OFFICE OF THE COMMISSIONER OF SECURITIES AND INSURANCE
MONTANA STATE AUDITOR
MEMORANDUM

TO: Office of the Commissioner of Securities and Insurance, Montana State Auditor

FROM: Jameson Walker, Staff Attorney JCW

DATE: July 8, 2011

RE: Confidentiality of Filings

ISSUE PRESENTED

What procedures should the Department use to address requests for confidentiality?

BRIEF ANSWER

All entities requesting confidentiality of filings must file an affidavit with the Department. The affidavit shall make a prima facie showing that certain filings are protected from public disclosure. Moreover, the requesting entity cannot provide mere conclusory statements that the information is confidential, as it must make an affirmative argument for confidentiality. The Department will review the legal arguments made, and assess whether the filings are indeed confidential. If the Department receives a public information request, it will notify the filing entity prior to taking action.

ANSWER

The general principle is that every document held by a government official is subject to public inspection.[1] Montana government officials have an affirmative duty to make all records and proceedings available for public scrutiny, including regulatory filings by corporations.[2] This presumption applies unless the documents fall within an exclusion identified by the Montana Constitution, Federal Constitution, or Montana and Federal statutory law.

Despite the presumption for public disclosure, a Montana governmental entity may withhold information involving individual privacy interests under the Montana Constitution's right to privacy.[3] However, this right to privacy applies only to individuals, and not to corporations.[4]

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[1] *See* Mont. Const. Art. II § 8 (Right of participation); Mont. Const. Art. § 9 (Right to know); Mont. Code Ann. § 2-6-102 (Citizens entitled to inspect and copy public writings); Mont. Code Ann. § 33-1-312 (The records and insurance filings in the commissioner's office must be open to public inspection except as otherwise provided in this code with respect to particular records or filings); *Great Falls Tribune v. Mont. Pub. Serv. Comm.*, 2003 MT 359, MT ¶ 54, 319 Mont. 38, 82 P.3d 876 ("[…] there is a constitutional presumption that all documents of every kind in the hands of public officials are amenable to inspection […]").

[2] *Great Falls Tribune,* ¶¶ 54, 60.

[3] *See* Mont. Const. Art. II § 10 (Right to privacy)(Supra N. 1).

Put simply, corporations cannot themselves claim this privacy right in documents submitted to government agencies.

Montana statutory law may nevertheless protect information which does not imply individual privacy rights. In particular, trade secrets are repeatedly protected from public disclosure by the Montana Insurance Code (Code).[5] The Montana Supreme Court has justified the protection of trade secrets through statute, because public disclosure would amount to a "taking" without "due process" in violation of the Montana and Federal constitutions.[6] It should be noted that the bulk of the statutes in the Code mandate confidentiality for trade secrets.[7]

Trade secrets are defined under the Uniform Trade Secrets Act.[8] The definition is broad, making the determination factually specific:

> "Trade Secret" means information or computer software, including a formula, pattern, compilation, program, device, method, technique, or process, that: (a) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain

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[4] *Great Falls Tribune*, ¶¶ 37-39 (reversing *Mountain States Tel. & Tel. Co. v. Dept. of Pub. Serv. Req.*, 194 Mont. 277, 634 P.2d 181 (1981) and over two decades of rulings that corporations are entitled to privacy protection).

[5] *See* Uniform Trade Secrets Act, Mont. Code Ann. § 30-14-401, et seq. (Providing a definition of trade secrets); Mont. Code Ann. § 33-1-409 (Confidentiality of trade secret information in an examination report); Mont. Code Ann. § 33-1-1403 (Actuarial reports, work papers, and actuarial opinion summaries, submitted in an annual report, are trade secrets and privileged); Mont. Code Ann. § 33-2-1116 (Confidentiality of criminal justice information, personal information protected by an individual privacy interest, and trade secrets obtained in an examination); Mont. Code Ann. § 33-18-609(2) (Credit information filings are a trade secret); Mont. Code Ann. § 33-22-1809(5)(c) (Information used by a small employer carrier which demonstrates that its rating methods and practices are based upon commonly accepted actuarial assumptions and are in accordance with sound actuarial principles must be considered proprietary and trade secret information); Mont. Code Ann. § 33-31-112 (Trade secrets or privileged or confidential commercial or financial information filed by a health maintenance organization are not public).

[6] *See* Mont. Code Ann. § 2-6-102(3) (Constitutionally protected, individual privacy interest clearly exceeding the merits of public disclosure, trade secret, and matters relating to individual or public safety information is not subject to public inspection); *Great Falls Tribune*, 2003 MT 359 at ¶¶ 39, 46, 54, 56 (Addressing due process clause and equal protection analysis regarding trade secrets).

[7] Statutes in the Montana Insurance Code which mandate confidentiality, but do not specifically address trade secrets, include: Mont. Code Ann. § 33-1-311 (Any confidential information obtained from the NAIC and state and federal agencies is confidential); Mont. Code Ann. § 33-2-521 (Confidentiality of memorandum in support of disciplinary actions against an actuary); Mont. Code Ann. § 33-1-1203 (Materials relative to the subject of an insurance fraud investigation must remain confidential); Mont. Code Ann. § 33-2-1323 (Confidentiality of information in supervision, rehabilitation, and liquidation proceedings); Mont. Code Ann. § 33-2-1504 (Financial analysis ratios and examination synopses submitted to the commissioner by the NAIC insurance regulatory information systems are confidential); Mont. Code Ann. § 33-2-1909 (RBC reports and plans submitted to the commissioner are confidential if the information might be damaging to the insurer if made available to competitors); Mont. Code Ann. § 33-18-234 (Guaranteeing right of privacy to information collected in connection with the Insurance Information and Privacy Protection Act); Mont. Code Ann. § 33-28-102 (Information submitted by a captive insurance company for licensing must remain confidential); Mont. Code Ann. § 33-20-1310 (Names of and individual identification data for all policyholders and certificate holders who have entered viatical settlement contracts with viatical settlement providers are confidential and may not be disclosed unless the commissioner determines that the merits of public disclosure exceed the demands of individual privacy).

[8] Mont. Code Ann. § 30-14-101, et seq. (Supra N. 5).

> economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[9]

The Montana Supreme Court held that when an entity submits trade secrets or confidential proprietary information to a state regulatory agency, the entity must prove that the information is confidential: "[. . .] the burden rests with the filing entity to establish prima facie proof that the information is a discernable property right entitled to protection."[10] The Court held the submitting entity must provide a supporting affidavit, offering "more than conclusory" statements that the information is confidential.[11] Upon receiving the request, the state agency has an affirmative duty to determine whether the records are protected from public disclosure, at the time of the filing.[12]

In sum, entities submitting regulatory filings shall provide an affidavit making a prima facie showing that the information is protected from public disclosure. The Department will review the legal arguments made, and assess whether the filings are indeed confidential. If the Department receives a request for information and has reason to believe that a plausible argument may be made to protect the information, it will notify the filing entity prior to releasing the information.

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[9] Mont. Code Ann. § 30-14-402(4).
[10] *Great Falls Tribune*, 2003 MT 359 at ¶ 60.
[11] *Id.* at ¶ 56.
[12] *Id.* at ¶ 57.