCGEE** does that); to amend Title II, Chapter 6 (SB 142 does that); and/or to amend and update the criminal justice information statutes.

Mr. Greene said he was on a conference call Wednesday with the National Governors' Association concerning Homeland Security on domestic water supplies. They had a presentation from the Environmental Protection Agency (EPA), and had conducted a vulnerability analysis of each state considering how to reduce risks in areas of greatest concern. The EPA said they would not release that information to states unless they could be assured the information would be protected. Montana has a choice to participate and manage security, or to leave it to chance and the Federal government. **Mr. Greene** said "however, it's our power, it's our water, and it's our lives." **EXHIBIT(sts10a06)**

Former **SENATOR TOM BECK, Chief Policy Advisor** to **Governor Martz,** said he was here in a dual role. He is here for the Governor, who supports SB 142; and he sat on the Interim Committee on Homeland Secretary as President of the Senate.

Mr. Beck read a statement from **Governor Judy Martz** to the Committee:

> Our office stands in full support of SB 142, which clarifies the privacy and safety rights of a limited group of public officers in order to protect the security of our State and Nation. It is absolutely key that the members of the public have access to the information they need to our open government, for right to privacy is also Constitutionally guaranteed, and must be taken into consideration. This bill clarifies that information, compiled by the State, that would create a threat to the privacy and physical safety of public officers if released to the public, and must be protected. At the same time, this bill in no way limits the public's "Right to know" unless there is a compelling reason to take that step. This bill strikes the necessary balance between the "Right to know" and the "Right to privacy," and has the full and complete support of my administration.

Mr. Beck said, as a member of the Interim Committee, he felt it was important to emphasize that SB 142 was in Committee for one reason: to protect the people of Montana. Since 9-11 and the tragedies the County has faced, things have changed. Certain things need to be done to protect the people of the State. **Mr. Beck** emphasized that, in the event of a catastrophe or any kind of situation where information needs to be dispersed, it is the news media that puts the message out. SB 142 is not a gag on the news media. The original draft of the bill had some language that looked "precarious." People in the offices of Governor and Attorney General have brought the bill back into context. It is not the intention to stymie any information on Milltown Dam. The intention is to provide a minimum level of security for classified information. **Mr. Beck** said somebody out there could want information in order to misuse it. The intend is to protect privacy of public officials, judges, and people holding classified information, not to keep the news media from publishing information that would be important in case of disaster.

SENATOR MCGEE said he served with former **SEN. BECK** on the Homeland Security Task Force (HLSTF) for the last interim. It is clear that Montana has a situation that needs to be addressed. Federal law allows for certain types of information to be held secure, for logical reasons. But Montana doesn't have that ability. Information coming from the Federal government to the State is private until it is written out or published; then it becomes public. The HLSTF discovered it was possible to identify strategic and critical factors that could make Montana subject to terrorist attack; but it would become a public document if reduced to writing, and then become a blueprint for anybody wanting to misuse the information. SB 142 doesn't intent to usurp anything. From this point on, people are going to have to live with a dynamic tension regarding privacy and the information that must be private for public safety. **SEN. MCGEE** strongly supports SB 142 that takes a statutory approach. He also has a bill draft on hold that proposes amending the Montana Constitution. If SB 142 does not go forward, he intends to bring the other bill.

Jeff Brandt, Deputy Chief Information Officer, Department of Administration (DOA), said the DOA has a representative on Governor Martz's Homeland Security Task Force. The DOA has participated in discussions of the Task Force (HLSTF). **Mr. Brandt's** interest is directed at information technology infrastructure for two reasons: 1) to protect State government operation it is crucial to have the means to protect critical computing and telecommunications infrastructure. These valuable resources need to be protected by carefully managing information about them which could be used to disrupt government operations

or even destroy government property. Like in virtually all large organizations, the State of Montana's information technology infrastructure is under attack. The threat is growing, and becoming more sophisticated. **Mr. Brandt** said the statistics speak for themselves: The network is pinged or scanned in excess of one million times a day by those that are looking for a way to get in. A very conservative estimate is that over 50% of those attempts are by those up to no good. It is a growing threat: In 1997, 93 virus attacks were intercepted before they could infect the network; in 2002, over 115,000 virus attacks were intercepted. The systems used to protect the infrastructure require technical designs and passwords; it is this type of information that must be protected. 2) to coordinate with other organizations. Through DOA's involvement on the Governor's HLSTF, together with representatives of various State, Federal and local agencies, threats have been identified. Without SB 142, efforts at coordinating and sharing information will be hampered by the legitimate concerns of the many agencies involved. SB 142 provides the ability to protect against disruptions to services, and to secure the privacy of information maintained on behalf of Montana citizens.

Maggie Bullock, Administrator, Internal Policy and Services Division, Department of Public Health and Human Services (DPHHS), said **Gail Gray** was on the HLSTF representing the Department. **Ms. Bullock** distributed **EXHIBIT(sts10a07)**. She said she supported prior testimony. In the area of public health, there is an effort to strengthen the public health infrastructure. She said, the one consistent thing the Committee would be hearing is that the events of 9-11 have dramatically changed our lives. The Department is involved in the development of the National Pharmaceutical Stockpile, and its application to Montana. Should operational plans for the stockpile be made available to the public ***{Tape: 2; Side: A}*** it could be devastating because it concerns disease. Public health is in preparation stages, making sure that local communities and the State can respond. The Department supports SB 142 as amended.

Chris Tweeten, Chief Civil Council, Office of the Attorney General (OAG), said the previous witnesses have described the long, involved process leading to SB 142. He said several members of the Attorney General's staff have participated in the process in various capacities. He represents the Attorney General in support of SB 142 as amended.

Joan Miles, Health Officer, Lewis & Clark County, said she was in the hearing as a member of the **Homeland Security Task Force** (HLSTF). She represents Public Health interests on the task force. She said it was important to support the intent and the

purpose of this bill even if there was work to do on the language. SB 142 is an attempt to craft a Constitutionally-sound statutory exemption to our "Right to know" provisions in order to protect critical information, and only when necessary. It has been difficult to come to a clear definition, but language is being crafted. The Montana Supreme Court has given a very clear direction with regard to infringing on a Constitutional Right- only when there is compelling State interest; and only when the exemption is narrowly tailored. It's important to focus on the operative language in the bill. In order to withhold information from public scrutiny, the burden is on the State to show that, if released to the public, the information would create a threat to privacy or physical safety. **Ms. Miles** encouraged moving SB 142 forward for two reasons: 1) there is a need to protect critical information in Montana; 2) the process involved with a Constitutional amendment takes time. She said it wasn't necessary to sacrifice "Right to know" protections in order to protect the safety of Montana citizens. It could be done through a statutory exemption.

Janice Doggett, Chief Legal Council, Secretary of State, said she was involved in the Committee that helped draft SB 142. She rose in support of the bill.

Opponents' Testimony: **John Shontz, Montana Newspaper Association (MNA),** referred to exhibits from people representing the MNA: **EXHIBIT(sts10a08), EXHIBIT(sts10a09), EXHIBIT(sts10a10), EXHIBIT(sts10a11).** He said a fundamental question is at issue. It deals with the public's "Right to know" what government is doing. The proponents have all been representatives of the government representing government's viewpoint. The government and the public can have divergent viewpoints. He referred to **EXHIBIT (9),** a letter from **John Kuglin, Chairman, Montana Freedom of Information Hotline, Inc.;** and EXHIBIT (10), a letter from **Ian Marquand, President, Montana Professional Chapter of the Society of Professional Journalists.** Both letters point to a recent experience in Montana regarding withholding information from the public: the Milltown Dam situation in Missoula. He encouraged the Committee to consider them carefully as part of their deliberation. He said an attachment to one of the letters dealt with an e-mail from State Government where information was redacted by the government because the government didn't view that citizens needed to know it. That goes to the heart of the issue. Particular care needs to be taken when there is a reaction to a situation. The first question always ought to be: Is this bill necessary? The second question ought to be: Does current law cover the situation? The third question ought to be: If this issue is covered under current law, is a bill really needed? SB 142 is about secreting

information. **Mr. Shontz** noted the words "critical infrastructure" have been struck. He said SB 142 may have the impact of broadening the scope to all information compiled by the State. He said he didn't believe that was the intent of the drafter; but it could easily be interpreted that way. Lines 19-20 pertain to public safety as a reason for withholding information, a reason which might not pass Constitutional muster. **Mr. Shontz** said there is already a protection in current law relating to public safety, and repeated in SB 142 (Page 3, line 2). He said SB 142 probably wasn't necessary. The open meeting section of the statute says if an agency is involved in a State military establishment, or agencies concerned with civil defense or recovery from hostile attack, those agencies are exempt from Montana's notice requirements of the open meeting law. **Mr. Shontz** said the language to withhold certain public documents is already in statute. Information relating to public officials can also be withheld from public view if an individual's right to privacy clearly exceeds the public's "Right to know." In any case, the test has two parts (**Mr. Shontz** noted this is the only exception in the Constitution): 1) Does the individual have a subjective expectation for right to privacy; and 2) Does society recognize that the expectation is reasonable. The final question must be answered by the court: Does the privacy interest clearly exceed the merits of public disclosure. He said perhaps society doesn't have a reasonable "Right to know" public officials' and employees' travel plans, but SB 142 doesn't change the test already in law. He said there is an important reason for the Constitutional provision: To guarantee that people know what government is doing.

Mr. Shontz mentioned that he has served in the Montana Legislature, and been on the staffs of two Governors in another state. He said, "part of the deal of being in public life (is that) people know where you are, where you live and can get to you." He said Federal law can trump State law, and often does. SB 142 doesn't add anything to that discretion. The urge to do something in a situation isn't always the best course. **Mr. Shontz** said inaction may be the best course.

Mr. Shontz referred to **EXHIBIT (10)** from the proceedings of the State Constitutional Convention. It contains a discussion regarding a proposed amendment to the Constitution which would have promoted national and state security over the public's "Right to know" what their government was doing. That amendment to the Constitution failed by a vote of 19:46. Consider that Pearl Harbor, where many thousands of Americans-civilian and military-died in a direct attack on the United States, was not in the far distant past at the time of Montana's Constitutional Convention. Delegates of that Convention were keen to make sure the people's "Right to know" trumped State security in our Constitution.

In the Supreme Court Decision mentioned earlier, Justice Leaphart filed a dissent. The Court, including current Chief Justice Karla Gray and then Chief Justice Jean Turnage, made this statement: "While on any given occasion, there may be legitimate arguments for handling government operations privately, the delegates to our Constitutional Convention concluded that in the long term, those fleeting considerations are outweighed by the dangers of a government operating beyond the public scrutiny."

Jim Fall, Executive Director, Montana Newspaper Association (MNA), representing 83 Montana daily and weekly newspapers, said he was willing to take a timely oath that neither he, nor any of the members he represented, were members of Al-Quida or any other terrorist organization. He submitted the editorial of January 15, 2003 edition of the Pulitzer Prize winning Great Falls Tribune. **EXHIBIT(sts10a12),** saying it is a very clear and precise statement of the position of Montana's newspapers in opposition to SB 142.

Matthew Leow, Montana Public Interest Research Group (MT-PIRG), a State-based public interest advocacy group representing over 5,000 members in Montana, rose in opposition to SB 142. MT-PIRG believes the intent of the bill is to protect public safety and privacy; however, MT-PIRG questions that SB 142 is the best method to do so. Sections of SB 142 limit public access to information beyond what is reasonable. He asked the Committee to consider if the sense of security gained through SB 142 was worth compromising public trust in government. SB 142 will whittle away the public's access to information. MT-PIRG believes increased secrecy would rightfully create a sense of distrust between the public and the government. While passing SB 142 might suppress information vulnerable to terrorist attack, it is more likely the same information poses a daily health risk, in air or water pollution, as well as the greater risk of a large-scale accident. Day-to-day pollution or a catastrophic accident are more likely to threaten public safety than terrorist attack. In 1986, Congress passed the Emergency Planning and Community Right to Know Act, which requires facilities to report to Federal, State and local officials regarding the amounts of hazardous chemicals at their sites. This information is valuable to citizens as well as emergency response workers because it allows communities to be prepared should a chemical disaster occur. Suppressing this information due to fear of a terrorist risk would create a barrier for citizens seeking information about a nearby facility. This information could be used to open a dialogue about how to address concerns for public safety. In this way, passage of SB 142 could have an effect opposite to its intent, actually increasing risks to public health rather than diminishing them. Risks of terrorists are very real; but information and not

secrecy is the best weapon against terrorism. Creating exceptions to the public's right to information is a very dangerous road to go down. In the interest of democracy, public health and safety, as well as the rights of citizens, **Mr. Leow** asked the committee not to pass SB 142.

For the record, **Patrick Judge, Montana Environmental Information Center (MEIC),** has reviewed **Mr. Leow's** testimony and asks that MEIC be included as an opponent of record.

Al Smith, Montana Trial Lawyer's Association (MTLA),said MTLA opposes SB 142. The bill goes way beyond what is necessary. The amendments make it worse.

Scott Crichton, Executive Director, ACLU/Mt, said he supported **Mr. Shontz's** thoughtful testimony. As a civil libertarian, he is concerned about new challenges. During this session and beyond, both in State and National government, citizens are going to be asked to surrender some of their liberties in the name of security. This is the first instance of what will be many supplications to the Legislature to look at core Constitutional values and begin to whittle away at them. It is important to keep in mind, people want to be safe and free; and not to sacrifice freedom for a false sense of security.

Questions from Committee Members and Responses: **SEN. WHEAT** asked if federal dollars were involved. **SEN. MCNUTT** said he didn't know. **Mr. Green**e said he wasn't aware of any dollars at risk. All of the Homeland Security dollars have been presented to the local government level. It's a matter of information-sharing.

SEN. WHEAT asked if there was continuing money available to the states related to Homeland Security. **SEN. MCNUTT** said the budget has not been approved by Congress for the current fiscal year. Immediately after 9-11 there was talk about a First Responder Initiative; that has not happened yet. Formation of the new Homeland Security Department at the National level will probably get it organized. There is a proposal in this year's budget for Homeland Security dollars.

SEN. WHEAT asked **Mr. Tweeten** if he had a chance to review **Ms. Heffelfinger's** research paper, as to Constitutionality. **Mr. Tweeten** said he had not. **SEN. WHEAT** asked if he, himself, had taken any analysis in the Attorney General's office relating to the Constitutionality of SB 142. **Mr. Tweeten** said the bill had been considered in light of the Constitution, and what is known about Supreme Court decisions interpreting "Right to know" provisions in Montana. Nothing is in writing. **SEN. WHEAT** asked for his opinion about the Constitutionality of SB 142 as it exists. **Me. Tweeten** said it was impossible to predict what the Montana Supreme Court would do with any statute. The concept of

personal security abiding in SB 142 is, and ought, to fall within the scope of a right to personal privacy. He said the Attorney General would argue in defense of SB 142 before the Supreme Court. Encompassed within the personal right to privacy, to the extent that the subject of that information has taken the necessary steps to protect that information from public disclosure, is the requisite subjective expectation to privacy that the Court is going to require. A government agency ought not be required to divulge that information to a member of the public. **SEN. WHEAT** asked if his answer could be taken to mean that he believed SB 142 to be a Constitutional bill. **Mr. Tweeten** said no. Ordinarily the Attorney General's Office (AGO) does not opine on the Constitutionality of legislation in advance of its enactment, or even afterwards. The AGO is often called upon to defend Constitutionality in court. Consistent with obligations as attorneys, the AGO only makes those arguments that are well-grounded in fact and law. He said the AGO believes there are well-grounded legal arguments in support of the Constitutionality of the statute, and would advance them if the statutes were challenged.

SEN. GEBHARDT said he had input from constituents who felt that the need for SB 142 was to protect their rights. His concern was for information-such as that filed at the Appraiser's Office-that could compromise personal safety. Someone wanting to harm a public person would have no problem figuring out where he or she slept at night. He asked **Mr. Shontz** if he had considered that information. **Mr. Shontz** said information in a property file in an assessor's office has traditionally been viewed as public information. To the extent the information occurs in a realty transfer certificate, it has not been made public. He didn't know if anyone had ever challenged that property information is available at the Assessor's Office; or if it would give rise to a public right, in terms of State security, to hold that information in secret.

SEN. SPRAGUE asked **Mr. Fall** if the newspapers ***{Tape: 2; Side: B}***, to his knowledge, had ever sat on a story. He answered yes. **SEN. SPRAGUE** asked if the newspapers had ever withheld information. **Mr. Fall** said probably, yes. **SEN. SPRAGUE** asked if the editor of a paper would withhold information based on what is thought to be a social obligation, political obligation, or moral obligation to readers. **Mr. Fall** said he assumed those were viable suppositions. **SEN. SPRAGUE** said SB 142 is withholding information before giving it to the newspapers, because the State has a public interest as well. The State is trying to do the right thing, the papers are trying to do the right thing; but we're all subject to a subjective perspective of who's right. **SEN. SPRAGUE** said none of us really knows who is making money in a way that compromises public information. He asked if **Mr. Fall** could assure

him that his employees would not misuse information that he intended to withhold from society. **Mr. Fall** said he could not.

SEN. WHEAT said he'd read the statute. He asked **Mr. Smilie** to assume the bill passed. If a person was denied access to critical information, what process would a person use to recover it. **Mr. Smilie** said first a person would ask for it, and go up the food chain in the organization; after that, District Court. The statutes about "Right to know" lean toward the plaintiff. Fees and costs are mostly granted to them. **SEN. WHEAT** said he asked because, in another Committee, there was a proposed amendment that adopted a procedure that someone requesting information required a prosecuting attorney or the Attorney General to file a declaratory judgment action. He asked if SB 142 would trigger that procedure. **Mr. Smilie** said he loved the question. The idea of a safe harbor has come up in an Interim Committee. There is not right now a way to seek a declaratory judgment action to see ahead of time if something is public or not. The chance of having to pay costs and fees is real. A safe harbor, not unlike a medical-legal panel, could be accessed in good faith. It would give the public and the government a way to get an opinion before continuing. That bill inadvertently didn't get drafted.

SEN. WHEAT said he was looking for some mechanism to speed up the process of deciding what information is or isn't protected. **Mr. Tweeten** said the envisioned process didn't contemplate speeding up the procedure to get something in front of a judge, but to short-circuit the need to put it in front of a judge at all by creating an administrative review prior to the time a lawsuit is filed. An agency's determination as to whether to produce information or not in response to a member of the public could be reviewed administratively by a panel outside of that agency. Advice could be given to the agency by experienced administrators and attorneys as to whether the agency's position was one likely to prevail on litigation. If the decision to withhold information was reviewed, the likelihood was that indefensible decisions might be short-circuited before they went to court. Information would be produced faster; the courts would not be co-opted in an additional lawsuit; the agency would not be exposed. Real efficiency would be gained by putting that sort of procedure in place. **SEN. WHEAT** asked if there had been an effort to draft the language. **Mr. Tweeten** said yes. He will share it with the Committee.

SEN. WHEAT asked if, other than due process, there had been any further discussion about ways to short-circuit the process to protect critical information and expeditiously release the other. **Mr. Tweeten** said he had reduced only his own idea to writing. He doesn't know if others have ideas. The Secretary of State has some ideas about reducing the volume of information kept. That might have an effect to make the process quicker. One of the

problems of a broad-based request for information from the public is that frequently there is a huge amount of information. To find a few kernels responsive to the request, a mass of information has to be handled. Reducing the mass might make the process quicker. **SEN. WHEAT** asked who made the decision as to what information would be withheld from the public. **Mr. Tweeten** said it would happen in precisely the same way it happens now. It varies from agency to agency. In the Department of Justice, the Attorney General would make the final decision as the Director of the Department. He assumes that as serious problems of this magnitude arise, they will percolate up to the department director level, and possibly to the Governor's office, before a final decision is made.

SEN. SPRAGUE asked if the 1971-72 Constitution Convention envisioned emails, computers, cell phones and so on. **Mr. Tweeten** said, specifically, probably not. But there is evidence in the transcripts that the delegates knew there was a technology explosion coming that would affect this area of the Constitution. There are frequent discussions in the transcripts about electronic databases and gathering information by electronic means. **SEN. SPRAGUE** asked if they could have predicted identity theft with social security numbers, and other modern electronic problems. **Mr. Tweeten** said probably not specifically. But the delegates were generally aware of the threshold to the brave new world of information. What specifically that would involve, no one could predict. They were aware that technology was going to affect how government information was treated.

CHAIRMAN COBB went through the bill with **Mr. Tweeten** examining specific language. **CHAIRMAN COBB** asked if, under the existing law, a judge could keep information about his residence private. **Mr. Tweeten** said, to a certain extent, he agreed with the opponents of the bill. He thinks one could extrapolate arguments from the existing law, and existing case law, that would say that the things SB 142 allows could be accomplished under existing law. **CHAIRMAN COBB** said the test would still be the same; but the Legislature may be clarifying certain issues. **Mr. Tweeten** said that was correct.

CHAIRMAN COBB said Executive Action would be taken on SB 142 on Wednesday.

Closing by Sponsor: **SEN. MCNUTT** thanked the Committee for a good hearing. He was concerned that the preponderance of the resistence is coming from the news media. He would have preferred that they look at SB 142 as a very small step to move forward on issues that are becoming a problem to society. This is a bit of a dilemma, in that there is an obligation to promote and ensure the safety and security of the public. SB 142 is just a small step in

that direction. It sends a message from the Legislature that, under certain limited circumstances, SB 142 needs to go forward.

HEARING ON SB 9

Sponsor: **SENATOR MIKE SPRAGUE, SD 6, BILLINGS**

Proponents: None.

Opponents: **Don Allen, Powell, Granite, Deer Lodge counties, and the city of Anaconda; Former Rep. Bob Gilbert, Roosevelt County; Gail Jones, Powell County; Elaine M. Mann, Broadwater County; Gordon Morris, Montana Association of Counties (MACO); Donna J. Sevalstad, Beaverhead and Madison Counties**

Opening Statement by Sponsor: **SENATOR MIKE SPRAGUE, SD 6,** explained the process by which SB 8 and SB 9 came to be. He referred to **Greg Petesch's** article in the Law Review: "The State of the Montana Constitution: Turkey Feathers in the Constitutional Eagle." (See Senate State Administration minutes of January 10, 2003, Exhibit (17)) SB 8 and SB 9 speak to a dilemma in the Constitution whereby two dynamic processes cancel each other.

SB 9 gives the Legislature, with the vote of the people, the right to change the number of counties in Montana-more, or less. The Constitution now says counties can agree by mutual consent to consolidate. The problem is that the Constitutional Convention stopped the clock at the moment of ratification by saying there will be 56 counties.

Proponents' Testimony: None.

Opponents' Testimony: **Gordon Morris, Director, Montana Association of Counties (MACO),** said although he has a great deal of respect for **Greg Petesch** and **SEN. SPRAGUE,** in this case he is at odds with them. **Mr. Morris** does not believe the Constitution has contradictory messages. When the Constitution was signed there were 56 counties, those that existed at the time. The drafters of the Constitution went on to say, that no county boundary could be changed without involvement of the people. That is not a denial of the fact that counties could change, more or less. One proposal from the early 1980s was to have only 17 counties in the State. **Mr. Morris** pointed out the Montana's Constitution is unique, and one of the youngest. Every twenty years, Montanans are required to ask themselves if they want to reopen the Constitution and have a Constitutional Convention. Every 10 years, cities, towns and counties across Montana are required to ask voters if a commission should be empowered to

look at their form of government: to change its form, consolidate, change boundaries, etc. It's interesting that the ten-year period falls in 2004. To put the Legislature in charge, is at odds with every premise on which local government in Montana is based. There is a statement in MACOs policies that says MACO will oppose any effort on the part of the Legislature to intervene in terms of county consolidation. ***{Tape: 3; Side: A}*** **Mr. Morris** said he is at a loss to understand SB 9. He pointed out not only is SB 9 in the Legislature, but HB 229 proposes almost the same thing. He asks the Committee to indefinitely postpone SB 9.

Elaine M. Mann, Broadwater County Commissioner, said she didn't understand why SB 9 was being put forth. People need the services of local representatives. In her district, if the county were dissolved, they would not have local representation. Those decisions should not be left to the Legislature.

Former Rep. Bob Gilbert, Roosevelt County, said in 1987 he and **Rep. Jack Ramirez**, carried a bill amending this section of the law. He said, "Jack sweet-talked me, and I can still show you the scars on my back." **Rep. Gilbert** said he'd never forget **Rep. Francis Bardanouve's** statement on the floor of the House: "Representative Ramirez you're a dreamer, and we need dreamers. But we don't need this bill." **REP. GILBERT** said all they were trying to do was broaden the law to give residents of two counties who wanted to merge the ability to vote on the issue. He still doesn't see a problem with that. He does see a problem allowing the Legislature to make decisions of this nature, because the State of Montana is telling local governments what to do. That isn't the way things are supposed to work in Montana. **REP. GILBERT**, said if **SEN. SPRAGUE** truly thought there was a Constitutional conflict, he should change the wording in SB 9 to reflect that counties be allowed to merge upon the vote of the people of the counties involved, not the Legislature.

Questions from Committee Members and Responses: **SEN. GEBHARDT** and **Mr. Morris** discussed several language changes in SB 9. **SEN. GEBHARDT** asked **Mr. Morris** If he would have a problem with the following language: "The counties of the State are those provided by law. No county boundary may be changed or county seat transferred until approved by a majority of those voting on the question in each county affected." **Mr. Morris** said his opinion is that the first sentence refers only to the situation that existed when the Constitution was adopted. It didn't mean that from that point forward there were 56 counties. The next sentence says the county boundaries may be changed, or county seats transferred if approved by a majority of people voting. A county boundary change

is a county consolidation. **Mr. Morris** said he would be more agreeable to the language, but does not agree there is a need.

SEN. GEBHARDT addressed the same question to **Rep. Gilbert**, who said his concern would be the words "provided by law." Legislatures make laws. A future Legislature could pass a law that establishes 52 counties, for example. He said it would be better to eliminate the first sentence, leaving "no county boundaries may be changed, or county seat transferred, until approved by a majority of those voting on the question in each county affected." That clarifies the Constitution Counties may move boundaries, and may merge, but only with all the voters in the affected counties.

Closing by Sponsor: **SEN. SPRAGUE**, by way of offering an explanation to the opponents, referred again to **Greg Petesch's** article in the Law Review: "The State of the Montana Constitution: Turkey Feathers in the Constitutional Eagle." (See Senate State Administration minutes of January 10, 2003, Exhibit (17) He said this issue came to his attention last session when local governments gave up some budgetary authority to the Legislature. (The Big Bill, HB 124, guaranteeing funding.) **SEN. SPRAGUE** commented on a letter from a new Commissioner in Liberty County, **Ed Diemert**. **EXHIBIT(sts10a13)** **Mr. Diemert** is neither an opponent or a proponent to SB 9. His concern is that Liberty County doesn't have enough money to cover unfunded mandates, both federal and state. Speaking for himself, **Mr. Diemert** would like to consolidate. His point is that he can't imagine another county would accept the liability. **SEN. SPRAGUE** said he doesn't have great empathy for local governments when they conflict with constituents' needs. Not to reflect constituents' needs becomes a kind of protectionism.

SEN. SPRAGUE gave a historical perspective: In the early 1900s, the federal government sent out economic development people. If a rural community wanted economic development, it was advised to develop a county to initiate cash flow through a local tax base. Those were the early economic development days. In about 1913 there were thirteen counties in Montana. Now there are 56. Texas has some 250 counties. Who is to say that 56 is the perfect number of counties for Montana. There has been an increase in population to the Rocky Mountain Front; the eastern part of Montana is losing population, with the exception of Yellowstone County. **SEN. SPRAGUE** said he thought the Legislature, especially with term limits, could be trusted to make adjustments. The Constitution isn't sacrosanct. In about thirty years since it's ratification, there have been about thirty changes.

SENATOR SPRAGUE took the chair.

HEARING ON SB 117

Sponsor: **SENATOR JOHN COBB, SD 25, AUGUSTA**

Proponents: **Janice Doggett, Chief Legal Council, Secretary of State (SOS); DAL SMILIE, Chief Legal Council, Department of Administration (DOA)**

Opponents: None.

Informational Witnesses: **Kathy Lubke**, Records Management Bureau

Opening Statement by Sponsor: **SENATOR JOHN COBB, SD 25**, said SB 117 is a request by the Department of Administration (DOA) to provide that executive branch agency policies, regulations, standards and statements concerning internal management of state government, where it does not affect private rights or procedures available to the public, and does not constitute rules for the purposes of the Montana Administrative Procedure Act (MAPA). When an agency does rulemaking, certain procedures must be followed. In this case, the DOA is concerned about computer use between agencies. They wonder if computer activity should involve rulemaking procedures; if so, they are in violation. The DOA wants to make sure rulemaking doesn't apply to the internal management of an agency when private rights or procedures are not affected. They still plan to post changes and take comments. They do not want to have hearings in these cases.

SEN. COBB said he was interested in statements of opposition. He thinks SB 117 is all right, but is always hesitant about removing the public hearing process.

Proponents' Testimony: **DAL SMILIE, Chief Legal Council, Department of Administration (DOA)**, reviewed the change in the bill. He distributed **EXHIBIT(sts10a14)** In 1995, HJR 5 eliminated unnecessary rules that created cost and confusion. SB 117 affects only policies and procedures internal to State government. If these were added to existing rules, costs would double or triple. The information will still be public because there is a Constitutional duty to tell people. Much of the information is already posted on the World Wide Web. SB 117 is a clean-up bill. **Mr. Smilie** asked the Committee to look closely at HJR 5 and the reasons given then for not greatly expanding the rules because they apply.

Janice Doggett, Chief Legal Council, Secretary of State (SOS), said the SOS supported SB 117. The Administrative Rules Bureau estimates that if the rules were increased by one volume, it would take at least eighty hours of staff time for the initial publication. It could permanently increase staff workload about

33% because of density, and frequency of occurrence. **Kathy Lubke**, head of the Records Management Bureau was in Committee to answer questions. SB 117 speaks only to intra-government policy, and does not affect public policy. **Ms. Doggett** noted that expanding rulemaking would also increase the filing fees paid by state agencies to the SOS. Every agency that files a rule, pays a filing fee.

Opponents' Testimony: None.

Questions from Committee Members and Responses: **SEN. WHEAT** asked for clarification on Page 2. **Mr. Smilie** said when he drafted the bill, three words were changed, "or State government." The Legislative Services Division has made organizational changes, but nothing of substance. **SEN. WHEAT** asked how the three word change affected law. **Mr. Smilie** said that now the definition of rule is very broad: Internal to an agency, policy can be made (wear a tie; smile at the customers). A few agencies, such as the Secretary of State and Department of Administration, have policies that are intra-government; that is they affect other agencies. Where those policies also affect private rights, a MAPA rule will still be necessary.

Closing by Sponsor: **SENATOR COBB** closed the hearing.

The chair returned to **SENATOR COBB.**

Announcements: **CHAIRMAN COBB** said Executive Action would taken on SB 117, SB 132, SB 149 on Monday, January 20; and SB 8, SB 9, SB 142 on Wednesday, January 22.

ADJOURNMENT

Adjournment: 5:15 P.M.

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SEN. JOHN COBB, Chairman

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MONA SPAULDING, Secretary

JC/MS

EXHIBIT(sts10aad)