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 REPLY 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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INTRODUCTION

Tellingly, the Governor's brief ignores the bulk of the District Court's rationale: the State's actions were completely unreasonable and that its arguments were not meritorious. That omission is due to the fact that the State had no basis in law or fact to withhold the requested documents. And because the Governor withdrew his appeal, the District Court's factual findings and conclusions of law are not challenged here. Meaning, the following facts and legal conclusions cannot be disturbed:[1]

1. The Governor's office "rejected MEIC's public records request wholesale. . ." (Dkt 72, p. 12.)
2. The Governor's office did not simply refuse "to produce individual documents that it [had] determined need not be produced under an applicable exception or privilege; it has refused the request *in toto*." (*Id*, p. 18.)
3. The Governor's assertion of a pending litigation exception is "completely unmoored from the text, history, and purpose underlying both Article II, Section 9 and the implementing public records statutes." (*Id.*, p 12.)
4. The Governor did not cite "any evidence from the 1972 Convention, the ratification debate that followed the Convention, or the common law that

[1] Nevertheless, the Governor attempts to sidestep the withdrawal of its appeal to challenge the court's summary judgment findings. *See, e.g.* Gov. Br., p. 38 at n. 2.

preceded Convention recognizing a privilege against disclosure of information that is the subject of litigation." (*Id.*, p. 13.)

5. MEIC's subjective motivation in acquiring the documents is irrelevant and the Governor cited nothing "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 the request." (*Id.*, p. 16.)
6. There is "no logical basis for the suggestion that the availability of discovery naturally trades off with the availability of the right to know." (*Id.*, p. 16.)
7. The Governor's office "has a clear legal duty under the Constitution and the implementing statutes to honor public records requests regardless of the purpose of which the disclosures will be put." (*Id.*, p. 18.)
8. Civil discovery is not "an adequate alternative remedy" to a writ of mandamus. (*Id.*, p. 20.)

None of these facts were disturbed in the order on attorney fees, and the Governor cannot challenge them here. Those facts alone demonstrate the State is wrong, and the District Court abused its discretion when it failed to award attorney fees.

ARGUMENT

A. The District Court abused its discretion by failing to award attorney fees under the Right to Know statutes.

While attorney fees are discretionary under §§ 2-3 221 and 2-6-1009, MCA, there is a good reason for awarding them, here. Right to Know cases serve an important purpose of providing transparency in government and ensuring an informed citizenry. But when the government impedes those purposes by inventing privileges and withholding public information, it can often be difficult to overcome the hurdles of litigation without an attorney or it is too expensive to hire an attorney. Either scenario allows the Government to use its largess and the bureaucracy to hide from the public and operate in the shadows. But by awarding fees, it enables cases, like this one, to be brought by any individual because the attorneys may ultimately be compensated for their work. *Laudert v. Richland Cty. Sheriff's Dep't*, 2001 MT 287, ¶ 26, 307 Mont. 403, 38 P.3d 790. ("The purpose of fee shifting provisions in civil rights laws like the Montana Human Rights Act, is to encourage 'meritorious civil rights litigation' and ensure effective access to the judicial process for persons with discrimination grievances.") Under this background, the District Court's denial of attorney fees was an abuse of discretion.

1. The State acted in bad faith.

This case involves an elected official inventing an exception to Montanans' Constitutional Right to Know. The cases cited by the Governor are inapposite. In *Bozeman Daily Chronicle*, law enforcement officials – concerned with privacy rights - sought to shield the name of an officer involved in an incident from the public. The District Court ruled in favor of the newspaper. That court awarded fees despite a lack

of bad faith by the Police. *Bozeman Daily Chronicle v. City of Bozeman Police Dep't*, 260 Mont. 218, 859 P.2d 435 (1993). In *Billings High School*, the requests involved the right to privacy in employment records, and the school district filed a declaratory judgment action. *Billings High Sch. Dist. No. 2 v. Billings Gazette*, 2006 MT 329, 335 Mont. 94, 149 P.3d 565. In *Disability Rights*, the plaintiff sought disclosure of information with personally identifiable information redacted – i.e. a privacy interest. *Disability Rights Mont. v. State*, 2009 MT 100, 350 Mont. 101, 207 P.3d 1092.

Instead of acknowledging this distinction, the Governor's office now attempts to collaterally attack the District Court's summary judgment order that found the Governor's actions unreasonable. *See* Gov. Br., p. 13. In doing so, the Governor argues that its reliance on *Nelson* was appropriate. However, the District Court spent two pages explaining why the Governor's reliance on *Nelson* was unavailing. Specifically, the Court found the passage relied on by the governor is not "of any assistance." And that the holding relied on by the Governor is "dicta," which was not binding on the District Court. (Dkt. 72, pp. 14-15.) Continuing, the Court found that none of the arguments raised by the Governor were based in "the text, history, and purpose underlying both Article II, Section 9 and the implementing public records statutes," (*Id.*, p. 12); that the Governor cited no evidence that the pending litigation exception exists, (*Id.,* p. 13); and that there was no textual or historical basis for finding a pending litigation exception (*Id.*, p. 15.) Moreover, the Court found that even if some exception existed, the Governor had a "clear legal duty to honor public

records requests." (*Id.*, p. 18). And that simply refusing to produce documents, wholesale, violated that clear legal duty. Ultimately, the Court agreed that the State did not "adequately justif[y] its reliance on [the pending litigation privilege]." (*Order on Fees*, Dkt. 85, p. 3).

Nevertheless, the District Court in ruling on attorney's fees refused to find bad faith. (Dkt. 85). The court's finding of a lack of bad faith to justify an award of fees cannot be squared with the above facts. The District Court cannot on one hand say everything about the Governor's argument was, essentially, meritless, but then claim the asserted actions were merited. Providing these inconsistent and contradictory holdings is an abuse of discretion.[2]

2. It is disputed that previous administrations utilized the pending litigation exception.

Both the District Court and the Governor argue that past administrations have used the pending litigation exception. *See Gov. Br.*, p 14. They also claim that MEIC does not dispute that fact. That is incorrect and ignores the record. Notably, none of the assertions in the Governor's counsel's Affidavit were used to defend the litigation

[2] The Governor also attempts to place the burden on plaintiffs to show that the at the constitutional convention the delegates wanted to create "new discovery tool." But why would convention members discuss discovery? The Convention was about creating constitutional rights, not discovery. Additionally, that argument was ever made below and must be rejected. *See, e.g.*, *Pilgeram v. GreenPoint Mortg. Funding, Inc.*, 2013 MT 354, ¶ 23, 373 Mont. 1, 313 P.3d 839. It also flips the burden to the Plaintiffs to establish which privileges apply, when in fact, the Governor has the burden. *Nelson*, ¶ 36.

exception, but only upon a motion for attorney fees. And, as MEIC pointed out, the assertions are based on two conclusory sentences with no supporting evidence. *See* Opening. Br., pp. 18-19; *See also* Dkt. 80, pp. 3-4. Because those claims do not have factual support, they are conclusory, making them "not credible or susceptible to being readily controverted" and cannot be relied upon. *See, e.g.*, *Castro v. Am. Express Nat'l Bank*, 2023 Tex. App. LEXIS 9193, at *6-7 (Tex. App. Dec. 7, 2023).

It is the Governor's burden to establish that the privilege exists, and without having provided any evidence of the past use of a pending litigation exception, it cannot establish its historical usage. *Cf. PPL Mont., Ltd. Liab. Co. v. State*, 2010 MT 64, ¶ 84, 355 Mont. 402, 229 P.3d 421. (Reliance upon "conclusory statements" lacking specific factual support is not sufficient to raise a genuine issue of material fact on summary judgment).

3. The Governor's office took more than 100 days to respond to the request for information, which is dilatory.

Addressing the delay issue, the District Court and the Governor ignore the actual delay in producing the documents or responding to the request. A brief timeline:

1. On November 29, 2021, the request for information was filed.
2. On January 7, 2022, because MEIC had not heard anything, it requested an update.

3. On January 7, 2022, The Governor's office advised it would look into the request.
4. On January 10, 2022, MEIC requested an estimate of fees and costs.
5. The Governor's said it would take two weeks to process the request once the work began.
6. On February 18, 2022, MEIC had not heard back and followed up again.
7. On February 25, 2022, The Governor's office replied and advised the information would be provided "soon."
8. On March 15, 2022, MEIC filed this suit.
9. On April 19, 2022, the Governor's office denied the request.

In total, the Governor took 141 days[3] to respond, and the response was only forthcoming after this suit was filed.

The District Court found that the Governor's actions "stymied" MEIC's request. (Dkt. 72, p. 5). Once the Governor responded, the office did not simply refuse "to produce individual documents that it [had] determined need not be produced under an applicable exception or privilege; it has refused the request *in toto*." (*Id.*, p. 18.) To say the Governor was not dilatory not only ignores the actual length of the delay, but also ignores the final response was simply a denial.

[3] 106 days from the date of the request to the date of the lawsuit filing.

Compounding this problem is that the Governor's office was *required* to *either* provide the documents *or* an estimate of the time to produce the information. § 2-6-1006(2), MCA. That had to be done in a timely manner. *Id.* Yet the Governor did neither until after the suit was filed.

This court has found that a delay of roughly 30 days constitutes a wrongful delay. *Bryan v. Yellowstone Cty. Elem. Sch. Dist. No. 2*, 2002 MT 264, ¶¶ 38-39, 312 Mont. 257, 269, 60 P.3d 381, 389-90. In *Bryan*, the records request was made on April 4, 2001, and again on April 9, 2001. The defendant refused to produce the documents, and on May 8, 2001, a suit was filed. This Court found that the denial violated the Plaintiff's constitutional rights. *Id.*; *compare with Zunski v. Frenchtown Rural Fire Dep't Bd. of Trs.*, 2013 MT 258, ¶ 12, 371 Mont. 552, 554-55, 309 P.3d 21, 24 (timely when partial responses were provided both three and thirteen days after a request was made); *See, e.g.*, § 2-6-1006(3), MCA[4] (five days for readily identifiable information, 90 days for other requests unless a written notice explaining the need for additional time is provided).

But even if the Governor were not dilatory, that's not a reason to deny fees. Section 2-6-1009, MCA specifically allows a party to bring a suit based on a denial. And the court may award fees for establishing the denial was inappropriate.

[4] This statute is not applicable to the governor yet, but provides guidance on timeliness.

It bears repeating, the Governor's office made up a new exception to the Right to Know, and then refused to honor a public records request. It could have asserted this nonexistent privilege at any time, but waited until this suit was filed. That is dilatory.

4. Discovery in Ksanka Elders was not sufficient.

The Governor and the District Court wrongly assert that the information was discoverable in the *Ksanka Elders* case, justifying the denial of fees. Both MEIC and the Governor have acknowledged that the information likely was not discoverable or relevant in *Ksanka Elders*. The Governor does not dispute that on June 6, 2022, MEIC stated that the information requests were needed for larger public policy purposes and not the *Ksanka Elders* case. (Dkt. 36, ¶ 9). The Governor even agreed (Dkt. 75, p. 3.)

This case is also nothing like *Friedel*. There the plaintiff filed *both* discovery requests and a right to know request seeking the *same* information in an administrative contested case. The State provided 276 documents and a privilege log less than thirty days after the requests. Instead of challenging the privilege log in the case, Friedel filed a separate lawsuit, obtained the requested documents and then sought fees. The Court declined the request for fees, because Friedel had taken an unreasonable approach to resolving the discovery dispute. In other words, the plaintiff's problems were self-created. *Friedel, LLC v. Lindeen*, 2017 MT 65, ¶ 8, 387 Mont. 102, 392 P.3d 141. In contrast, here, the Governor "stymied" MEIC's efforts, and then refused to produce the documents wholesale.

Moreover, the Court's fees order is once again inconsistent with its Summary Judgment Order. On Summary Judgment, the Court found (which finding is not on appeal) that discovery was not an adequate alternative to a right to know request based on the limitations in discovery. (Dkt. 72, p. 16)

5. The burden on taxpayers was inappropriately considered.

This Court has said, on multiple occasions, that the purpose of awarding attorney fees to the prevailing party is to ensure the "cost of litigation is properly spread among the beneficiaries." *Bozeman Daily Chronicle*, 260 Mont. at 232, 859 P.2d at 444. In other words, the taxpayers benefit from this ruling, and awarding fees is the necessary mechanism to ensure that all the beneficiaries share the costs. In fact, it "is the intent of the statute." *The Associated Press v. Bd. of Pub. Educ.*, 246 Mont. 386, 393, 804 P.2d 376, 380 (1991)

Moreover, it's a bit disingenuous for the Governor to be worried about taxpayer funding when he's hired private counsel to litigate this case on appeal.

B. The attorney fee test advocated by MEIC is found in this Court's own case law – a fact that the Governor simply ignores.

The Governor claims that the "test" suggested by MEIC is "novel," but ignores that in determining whether to award attorney fees this Court has regularly explained that it is important to look at the public benefit. In *Associated Press*, for example, this Court upheld an award of attorney fees – despite a lack of bad faith – and explained: "Due to the particular advantage of enforcement of the right in this

case, as well as the resultant public benefits gained by plaintiffs' efforts it was not an abuse of discretion to reimburse them from the public coffers. That is the intent of the statute." *Associated Press*, 246 Mont. at 393, 804 P.2d at 380. In other words, the Court must look to the benefits gained in determining whether an award of fees was an abuse of discretion. *Bozeman Daily Chronicle*, 260 Mont. at 232, 859 P.2d at 444; *Unidentified Police Officers 1, 2 & 3 v. City of Billings*, 2019 MT 299, ¶ 13, 398 Mont. 226, 232, 454 P.3d 1205, 1209; *Yellowstone Cty. v. Billings Gazette*, 2006 MT 218, ¶ 30, 333 Mont. 390, 143 P.3d 135.

Evaluating that factor here, weighs in favor of finding an abuse of discretion. The Governor invented an exception to the right to know, which MEIC struck down. That work benefits all of Montana, not just MEIC. Under controlling case law, fees should be awarded. This is not a new test.

C. Attorneys' fees on mandamus are mandatory despite the use of "may".

The bulk of the Governor's argument revolves around the word "may" and that that word alone means the award of attorneys is discretionary. However, when read in context the phrase "may recover" places the power to recover fees in the hands of the successful party and not the Court. The Governor, throughout his argument, ignores the full phrasing of the mandamus statutes, violating one of the basic elements of statutory construction. Section 1-2-106, MCA.

1. The Governor's interpretation would give the district court's discretion to disallow damages.

The Governor's argument regarding fees ignores one important fact: attorney fees in mandamus actions are "damages" they are not a standalone remedy. This is different than every statute cited by the Governor. Accepting the Governor's argument would, thus, grant the court discretion to deny damages altogether, not just attorney fees, in a mandamus action.

Adopting a reading of "may recover" as giving the court discretion would affect other statutory damages provisions. For example, if "may recover" is discretionary, a court would have discretion to deny damages "to every person who suffers a detriment." Section 27-1-202, MCA. A court could also deny damages to: a tenant for a landlord's lease violations, § 70-24-406(2), MCA; a landlord for a tenant's damages to their property, § 70-24-426(1), MCA; an employee whose wages were wrongfully withheld or delayed, § 39-3-207(1), MCA; a debtor whose UCC rights were violated, § 30-9A-625, MCA; a road supervisor who removes an encroachment, § 7-14-2137(2)(b), MCA; or a person who obtained a letter of credit, but never received the funds, § 30-5-131, MCA. Each of these statutes states that the wronged person "may recover" their damages. If the Court adopts a discretionary interpretation of "may recover," then district courts could simply exercise their discretion to deny damages altogether.

2. The use of "may" versus "must" is not sufficient to overcome the mandatory nature of attorney fees.

The use of "must" in § 27-26-402(3), MCA, as opposed to "may recover" in § 27-26-402(1), MCA, does not render fees optional. The two subsections relate to different obligations between the court or the applicant.

Subsection 27-26-402(1), MCA, allows the applicant to ask the court for the damages. It places the power in the hands of the applicant, not the court. *Bisson v. Ward*, 628 A.2d 1256, 1259 (Vt. 1993). In fact, an applicant would be free to waive any claim to damages. There is no obligation on the part of the applicant to request fees. But once those fees are requested, they must be awarded.[5]

In contrast, § 27-26-402(3), MCA, places a burden on the court. It requires a court to issue the peremptory mandate. Which makes sense; when a party asks for a writ of mandamus, and obtains a judgment in their favor, it would be absurd to allow the Court not to issue a peremptory mandate. That was the purpose of the suit.

Put simply, § 27-26-402(1) and § 27-26-402(3), serve different purposes and the use of "may recover" as opposed to "must" does not mean that the court has discretion to deny fees when requested.

[5] This interpretation is supported by the post judgment interest statutes. In § 27-1-211, MCA, the legislature defiance the right to recover as a right that "vest[s]" in a person.

3. The Governor's references to § 13-36-205, MCA and § 70-24-401, MCA, are misleading as the statutes at issue specifically provide discretion.

The Governor misses a key distinction between § 27-26-402(1), MCA, and the other statutes allowing the recovery of attorney fees. And even fails to cite the entire statutes on which it relies.

First, with respect to fees under and § 13-36-205, MCA, and relying on *Paulsen v. Huestis*, 2000 MT 280, 302 Mont. 157, 13 P.3d 931 and *Marsh v. Overland*, 274 Mont. 21, 905 P.2d 1088 (1995), the Governor omits the second sentence of the statute. That omitted sentence grants discretion: "costs, disbursements, and attorney fees *in all cases must be in the discretion of the court.*" Section 13-36-205, MCA. So, even though the statute states that a party "may recover" attorney fees, the second sentence makes clear that an award of fees is discretionary.

That language also that "may recover" is mandatory. If the legislature believed the use of "may recover" was discretionary, then there would be no need for the second sentence imbuing discretion on the courts. In other words, the second sentence would have been superfluous and unnecessary.

Similarly, the Governor's reliance on *Summers v. Crestview Apartments*, 2010 MT 164, ¶ 32, 357 Mont. 123, 236 P.3d 586 and § 70-24-401(1), MCA, is misleading at best. With respect to § 70-24-401(1), MCA, it states that an aggrieved party "may recover appropriate damages" and then discusses an obligation to mitigate those damages. The Governor's reading of "may recover" as discretionary, would render

those damages discretionary. Section 70-24-401(1), MCA, does not, though, discuss attorney fees. The statutory provision at issue in *Summers* is § 70-24-404(1), MCA, which prohibits rental agreements from including provisions prohibited by the Act. The lease term at issue in *Summers* was a prohibition on attorney's fees in a suit over the agreement, which contradicted the Act's discretionary allowance of fees. *Summers*, ¶ 42 *citing* § 70-24-442(1), MCA (fees "may be awarded.") So, the *Summers* court never "construed the Act's 'may recover' language as providing for a discretionary award of attorney fees." *See* Gov. Br., p. 27.

4. Granting fees on mandamus does not undercut the discretionary fees under § 2-6-1009, MCA, but even if it does, fees are appropriate because the Governor violated a clear legal duty.

The Governor misunderstands why fees on mandamus are important, and instead claims that they will undermine the discretionary nature of fees under the right to know statutes. The difference is important.

Here, the District Court issued *two* distinct rulings (1) that the Governor cannot "deny public records claim because the requested records overlap in whole or part with the subject of pending litigation to which the requester is an interested party" (Dkt. 72, p. 21), and (2) issued a writ of mandamus requiring the "Governor to produce all public information within his possession or control to Plaintiffs within six weeks of the date of this Order." (Dkt. 72, p. 21).

These two actions work together, "because mandamus commands performance, while a declaratory judgment simply pronounces the duty to be

performed." *Gallatin Cty. v. D & R Music & Vending*, 201 Mont. 409, 413, 654 P.2d 998, 1000 (1982). In order to obtain the documents, Plaintiffs had to purse the mandamus action; the declaratory judgment would be somewhat meaningless unless the Governor must also produce the requested documents.

The Governor cites no law, case, rule or other authority that renders the remedies under the right to know statutes and the mandamus statute as exclusive. Here, the District Court found in Plaintiffs' favor under two distinct statutes, each containing a fee provision.

If this Court finds that mandamus fees are mandatory, the Governor has provided *no authority* to ignore that plain language. The court can and should disregard that public policy argument.

5. Since at least 1923, this Court has upheld mandatory attorney fees in mandamus actions.

The Governor spends significant effort to disprove this Court's century old tradition of awarding attorney fees, but cites no cases where fees were not awarded when they were requested in the complaint. That is not the case, here.

The Governor's attempts to distinguish cases is unavailing. In 1923, this Court held that a police judge from Butte, who successfully obtained a writ of mandamus was "entitled to reimbursement" of his attorney's fees and costs for bringing the

mandamus action. *State ex rel. Shea v. Cocking*, 66 Mont. 169, 177, 213 P. 594, 596 (1923).[6]

In 1925, this Court considered another mandamus action, but denied fees because they were "not proved." *State ex rel. Golden Valley Cty. v. Dist. Court*, 75 Mont. 122, 129, 242 P. 421, 423-24 (1925). The Governor argues that this "not proved" language imbues the Court with discretion. But the Governor's again ignores the qualifying language, which noted the fees were not recoverable because they should "have been litigated and determined in the *mandamus* action; and not having done so, the court is now without jurisdiction to do so." *Id.* The language in *State ex rel. Barry v. O'Leary*, 83 Mont. 445, 451, 272 P. 677, 679 (1928) regards the same issue. Put another way, when an applicant for mandamus *fails to request* attorney's fees and damages, the applicant has waived their right to recover those damages. *See also*, *State ex rel. Lynch v. Batani*, 103 Mont. 353, 364, 62 P.2d 565, 569 (1936); *State ex rel. Miller v. Dist. Court*, 130 Mont. 65, 66-67, 294 P.2d 903, 904 (1956).

The Governor correctly notes that the opening brief accidentally quoted the dissent in *State ex rel. Miller* for the premise that fees are mandatory. However, the majority opinion reached functionally the same conclusion. There, the Court explained that damages are allowed in mandamus action, and those *damages* include

[6] Misquoted as *State ex rel. Lynch v. Batan*i, 103 Mont. 353, 62 P.2d 565 (1936) in Appellants' opening brief. *See Opening Br.*, p. 29.

attorney fees. But only if they are claimed in a complaint. Nothing in *Miller* indicates that fees are discretionary.

Finally, the other mandamus cases relied on by the Governor, likewise, do not undercut the mandatory nature of fees in a mandamus action. In *Christopherson*, the court awarded an intervenor partial attorney's fees based on § 27-26-402, MCA and its inherent equitable powers. *Christopherson v. State*, 226 Mont. 350, 355, 735 P.2d 524, 527 (1987).[7] This court did not analyze anything but rather affirmed the award because it was supported by the record. *Id.* In fact, the Court relied on *State ex rel. Wilson v. Dep't of Nat. Res. & Conservation, Water Res. Div.*, 199 Mont. 189, 196, 648 P.2d 766, 769 (1982), which explicitly evaluated attorney's fees in equity, and did not discuss mandamus. Thus, because this court affirmed the equitable fees, it had no need to discuss the import of the mandamus damages provision.

Braach v. Graybeal is similarly unpersuasive. It simply cites § 27-26-402, MCA, as allowing fees as an element of damages, and provides no analysis of the statute. Instead, the Court ruled that a person who obtains an *injunction* is not entitled to fees. *Braach v. Graybeal*, 1999 MT 234, ¶¶ 14-15, 296 Mont. 138, 988 P.2d 761. *Davis v. Jefferson Cty. Election Office*, similarly, has no analysis of § 27-26-402, MCA, other than to say fees may be available in a mandamus action. But the availability depends upon

[7] Arguably, the intervenor was not entitled to any fees under § 27-26-402, MCA, because only an applicant for a writ of mandamus is entitled to fees under § 27-26-402, MCA and the intervenor was not an applicant. The *Christopherson* court did not discuss that issue.

fees being requested as damages, or a party's election to recover them. It does not depend on the court's discretion. *See also*, *State ex rel. Lynch*, 103 Mont. at 364, 62 P.2d at 569.

Ultimately, the Governor has cited no mandamus case denying fees, as a component of damages, for a successful applicant and this Court should do it now.

6. Section 27-2-201, MCA is analogous to § 27-26-402, MCA.

The Governor argues that this Court should distinguish "may recover" in the mandamus statutes from the phrase "may recover" in tort actions, § 27-2-202, MCA. But that is unfounded. As the Governor also notes, a few sentences later, "statutes consistent with one another that refer to the same subject matter should be construed consistently." *See Gov. Br.*, p. 30. Both §§ 27-1-202, MCA, and 27-26-402, MCA relate to "damages". The Governor ignores this fact and fails to understand that attorney fees are a component of "damages," here. As such, comparing § 27-1-202, MCA and § 27-26-402, MCA, is not a "red-herring" but completely appropriate.

7. The Governor should not escape fees by inventing a privilege and claiming it is an "issue of first impression"

Finally, the State argues that this is an issue of first impression, *inter* alia, and so it should be forgiven for its intransigence. Again, however, the Governor did not appeal the findings of the District Court; meaning, its arguments to the District Court were, and are, unmoored from the text and history of the constitution, and the Governor cited no case law or other law to defend its wholesale refusal to produce

documents. And much like those arguments, the Governor has provided no authority that an issue of first impression should shield it from fees. The Governor violated a clearly established duty, fees are appropriate.

The Governor then argues that there was no clear legal duty to produce the documents. That issue is not on appeal, and there was a clear legal duty – produce the documents with a privilege log *or* provide them to the Court for in camera review. *Nelson v. City of Billings*, 2018 MT 36, ¶ 36, 390 Mont. 290, 412 P.3d 1058. The Governor did neither. The Court should not award his obfuscation, delay, and willful efforts to hide public documents in violation of the the Montana Constitution's right to know.

CONCLUSION

The Governor complains about the fact that this case even exists and that he is liable for fees. But the only reason this case exists in the first place is because the Governor stymied MEIC and Earthworks' request for information by inventing a privilege unmoored from the text and history of Montana's right to know. When the request was made, the Governor had two options; either produce the information with a privilege log or provide it to the Court for in camera review. *Nelson*, ¶ 36. The Governor did neither and instead refused to do anything. As a result, MEIC and Earthworks had to sue the Governor to force him to fulfill his statutory and constitutional obligations. As a result, all the people in Montana have benefited, and MEIC and Earthworks are entitled to their attorney fees.

DATED this 25th day of July, 2024

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Garamond text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word for Mac 2016 is 4,992 not averaging more than 280 words per page, excluding caption, certificate of compliance, and certificate of service.

By: /S/ROBERT FARRIS-OLSEN
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Dated: 07-25-2024