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by and through the Office of the Governor

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER AND EARTHWORKS, PLAINTIFFS, V. STATE OF MONTANA, BY AND THROUGH THE DEPARTMENT OF ADMINISTRATION AND THE OFFICE OF THE GOVERNOR. DEFENDANTS.	Cause No. DDV 2022–209 **OFFICE OF THE GOVERNOR'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

To evade their inappropriate use of the Right to Know, Plaintiffs mischaracterize and overgeneralize the Governor's straightforward arguments entitling him to summary judgment. They also attempt to create "disputed facts" with a new declaration that expands the scope of the claims of their Complaint. But their attempts to create genuine material fact issues where none previously existed are insufficient to defeat summary judgment. In reality, Plaintiffs failed to provide more than conclusory and speculative statements that would give rise to an issue of material fact. Based upon Plaintiffs' inappropriate use of the Right to Know to facilitate their collateral litigation against the Department of Environmental Quality ("DEQ") the Governor is entitled to judgment as a matter of law. Moreover, the fulfillment if a public records request is not a purely ministerial task, and therefore a writ of mandate is inappropriate in this case.

ARGUMENT

"While the district courts must exercise extreme care not to take genuine issues of fact away from juries, (a) party should not be allowed to create issues of credibility by contradicting his earlier testimony. . . a district court may grant summary where a party's sudden and unexplained revision of testimony creates an issue of fact where none existed before. Otherwise, any party could head off a summary judgment motion by supplementing previous depositions ad hoc with a new affidavit, and no case would ever be appropriate for summary judgment." *Fenger v. Flathead Cnty.* (1996), 277 Mont. 507, 512, 922 P.2d 1183, 1185 (quotations omitted). To defeat the State's motion, Plaintiffs must provide material and substantial evidence, rather than mere

conclusory or speculative statements, to one or more elements of its case to raise a genuine issue of material fact. *Lee v. Great Divide Ins. Co*., 2008 MT 80, ¶ 10, 342 Mont. 147, ¶ 10, 182 P.3d 41, ¶ 10 (citing *Stuart v. First Sec. Bank,* 2000 MT 309, ¶ 16, 302 Mont. 431, ¶ 16, 15 P.3d 1198, ¶ 16).

I. MEIC's Affidavit does not demonstrate fact issues sufficient to defeat summary judgment.

Plaintiffs concede the Declaration of Anita Milanovich and its three exhibits provide "undisputed facts central to this dispute." (Pls.' Resp. Br. at 2.) But in an attempt to establish the existence of material fact issues, MEIC submitted the Declaration of Derf Johnson. While MEIC did not contradict earlier testimony like in *Fenger*, it is contradicting the allegations of its own Complaint.

In their First Amended Complaint, Plaintiffs allege the primary interest of their records request "revolve around the Gianforte Administration's decision to voluntarily dismiss the DEQ's "bad actor" claims against the applicants for mining permits for the proposed Montanore and Rock Creek mines." (First Am. Compl. at ¶¶ 8, 13.) However, now Plaintiffs walk that back by claiming their request is to "fully understand the Office of the Governor's role in environmental enforcement more broadly, mine permitting in Montana, [and] the Governor's relationship with the mining industry." (Pls.' Resp. Br. at 5.)

Plaintiffs cannot, however, create genuine issues of material fact where none previously existed by submitting a declaration that contradicts their Complaint allegations. Simply put, MEIC is manufacturing "disputed facts" that don't exist to soften its improper attempts to use a public records request as a litigation tool. The

Court should reject the Declaration of Derf Johnson and rely on the undisputed facts presented in the Governor's opening Brief.

II. Summary judgment for the Governor is proper.

It is well established that the right to know is not absolute. *Nelson v. City of Billings*, 2018 MT 36, ¶ 18, 390 Mont. 290, 412 P.3d 1058. The Framers recognized that the parameters of the right to know would be interpreted over time *in the context of particular factual* situations. *Id.* at ¶ 19 (emphasis added). And that the Right to Know would be subject to interpretation and considered together with other constitutional rights and existing laws. *Id.* The Montana Supreme Court has done precisely what the Framers intended, interpreted the right to know in the context of the factual situations. And by doing so, the Court decided the right to know should not be used to circumvent the discovery process in private litigation. Both *Friedel* and *Nelson* are clear—the right to know may not be weaponized as a tool for private litigation interests. *Id.* at ¶ 31.

Plaintiffs distort the Governor's argument, and case law, by claiming *Nelson* and *Friedel* merely stand for the proposition that a party may not simultaneously pursue litigation and a right to know request. (Pls.' Resp. Br. at 10.) This is an oversimplified view. *Friedel* demonstrates that records requests filed for the same material that is available through the discovery process and used in an attempt to bypass a claim of privilege is considered an unreasonable approach to resolving a discovery dispute. *Friedel, LLC v. Lindeen,* 2017 MT 65, ¶¶ 3–4, 8, 387 Mont. 102, 392 P.3d 141. Understanding the circumstances in *Friedel* provides vital context for

the Montana Supreme Court's concise articulation that the right to know is not a tool for private litigation interests. *Nelson,* ¶ 31.

During an administrative action, Friedel served two nearly identical requests. *Id*. at ¶ 3. One was a discovery request, and the other was a Right to Know request. *Id*. The requests were satisfied except for privileged documents. *Id*. Three months after the disclosure Friedel filed a motion to compel access to the privileged documents. *Id*. Before the hearing examiner ruled on Friedel's motion, it filed another Right to Know request in district court seeking the privileged documents. *Id*. at ¶ 4. Ultimately, privilege was waived voluntarily and Friedel obtained the withheld documents. *Id*. Friedel then requested attorney fees before the district court which were denied. *Id*. As part of its denial, the court reasoned the fees could have been avoided if the discovery issues had been addressed in the underlying litigation and filing a right to know request was an unreasonable approach to resolving a discovery issue. *Id*. at ¶¶ 4, 8.

Like Friedel, Plaintiffs have taken a similarly unreasonable approach to obtain the records at issue in this case. Instead of engaging in the discovery process in the Underlying Litigation, Plaintiffs waited a mere nineteen days between initiating that case and submitting the records request to the Governor. And yet Plaintiffs have failed to provide an explanation as to why the discovery process in the Underlying Litigation is insufficient. Their approach is not only an unreasonable approach like in *Friedel*, but it abuses the constitutional Right to Know.

Further, Plaintiffs over generalize the rule in *Nelson* by equating it to a sweeping "pending litigation exception." (Pls.' Resp. Br at 8, 10.) At a fundamental level *Nelson* does not stand of any type of sweeping exception or privilege. This is confirmed in the sentence at issue: "And just as the right to know is not a tool for private litigation interests, neither are these privileges a means for public bodies and government agencies to impede transparency." *Nelson,* at ¶ 31 (internal citation omitted). The Court's juxtaposition demonstrates that just as the government cannot largely wield privileges as a shield against transparency, the right to know is limited by its inability to be used as a weapon to further interests in private litigation.

Lastly, Plaintiffs contend that because the Governor is not a party to the Underlying Litigation, *Nelson* is not applicable. This is unpersuasive. Whether the Governor is a party to the Underlying Litigation does not change the direct relationship between the records sought, the individuals and entities named in the Underlying Litigation, and the Plaintiffs interests that would be served by circumventing the discovery process.

III. A Writ of Mandate is not appropriate in this case because fulfilling or denying a public records request requires the exercise of discretion.

When determining whether action may be compelled by a writ of mandate, the first essential question is whether the act sought to be compelled is one which the law specially enjoins as a duty resulting from an office, trust, or station. *State ex rel. Thomas v. Dist. Court* (1986), 224 Mont. 441, 443, 731 P.2d 324, 325. This first question requires a showing that a clear legal duty exists. *Id.* A "clear legal duty" must be a ministerial act that allows the agency no discretion. *Beasley v. Flathead*

Cnty. Bd. of Adjustments, 2009 MT 120, ¶ 16, 350 Mont. 171, 205 P.3d 812. "We consider an act to be ministerial where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Id.* at ¶ 17 (citing *Smith v. Missoula Cnty.*, 1999 MT 330, ¶ 28, 297 Mont. 368, 992 P.2d 834). If no clear legal duty is established, the issuance of the writ is barred. *Best v. Billings Police Dep't*, 2000 MT 97, ¶ 14, 299 Mont. 247, 999 P.2d 334.

Plaintiffs admit the Governor may employ discretion when reviewing a records request by stating the requested documents could either be produced or their denial explained. (Pls.' Resp. Br. at 16.) Whether Plaintiffs believe the Governor adequately explained the denial is irrelevant. Discretion is inherent when provided a choice, especially a choice permitted by statute. As presented in the Declaration of Anita Milanovich, after a thorough review of the requested documents, the Governor denied the request in writing and explained the legal basis for the denial as is required under Mont. Code Ann. § 2-6-1009(1). (Decl. Anita Y. Milanovich, ¶ 10 (May 16, 2022). The Governor had no clear legal duty to produce the documents requested without determining a number of things, such as whether the request sought public information subject to the Right to Know, whether the request was proper, and other considerations. As such, the fulfillment or denial of a public records request is not purely ministerial, and Plaintiffs' Petition for a Writ of Mandate must be barred.

CONCLUSION

The Governor is entitled to summary judgment because Plaintiffs have improperly used the Right to Know in this case to further their interests in the

Underlying Litigation against DEQ, and Director Dorrington. Accordingly, judicial economy is served by dismissal of Plaintiffs' claims and avoids unnecessary trial, delay, and expense. Plaintiffs should serve the Governor with a subpoena in the Underlying Litigation, where any discovery disputes over the documents can be resolved within the context of that case, rather than multiplying proceedings by this suit. For the reasons stated in this Brief and its opening Brief, the State of Montana, by and through the Office of the Governor, respectfully requests that this Court grant its Motion for Summary Judgment.

DATED this 27th day of June, 2022.

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CERTIFICATE OF SERVICE

I certify that I served the foregoing document to counsel for the Plaintiffs via electronic mail and regular mail, postage pre-paid.

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Dated: June 27, 2022

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