

OFFICE OF THE GOVERNOR  
STATE OF MONTANA

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Derf Johnson  
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***Via Email Only***

Dear Mr. Johnson:

This letter responds to MEIC's public records request dated November 29, 2021, relating to DEQ's bad actor litigation and the mines and individuals implicated by that litigation.

In Montana, any person has the right to examine or obtain copies of public information from a public agency. However, this right is not absolute. On close review of MEIC's request and the subsequent, March 15, 2022, litigation MEIC initiated against the State to secure this information,<sup>1</sup> it has become clear that MEIC's request is an effort to facilitate its litigation against DEQ regarding the dismissal of the bad actor litigation. *See, e.g., Compl., Facts*, ¶ 7; *id., Background*, at ¶ 21 ("The State's refusal to provide the requested documents has hampered Plaintiffs' work and advocacy."). Montana courts have held that such a use of the Right to Know is improper, as litigation procedures provide appropriate mechanisms for securing such information. *See Friedel, LLC v. Lindeen*, 2017 MT 65, ¶ 8; *Nelson v. City of Billings*, 2018 MT 36, ¶ 31.

Additionally, the information sought is for the "primary interest" of learning "the decision-making that led up to th[e] decision" to dismiss Hecla and Backer bad actor claims and "the role

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<sup>1</sup> Service on the Governor has not been completed for that litigation. *See* Mont. R. Civ. P. 4(l) (requiring that the state be served "by delivering a copy of the summons and complaint to the attorney general ..."); *see also McDonald v. Jacobsen*, 2021 MT 287, 18 (noting that the Attorney General is counsel for the State and its agents requiring service on the Attorney General much like service on a party is effectuated through its counsel). Proper service is a jurisdictional requirement that a court cannot waive. *See, e.g., Comm'n of Political Practices v. Western Tradition Partnership, et al.*, No. DDV-2014-351 (dismissing with prejudice claims against the National Right to Work Committee for failure to comply with service rules).

of the Governor’s Office in that decision ....” Compl., *Facts*, at ¶ 7. As a general matter, in addition to any applicable attorney-client privilege protections, the deliberative processes of the Governor as executive are privileged and so are protected from disclosure. *Nelson*, 2018 MT 36, ¶ 37 (“that the government cannot withhold privileged documents would be ‘antithetical to’ the public’s interests the privileges serve ...”); *id.* at ¶ 20 (“the delegates acknowledged instances ... in which the right to know would not apply: when ‘necessary for the integrity of government’.”). Insofar as these documents exist that would be responsive to MEIC’s request, they are not subject to disclosure.

For these reasons, we decline to provide the documents requested. MCA § 2-6-1009(1).

Sincerely,



Anita Milanovich  
General Counsel