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**MONTANA EIGHTH JUDICIAL DISTRICT COURT,
CASCADE COUNTY**

DAVID SASLAV; MONTANA
ENVIRONMENTAL INFORMATION
CENTER; and KAYLEE HAFER,
Plaintiffs,

v.

JERRY HOWE, in his official capacity
as EXECUTIVE DIRECTOR OF THE
MONTANA LEGISLATIVE
SERVICES DIVISION of the
MONTANA STATE LEGISLATURE;
MONTANA LEGISLATIVE
SERVICES DIVISON of the
MONTANA STATE LEGISLATURE,
Defendants.

Cause No.:

**Verified Complaint & Application
for Writ of Mandate**

You shall not conduct the people’s business behind closed doors. You shall not keep from the people the secrets that belong to the people. You shall let the people in and the people shall know.

Mont. Const. Conv., IV Verbatim Tr., at 611 (Feb. 19, 1972) (Del. Heliker).

INTRODUCTION

For decades, Montana courts and the Montana Legislature have understood that bill drafts and related documents—often called a bill’s “junque file”—are subject to public disclosure under the Montana Constitution’s fundamental right to know.

But secrecy is seductive. In September 2024, Defendants Jerry Howe and the Montana Legislative Services Division adopted a policy that affirmatively withholds legislator communications about the bill drafting process from the public. The policy purports to rely on a decision from Montana’s First Judicial District earlier this summer that recognized—in the context of a civil discovery dispute—an unprecedented form of legislative privilege.

Historically, Legislative Services responded to public information requests for junque files as a matter of routine. Now it has manufactured a policy to conceal legislator communications, embracing the days of the Copper Collar when millionaires bought access, votes, and power in smoke-filled backrooms. But Montanans’ fundamental rights to know and to participate prohibit legislators from conducting legislative activities in secret. Legislative Services’ assertion of legislative privilege to deny Plaintiff and Montana Environmental Information Center (“MEIC”) member David Saslav’s and Plaintiff Kaylee Hafer’s junque file requests violates the Montana Constitution.

Plaintiffs ask this court to issue a writ of mandate ordering Legislative Services to produce the requested junque file documents under § 2-6-1009(2), MCA, to enjoin Legislative Services from denying right to know requests on the basis of legislative privilege, and to declare that all materials and correspondence used to draft bills, including bill drafts, are public documents subject to the right to know.

PARTIES

1. David Saslav resides in Great Falls, MT. He is a dues-paying member of the Montana Environmental Information Center (“MEIC”) who has asked Legislative Services for seven bill draft requests to Legislative Services for junque files. In response to four of these requests, Legislative Services has asserted legislative privilege on behalf of each legislator associated with a bill draft request, redacted all substantive portions of the bill draft requests, and refused to produce unredacted responsive documents. As of this filing, Legislative Services has yet to respond to the remaining requests.
2. Advocating for a clean and healthful environment is important to Saslav, and he is interested in following the progression of bills that will impact the environment. He is also a fervent believer in the check and balances necessary for a strong government and is therefore similarly interested in bills that would impact the balance of power between the three branches of state government. Finally, Saslav has submitted public comment on proposed legislation in the past and plans to do so again in the future, including in the upcoming 2025

- legislative session. Saslav believes that access to junque files is important to making thoughtful public comments and participating fully during the session.
3. MEIC is a nonpartisan, nonprofit organization headquartered in Helena, Montana. For more than 50 years MEIC has been dedicated to preserving a clean and healthful environment for present and future generations by advocating for the public's right to know and participate, and Montanans' right to clean air, clean water and a healthy climate in a wide variety of venues. MEIC serves as an agency and legislative watchdog, regularly submitting public information requests, using the resulting documents for public education purposes, and enforcing the right to know when necessary.
 4. Kaylee Hafer resides in Butte, MT. She is a public defender who is dedicated to enforcing her clients' constitutional rights. Hafer asked Legislative Services to produce the junque file associated with the bill draft request for LC 54, short title, "Generally revise partner family member assault laws to prevent victim from being charged with assault." In response, Legislative Services asserted legislative privilege on Senator Daniel Emrich's behalf, producing a version of the bill draft request that redacts the "Description" section of the form. With its response, Legislative Services explained that it refused to produce unredacted documents based on a First Judicial District opinion that resolved a discovery dispute in the summer of 2024.
 5. Hafer recognizes the outsized impact state legislation can have on her clients. She is thus committed to understanding legislation that touches on the

criminal justice system. She believes that accessing information about bills introduced during the legislative session can act as both encouragement for the passage of thoughtful, effective laws, and as a check on potential overreach because it encourages transparency and accountability among elected officials. In Hafer's opinion, the ability to review junque files also informs the public's ability to participate in the legislative session. She intends to use information contained in junque files to monitor whether she should take time to testify during the session and to understand potential changes in the law that will affect her clients and her professional responsibility to them.

6. Jerry Howe is the Executive Director of the Legislative Services Division of the Montana State Legislature. Like the legislature as a whole, the Legislative Services Division is a public body subject to Article II, Section 9 of the Montana Constitution and implementing statutes, §§ 2-6-1001 *et seq.*, MCA.
7. The Legislative Services Division provides bill and amendment drafting, committee staffing, policy and legal research, reference and communications, information technology, and administrative support services to the House, Senate, and other divisions of the Legislative Branch. It also supports the mission of the Legislative Council, which is Legislative Services' administrative committee.
8. Legislative Services was established in 1957 as a permanent legislative agency. It was created to provide information to the legislature and the public, among other responsibilities.

JURISDICTION & VENUE

9. MEIC member David Saslav lives in Cascade County.
10. Jurisdiction is vested in this Court under § 2-6-1009(2) and § 3-5-302, MCA.
11. Venue is properly laid in this judicial district pursuant to § 25-2-126(1), MCA.

COMMON ALLEGATIONS

Constitutional Framework

12. The Montana Constitution is unambiguous. “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 (emphasis added). More than that, “The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law.” Mont. Const. art. II, § 8.
13. These provisions were the product of thoughtful discussions that showed the delegates’ overt commitment to public access and government transparency:

Public awareness and access seem to be the only tools to remind the great mass of public servants that their job is to serve the needs of the public and no other; they are paid by tax dollars to benefit the public above all else.

Mont. Const. Conv., V Verbatim Tr., at 1657 (Mar. 7, 1972) (Del. Foster).

14. The delegates had the legislature in mind specifically, explaining:

We are saying to the Legislature, “You shall not conduct the people’s business behind closed doors. You shall not keep from the

people the secrets that belong to the people. You shall let the people in and the people shall know.”

Mont. Const. Conv., IV Verbatim Tr., at 611 (Feb. 19, 1972) (Del. Heliker).

15. The rights to know and participate also make sense in the larger context of the Montana Constitution, which provides that “[a]ll political power is vested in and derived from the people.” Mont. Const. art. II, § 1; *see also* Mont. Const. art. II, § 2 (“The people have the exclusive right of governing themselves as a free, sovereign, and independent state.”); Mont. Const. preamble (“We the people of Montana . . . do ordain and establish this constitution.”). The people are the sovereign’s power.
16. The ability to examine documents and participate before final decisions are made are the nuts and bolts of holding elected officials accountable to the people they represent. *See, e.g.*, Mont. Const. Conv., V Verbatim Trans., at 1670 (March 7, 1972) (Del. Eck) (“the openness of government documents and operations” addresses “the increasing concern of citizens and commentators alike that the government’s sheer bigness threatens the effective exercise of citizenship”); Mont. Const. Conv., V Verbatim Tr., at 1659 (Mar. 7, 1972) (Del. Vermillion) (“I came here with one idea in mind, a kind of a philosophy, and that is that the public and the people are actually the boss of the government and the government is the servant of the people. You take that in mind and take this Section 8 and replace the words ‘the public’ and make that ‘the boss’ and make ‘the government’ ‘the employees’, you could come up with a phrase like this: ‘The boss shall have the right to expect his

employees to afford him reasonable opportunity to participate in the operation of his business.”).

17. Montana courts consistently hold that privileges shielding documents from the right to know “must be narrowly construed to effect their limited purposes” because “they obstruct ‘the truth-finding process’ and—as applied to government agencies and public bodies—conflict with the public’s fundamental right to know under Article II, Section 9.” *Nelson v. City of Billings*, 2018 MT 36, ¶ 34, 390 Mont. 290, 412 P.3d 1058; *Bryan v. Yellowstone Cty. Elem. Sch. Dist. No. 2*, 2002MT 264, ¶ 39, 312 Mont. 257, 60 P.3d 381 (“Article II, Section 9 . . . essentially declare[s] a constitutional presumption that every document within the possession of public officials is subject to inspection.”).
18. Indeed, the right to know creates 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 Trib. v. Mont. Pub. Serv. Comm’n*, 2003 MT 359, ¶ 54, 319 Mont. 38, 82 P.3d 876; *see also Associated Press v. Mont. Dep’t of Rev.*, 2000 MT 160, ¶¶ 26–29, 300 Mont. 233, 4 P.3d 5 (invalidating statute as facially unconstitutional where it declared information confidential on a wholesale basis without balancing individual privacy interests with the right to know).
19. The right to know applies to the legislature. *See Associated Press v. Usher*, 2022 MT 24, 407 Mont. 290, 504 P.3d 1086 (addressing the right to participate in meetings with less than a quorum of a legislative assembly); *Willems v.*

State, 2014 MT 82, ¶ 16, 374 Mont. 343, 325 P.3d 1204; *see also Associated Press v. Wash. State Leg.*, 454 P.3d 93, 97–99 (Wash. 2019) (individual legislators’ offices and legislative chambers subject to state public records law).

20. In 1995, the First Judicial District held that “bill drafts and associated documents during any stage of the bill-drafting process”—namely, junque files—are subject to disclosure under the right to know. Ex. B-1 to Aff. of Derf Johnson (Oct. 28, 2024), *Mont. Env’tl. Info. Ctr. v. Mont. Env’tl. Quality Council*, Mem. & Ord., No. CDV-95-207, at 2–3 (Mont. 1st Jud. Dist. Ct. Aug. 7, 1995) (hereinafter “MEIC 1995 Ord.”).
21. The court concluded that “MEIC and other members of the public have the right to examine draft bills and associated documents.” *Id.* at 12. In the years since, junque files have remained fully available to the public upon request.¹

Legislative Privilege

22. When a government actor seeks to withhold information falling within the constitutional right to know, it is their burden to prove “that a privilege applies.” *Nelson*, ¶ 32 (quoting Mont. Const. Conv., VII Verbatim Tr. at 2489 (Mar. 16, 1972)). Although the right to know does not “abolish, supersede, or alter preexisting legal privileges applicable to government proceedings and documents,” *id.* ¶ 20 (emphasis added), it abides no new privileges.

¹ *See* Tom Lutey, *Legislature closing access to behind-the-scenes bill influences*, Mont. Free Press (Sept. 26, 2024), *available at* <https://perma.cc/UWC3-TH45>.

23. The concept of a legislative privilege that would allow legislators to conceal their communications and other documents associated with drafting bills from the public did not exist at the time of the Montana Constitutional Convention. Rather, this type of expansive privilege is a modern development in the federal common law, arising largely out of the previously interchangeable use of the terms “immunity” and “privilege” to describe the rights of lawmakers to be free from civil or criminal liability in federal court for their legislative acts.
24. Sources that predate the Montana Constitution’s ratification use both terms to refer to what is now often described as immunity. *See United States v. Johnson*, 383 U.S. 169 (1966); *Tenney v. Brandhove*, 341U.S. 368, 372 (1951) (holding that state legislators are immune from suits in federal court seeking money damages under 42 U.S.C. § 1983); *Kilbourne v. Thompson*, 103U.S. 168 (1881); *see also Bradley*, 57 N.C. L. Rev. 197 (1979 law review article using term “privilege” to refer to the concept of immunity).
25. The Montana Constitution’s immunity provision provides that a legislator “is privileged from arrest during attendance at sessions of the legislature and in going to and returning therefrom, unless apprehended in the commission of a felony or a breach of the peace. He shall not be questioned in any other place for any speech or debate in the legislature.” Mont. Const. art. V, § 8.
26. Contemporary cases use the terms “immunity” and “privilege” to refer to distinct concepts. *See S.C. State Conf. of NAACP v. McMaster*, 584 F. Supp. 3d 152, 160–62 (D. S.C. 2022) (describing the difference between absolute

immunity from prosecution or civil suit and qualified privilege from providing information; rejecting assertion of privilege); Note, Christopher Asta, *Developing a Speech or Debate Clause Framework for Redistricting Litigation*, 89 N.Y.U. L. Rev. 238, 244 (2014) (“Part of the confusion . . . is due to the inconsistent use of the terms ‘legislative immunity’ and ‘legislative privilege.’”).

27. Delegates to the Montana Constitution never contemplated that the immunity provision could or would grant legislators complete power to evade public scrutiny. *See, e.g.*, Mont. Const. Conv., V Verbatim Trans., at 1670 (March 7, 1972) (Del. Eck) (noting the committee’s intent to subject “the deliberations and resolution of all public matters . . . to public scrutiny” and explaining that they chose not to specify “public” documents because they did not want “to risk losing the right to examine a document because it does not fit statutory categories as a public document”); *id.* at 1673 (Del. Dahood) (describing a twofold purpose behind the right to know: “one, to allow the press be a watch guard on the activity of government and, second, to make sure that the rights of the individual citizen of a free democracy are protected”).
28. Discussing Article V, Section 10(3)—which requires that “sessions of the legislature and of the committee of the whole, all committee meetings, and all hearings shall be open to the public”—Delegate Bugbee explained:

The Legislature passes laws that affects every person in Montana. There is really no justification for keeping this process a secret from the people. The people need to know and have a right to know the reasons for committee votes.

Mont. Const. Conv., III Verbatim Trans., at 603 (Feb. 19, 1972) (Del. Bugbee); *see also id.* at 607 (Del. Kelleher) (“[T]he Legislature is concerned with only one thing—the public business—and the public business is my business as a private citizen.”).

29. And delegates rejected an attempt to permit the legislature to hold secret proceedings. Mont. Const. Conv., IV Verbatim Trans., at 631 (Feb. 19, 1972) (Clerk Hanson reading out votes on amendments); *see* Mont. Const. Conv., III Verbatim Trans., at 608 (Feb. 19, 1972) (Del. Heliker) (“if the word goes out from this Convention today in the public press that Con-Con supports secrecy in the proceedings of the Legislature . . . we might as well have our parties and relax for the next 4 weeks because whatever we produce won’t be adopted”).

Delegate Bugbee explained the rationale against legislative secrecy:

The Constitutional Convention . . . belongs to the people. It’s the people’s business. It’s the people’s document. And it seems to be, by the very same token that the Legislature is the people’s representative. I fail to understand why what belongs to them should be kept from them, and . . . to me it is absolutely an arbitrary decision to keep government’s business from the people.

Id. at 610 (Del. Bugbee).

30. Discussions related to the immunity provision were brief and contained no hint that it might later serve as a basis to shield legislator communications about bills from the sunlight some fifty years later. Committee members felt the provision “could be left to statute,” but Delegate Mahoney insisted on its inclusion. Mont. Const. Conv., III Verbatim Trans., at 595 (Feb. 19, 1971) (Del. Robinson).

31. Nor was there any reason for delegates to suspect the immunity provision could become a cudgel to defeat transparency. Federal legislative privilege shielding legislators from compulsory testimony or disclosure of documents began to develop only after the 1972 constitutional convention. Even then, it initially extended only to circumstances where documents and communications were sought to pursue civil or criminal liability against a federal legislator. *Compare Tenney*, 341 U.S. at 372 (state legislators immune from civil liability for legislative acts) *with, e.g., Gravel v. United States*, 408 U.S. 606, 626 (1972) (federal speech and debate clause protected U.S. senator’s staffer from testifying before a federal grand jury investigating criminal charges against the senator for disclosing classified materials in a subcommittee meeting); *United States v. Helstoski*, 442 U.S. 477 (1979) (federal speech and debate clause barred prosecutors from introducing evidence of congressman’s past legislative acts at his criminal bribery trial); *and United States v. Gillock*, 445 U.S. 360, 366 (1980) (declining to recognize a state legislative privilege against introducing legislative acts as evidence in federal criminal trial).
32. Delegates substantive comments focused limiting even traditional forms of legislative immunity. *Id.* (“We did not feel that members of the Legislature should be exempt for arrest for violation of their oath of office.”) (Del. Robinson).
33. And until the civil discovery dispute in the First Judicial District this summer, *see Mont. Conservation Voters v. Jacobsen*, Op. & Ord. on Mot. to Quash,

Dkt. 64, No. DDV-2023-702 (July 12, 2024) (hereinafter “Quash Op.”), the Montana Constitution’s immunity provision had only been applied once. In *Cooper v. Glaser*, the Montana Supreme Court held—predictably—that legislators are immune from the threat of prosecution for statements made on the house floor. 2010 MT 55, ¶ 14, 355 Mont. 342, 228 P.3d 443.

34. The public’s ability to examine legislators’ documents and communications under the right to know, in service of the people’s right to self-government and popular sovereignty, is wholly disconnected from the threat of civil or criminal liability for legislators.
35. Until a few months ago, the concept of legislative privilege as a mechanism for concealing documents and communications about official legislative business, including the information contained in junque files, had never been raised, considered, or otherwise addressed in Montana.
36. Even in *MEIC v. Montana Environmental Quality Council*, where state respondents argued that Article V, Section 8 protected them from MEIC’s suit seeking a junque file, the question was not one of privilege but one of immunity for legislative staff. *See* Ex. B-1, MEIC 1995 Ord., at 7–10; *see also Powell v. McCormack*, 395 U.S. 486, 504–06 (1969). In *MEIC*, the district court concluded that respondents could not “avoid judicial review of the constitutionality of their refusal to allow interested citizens access to their bill-draft files on the grounds that they, as legislative employees, are immune from suit.” Ex. B-1, MEIC 1995 Ord., at 10.

37. Regarding the constitutional right to know, respondents argued only that early access to bill-draft files “may have a chilling effect on the operation of the Legislature by stymieing fresh thought by premature public posturing on the subject.” *Id.* at 11. In other words, it did not occur to anyone involved that the documents in question might be subject to some form of permanent or all-encompassing privilege.
38. The court explained, “the framers of our constitutions . . . declared that the public has the right to examine documents held by public agencies which do not touch upon matters of individual privacy. The framers did not except bill drafts or bill-draft requests from that right, and the Court is not authorized to find such an exception where one does not exist.” *Id.*
39. Nothing about the right to know or Montana’s perception of the public nature of legislative work has changed in the last fifty years.
40. And as recently as 2023, Legislative Service’s Chief Legal Counsel and Code Commissioner Todd Everts authored a document explaining that “All the materials and correspondence used to draft the bill, including the various drafts of the bill, are included in the electronic bill draft file or “junque file” as we call it. These electronic junque files are public records subject to the constitutional public right to know provisions.” Ex. B-2 to Johnson Aff., Todd Everts, *Legal Review of Montana Proposed Legislation*, at 5 (Leg. Servs. 2023).

Junque Files

41. Junque files contain materials related to the bill’s drafting process that can include “emails between the legislator and legislative staff, lobbyists, stakeholders, or other third parties” and “documents of draft language provided to the bill drafter.” Ex. B-3 to Johnson Aff., Waiver of Legislative Privilege for Communications Related to Bill Drafts, at 1 (Sept. 24, 2024).²
42. They are quintessentially documents maintained by a public body and subject to Montanans’ right to know. *See* Mont. Const. art. II, § 9.
43. This information offers important context for journalists, lobbyists, and members of the public seeking to learn more about draft legislation and possible influence by outside stakeholders. *See* Tom Lutey, *Legislature closing access*, (describing an instance when legislative hearings lacked background information about an adultery bill, but junque file communications “explained why the bill was being introduced: a concern about unfaithful wives and judges sympathetic to attractive women”).³
44. In the past, Legislative Services would “promptly” respond to junque file requests and “also inform[] the legislator that a junque file has been requested and provided.” Ex. B-3, at 1.

² Available at <https://leg.mt.gov/content/Committees/Interim/2023-2024/Legislative%20Council/OCTOBER%202024/Waiver%20on%20Junque%20file%20requests%20-%20FINAL.pdf>.

³ Available at <https://montanafreepress.org/2024/09/26/montana-legislature-restricts-access-behind-the-scenes-bill-influences/>.

45. Sometime in September 2024, Legislative Services changed its tune, implementing a policy to significantly limit public access to junque files based on the district court’s interim discovery decision in *Montana Conservation Voters*. See Ex. B-3, at 1; see generally Quash Op., at 25–29.

Plaintiffs’ Requests

A. David Saslav

46. On October 2, 2024, Saslav requested from Legislative Services attorney and bill drafter Jameson Walker “bill draft request files” for LC 13 “by Senator Ellsworth, ‘Generally revise subdivision laws.’” Ex. A-1 to Aff. of David Saslav (Oct. 29, 2024), LC0013 Request correspondence & responsive documents, at 4 (Oct. 2–Oct. 22, 2024).
47. One week later, Deputy Director of Legal Services Jaret Coles responded to Saslav to acknowledge the request and provide an expected timeline for producing the requested materials. *Id.* at 2–3. A section titled “Background on Junque File Creation” detailed Legislative Services’ processes for creating and updating junque files. *Id.* at 3.
48. On October 22, Coles responded to Saslav’s request, claiming that the July 2024 Quash Order “held that a legislator’s communications regarding legislation between the legislator and legislative staff, lobbyists, stakeholders, or other third parties are considered privileged.” *Id.* at 1. He noted portions of the subpoena quashed by the court and quoted the court’s description of legislative privilege. *Id.* at 1–2.

49. Coles explained that Legislative Services was responding to Saslav’s request “based on” the Quash Order. *Id.* at 2. He produced a version of the bill draft request form for LC0013 that redacted the bill draft description and the portion of the form that listed “contact people.” *Id.* at 5.
50. No versions of the bill draft existed at the time of Saslav’s request, but Coles noted that “[i]f draft legislation was in the file our office would have provided it as part of this response.” *Id.* at 2.
51. Legislative Services nevertheless withheld documents from the requested junque file. Coles acknowledged “communications (emails) between the contact for the bill draft and legislative staff,” but asserted that “[t]hese emails are privileged as they pertain to legislation and are not provided.” *Id.* at 2.
52. Also on October 2, Saslav made similar requests for the following bill draft requests:
- LC 303 by Senator Zolnikov, “Generally revise laws regarding regulatory takings,” Ex. A-2 to Saslav Aff., LC0303 Request correspondence & responsive documents, at 4 (Oct. 2–Oct. 25, 2024);
 - LC 56 by Senator Emrich, “Include the judiciary in the public right to know,” Ex. A-3 to Saslav Aff., LC0056 Request correspondence & responsive documents, at 4 (Oct. 2–Oct. 23, 2024);
 - LC 439 by Senator Usher, “Generally revise laws relating to state lands,” Ex. A-4 to Saslav Aff., LC0439 Request correspondence & responsive documents, at 4 (Oct. 2–Oct. 23, 2024); and

- LC 224 by Senator Fitzpatrick, “Revise civil liability laws,” Ex. A-5 to Saslav Aff., LC0224 Request correspondence & responsive documents, at 6–7 (Oct. 2–Oct. 28, 2024).
53. Legislative Services responded to each request in the same way, first acknowledging receipt, estimating the time to production, and explaining how Legislative Services assembles junque files. *See* Ex. A-2 (LC0303), at 2–4; Ex. A-3 (LC0056), at 2–3; Ex. A-4 (LC0439), at 2–3; Ex. A-5 (LC0224), at 3–5.
54. When Legislative Services finally produced responsive documents, they cited the Quash Order and produced redacted bill draft request forms. Ex. A-2 (LC0303), at 1–2, 5 (bill draft description redacted); Ex. A-3 (LC0056), at 1–2, 5 (same); Ex. A-4 (LC0439), at 1–2, 5 (bill draft description and “contact people” information redacted). None of the requested junque files contained bill drafts or communications. In response to Saslav’s LC 224 request, Legislative Services produced an unreacted bill draft request form because the bill’s sponsor “executed a limited waiver.” Ex. A-5 (LC0224), at 2; Ex. A-6 to Saslav Aff., LC0224 Fitzpatrick limited waiver (Oct. 28, 2024).

B. MEIC

55. Saslav is a member of MEIC.
56. Prior to each legislative session MEIC routinely requests junque files and regularly participates in the legislative session by following bills from beginning to end, researching proposed and final bill contents and policy, educating their members about relevant bill proposals, and lobbying on behalf

of their members. MEIC will use the documents responsive to Saslav’s request in pursuit of its mission.

C. Kaylee Hafer

57. On October 7, 2024, Hafer reached out to Legislative Services through counsel, requesting “the complete ‘junque’ file for bill draft LC 54 by Senator Daniel Emrich to ‘generally revise partner family member assault laws to prevent victim from being charged with assault.’” She specifically sought “Senator Emrich’s related communications with legislative staff, other legislators, and third parties.” Ex. C-1 to Aff. of Kaylee Hafer (Oct. 29, 2024), LC0054 Request correspondence & responsive documents, at 5 (Oct. 7–Oct. 24, 2024). Two days later, Deputy Director of Legal Services Julie Johnson responded, acknowledging Hafer’s request and providing a timeline in which to expect a response. *Id.* at 3–5. Johnson included the same information that Coles had offered Saslav in response to his request.
58. On October 23, Johnson responded to Hafer’s request, citing the same portions of the July 2024 Quash Order that Cole had cited in response to Saslav’s requests. *Id.* at 1–2.
59. She explained that Legislative Services was responding to Hafer’s request “based on” the Quash Order and produced a version of the bill draft request form for LC 54 that redacted the bill draft description. *Id.* at 2, 7.

60. Johnson described the production as follows:

First, attached is the bill draft request form. This request has been redacted based on legislative privilege. Second, there are no draft versions of the bill because the drafter has not started drafting it. Third, there are no communications (emails) exchanged between the legislator and legislative staff. Finally, there are no emails in the file that include employees of the executive branch or judicial branch.

Id. at 2 (emphasis added).

CLAIMS FOR RELIEF

Count One

(Violation of §§ 2-6-1002(10), (11), & 2-6-1003, MCA, writ of mandate)

61. Plaintiffs incorporate herein all foregoing allegations as if set forth in full.

62. A writ of mandamus may be issued by any judge of the district court “to compel the performance of an act that the law specifically enjoins as a duty resulting from an office, trust, or station or to compel the admission of a party to the use and enjoyment of a right . . . to which the party is entitled and from which the party is unlawfully precluded by the . . . person.” Section 27-26-102(1), MCA.

63. The application for writ is made upon affidavit. Plaintiffs Saslav, MEIC, and Hafer are beneficially interested because the Constitution and implementing statutes requires that action be taken to restore their rights to know and participate. Section 27-26-201, MCA.

64. Plaintiffs Saslav and Hafer requested documents pursuant to the Montana Constitution’s right to know and implementing statutes, which include §§ 2-6-

1002(10), (11), & 2-6-1003, MCA. Under § 2-6-1003, “every person has a right to examine and obtain a copy of any public information of this state.”

65. Section 2-6-1002(10), MCA defines a “public agency” as, *inter alia*, any “division . . . of the executive, legislative, or judicial branch of the state of Montana.” Section 2-6-1002(11), MCA defines “public information” as “information prepared, owned, used, or retained by any public agency relating to the transaction of official business . . . except for confidential information.”
66. Although a “public officer may withhold from public scrutiny information relating to individual or public safety or the security of public facilities,” § 2-6-1003(2), MCA, there is no exception to the right to know that either recognizes any form of legislative privilege or otherwise permits Legislative Services to assert legislative privilege on behalf of Montana legislators to withhold documents related to official legislative business.
67. “Confidential information” includes a limited number of exceptions to what constitutes “public information.” *See* § 2-6-1002(1), MCA. Among the listed exceptions is information “designated as confidential by statute or through judicial decisions, findings, or orders.” Section 2-6-1002(1)(d), MCA.
68. The documents Plaintiffs have requested are generated and/or maintained by a public body, the legislature and the Legislative Services Division, in relation to the legislature’s function and duties. *Nelson*, ¶ 12; Mont. Const. art. II, § 9; § 2-6-1002(10), MCA.

69. As a government entity subject to the constitutional right to know, Legislative Services bears the burden of proving that a legitimate privilege shields the requested documents. *Nelson*, ¶ 32.
70. The Quash Order that Legislative Services relies on to assert legislative privilege on behalf of several legislators as described herein designates specific documents as confidential in the context of a civil discovery dispute. Quash Ord., at 25–28 (concluding that Senator Regier’s communications related to Senate Bill 109 (2023) are not subject to disclosure pursuant to subpoena).
71. The Quash Order implicates no documents other than those expressly considered.
72. Moreover, the First Judicial District has previously held that “bill drafts and associated documents during any stage of the bill-drafting process”—namely, junque files—are subject to disclosure under the right to know. Ex. B-1, MEIC 1995 Ord., at 2–3.
73. Plaintiffs’ requests are for public legislative documents—junque files, including bill draft requests—that do not meet the definition of “confidential information.” *See* § 2-6-1002(1), MCA.
74. Legislative Services thus has a ministerial legal duty to produce the requested correspondence and materials and has no basis for withholding them.
75. Given the imminent beginning of the 2025 legislative session and immediate need for access to legislative documents in advance of and during that session, no plain, speedy, and adequate remedy exists in the ordinary course of law.

76. Plaintiffs are entitled to costs and attorney's fees for this mandamus action. Sections 27-26-402–403, MCA.

Count Two

(Violation of the right to know and the right to participate, declaratory relief)

77. Plaintiffs incorporate herein all foregoing allegations as if set forth in full.
78. Plaintiffs requested documents pursuant to the Montana Constitution's right to know, which 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.
79. The Montana Constitution separately guarantees the "right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law." Mont. Const. art. II, § 8.
80. The documents Plaintiffs have requested are generated and/or maintained by a public body, the legislature and the Legislative Services Division, in relation to the legislature's function and duties. *Nelson*, ¶ 12; Mont. Const. art. II, § 9; § 2-6-1002(10), MCA.
81. As a government entity subject to the constitutional right to know, the legislature bears the burden of proving that a legitimate privilege shields the requested documents. *Nelson*, ¶ 32.

82. Plaintiffs are entitled to receive the requested correspondence and materials, which are documents in Legislative Services' possession.
83. Legislators may not rely on a categorical assertion of legislative privilege to deny information requests for public documents. The Montana Supreme Court has never recognized legislative privilege as an exception to the right to know. The absolute privilege that Legislative Services purports to assert on behalf of legislators here unconstitutionally interferes with Plaintiffs' right to know and right to participate by undermining their ability to understand the proceedings related to legislation before the legislature makes any final decisions as to that legislation.
84. The legislature defines "Public information" as "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." Section 2-6-1002(11), MCA. The "legislative . . . branch[] of Montana state government" is a "public agency." Section 2-6-1002(10), MCA.
85. Legislative documents, including junque files, are not "confidential information." *See* § 2-6-1002(1), MCA; MEIC 1995 Ord., at 2–3, 8.
86. Even if legislative privilege existed, which it does not, the legislature has waived the right to assert privilege over the junque files by including legislative documents in the Public Records Act. *See* § 2-6-1002, MCA, *et seq.*

87. Plaintiffs therefore request that the Court declare Legislative Services' denial of right to know requests based on its assertion of legislative privilege to be unconstitutional. *See* § 27-8-201, MCA.

Count Three

(Injunctive relief)

88. Plaintiffs incorporate herein all foregoing allegations as if set forth in full.

89. In addition to mandamus relief as to their specific pending requests and declaratory relief as to Legislative Service's unconstitutional policy, Plaintiffs request that this Court grant injunctive relief to prevent application of the policy to future requests.

90. Under § 27-19-201(1), a preliminary injunction order may be granted when the applicant establishes that

- (a) the applicant is likely to succeed on the merits;
- (b) the applicant is likely to suffer irreparable harm in the absence of preliminary relief;
- (c) the balance of equities tips in the applicant's favor; and
- (d) the order is in the public interest.

91. In a simultaneously filed motion for preliminary injunction, Plaintiffs have established likelihood of success on the merits, imminent and irreparable harm absent relief, and that both the equities and the public interest favor a preliminary injunction.

92. Legislative Services has refused to produce essential portions of the junque files that Saslav and Hafer requested. In so doing, Legislative Services has forced Plaintiffs to file this lawsuit to vindicate their constitutional rights.

93. Plaintiffs are entitled to costs and attorney's fees. Section 2-6-1009(4), MCA.

PRAYER FOR RELIEF

Wherefore, Plaintiffs pray that this Court enter:

1. A writ of mandamus directing Defendant Legislative Services to produce the requested documents under §§ 2-6-1002(10), (11), & 2-6-1003, MCA;
2. A preliminary injunction enjoining Defendant Legislative Services from denying right to know requests based on its assertion of legislative privilege;
3. A declaratory judgment that legislators' communications and documents related to legislative acts are public documents subject to the right to know;
4. An award of Plaintiffs' attorney's fees and costs incurred in enforcing the public's right to know pursuant to § 2-6-1009(4), MCA, under §§ 27-26-402–403, MCA, the Private Attorney General doctrine, or any other basis recognized by law or equity; and
5. Such other relief as this Court deems appropriate.

Respectfully submitted this 30th day of October, 2024



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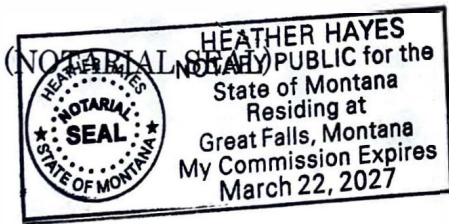
VERIFICATION

I, David Saslav, being first duly sworn, upon oath depose and say:

- 1. I am Plaintiff in the action set forth above.
- 2. I verify the foregoing Verified Amended Complaint for and on behalf of Plaintiffs.
- 3. I have personal knowledge that the facts and information set out in the foregoing Verified Amended Complaint are true and authentic facts and information available through the Montana State Legislature’s website; that the facts therein have been assembled by counsel and Plaintiffs; and that the allegations therein are true and correct to the best of my knowledge.
- 4. I declare under penalty of perjury that the foregoing is true and correct.

David Saslav
 David Saslav

Subscribed and sworn to before me this 29th day of October, 2024.



Heather Hayes
 Printed Name: Heather Hayes
 State of Montana
 County of Cascade

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above was duly served in person upon the following on the 30th day of October, 2024.

Executive Director Jerry Howe
Legislative Services Division
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PO Box 201706
Helena, MT 59620-1706

Legislative Services Division
Room 110, State Capitol
PO Box 201706
Helena, MT 59620-1706

Office of the Attorney General
Justice Building, Third Floor
215 North Sanders Street
PO Box 201401
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Rylee Sommers-Flanagan

CERTIFICATE OF SERVICE

I, Rylee Sommers-Flanagan, hereby certify that I have served true and accurate copies of the foregoing Complaint - Complaint to the following on 10-30-2024:

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Electronically Signed By: Rylee Sommers-Flanagan
Dated: 10-30-2024