MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

MONTANA ENVIROMENTAL 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 **OPINION AND ORDER ON PENDING MOTIONS AND WRIT OF MANDATE**

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Before the Court is the following:

1. Plaintiffs Montana Environmental Information Center (MEIC) and Earthworks' Amended Application for Writ of Mandate (Dkt. 17), filed May 9, 2022.

2. Defendant Governor Greg Gianforte's Motion for Summary Judgment (Dkt. 29), filed May 17, 2022;

3. Defendant Montana Department of Administration's (DOA) Motion to Dismiss Plaintiffs' First Amended Complaint (Dkt. 33), filed May 23, 2022; and

4. Plaintiffs Montana Environmental Information Center (MEIC)and Earthworks's Motion to Strike (Dkt. 51), filed July 19, 2022.

Plaintiffs are collectively represented by David K.W. Wilson, Jr. and Robert Farris-Olsen. MEIC is additionally represented by Derf Johnson. The State is collectively represented by Brent Mead, Michael Russell, and Emily Jones. DOA is represented by Don E. Harris and Rebecca Narmore. The Governor is represented by Anita Milanovich. The foregoing motions are fully briefed and ready for decision. For the reasons that follow, DOA's motion to dismiss will be granted, the Governor's motion for summary judgment will be denied, Plaintiffs' motion to strike will be denied[1], and Plaintiffs' application for a writ of mandate will be granted in part and denied in part.

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[1] Little need be said on the motion to strike. The Court has reviewed the briefing. The Governor's reply brief fairly responds to the arguments made by Plaintiffs in opposition to the motion for summary judgment. MEIC's motion to strike lacks merit.

BACKGROUND

The parties do not dispute the essential facts.[2] MEIC, acting on behalf of itself and Earthworks, filed two public records requests on November 29, 2021. The identical requests, sent to the Department's State Information Technology Services Division (SITSD) and the Governor's office, sought the following:

> a. All documents, records, information, and materials regarding the Montanore and Rock Creek Mines;
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> b. All documents, records, information, and materials, regarding Montana's Bad Actor provision in the Metal Mine Reclamation Act;
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> 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.. *(sic)* These communications may include (but this request is not limited to) the email domains @hecla-mining.com. This correspondence may also include, but is not limited to, employees of the consulting firm Environomics, Inc.;
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> 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. 17, 1st Am. Compl. & App. for Writ of Mandate, ¶ 15.) The information requested substantially overlaps with the subject matter of a pending lawsuit

[2] The parties dispute the subjective purpose of MEIC's records request, but for the reasons stated below, this is not a material dispute of fact.

before this Court in which MEIC is a plaintiff, *Ksanka Elders Advisory Committee v. Dorrington*, Cause No. DDV-2021-1126 (1st Jud. Dist. Ct.). In *Ksanka Elders*, MEIC and other plaintiffs have sought a declaratory judgment and a writ of mandamus to compel the Department of Environmental Quality (DEQ) (which is not a party to this action) to reinstate an enforcement action against several subsidiaries of Hecla Mining Company in connection with mining projects in the Cabinet Mountains.[3] MEIC's public records requests were sent near in time to the filing of *Ksanka Elders*.

DOA did not immediately respond to MEIC's request, prompting MEIC to contact the Department's director, Misty Ann Giles, on January 7, 2022. DOA, through counsel, responded:

> SITSD does not handle records requests from the public. Instead, such requests should be direct [sic] to the agencies that are responsible for maintaining the records, and in particular to the agency head or public information office. It appears, in this case, your requested [sic] should have been sent to the Department of Environmental Quality and the Governor's Office.

(1st Am. Comp., ¶ 18, Dkt. 17.)

Likewise, the Governor's Office did not immediately respond to the public records request, prompting MEIC to contact the Governor's general counsel on January 7, 2022. The Governor's Office, through counsel, initially responded that it would look into the request. Several months later, however, the Governor's Office notified MEIC in writing that it would not provide the

[3] *Ksanka Elders* is also before this Court. On December 15, 2022, this Court dismissed the request for a writ of mandamus in that matter, but a parallel request for a declaratory judgment remains and is being actively litigated.

requested information. The Governor's Office reasoned that the public information requested was an effort to facilitate MEIC's ongoing litigation against DEQ, and that it was covered by attorney client privilege and the deliberative process privilege. (Milanovich Decl. Ex. C, Dkt. 31.) The Governor's Office did not disclose any documents at all, and nothing in the record suggests the Governor's Office provided a privilege log.

Stymied by both DOA and the Governor's Office, Plaintiffs filed this action.

STANDARDS

A motion to dismiss for failure to state a claim for which relief can be granted, brought under Mont. R. Civ. P. 12(b)(6), is a test of the legal sufficiency of the allegations in the complaint. It "has the effect of admitting all well-pleaded allegations in the complaint." *Cowan v. Cowan*, 2004 MT 97, ¶ 10, 321 Mont. 13, 89 P.3d 6 (quoting *Powell v. Salvation Army*, 287 Mont. 99, 102, 951 P.2d 1352, 1354 (1997)). The Court must construe the complaint "in the light most favorable to the plaintiff" with all well-pleaded factual allegations taken as true. *Cowan*, ¶ 10. The complaint may not be dismissed under Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [the] claim that would entitle [the plaintiff] to relief." *Cowan*, ¶ 10.

Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is not genuine issue as to any material fact" and the moving party it entitled to judgment as a matter of law. Mont. R. Civ. P 56(c).

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DISCUSSION

The Montana Constitution provides: "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 demand of individual privacy clearly exceeds the merits of public disclosure." Mont. Const. art. II. § 9. At the 1972 Constitutional Convention, the right was described as presuming "the openness of government documents and operations to combat government's sheer bigness, which threatens the effective exercise of citizenship." *Nelson v. City of Billings*, 2018 MT 36, ¶ 17, 390 Mont. 290, 412 P.3d 1058 (alteration and internal quotation marks omitted). Thus, this fundamental right has long been interpreted as creating a "presumption of openness" that "impose[s] an 'affirmative' duty on government officials to make all of their records and proceedings available to public scrutiny." *Great Falls Tribune v. Mont. Pub. Serv. Comm'n*, 2003 MT 359, ¶ 54, 319 Mont. 38, 82 P.3d 876; *see also Crites v. Lewis & Clark County*, 2019 MT 161, ¶ 19, 396 Mont. 336, 444 P.3d 1025.

This constitutional guarantee is implemented through statute. The public records statutes' core requirement is as follows: except as otherwise expressly excepted, "every person has a right to examine and obtain a copy of any public information of this state." Mont. Code Ann. § 2-6-1003(1). "Public information" is "information prepared, owned, used, or retained by any public agency relating to the transaction of official business, regardless of form, except for confidential information that must be protected against public disclosure under applicable law." *Id.* § 2-6-1002(11). A public agency has a duty to "respond in a timely manner" to a person requesting public information. *Id.*

§ 2-6-1006(2). If a request is denied, the person may bring an action in district court to enforce the public records statutes. *Id.* § 2-6-1009(2).

With these general principles in mind, the Court turns to the motions at issue.

1. DOA's Motion to Dismiss

DOA seeks dismissal to the extent MEIC's claims pertain to the records request made to DOA, because it contends the requested information does not "relat[e] to the transaction of" DOA's "official business," and therefore does not constitute "public information." MEIC counters that this view of "official business" is too narrow, and that the relevant "official business" is the official business of the Executive Branch, not just the official business of DOA itself.

This, however, strikes the Court as the wrong question. Even assuming that MEIC is right that the phrase "the transaction of official business" refers to the official business of the entirety of the Executive Branch, that does not answer the question whether MEIC can request those records *from DOA*. Importantly, the public records statutes provide that a public agency fulfills a request for public records by "making the public information *maintained by the agency* available for inspection and copying by the requesting person." *Id.* § 2-6-1006(2)(a). Thus, the relevant question is whether DOA "maintains" the records of other agencies simply because they are hosted on the computer system and state networks operated by DOA. When the statutory scheme is considered as a whole, the answer to this question becomes clear: no.

Under the public records statutes, records belong to the agency that generates, gathers, or retains the records. "All public records are and remain the

property of the public agency possessing the records." *Id.* § 2-6-1013. Each executive branch agency is tasked with managing its own records in accordance with law. *See id.* § 2-6-1012(1)(b). Additionally, each head of each agency bears ultimately responsibility for ensuring the property management of the agency's records, including their preservation and retention according to state retention policies, and for appointing a qualified agency records manager to provide these management functions for the agency. *Id.* § 2-6-1103. In other words, each agency is responsible for maintaining, preserving, retaining, and (when appropriate) disposing of its own public records.

As DOA notes in its briefs, the right to know and the implementing public records statutes were first adopted in an era when records were primarily stored in paper form. Records were inspected by going to the offices of the agency that maintained them. But this is no longer how most records are kept: banker boxes in closets and warehouses have largely been replaced by digital documents on servers and hard drives. And for sake of efficiency, Montana has adopted a centralized statewide computer network that DOA "operates and maintains." *Id.* § 2-17-512(1)(m). Indeed, the public records statutes give a nod to this new reality: they expressly acknowledge DOA's responsibility "for the management and operation of equipment, systems, facilities, and processes integral to the department's central computer center and statewide telecommunications system." *Id.* § 2-6-1102(3).

The term "maintained" is undefined in statute but is commonly understood to mean (in this context) "to care for (property) for purposes of operational productivity or appearance; to engage in general repair and upkeep." Black's Law Dictionary 1142 (11th ed. 2019). There is no plausible basis for

disputing that DOA "maintains" the State's computers and servers. Nevertheless, the question is not whether DOA "maintains" the network; the question is whether DOA "maintains" the records stored on the network. Nothing in statute empowers DOA to regulate the content of what an agency generates or stores via the State's network. DOA is not responsible for ensuring the preservation, retention, or disposal of records stored on its network apart from maintaining the infrastructure necessary to permit preservation, retention, or disposal of records; rather, each agency is. DOA does not apply agency retention schedules to the documents on its systems; the individual agencies do. *See id.* § 2-6-1103.[4] Thus, while it can be fairly said that DOA "maintains" the State's computer systems and networks, it cannot be said that DOA "maintains" the records hosted on those systems and networks.

This conclusion is bolstered by the necessity of determining what records are "confidential information that must be protected against public disclosure under applicable law," and therefore not "public information" subject to disclosure. This is frequently not straightforward. Agencies must assess, for instance, whether the requested information includes materials covered by attorney-client privilege. *See Nelson*, ¶ 33. Agencies may also exclude matters in which the right to privacy "clearly exceeds the merits of public disclosure," including, for example, "confidential medical information and potential employee disciplinary matters," "disability accommodations," and certain security matters. *McLaughlin v. Mont. State Legislature*, 2021 MT 178,

[4] To be sure, DOA is one of several agencies who participate in the retention and disposition subcommittee of the state records committee, and that body *is* empowered to make decisions about the retention and disposal of records. *See* Mont. Code Ann. § 2-6-1109. But DOA shares that responsibility with the four other offices represented on the subcommittee.

¶ 47, 405 Mont. 1, 493 P.3d 980. When records requests implicate production of confidential criminal justice information, the request must also be balanced against the countervailing interests in nondisclosure. *See Crites v. Lewis & Clark County*, 2019 MT 161, ¶¶ 19–27, 396 Mont. 336, 444 P.3d 1025.

The foregoing considerations all require analysis of "mixed questions of law and fact" that DOA—who merely hosts the content—is generally incapable of conducting. *See City of Billings Police Dep't v. Owen*, 2006 MT 16, ¶ 28, 331 Mont. 10, 127 P.3d 1044. DOA does not have the subject matter expertise of the other individual agencies, and it follows that DOA thus lacks the "specific expertise" necessary to adjudge the significance, responsiveness, and disclosure implications of records it had no part in creating, gathering, or retaining. *See Owen*, ¶ 26 (quoting *Shoemaker v. Denke*, 2004 MT 11, ¶ 18, 319 Mont. 238, 84 P.3d 4). Indeed, the Supreme Court has held that it is the agency who possesses and controls the records that "has the authority and jurisdiction to examine records in its possession and determine if privacy rights outweigh the right to review and inspect those records." *Owen*, ¶ 30.

MEIC cites *McLaughlin* to argue that DOA has previously stepped into the business of fulfilling records requests when, two years ago, it produced judicial branch emails to the legislature. *McLaughlin*, however, did not involve a public records request, but rather a legislative subpoena. And in any event, that effort was legally unsuccessful: the Supreme Court quashed the subpoenas as overly broad and insufficiently related to a legitimate legislative purpose and ordered return of the emails. *McLaughlin*, ¶ 46. *McLaughlin* thus does not alter this Court's conclusion.

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Nor does this conclusion risk the game of bureaucratic whack-a-mole feared by Plaintiffs. MEIC expresses concern about the "accidental or intentional destruction of computer hardware, missing files, or other information technology issues" (Dkt. 39 at 10–11), which seems to be a concern that agencies might claim they only have to produce what is physically saved to hard drives on computers or other electronic media owned by that agency. But just as this the Court does not hold that agency records become the DOA's records merely because they're stored on a DOA network, the Court also does not hold that the agency or agencies responsible for records can beg off compliance because those records are stored on a DOA-operated network. The records belong to the agency, not to DOA. Thus, just as was done in the old days of paper files, Plaintiffs must go to the agency whose maintains the records.

DOA does not maintain public records merely because it maintains the computer systems in which they are stored. Accordingly, it is not obligated to produce the requested records under Mont. Code Ann. § 2-6-1006(2). Because it is beyond doubt that MEIC can prove no facts that would entitle it to a writ of mandamus against DOA, MEIC has failed to state a claim for which relief can be granted.

2. The Governor's Motion for Summary Judgment

The Governor also seeks judgment in his favor, but for different reasons. First, he contends the records request cannot be used to circumvent discovery in the *Ksanka Elders* litigation. Alternatively, the Governor argues that mandamus is inappropriate because its fulfillment of a public records request is discretionary rather than ministerial, and because he contends MEIC has a speedy

and adequate alternative remedy through discovery in *Ksanka Elders.* As discussed below, the Court disagrees with both contentions.

a. Effect of pending litigation on the right to know.

The Governor's Office has rejected MEIC's public records request wholesale because it contends MEIC is using the records request to benefit its litigating position against DEQ, and it contends more generally that litigants may not use public records requests to circumvent discovery. In other words, the Governor argues for a "pending litigation" exception to the right to know. The difficulty with this 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.

The meaning of Article II, Section 9 is not virgin earth. Multiple Supreme Court opinions have analyzed the text of the Constitution and the proceedings of the 1972 Constitutional Convention to flesh out its meaning and have consistently held that it establishes a broad "constitutional presumption that *every* document within the possession of public officials is subject to inspection." *Crites*, ¶ 9 (quoting *Nelson*, ¶ 17) (emphasis added). To be sure, like all rights, the right to know is not absolute. *Nelson*, ¶ 18. But given its breadth, that does not mean a court can carve out exceptions or narrow its scope whenever it seems like a good idea. To the contrary, *Nelson* established a framework for understanding when the right to know must yield to other considerations. In its review of the Convention debates, the court found that the right to know was never intended to "abolish, supersede, or alter preexisting legal privileges applicable to government proceedings or documents." *Nelson*, ¶¶ 20–22. In other words, the right to know is cabined by the traditional interests, privileges, and

exceptions that existed at the time of its adoption. Surveying the "deep roots" of the attorney-client and attorney work product privileges, the Court then held that they limited the scope of the right to know notwithstanding textual silence on the matter. *See Nelson*, ¶¶ 23–30.

Thus, that the right to know does not upset those privileges that predate 1972 does not mean the government may invent privileges out of whole cloth. Nor is the governmental interest in withholding documents when "necessary for the integrity of the government," *see Nelson*, ¶ 20*,* an interest in withholding documents to serve the convenience of government. Notably, 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. Absent some objective basis for finding the exception other than a policy one, the Court declines to find an implied limitation to the right to know.

The Governor relies heavily on *Friedel LLC v. Lindeen*, 2017 MT 65, 387 Mont. 102, 392 P.3d 141, and a line in *Nelson v. City of Billings* that purports to characterize *Friedel*'s holding. Neither *Friedel* nor the passage in *Nelson,* however, alter the foregoing analysis.

Friedel is principally a case about attorney fees, not records requests. There, the Commissioner of Securities and Insurance commenced an administrative action against Friedel, a bail bonds company, under the insurance code. Friedel subsequently submitted two requests seeking the entire agency file; one through discovery requests in the administrative action, the other as a public records request. The Auditor responded by producing numerous documents while

withholding nine documents covered by a privilege log. Friedel's effort to compel production of the withheld documents failed in the contested case, but he filed a renewed public records action in district court seeking the withheld documents. Before the district court ruled, the Commissioner waived privilege and produced the documents. The district court denied fees because it found Friedel was dilatory and unreasonable in the means by which it sought the withheld documents.

The issue in *Friedel* was not Friedel's entitlement to the documents or whether a public records request was a proper substitute for litigation, but rather whether, as an exercise of discretion, the district court could deny fees when Friedel did not avail himself of less drastic measures to get the records. The Supreme Court affirmed, noting that Friedel's motion to compel in the administrative case did not come until three months after he received the privilege log and that he did not make any efforts to communicate with the Commissioner to resolve the dispute over privilege before bringing a right-to-know action. None of this amounts to a holding that Friedel could *not* bring a public records request or file a right-to-know action while he was engaged in litigation with the Commissioner.

Nor is the cited passage in *Nelson* of any assistance. As discussed above, *Nelson* was about whether and to what extent an agency can invoke exceptions beyond the textual exceptions to the right to know and public records laws to justify withholding responsive documents. The Court held that agencies can, at least sometimes. *Nelson*, ¶ 30 ("[Regardless of the broad, clear, and unambiguous language of Article II, Section 9. . . we hold that documents protected by the attorney-client or attorney-work product privileges are not

subject to disclosure under Article II, Section 9."). The Governor, however, focuses not on the holding of *Nelson* but on the following passage:

> Pointedly, just as the fundamental right to know is not absolute, neither are these privileges. And, just as the right to know is not a tool for private litigation interests, *see Friedel, LLC v. Lindeen*, 2017 MT 65, 387 Mont. 102, 392 P.2d 141, neither are these privileges a means for public bodies and government agencies to impede transparency. We construe the attorney-client privilege narrowly because it obstructs the truth finding process.

Nelson, ¶ 31. This paragraph—which is at least as consistent with the more modest reading of *Friedel* that parties who use public records requests to serve private litigation interests *should not be rewarded with attorney fees* as it is with the Governor's reading that they should not get a public records request at all—is not essential to the holding of *Nelson.* Rather, it is dicta, and this Court is bound only by holdings, not dicta. *In re Marriage of Boharski*, 257 Mont. 71, 76, 847 P.2d 709, 712 (1993).

And even if the Court were to read it as the Governor does, this brief aside in a lengthy opinion about attorney privileges—an aside which provides no analysis or explanation at that—neither binds nor persuades the Court. For one, as noted above, there is no textual or historical basis for finding a general litigation exception.

Second, there is no basis for concluding, as the Governor seems to do, that the right to know turns on the subjective *purpose* of the request. The right to know vindicates an interest in openness and transparency in government. That interest is served when government information is publicly disclosed, whatever the motive of the requester may have been. Indeed, this Court suspects many

public records requests are made for more self-interested purposes than the public interest. The Court is unaware of any 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 the request.

And finally, the Court finds no logical basis for the suggestion that the availability of discovery somehow naturally trades off with the availability of the right to know. Throughout the law, remedies are overlapping and independent. A party breaching a contract may also be liable in tort. Prosecutors can charge multiple crimes relating to the same criminal act. A public employee claiming racial discrimination motivated their firing may have overlapping remedies under the Montana Human Rights Act, the Wrongful Discharge from Employment Act, Title VII of the Civil Rights Act, and 42 U.S.C. § 1981. Similarly, it does not follow that the ability to request a document in discovery means that same document cannot be obtained through other means.

In any event, if there were any doubt as to the legislature's intentions when they enacted the public records statutes, the legislature has now resolved that doubt. Over the Governor's veto, the legislature this session enacted House Bill 693, entitled "An Act *Clarifying* Requirements for Public Agencies Regarding Public Information that is or may be Part of Litigation" (emphasis added), which expressly states that a public agency "may not refuse to disclose public information because the requested public information is part of litigation or may be part of litigation unless the information is protected from disclosure under another applicable law." 2023 Mont. Laws 775. This law does not take effect until October 1. Nevertheless, it further establishes that even under present

law, it is the legislature's intention that the existence of litigation does not provide a basis for withholding information otherwise validly sought by a public records request.

b. Whether MEIC is entitled to a writ of mandamus

The Governor not only argues with the violation, but also the remedy. The Governor contends that a writ of mandamus is inappropriate because MEIC has not established the requirements for one's issuance. It is this Court's belief that writs are narrow remedies that should seldom be granted. This, however, is one of the few cases where this Court will hold that issuance of a writ is appropriate.

A writ of mandamus is an "extraordinary remedy," the purpose of which is to "compel performance of a duty or entitlement." *Allied Waste Servs. of N. Am., LLC v. Mont. Dep't of Pub. Serv. Regulation*, 2019 MT 199, ¶ 19, 397 Mont. 85, 447 P.3d 463 (internal citations omitted). The writ is only available in cases where the party seeking the writ can establish that (1) it is entitled to the performance of a clear legal duty by the party against who the writ is sought; and (2) there is no speedy and adequate remedy available in the ordinary court of law. *Yellowstone Disposal, LLC v. State*, 2022 MT 26, ¶ 14, 407 Mont. 316, 503 P.3d 1097.

The Governor contends MEIC can not establish the existence of a "clear legal duty" because its response to the records request is not ministerial, but discretionary in nature. *See Boehm v. Park Cty.*, 2018 MT 165, ¶ 10, 392 Mont. 72, 421 P.3d 789. An act is "ministerial" where "the law prescribe[s] and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Boehm*, ¶ 10. The Governor

maintains—and the Court agrees—that the process of determining what documents are responsive, whether any of those documents must be balanced against the right to privacy, whether disclosure is subject to any other exception or privilege (and, crucially, whether that privilege should be waived or enforced) are matters of judgment, and therefore discretion.

But that is not what happened here. Here, the Governor has produced no documents at all and supplied no privilege log. The Governor's defense is not asserted on a per-document basis, but rather is predicated on a more broad-brush assertion that the right to know does not apply when the party seeks the records to assist with litigation. Consistent with the Governor's litigation stance here, his Office's April 19, 2022, letter denies the request as a whole because it asserts "MEIC's request is an effort to facilitate its litigation against DEQ regarding the dismissal of the bad actor litigation." In other words, the Governor's Office has not simply refused to produce individual documents that it has determined need not be produced under an applicable exception or privilege; it has refused the request *in toto*.

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. 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 that document-by-document review is not. The Montana Supreme Court has repeatedly held that the right to know is "unique, clear, unambiguous, and speaks for itself." *Nelson*, ¶ 12; *Crites*, ¶ 18; *Associated Press v. Usher*, 2022 MT 24, ¶ 29, 407 Mont. 290, 503 P.3d 1086; *Great Falls Tribune Co. v. Great Falls Pub.*

Schs., 255 Mont. 125, 129, 841 P.2d 502, 504 (1992). Similarly, Montana law has long operated under the presumption that "every document within the possession of public officials is subject to inspection." *Nelson*, ¶¶ 13, 17; *Crites*, ¶ 19; *Great Falls Tribune*, ¶ 54. The Governor has a clear, legal, and ministerial duty to conduct a timely review.

The Governor also contends MEIC has a speedy and adequate remedy because it could seek the same information through discovery. But an "adequate remedy" must be "one that *itself* enforces the performance of the particular duty that the applicant for a writ of mandamus seeks." *Victor Fed'n of Teachers Local 3494 v. Victor Sch. Dist. No. 7*, 2018 MT 72, ¶ 23, 391 Mont. 139, 414 P.3d 1284 (emphasis added). The right to be vindicated is one in openness, transparency, and the airing of the workings of government. The right to know's inclusion in the Declaration of Rights places intrinsic value in government transparency that does not turn on whether that transparency serves some other objective. By contrast, discovery is tied to objective: the discovery process is meant not to expose the workings of government to the world, but only to locate evidence relevant to one's legal claims and defenses.

Indeed, discovery in litigation is constrained by the scope of the litigation. Thus, MEIC only receives what they have requested here in discovery in *Ksanka Elders* if they survive the pending motions and if their requests are "relevant to any party's claim or defense," Mont. R. Civ. P. 26(b)(1), if they are not deemed "unreasonably cumulative or duplicative," *id.* 26(b)(2)(C)(i), and if the burden of production does not outweigh their likely benefit in the litigation, *id.* 26(b)(2)(C)(iii). Discovery 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. And discovery is expensive and time-consuming, as any seasoned civil litigator knows. The Court thus does not agree that civil discovery is an adequate alternative remedy.

MEIC has not moved for summary judgment specifically, but it has treated its petition for a writ of mandamus as a motion for relief. Additionally, the Court may grant summary judgment for the non-moving party even in the absence of a cross motion for summary judgment. *Bitterroot Int'l Sys. v. W. Star Trucks, Inc.*, 2007 MT 48, ¶ 37, 336 Mont. 145, 153 P.3d 627. With respect to the Governor's clear legal duty to respond to the request with all responsive public information and the absence of an adequate alternative remedy, the Court finds no genuine dispute of material fact. Consequently, the Court will grant summary judgment for MEIC and issue the requested writ (in part) and corresponding declaratory judgment.

Accordingly,

IT IS ORDERED:

1. The Department of Administration's Motion to Dismiss (Dkt. 33), filed May 23, 2022, is **GRANTED**. All claims pertaining to the request for records made to the Department of Administration are **DISMISSED** with prejudice.

2. The Governor's Motion for Summary Judgment (Dkt. 29), filed May 17, 2022, is **DENIED**.

3. Plaintiffs' Application for a Writ of Mandate (Dkt. 17), filed May 9, 2022, is **GRANTED** in part and **DENIED** in part.

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4. Summary judgment is entered for Plaintiffs on all claims related to the public records requests made to the Governor's Office.

5. The Court **DECLARES** that the Governor's Office may not 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.

6. The Court **ISSUES** a writ of mandamus compelling the Governor to produce all public information within his possession or control to Plaintiffs within **six weeks** of the date of this Order. The production must be accomplished consistent with this Order and the corresponding declaratory judgment. The Governor may withhold individual documents if it believes they are exempted from disclosure on a recognized ground, but the production shall be accompanied by a detailed privilege log that, without disclosing the protected information, provides sufficient information for MEIC and Earthworks to evaluate the basis for withholding.

Judgment may be entered accordingly.

/s/ Christopher D. Abbott
CHRISTOPHER D. ABBOTT
District Court Judge

cc: David K.W. Wilson, via email at kwilson@mswdlaw.com
Robert Farris-Olsen, via email at rfolsen@mswdlaw.com
Brent Mead, via email at brent.mead2@mt.gov; Bekola@mt.gov
Michael Russell, via email at Michael.russell@mt.gov
Derf Johnson, Po Box 1184; Helena, MT 59624
Austin Knudsen, Po Box 201401; Helena, MT 59620
Don Harris, via email at don.harris@mt.gov
Anita Milanovich, via email at Anita.Milanovich@mt.gov

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