IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause: DA 23-0648

MONTANA ENVIRONMENTAL INFORMATION CENTER and EARTHWORKS

Plaintiffs and Appellants

v.

OFFICE OF THE GOVERNOR FOR THE STATE OF MONTANA

Defendant/Appellee.

APPELLANT'S OPENING BRIEF

On Appeal from the Montana First Judicial District Court
Lewis and Clark County
District Court Cause No. DDV-25-2022-0000209-IJ
Honorable Christopher Abbott, Presiding

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1. Whether the District Court erred when it refused to award attorney fees to the Plaintiffs, even though it found that the Governor's argument was "completely unmoored from the text, history, and purpose" underlying Montana's constitutional right to know, and the Governor failed to cite "any evidence from the 1972 Convention, the ratification debate that followed the Convention, or the common law that preceded the Convention" recognizing the pending litigation exception.

2. Whether the District Court committed legal error when it failed to award attorney fees as damages when it issued a Writ of Mandamus and found that the Governor's Office's failure to produce any documents or privilege logs violated its clear legal duty to do so.

STATEMENT OF THE CASE

MEIC and Earthworks filed this action on March 15, 2022, to obtain various documents from the Governor's Office and the Department of Administration (DOA). (Dkt. 1). They requested the Court to issue a Writ of Mandamus requiring the Governor's Office and DOA to produce the requested documents. (Dkts. 8-10). Plaintiffs filed an amended complaint on May 9, 2022. (Dkt. 17.) In response, DOA filed a motion to dismiss (Dkts. 33, 34.) and the Governor's Office filed a motion for summary judgment. (Dkts. 25, 26.) On June 23, 2023, the District Court issued its order on the pending application for a Writ of Mandamus, Motion to Dismiss and Motion

for Summary Judgment. (Dk. 72.) In its order, the District Court dismissed the claims against DOA, but found that MEIC and Earthworks were entitled to a Writ of Mandamus as to the Governor's Office and issued a declaration that the Governor's Office could not deny the public records request. (Dkt. 72, p. 21).

Thereafter, MEIC and Earthworks requested that the Court award them attorney fees under both the Right to Know implementing Statutes, and as damages for their Writ of Mandamus. (Dkts. 73, 74.) In their arguments, MEIC and Earthworks asserted they were "entitled" to fees as a matter of law on the mandamus action and that fees were discretionary under the right to know statutes. (Dkt. 74). The Governor asserted that the District Court's award of fees was discretionary for both the mandamus and right to know claims. (Dkt. 75.) The District Court agreed with the Governor's Office, and found that fees were discretionary, and then denied MEIC and Earthwork's request for fees on September 18, 2023. (Dkt. 85.)

The Governor's Office then appealed the District Court's ruling, and the Plaintiffs Cross appealed the order on attorney fees.[1] The Governor's Office subsequently requested that this Court dismiss its appeal, which was granted on February 13, 2024. Thus, the only remaining issues relate to the District Court abusing its discretion in refusing to award attorney fees.

1 Plaintiff's Cross also cross-appealed the dismissal of DOA, but in light of DOA's new Office of Public Information Requests, created as a result of 2023 legislation, Plaintiffs withdraw their appeal as to DOA only.

STATEMENT OF FACTS

A. The Governor's refusal to produced documents requested by MEIC and Earthworks.

Nearly three and a half years ago, on November 29, 2021, MEIC acting on behalf of Earthworks, requested that the Governor's Office provide the following:

> a. All documents, records, information and materials regarding the Montanore and Rock Creek Mines;
>
> b. All documents, records, information, and materials regarding Montana's Bad Actor Provision in the Metal Mines Reclamation Act;
>
> c. All communications which were generated, received, kept, referenced, and/or considered by the Office of the Governor and representatives, employees, shareholders, contractors and/or other entities representing the interests of Hecla Mining and/or Phillips S. Baker, Jr. These communications may include (but this request is not limited to) the email domain @hecla-mining.com. This correspondence may also include, but is not limited to, employees of the consulting firm Environomics, Inc.;
>
> d. All communications which were generated, received, kept, referenced, and/or considered by the Office of the Governor and DEQ concerning the permitting activities at the Montanore and Rock Creek Mines and/or enforcement of the Bad Actor Provision.

(Dkt. 72, p. 3.)

Concurrent with this information request, the District Court was overseeing a related case against Director Chris Dorrington and the Montana Department of Environmental Quality ("DEQ"). *Ksanka Elders Advisory Committee v. Dorrington*, Cause NO. DDV 2021-1126, First Jud. Dist. Ct. The *Ksanka Elders* is an effort to force DEQ to "enforce the Bad Actor provision against Hecla Mining". Dkt. 36, ¶ 6.). Importantly,

the Governor's Office is not a party to the *Ksanka Elders* litigation, and neither Director Dorrington nor DEQ are parties to this suit. (Dkt. 72, p. 4; Dkt. 36, ¶ 6).

Related to *Ksanka Elders*, but not the same matter, are the requests here. Instead of attempting to enforce the Bad Actor provision, MEIC and Earthworks are seeking a much broader array of information. (Dkt. 36, ¶¶ 7-10). Indeed, the request was triggered by, *inter alia*, statements from both DEQ and the Governor's office that DEQ was fully entrusted with decision-making powers concerning the pursuit of the Bad Actor enforcement action. (Dkt. 36, ¶ 8). To that end, MEIC and Earthworks wanted to better understand *why* the Gianforte Administration retreated from enforcing the Bad Actor provision, and more importantly, the Administration's approach to environmental regulation and enforcement in Montana. (Dkt. 36, ¶ 8). This resulted in the information request set forth above being sent. (Dkt. 36, ¶ 8).

Fundamentally, these requests were different than the issues in the *Ksanka Elders* case. For example, Chris Dorrington, the Director of DEQ was quoted as stating that "the governor relied upon [DEQ] to make those decisions" about withdrawing the enforcement action. (Dkt. 36, ¶ 8). This was confirmed by the Governor's Office. (Dkt. 36, ¶ 8). Assuming DEQ and the Governor's Office's statements were true, and DEQ had been ceded full authority, then the requests for information to the Governor's Office would be unrelated to the decision to stop enforcing the Bad Actor Provision. (Dkt. 36, ¶ 9). Instead, they would be relevant to allow MEIC and Earthworks to better understand the Office of the Governor's role in environmental enforcement more

broadly, mine permitting in Montana, the Governor's relationship with the mining industry, and, specifically, the Governor's office's relationship to the mining company seeking to develop mines in the Cabinet Mountains. (Dkt. 36, ¶ 9). This information would, therefore, be useful in non-*Ksanka Elders* related actions, such as informing the Plaintiff's lobbying activities, government accountability goals, and public education objectives. (Dkt. 36, ¶ 7.)

Nevertheless, the Governor's Office first delayed responding, and then refused to produce the requested information. By January 7, 2022 (more than 30 days after the request), the Governor's Office had not responded to the written request for information. (Dkt. 72, p. 4.) MEIC contacted the general counsel for the Governor's Office. (Dkt. 72, p. 4). In response, the Governor's Office advised that it would look into the request. (Dkt. 10, Ex. 4). A few days later, on January 10, 2022, MEIC requested that the Governor's Office provide it with an estimate of the fees and costs as required by § 26-6-1006(2)(b), MCA. (Dkt. 10, Ex. 4). The Governor's Office responded that it would take approximately two weeks once the work began, but that because of other records request it could take longer. (Dkt. 10, Ex. 4.) Having not gotten the responses by February 18, 2022 (81 days after they were made), MEIC followed up with the Governor's Office and was told it would take more time, but that the information should be provided "soon." (Dkt. 10, Ex. 4). This last communication happened on February 25, 2022. (Dkt. 10, Ex. 4).

By March 15, 2022, MEIC and Earthworks had still not received a response, and so they commenced this suit. (Dkt. 1.) They raised two claims against the Governor: first that he violated the Public Records Act by refusing to turn over the documents, and second, that they were entitled to a writ of mandamus directing the Governor to provide the requested documents. (Dkt. 17). That same day, the Governor was served with a copy of the suit. (Dkt. 7). The requested information had still not been provided. Instead, more than a month after the suit was filed, on April 19, 2022, the Governor's Office responded and wholesale refused to produce *any* documents to MEIC and Earthworks. (Dkt. 28, Ex. C.) As part of its refusal, the Governor's Office claimed that MEIC's request was "an effort to facilitate [MEIC's] litigation *against DEQ* regarding the dismissal of the bad actor litigation." (Dkt. 28, Ex. C (emphasis added.))

MEIC dispelled this myth on June 6, 2022, through a declaration of its staff attorney, Derf Johnson. (Dkt. 36.) Therein, he articulated that the reasons for the requests were unrelated to the Bad Actor litigation. (Dkt. 36.) But instead of providing the documents, the Governor's Office forced this litigation to continue, and ultimately lost. After losing, though, the Governor's Office *finally* acknowledged that the requests were "not in fact needed for litigation" in the *Ksanka Elders* case. (Dkt. 75, p. 3). It then tried to blame MEIC for the necessity of the litigation. (Dkt. 75, p. 3). Yet had the Governor's Office reviewed the requests and the June 6, 2022, declaration, it would have been clear that the requests were unrelated to the *Ksanka Elders* case. (Dkt. 90.)

B. The Court denies the Governor's Cross motion for summary judgment and issues an order declaring the Governors assertion of a pending litigation exception was inappropriate and ordering the Governor's office to produce documents.

The parties filed cross-motions for the Court to review, and the evidence presented were the requests for information, related correspondence, and declarations from the Parties. None of the information that MEIC and Earthworks had sought was produced, or available for review, prior to the District Court issuing its Order. Thus, the only question was essentially a legal question as to whether the pending litigation exception was a recognized exception to the Montana Constitution's Right to Know provisions. Mont. Const. Art. II, §§ 8, 9.

The Court unequivocally rejected the Governor's arguments that a pending litigation exception existed under Montana law or existed at the time of Constitutional Convention. In fact, the Court stated, with boldness, that the "difficulty with [the Governor's] argument, however, is that it is completely unmoored from the text, history and purpose underlying both Article II, Section 9 and the implementing public records statutes." (Dkt. 72, p. 13.).

In making this proclamation, the Court flat out rejected the Governor's reliance on two cases. First, the Governor relied on *Friedel, LLC v. Lindeen*, 2017 MT 65, 387 Mont. 102, 392 P.3d 141. which the District Court aptly noted, is a case about attorney fees, not records requests. (Dkt. 72, p. 13.) And, second, the Governor did not focus on the actual holding of *Nelson v. City of Billings*, 2018 MT 36, 390 Mont. 290, 412 P.3d

1058, but rather a single sentence of dicta that "the right to know is not a tool for private litigation." But again, the passage in *Nelson*, ¶ 31, indicated that attorney fees were not appropriate, and did not address the propriety of a new exception to the right to know. (Dkt. 72, p. 15.) In short, the District Court concluded that the "Governor has not cited any evidence from the 1972 Convention, the ratification debate that followed the Convention, or the common law that preceded the Convention recognizing a privilege against disclosure of information that is the subject of litigation." (Dkt. 72, p. 13.)

The Governor raised two other issues. First, the Governor asserted that somehow MEIC and Earthwork's subjective intent for making the request impacted the Governor's constitutional obligations under the Right to Know. In dispatching this argument, the District Court was again critical of the Governor's arguments. In finding that the subjective motive of the requester was not an issue, the Court once again noted that the Governor had no "support in the text of the Constitution or implementing statutes, their history or the cases interpreting them for the notion that the subjective motive of the requester alters the government's duty to fulfill [a] request." (Dkt. 72, p. 16.)

Second, the Governor argued that because discovery was potentially available in *Ksanka Elders*, that the litigation exception existed. (Dtk. 72, pp. 14-16.) In rejecting these arguments, the District Court found "no logical basis for the suggestion that the availability of discovery somehow naturally trades off with the availability of the right to know." (Dkt. 72, p. 16.) As such, "it does not follow that the ability to request a

document in discovery means that the same document cannot be obtained through other means." (Dkt. 72, p. 16.)

The Governor's arguments with respect to the Writ of Mandamus were equally unavailing to the District Court. After acknowledging that a writ of mandamus is an extraordinary remedy, only available when there is a clear legal duty and no adequate remedy, the District Court issued a Writ of Mandamus. The Court found that the writ was appropriate because the Governor's Office had a clear legal duty to produce *something*, but it produced nothing. Specifically, the "Governor's Office, like any other public body, has a clear legal duty under the Constitution and the implementing statutes to honor public records requests *regardless of the purpose to which disclosure will be put*." (Dkt. 72, p. 18 (emphasis added.))

The Court then rejected, again, the Governor's assertion that discovery in *Ksanka Elders* is an adequate substitute. Noting that discovery is "constrained by the scope of litigation" to documents that are relevant, not unreasonably cumulative or duplicative, and if the burden of production does not outweigh their benefit. (Dkt. 72, p. 19). Accordingly, the Court found that civil discovery is not an adequate remedy. (Dkt. 72, p. 20.)

Significantly, once the Governor's appeal was dismissed, the factual and legal conclusions of the District Court are binding on the Governor.

C. The District Court denies MEIC and Earthworks requests for attorney fees, despite finding that the Governor's actions were not based on history or the law.

After receiving the Order and Writ of Mandamus, a year and a half after the initial records request, MEIC and Earthworks requested the Court award their attorney fees under both causes of actions. Specifically, they asserted they were entitled to attorney fees under § 27-26-402, MCA, for successfully obtaining a writ of mandamus, and that they were entitled to fees for their successful vindication of their constitutional right to know under § 2-6-1009, MCA, and § 2-3-221, MCA. (Dkt. 73).

After briefing, the District Court issued its order denying fees, but in doing so, highlighted the importance of this litigation. Namely, "there is an undeniable public interest in the question and in the State's reasoning for declining to pursue the bad actor enforcement action against Hecla." (Dkt. 85, p. 2.). Further, that there was a public purpose in securing "transparency in government and to arm members of the public with information so they may better exercise their role as voters and advocates in a participatory democracy." (Dkt. 85, p. 3.) The Court explained that attorney fees "can deter and disincentivize dilatory conduct by public bodies that would deny the right to know through unreasonable delay or denial." (Dkt. 85, p. 3).

Nonetheless, the Court denied attorney fees because the Governor's office did not act in "bad faith," or in a "dilatory fashion." (Dkt. 85, p. 3). In supporting its ruling, the Court explained that the Governor's Office's actions were not "frivolous or wholly unreasonable". *Id.* Finally, the Court noted that "much of the information sought by the request could have been requested in *Ksanka Elders." Id.*, pp. 4-5.

Each of these conclusions was incorrect.

STANDARD OF REVIEW

A denial of attorney fees under the Right to Know statutes, § 2-3-221, MCA, and § 2-6-1009(4), is reviewed for an abuse of discretion. *Bozeman Daily Chronicle v. City of Bozeman Police Dep't*, 260 Mont. 218, 222, 859 P.2d 435, 437 (1993). An abuse of discretion exists if the district court acted arbitrarily, without the employment of conscientious judgment, or exceeded the bounds of reason resulting in substantial injustice. *Friedel, LLC v. Lindeen*, 2017 MT 65, ¶ 5, 387 Mont. 102, 103, 392 P.3d 141, 142. It is also an abuse of discretion when the District Court provides no rationale for its decision. *Id.*

In contrast, where attorney fees are non-discretionary, such as a mandamus action, a district court's decision is reviewed to determine whether the district court's interpretation of law was correct. *Kelleher v. Bd. of Soc. Work Exam'r & Licensed Prof'l Counselors*, 283 Mont. 188, 190, 939 P.2d 1003, 1005 (1997).

SUMMARY OF THE ARGUMENT

The Right to Know is a fundamental constitutional right enshrined in Article II, section 9 of the Montana Constitution. It is implemented, in part, through Montana's Public Records Act, which generally requires public agencies to provide public information upon request. If a public entity fails to provide the information, or a timely response, then the requesting party may bring a suit to obtain the information, and if

successful, the plaintiff may recover attorney fees. Whether those fees are granted for obtaining the information is at the discretion of the court.

Here, the District Court determined that the Office of the Governor violated the Public Records Act when it failed to provide the requested documents to MEIC and Earthworks. In reaching that conclusion, the Court determined the Governor's Office's asserted pending litigation exception to the right to know was not based in history or law, and it ordered that the documents be provided to the Plaintiffs.

Due to the Governor's failure, and their success under the right to know statutes, MEIC and Earthworks requested their fees under § 2-6-1009(4), MCA, and § 2-3-221, MCA. The District Court denied this request because the State did not act in bad faith or frivolously, that the Governor's actions were not dilatory, that MEIC and Earthworks could have obtained the information elsewhere, and that it would burden the taxpayers. Not only are each of these conclusions incorrect, but they are not based on this Court's standard for awarding fees under the right to know statutes. That standard requires that a plaintiff vindicate an important public interest, which is exactly what MEIC and Earthworks accomplished, and the Court acknowledged in its order on summary judgment. Thus, the Court's reversal in its denial of attorney's fees was an abuse of discretion.

Concurrent with the request for information, MEIC and Earthworks sought a writ of mandamus to compel the Governor's Office to produce the requested documents. The District Court granted this request, but when MEIC and Earthworks

sought their attorney fees, the District Court stated that it had discretion to award the fees. This was a legal error because the District Court had no discretion to deny fees under § 27-26-402(1), MCA, based on the plain language of the statute, Montana's long history of finding fees mandatory, and a myriad of cases from around the country.

The District Court's decision, therefore, must be reversed and remanded to award fees to MEIC and Earthworks, and to determine their reasonableness.

ARGUMENT

A. The Right to Know is self-executing, liberally construed, and provides a specific mechanism to award fees to ensure protection of the fundamental right.

The basis for the public's "right to know", and the starting point for any dispute involving access to the workings of government, is Article II, Section 9 of the Montana Constitution:

> No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demands of individual privacy clearly exceeds the merits of public disclosure.

Because this right is contained in the Constitution's Declaration of Rights, it is a fundamental right. *State v. Tapson* 2001 MT 292, ¶ 15, 307 Mont. 428, 41 P.3d 305.

The provision contains two components: the right to examine documents and the right to observe the deliberations of public bodies. The Supreme Court considers the provision "unique, clear and unequivocal." *Associated Press v. Board of Public Education*, 246 Mont. 386, 391, 804 P.2d 376, 379 (1991). The Court has repeatedly observed that

the provisions of the right-to-know laws are to be liberally construed. *E.g., Associated Press v. Croft,* 2004 MT 120, ¶ 15, 321 Mont. 193, 89 P.3d 971.

Based on the liberal construction, there exists a strong presumption against withholding documents. Indeed, "[t]his constitutional provision **generally requires** information regarding state government to be disclosed to the public, **except** in cases where the demand of individual privacy clearly exceeds the merits of public disclosure." *Krakauer v. State,* 2016 MT 230, ¶ 35, 384 Mont. 527, 381 P.3d 524, (Emphasis added, quotations and citations omitted). The Court went on: "our constitution gives a **high priority** to the public's right to know." *Id.* citing *Lence v. Hagadone Inv. Co.*, 258 Mont. 433, 447, 853 P.2d 1230, 1239 (1993), *overruled on separate grounds by Sacco v. High Country Independent Press*, 271 Mont. 209, 896 P.2d 411 (1995) (emphasis added).

The Court's explanation in *Krakauer* is consistent with the Constitutional Convention delegates' intent, where they "essentially declared a constitutional **presumption** that **every document within the possession of public officials** is subject to inspection." *Bryan v. Yellowstone County Elementary School District*, 2002 MT 264, ¶ 23, 312 Mont. 257, 60 P.3d 381 (Emphasis added). So, "While the Legislature is free to pass laws implementing constitutional provisions, its interpretations and restrictions will not be elevated over the protections found within the Constitution." *Id.*, ¶ 23.

To ensure that these fundamental rights are not trampled by State agencies, the legislature enacted the Public Records Act. Section 2-6-1001 et seq., MCA. This Act

requires, generally, that government agencies provide public information to a requesting party, unless outweighed by privacy interests. Section 2-6-1003, MCA. To ensure compliance with the Public Records Act, and Art. II, § 9 of the Montana Constitution, the Act allows an award of attorney fees to any person who prevails in an action in District Court to enforce either the Public Records Act, or under Art. II, § 9. This language is similar to § 2-3-221, MCA, which provides that a person alleging a deprivation of rights under Art. II, § 9, of the Montana Constitution, may recover their reasonable attorney fees.

Specifically, both provide, "A person alleging a deprivation of rights who prevails in an action brought in district court to enforce the person's rights under Article II, section 9, of the Montana constitution may be awarded costs and reasonable attorney fees." While the language awarding fees is discretionary, the Court's discretion to deny fees is "not unfettered." *Yellowstone Cty. v. Billings Gazette*, 2006 MT 218, ¶ 31, 333 Mont. 390, 400, 143 P.3d 135, 142. While this language is discretionary, fees and costs should generally be granted because a successful plaintiff has "performed a service for the citizens of the State by enforcing a portion of our Constitution that would otherwise be violated." *Ap, Inc. v. Mont. Dep't of Revenue*, 2000 MT 160, ¶ 43, 300 Mont. 233, 245, 4 P.3d 5, 13. This is the intent of the statute. *See, e.g., The Associated Press v. Bd. Of Pub. Educ.*, 246 Mont. 386, 393, 804 P.2d 376, 380 (1991). Based on these standards, the District Court abused its discretion in denying fees to MEIC and Earthworks. It made four crucial errors (1) implicitly allowing only fees if the State acts in bad faith or

frivolously; (2) finding that the Governor's actions were not 'dilatory' while ignoring the blanket denial of the request; (3) the need of MEIC to exhaust alternative mechanisms to obtain the information; and (4) considering the burden on the taxpayers.

1. The District Court abused its discretion when it determined the State's lack of bad faith.

Foremost, the District Court recognized that an award of attorney fees does not "turn on a public body's good faith," but then in error considered the Governor's lack of bad faith and that its position was not "frivolous or wholly unreasonable." Dkt. 85. P. 3. The District Court's conclusion is unsupported by this Court's precedent.

For the last thirty years this Court has held good faith does not "preclude a discretionary award of fees" in a Right to Know case. *Bozeman Daily Chronicle*, 260 Mont. t 232, 859 P.2d at 443-44. Concomitantly, the State's subjective bad faith is not a prerequisite to attorney fees. Instead, the Court looks to the "public benefits from receiving full disclosure of relevant information." *Id.*; *see also*, *The Associated Press v. Bd. of Pub. Educ.*, 246 Mont. 386, 393, 804 P.2d 376, 380 (1991).

Under this standard, attorney's fees are appropriate even if a government entity exercises good faith. For example, in *Bozeman Daily Chronicle*, the City of Bozeman was faced with Hobson's choice – either turn over information protected by code, or potentially violate the Right to Know. The City chose the latter and was sued by the Chronicle. In determining whether the City's withholding of the documents was improper, and awarding attorney's fees, the Court noted that the City acted

"conservatively in a good faith effort." Nevertheless, the Court affirmed an award of attorney fees and held that the "public benefits from receiving full disclosure of relevant information, and will benefit because of the Chronicle's efforts. By awarding attorney's fees against the City, the cost of litigation is properly spread among the beneficiaries." *Bozeman Daily Chronicle* 260 Mont. at 232, 859 P.2d at 444; *see also Yellowstone Cty.*, ¶ 30. Thus, the District Court's consideration of a lack of bad faith – as opposed to acting in good faith – was an error.

This methodology was recently reaffirmed by this Court in *Forward Mont. v. State*, 2024 MT 19, ¶ 20, 415 Mont. 101.2 There, this Court considered denial of fees where the Plaintiffs challenged the constitutionality of a 2021 law. In awarding fees, this Court found that the denial of fees under the Private Attorney General Doctrine was an abuse of discretion. As part of that conclusion, this Court explained, "we do not hold attorney fees are proper because of the Attorney General's defense of the law, which included a challenge to Appellants' standing at different stages of the litigation as well as defenses on the merits of the Bill." Instead, the Court awarded fees based on the processes that were implemented by the legislature, were obviously unlawful and constituted a "willful

2 On April 9, 2024, this Court granted a petition for rehearing in *Forward Montana*, however, its limited rehearing was based on potentially confusing language regarding any "suggested binding legal interpretations of internal legislative rules." *Forward Montana v. State,* Cause No. DA 22-0639, Order on Petition for Rehearing (Apr. 9, 2024). In the order, this Court again noted that "the crux of [the] decision to award attorney fees rested on the bad faith of the Legislature in *willfully enacting unconstitutional laws*." *Id.* (emphasis added).

disregard of constitutional obligations. . .” *Id.* The same is true here, as the Governor cited to *no authority* defending its position, as the District Court noted, and yet refused to produce the documents until the Court ordered it to do so.

The same type of analysis applies here, where the Governor's actions were in "willful disregard of the constitutional" obligations to respond to an information request. Thus, fees are appropriate. The District Court's determination that the State would have had to act in "bad faith" was directly contrary to long established precedent.

i. The Governor's actions were unreasonable.

Compounding this error was the District Court's incorrect conclusion that the Governor did not act in bad faith, and acted reasonably. To reach that conclusion, the District Court relied on the Governor's General Counsel affidavit that past administrations had asserted the existence of the same privilege and her good faith efforts. (Dkt. 76.) The affidavit set forth two sentences to make that assertion (1) she "learned that past administrations understood that a litigation exception exists under the Right to Know," and (2) she "did independent research and concluded, in good faith, that this exception is recognized under Montana law." (Dkt. 76, ¶¶ 4, 5).

First, General Counsel for the Governor claims that prior administrations believed this exception existed. Yet, much like their response to the information requests, the Governor has provided no documents to support this claim. They did not attach any opinions, memorandums, or documents to support their assertion; and they did not identify any particular administration, individual(s), or dates on which the

exception was asserted. Nor are there any Montana cases on this issue, which indicates that prior administrations likely never asserted the issue. Regardless, even if prior administrations believed such an exception existed, it should not insulate the current administration from asserting a privilege that is not founded on any rational basis. *See, e.g.*, (Dkt. 72, p. 12.)

Similarly, the Governor's General Counsel asserted that she did "independent research" to determine the exception existed but failed to cite any case law supporting this conclusion. As the District Court noted, the Governor's original argument was unmoored from the text, history and purpose of the constitution and statutes. And in its argument, the Governor cited "no evidence from the 1972 Convention, the ratification debate that followed the Convention, or the common law that preceded the Convention recognizing a privilege against disclosure of information that is the subject of litigation." (Dkt. 72, p. 13)

Indeed, the Court made clear that "there is no textual or historical basis for finding a general litigation exception." (Dkt. 72, p. 15). So, without more than a single, self-serving sentence in an affidavit, it is unclear what research indicates that the "exception is recognized under Montana law."

To that end, the District Court's order on fees is completely belied by its Order requiring the Governor to turn over the requested documents. The Governor cannot be said to simultaneously have acted reasonably, while making arguments that are without any historic or legal basis. Put simply, the Governor's Office invented a pending

litigation exception to Montana's right to know; that is not reasonable or acting without bad faith.

ii. Utilizing the correct standard, MEIC and Earthworks are entitled to their fees under the right to know statutes.

The rationale for awarding fees in right-to-know cases is that "due to the public benefits gained by the vindication of the public's right to know, the costs of litigation to secure these rights should be spread among the beneficiaries." *Yellowstone County*, ¶ 31. This is particularly true when a person has "performed a service for the citizens of the State by enforcing a portion of our Constitution that would otherwise be violated." *Associated Press, Inc. v. Mont. Dep't of Revenue*, 2000 MT 160, ¶ 43, 300 Mont. 233, 4 P.3d 5. This includes enforcing the right to know. *Id.*

That is exactly what occurred. MEIC and Earthworks vindicated an important constitutional right, while simultaneously establishing that the Governor's reliance on a pending litigation exception was not a recognized exception to the right to know. This certainly benefits more than just MEIC and Earthworks, but rather the State as a whole and any person requesting such information. More concretely, the District Court also recognized that the implications of this request for information went well beyond the *Ksanka Elders* case, because "there is an undeniable public interest in the question and in the State's reasoning for declining to pursue the bad actor enforcement action against Hecla." (Dkt. 85, pp. 2-3) By providing this information, MEIC and Earthworks have helped to "secure transparency in government and to arm members of the public with

information so they may better exercise their role as voters and advocates in a participatory democracy." (Dkt. 85, p. 3) Accordingly, as noted by the District Court, these considerations favor awarding attorney fees, and so once the Court removes from consideration the Governor's potential "not bad faith," then fees are appropriate.

Moreover, in establishing that no pending litigation exception exists in Montana, MEIC and Earthworks have established a deterrent or disincentive for dilatory conduct by public bodies that would deny the right to know through unreasonable delay or denial. Indeed, awarding fees is necessary to avoid a future that Justice Nelson warned of: "While awarding attorney fees is, as noted, discretionary, the sorts of abuses at issue in this case will continue *ad infinitum* unless the custodians of public documents appreciate that violations of the right-to-know provisions of the Constitution will, **in the usual course**, result in an award of attorney fees in favor of the requestor and against the local government." *Yellowstone Cty.*, ¶ 50 (J. Nelson specially concurring, emphasis added). Awarding fees here will help the Governor's Office, and all agencies, to appreciate its responsibility to comply with the Montana Constitution and its implementing statutes.

2. The District Court abused its discretion in determining that the Governors' actions were not dilatory.

Continuing with its flawed analysis, the District Court unnecessarily analyzed whether the State acted in a dilatory manner. Whether the Governor's Office was slow to provide the documents is practically irrelevant, as it never provided the requested

information. Instead, MEIC and Earthworks had to institute this action to obtain those documents.

The District Court correctly notes the timeline but ignores that once the Governor's Office did respond, it wholesale refused to produce *any* documents, and asserted a non-existent exception to the right to know. Whether MEIC and Earthworks were "premature" in filing suit has no bearing on the need for the litigation. The Governor's Office provided *no evidence* that it was ever planning to produce the requested documents, regardless of timelines.

Second, the District Court ignored the actions that were dilatory and wrongly adopted the Governor's Office's statement that it "was preparing a response." The Governor asserted that it "was in the process of preparing and responding to Plaintiffs' request" when the lawsuit was filed. They cited Ms. Milanovich's affidavit from May 16, 2022. That affidavit, though, simply parrots the emails that MEIC received – i.e., it is going to take more time to process the request. The affidavit does not indicate what, if anything, the Governor was doing to actually respond to the request. Instead, it appears that, at some undefined time, Ms. Milanovich realized MEIC had filed the *Ksanka Elders* case, and then she received the Complaint in this matter. It is unclear what, if anything, the Governor was doing to respond to the information request during that period. But it is undisputed that when the Governor's office *did* respond, it was with a blanket refusal to provide anything, let alone a privilege log. As the Court stated, "while the decision whether to withhold any particular document may involve an

exercise of discretion, the decision not to produce anything at all without doing a document-by-document review is not." (Dkt. 72, p. 18.)

Moreover, the timing of the Governor's response is circumstantial evidence that it did not intend to respond prior to the suit being filed. This matter was filed on March 15, 2022, almost four months after the initial request. Yet, it was not until April 19, 2022, that the Governor's Office finally responded to the request. As noted by Ms. Milanovich, before she responded, she evaluated the Complaint and Application for Mandamus. In other words, she appears to have not evaluated the original information request until this suit was filed. This timeline certainly undermines the Governor's claim, and the District Court's finding, that the Governor's actions were not dilatory.

Finally, the District Court's claim that the Governor's office did not act with "indolence or intentional delay," (Dkt. 85, p. 4), shows its reliance on criteria that this Court has simply never considered.

In sum, the District Court's reliance on dilatoriness, indolence, or intentional delay, as a standard that must be met to justify an award of fees, is in error, as no such standards exist, and the Court's decision was a reversible abuse of discretion.

3. The District Court erred when it suggested that MEIC should have used the discovery process in *Ksanka Elders* instead of a public information request. MEIC and Earthworks could not obtain the requested documents through discovery in the *Ksanka Elders* case.

The District Court next erred when it found that "much of the information sought by the November 2021 request could have been requested in discovery in *Ksanka*

Elders." This conclusion, though, is factually contradicted by both Parties' pleadings, and legally contradicted by the District Court's own ruling.

Primarily, the Parties in the bad actor litigation are different than those, here, or referenced in the information request. The bad actor litigation involves a number of plaintiff groups including MEIC. The defendants are DEQ and its Director, and the intervenors are Hecla subsidiaries. Notably, the Office of Governor is not a party. (Dkt. 72, p. 4; Dkt. 36, ¶ 6). The Governor also asserted, publicly, that he had no involvement in the decision-making process to drop the bad actor suit. (Dkt. 36, ¶ 8.) These facts are important for two reasons: first, MEIC and Earthworks could not obtain from the Governor the requested documents absent a subpoena, and second, more importantly, the documents would likely not be relevant.

With respect to the Governor as a non-party, MEIC and Earthworks ability to obtain discovery is limited. That leaves MEIC and Earthworks to use Rule 45, a subpoena duces tecum, to obtain the requested documents. If the Governor's Office had been served with a subpoena there is a strong likelihood they would have objected and argued that the disclosure was unwarranted based on the same logic it used here – a pending litigation privilege or that it would constitute an undue burden. *See, e.g.*, M. R. Civ. P. 45(d)(3)(A)(iii) (requiring a subpoena to be quashed or modify a subpoena based on a privilege or exception). Moreover, Rule 45 is subject to the same limitations as requests for production, so only relevant documents or those likely to lead to the discovery of admissible information are allowed. *See, e.g.*, *Prindel v. Ravalli Cty.*, 2006 MT

62, ¶ 48, 331 Mont. 338, 360, 133 P.3d 165, 181. MEIC's discovery requests to Hecla and its subsidiaries would be limited for the same reasons. The information would have to be relevant, or reasonably calculated to lead to the discovery of admissible information. M. R. Civ. P. 26. Based on these discovery rules, any requests would be objectionable.

Both Parties here agree that the information would not have been discoverable in the *Ksanka Elders* case. As noted, on June 6, 2022, MEIC stated that the information requests were not intended to influence the *Ksanka Elders* case, but rather for larger public policy purposes such better understanding the Office of the Governor's role in environmental enforcement more broadly, mine permitting in Montana, the Governor's relationship with the mining industry, and, specifically, the mining company seeking to develop mines in the Cabinet Mountains. (Dkt. 36, ¶ 9). This is particularly true because both the Governor and DEQ publicly stated that DEQ was the sole decision-maker, which decided to terminate the enforcement of the bad actor provision. To that end, any communications with the Governor would, theoretically, be irrelevant to DEQ's decision to drop the suit. As such it would not be discoverable.

The Governor's Office essentially conceded as much. In citing the *Ksanka Elders* briefing, the Governor notes that MEIC did not need the information in the requests for the *Ksanka Elders* case. In doing so, it quotes MEIC's brief, that the question in *Ksanka Edlers* does not require significant fact finding because the underlying facts "are historical and can be resolved with limited discovery." (Dkt. 75, p. 3.) This statement

highlights the relevancy limitations in discovery during the *Ksanka Elders* case and intimates that the requested information is not relevant to that suit.

The District Court even originally agreed that discovery was not an adequate remedy for the Governor's failure to provide any information. In particular, the District Court noted that civil discovery is limited by Rule 26, and does "not allow for production of public information that may be embarrassing to the government or valuable from a political or policy standpoint but that is nevertheless *legally* irrelevant to the cause of action." (Dkt. 72, pp. 20-21.) As such, the District Court stated that it "does not agree that civil discovery is an adequate alternative remedy." (Dkt. 72, p. 20). That is particularly true, here, where the requests are much broader than the *Ksanka Elders* case and include requests for information from non-Parties (Hecla, Environomics, and the Governor), requests for information regarding the Montanore and Rock Creek Mines in general, and information regarding the Bad Actor Provision in the Metal Mines Reclamation Act.

Neither the Governor nor the District Court articulated how this information would be relevant or discoverable in the *Ksanka Elders* case. Instead, both simply rely on conclusory statements. (Dkt. 85, p. 6 ("much of the information sought by the November 2021 requests could have been requested in discovery.); Dkt. 75, p. 3.) Absent such analysis from the District Court, its denial based on discovery processes was "without rationale" and an abuse of discretion. *Yellowstone Cty.*, ¶ 30.

4. The District Court erred when it weighed the burden on the public taxpayer.

Finally, the Court made one small, but significant error when it noted that it did not want to impose the cost of this litigation on the taxpayers. (Dkt. 85, p. 6). The burden to the taxpayers is not something the Court considers on a motion for attorney fees. Instead, the Court must analyze the "public benefits gained," and based on those benefits, the costs of litigation "should be spread among beneficiaries". *Yellowstone Cty.*, ¶ 30.

B. The District Court's refusal to award attorney fees under § 27-26-402(1), MCA, was legally incorrect.

With respect to mandamus, the District Court concluded that it had "discretion to award attorney fees to the prevailing party in a mandamus action." (Dkt. 85, p. 2). This interpretation of the law is incorrect; the District Court had no discretion to deny fees, and MEIC and Earthworks are "entitled to their attorney's fees" under § 27-26-402(1), MCA. (Dkt. 73, p. 3.)

1. The District Court's reliance on *Kadillak* to conclude it had discretion to deny attorney fees under § 27-26-402, MCA is in error.

Section 27-26-402(1), MCA, provides that an applicant for a writ of mandamus "may recover the damages the applicant has sustained." Neither the Court nor the Governor's Office dispute that attorney fees are recoverable as damages under § 27-26-402, MCA. *Kadillak v. Mont. Dep't of State Lands*, 198 Mont. 70, 74, 643 P.2d 1178, 1181 (1982) (*Kadillak II*). Rather, they both assert that the use of "may recover" gives a district

court discretion in whether to award attorney fees. Both rely on *Kadillak II*, but such reliance is misplaced.

Kadillak II was the second of two cases concerning a complaint against the Anaconda Company and various state agencies related to the establishment and operation of a waste dump near the plaintiffs' residences in Butte, Montana. In the first case, *Kadillak v. Anaconda Co.*, 184 Mont. 127, 130, 602 P.2d 147, 150 (1979) (*Kadillak I*), this Court granted the plaintiffs a writ of mandate against the Department of State Lands and enjoined the Anaconda Company from using the waste dump. *Id.*, 184 Mont. at 144, 602 P.2d at 157 (1979). Of relevance here, after issuing the writ this Court remanded the cause to district court for a hearing "on attorney's fees *which are granted to the prevailing party on a writ of mandate.*" *Id.* (emphasis added); *see also*, *State ex rel. Haegg v. Dist. Court*, 130 Mont. 530, 532-33, 304 P.2d 1116, 1117 (1956) (relator is "entitled to recover reasonable attorneys' fees" for mandamus claim). This language is unequivocal; a successful applicant in a mandamus action is entitled to their attorney's fees as a component of damages.

Kadillak II did not change this calculus, but rather bolstered it. In *Kadillak II*, this Court considered the appropriate amount of fees based on the amount of work dedicated to the mandamus portion of the case. *Kadillak II,* 198 Mont. at 74-75, 643 P.2d at 1181. It did not consider the propriety of awarding fees, and it did not hold that the district court had discretion to award fees. It only considered the district court's discretion with respect to the *amount of* attorney fees. *Id.*, (court has discretion to

"determine reasonable attorney fees."); *State ex rel. Lynch v. Batani*, 103 Mont. 353, 364, 62 P.2d 565, 569 (1936) (fees are appropriate in a mandamus action, the court may determine the reasonableness of the fees.); *State ex rel. Barry v. O'Leary*, 83 Mont. 445, 451, 272 P. 677, 679 (1928) ("where damages are allowed the same must be ascertained and fixed by the court, referee or jury, as the case may be.")

In fact, the *Kadillak II* court reaffirmed that a successful plaintiff is entitled to damages under § 27-26-402, MCA. As part of the *Kadillak II* appeal, the plaintiffs appealed the district court's holding that certain out of pocket litigation expenses were not recoverable. In reversing that conclusion, this Court held that the plaintiffs were "entitled to be compensated for the reasonable litigation expenses related to the mandamus," and that the district court had "erred in not awarding as damages those litigation expenses incurred as a result of the mandamus action." *Kadillak II,* 98 Mont. at 78, 643 P.2d at 1183. This holding reaffirms that a district court has no discretion to deny damages – including fees and costs – for a successful mandamus applicant. *See also*, *State ex rel. Lynch*, 103 Mont. at 364, 62 P.2d at 569 (successful mandamus applicant "is entitled to reimbursement" of attorney fees as damages.)

2. The plain language of § 27-26-402, MCA, demonstrates that MEIC and Earthworks are entitled to their attorney fees.

The District Court further erred when it relied on § 27-26-402(1), MCA, to assert it had discretion to deny attorney fees. Presumably, it made this ruling based on the use

of the word "may" in § 27-26-402, MCA. However, the use of "may", here," does not give the district court discretion to deny a request for attorney fees.

In evaluating § 27-26-402(1), MCA, this Court follows the general cannons of statutory construction. The judge's role is to interpret consistent its plain language, *Hines v. Topher Realty, LLC*, 2018 MT 44, ¶ 15, 390 Mont. 352, 413 P.3d 813, so as to give effect to all of its parts, *State ex rel. Golden Valley Cty. v. Dist. Court*, 75 Mont. 122, 125, 242 P. 421, 422 (1925). The Court does not go beyond the plain language if the language is clear and unambiguous. *Hines*, ¶ 15. Its role is "simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." Section 1-2-101, MCA. When different words or phrases are used, they are to be given separate meanings. *Gregg v. Whitefish City Council*, 2004 MT 262, ¶ 38, 323 Mont. 109, 121, 99 P.3d 151, 160; § 1-2-101, MCA ("Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.") And when the same words or phrases are used in different statutes, they are given the same meaning except where a contrary intention "plainly appears." Section 1-2-107, MCA.

Applying these standards to § 27-26-402(1), MCA, yields but one result – attorney's fees, as a component of damages, are mandatory. *State ex rel. Golden Valley Cty.*, 75 Mont. at 129, 242 P. at 424 (1925) (applicant for mandamus has the "right to recover" the damages sustained.") The use of the word "may" in § 27-26-402(1), MCA, does not change this result. Section 27-26-402(1), MCA, in its entirety provides, "*the*

applicant may recover the damages that the applicant has sustained, as found by the jury or as determined by the court or referees, if reference was ordered together with costs." (Emphasis added.) For over a century, this Court has found the phrase "may recover" as mandatory. For instance, in 1923, in *State ex rel. Shea*, this Court found that an applicant was "entitled to reimbursement" of his attorney fees in pursuing a mandamus action, and that the mandamus statute "provides for damages and costs." *State ex rel. Shea v. Cocking*, 66 Mont. 169, 177, 213 P. 594, 596 (1923); *see also*, *State ex rel. Gebhardt v. City Council of Helena*, 102 Mont. 27, 42, 55 P.2d 671, 678 (1936) (rejecting challenge to an award of fees as "foreclosed.") In reaching that conclusion, the Court analogized Montana's mandamus statute to that of Kansas, which provided that an application "shall recover" their damages *Id. citing McClure* v. *Scates*, 64 Kan. 282, 67 P. 856 (1902). This comparison was reaffirmed 30 years later in *State ex rel. O'Sullivan v. Dist. Court*, 127 Mont. 32, 37, 256 P.2d 1076, 1079 (1953) (analogizing "may recover" to "shall recover."); *see also State ex rel. Miller v. Dist. Court*, 130 Mont. 65, 73, 294 P.2d 903, 907 (1956) (successful applicant for writ of prohibition entitled to "judgment for their damages and costs").

Beyond the historic case law, the use of "may recover" is prevalent through Montana Code to signify that a party who establishes liability *is entitled* to damages. Indeed, "Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation for it in money, which is called damages." § 27-1-202, MCA (emphasis added). Even though the statute uses the

terms "may recover," this language is not discretionary when liability is established because an injured party who has established liability is entitled to recover damages. "Montana law provides for monetary compensation to every person who suffers detriment from the unlawful act or omission of another." *Henricksen v. State*, 2004 MT 20, ¶ 76, 319 Mont. 307, 84 P.3d 38 (citing § 27-1-202, MCA); *see also Lima School Dist. No. 12 and Elementary School Dist. of Beaverhead County v. Simonsen*, 210 Mont. 100, 112-13, 683 P.2d 471, 477 (1984) ("unlawful acts that result in detriment to a party provide a right to recovery of money damages in our state" (citing § 27-1- 202, MCA)). Under § 27-1-202, MCA, a party who has established liability has the right to offer evidence in support of the amount of damages recoverable, but the "may recover" language does not establish the Court as a gatekeeper with authority to deny recovery of damages when liability is established. Once liability is established, the finder of fact's role is to determine the reasonableness of damages. Thus, in this case, the District Court's only role was to determine the reasonableness of the amount of attorney's fees.

The language in the writ of mandamus damages statute is similar to the language in § 27-1-202, MCA, and should be interpreted consistently. Section 1-2-107, MCA. "If judgment is given for the applicant," then § 27-26-402(1), MCA, provides "the applicant may recover the damages that the applicant has sustained, as found by the jury or as determined by the court or referees, if a reference was ordered, together with costs" (emphasis added). The first clause of § 27-26-402, MCA, requires the applicant to first obtain a judgment. Then the applicant is allowed to offer evidence in support of the

amount of damages recoverable, just as a successful litigant offers evidence of the amount of damages in other civil cases upon establishing liability.

The context of § 27-26-402(1), MCA, bolsters this conclusion in two parts. First, the "applicant may recover damages," and second the factfinder must "determine" those damages. Thus, the only role of the factfinder is to calculate those damages once liability has been established. Otherwise, the use of "determine" would be superfluous.

In contrast to § 27-26-402(1), MCA, when the legislature gives courts discretion to award damages or attorney fees, they use different language. For example, § 2-6-1009(4), MCA, provides that a person who prevails in a right to know case "may be awarded" costs and attorney fees. Section 2-3-221, MCA, uses the same language, stating that a prevailing party "may be awarded" attorney fees. The use of "may award" imbues discretion in the court. *See,e .g., Bocquet v. Herring*, 972 S.W.2d 19, 20 (Tex. 1998). Section 26-27-402(1), though, does not use "may award," but rather provides that an applicant "may recover." This strips the court of discretion to award damages. *Id.*, ("Statutes providing that a party "may recover", "shall be awarded", or "is entitled to" attorney fees are not discretionary.")

In addressing analogous language, this Court highlighted the difference under the 2016 version of Montana Consumer Protection Act. *Jacobson v. Bayview Loan Servicing, LLC*, 2016 MT 101, ¶¶ 53-54, 383 Mont. 257, 274-75, 371 P.3d 397, 411. There, this Court noted that under § 30-14-133(1), MCA (2016), a plaintiff "may recover" damages, and the Court may "award" treble damages. Thus, the court had no discretion on

whether to award damages but did have discretion with respect to an award of treble damages. As with mandamus, the plaintiff could elect the relief provided in the statute.

While the difference between "may award" and "may recover" may seem minor, it is significant in that it refers to two different powers – the power of the court or the power of the plaintiff. Where that power is derived changes the allocation of discretion. When the phrase "may recover" is used, it gives the plaintiff of applicant discretion to elect a remedy. *Bisson v. Ward*, 628 A.2d 1256, 1259 (Vt. 1993). And where "may award" is used, it grants the court discretion in providing a particular remedy. *Id.* If the legislature intended for the phrases to be identical in meaning, it would have used identical language. Section 1-2-107, MCA.

Courts around the country have reached this same conclusion. in *Bisson*, for example, the Vermont Supreme Court considered a district court's failure to award attorney fees under the Vermont Residential Rental Agreements. That act provided that the "tenant may . . . recover . . . reasonable attorney's fees." The Court rejected the landlords' argument that this vested the court with discretion to award fees, and instead found that the phrase "tenant may recover" created a right for the tenant to elect the relief provided in the statute. It did not vest the court with discretion to deny the elected remedy. *Bisson*, 628 A.2d at 1259. Likewise, the Wisconsin Supreme Court found that a party in an automobile fraud case was entitled to recover damages because the statute provided that a retail buyer "may recover damages." *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 683 N.W.2d 58, 65 (Wis. 2004). The court noted that although the provision did not

use the term "shall," the term "may" referred to the buyer/plaintiff and did not refer to the court. This was contrasted with clearly permissive provisions which state that "*the court may* award costs." *Id.* (emphasis added); *see also*, *James Twp. v. Rice*, 984 N.W.2d 71, 79 (Mich. 2022); *Gardner v. Gardner*, 2014 Colo. Dist. LEXIS 2477, *2 (Oct. 8, 2014); *Pepitone v. Winn*, 722 N.W.2d 710, 713 (Neb. 2006); *Bocquet*, 972 S.W.2d at 20; *Prevatte v. Asbury Arms*, 396 S.E.2d 642, 644 (S.C. Ct. App. 1990); *Love v. Monarch Apartments*, 771 P.2d 79, 82 (Kan. App. 2d 1989); *Beckett v. Olson*, 707 P.2d 635, 637 (Or. App. 1985).

Ultimately, then, the District Court erred when it found that an award of attorney fees under § 27-26-402(1), MCA was discretionary, and this matter must be remanded (as in *Kadillak I*) for a determination of reasonable attorney fees.

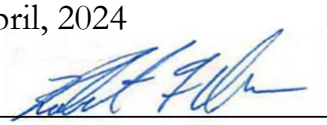
3. Even if § 27-26-402(1), MCA, provides discretion, the Court abused that discretion when it did not award MEIC and Earthworks attorney's fees.

As explained above, the District Court's conclusions regarding the Governor's office were without basis. As such, if this Court finds that attorney's fees are discretionary under § 27-26-402(1), MCA, this matter should still be reversed and remanded to determine the reasonable of fees.

CONCLUSION

In conclusion, the District Court's decision denying fees will discourage enforcement of the right to know by most citizens who do not have the means to hire an attorney. It is unlikely that ordinary citizens would take the risk of undertaking such a lawsuit. That discouragement flies in the face of the fundamental constitutional right at issue, and this Court's past rulings that the "public benefits from receiving full disclosure of relevant information, and will benefit because of the Chronicle's efforts. By awarding attorney's fees against the City**, the cost of litigation is properly spread among the beneficiaries.**" *Bozeman Daily Chronicle* 260 Mont. at 232, 859 P.2d at 444 (emphasis added). Here, too the public will benefit from MEIC's and Earthworks' efforts, and the costs to bring the action should be paid by the State.

DATED this 15th day of April, 2024



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CERTIFICATE OF COMPLIANCE

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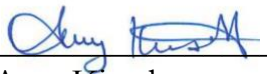
BY: 
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