

**MONTANA EIGHTH JUDICIAL DISTRICT COURT
CASCADE COUNTY**

<p>DAVID SASLAV, MONTANA ENVIRONMENTAL INFORMATION CENTER, and KAYLEE HAFER, Plaintiffs, vs JERRY HOWE, in his official capacity as EXECUTIVE DIRECTOR OF THE MONTANA LEGISLATIVE SERVICES DIVISION of the MONTANA LEGISLATURE, and THE MONTANA LEGISLATIVE SERVICES DIVISION of the MONTANA LEGISLATURE, Defendants.¹</p>	<p>Cause No. CDV-24-539</p> <p>ORDER GRANTING PRELIMINARY INJUNCTION AND WRIT OF MANDAMUS</p>
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¶ 1 A new non-statutory Legislative Services Division policy withholds from public examination some of the contents of its “junque”² files about proposed 2025 legislation. Plaintiffs seek a writ of mandamus requiring Legislative Services to produce immediately the complete, unredacted contents of several junque files the Plaintiffs have already requested. CR1, Count 1. They additionally seek a preliminary injunction prohibiting the withholding of such files in the future. *Id.*, Count 2. And they ultimately seek a declaration that the current Legislative Services policy withholding portions of these junque files from public examination is unconstitutional. *Id.*, Count 3.

¹Caption truncated to save space.

²Pronounced like “junk.” The use of this spelling of this word to identify these files appears to be unique to Montana Legislative Services.

¶ 2 The parties presented testimony and oral argument at a hearing on January 3. Rylee Sommers-Flanagan and Mikaela Koski, Kim Wilson, and Robert Farris-Olson represented the plaintiffs. Hannah Willstein and Kyle Nelson represented the press/media intervenors. Assistant AG Blake Koemans and Assistant AG Aislinn Brown represented Legislative Services. Deputy Solicitor General Brent Mead and Solicitor General Christian Corrigan represented intervenors Senator Barry Usher and the Montana Legislature. Jaret Coles, Derf Johnson, Mike Dennison, and Eric Dietrich testified. Based on the January 3 testimony and the record of the whole case, the Court now makes the following:

I. Findings of Fact

¶ 3 The Legislative Services Division is a non-partisan legislative agency under the supervision of Executive Director Jerry Howe.

¶ 4 Mr. Howe reports to the Legislative Council.

¶ 5 Legislative Services' duties include drafting proposed bills.

¶ 6 A junque file is a Legislative Services file that contains bill drafts, bill drafting requests, background material, and correspondence with the legislative staffers tasked with drafting a bill.

Montana Conservation Voters v. Jacobsen, 1st Jud. Dist. Cause No. DDV-23-702, 7/12/2024 *Opinion and Order on Motion to Quash*, p.3 footnote 2.

¶ 7 As of the present Session, the junque file contains all background information about the proposed bill up to its formal introduction in the Session.

¶ 8 This includes all draft versions of the bill, all reviewer comments, the document previously known as the “blue sheet” (the original request for the legislation), correspondence (including email) between Legislative Services and the requester and/or sponsor, and legal staff notes.

¶ 9 Junque files do not contain post-introduction committee and floor amendments.

¶ 10 These files initially existed in paper form. More recently they exist electronically as .pdfs with internal hyperlinks.

¶ 11 Publicly paid Legislative Services personnel maintain junque files on publicly owned servers at taxpayer expense.

¶ 12 Thirty years ago, Judge Honzel ruled that the kind of bill-drafting documents that now appear in the junque files³ were public records and thus subject to Mont. Const. Article II, § 9. *Montana Environmental Information Center v. Montana Environmental Quality Council ... and Montana Legislative Council*, 1st Jud. Dist. Cause No. CDV-95-207, *Memorandum and Order* filed 8/7/1995.

¶ 13 No one appealed Judge Honzel’s *MEIC* decision.

¶ 14 In the 30 years between Judge Honzel’s *MEIC* decision and this past summer, Legislative Services, legislators, lobbyists, and attorneys all shared a common understanding that the bill-drafting documents now held in junque files were public records and were accordingly subject to the open government provision in the Montana Constitution.

¶ 15 Legislative Services complied with Judge Honzel’s *MEIC* order until this past Fall.

³Judge Honzel’s decision pre-dated the use of the word “junque” to describe these files, but it is clear that that case was about public access to the same kind of bill-drafting documents as the present case.

¶ 16 On July 12, 2024, Judge Abbott ruled in litigation about Public Service Commission redistricting that the plaintiffs in that case could not subpoena Senator Regier and his personal documents to a deposition where they obviously intended to cross-examine him about his official legislative conduct. *Montana Conservation Voters et al v. Jacobsen*, 1st Jud. Dist. Cause No. DDV-23-702, *Opinion and Order on Motion to Quash* filed July 12, 2024 (CR64). Judge Abbott reasoned that legislative privilege prohibited compelling legislators to testify about the motives and factual bases for their official legislative actions. Judge Abbott accordingly quashed the deposition subpoena and the accompanying subpoena duces tecum. *Id.*, pp. 23-24.

¶ 17 Following Judge Abbott's order in *Conservation Voters*, Legislative Services Chief Legal Counsel Todd Everts, Deputy Legal Counsel Jaret Coles, Deputy Legal Counsel Julie Johnson, and Legislative Services attorney Laura Sankey Keip discussed the situation and concluded the privilege Judge Abbott recognized in *Conservation Voters* applied to some of the information in Legislative Services' junque files.

¶ 18 Specifically, these attorneys concluded that the constitutional open-records provision continued to apply fully to junque files on what they identified as "committee bills" and "agency bills." But, they reasoned, the constitutional open-records provision did not fully apply to what they identified as "individual legislator bills," because some of this information tended to reveal the individual requesting legislator's motive and/or factual bases for asking for the bill.

¶ 19 No legislators asked for or participated in this Legislative Services legal analysis of Judge Abbott's *Conservation Voters* order.

¶ 20 On or about September 24, 2024, Legislative Services sent each individual 2025 legislator a memo advising of the attorneys' interpretation of *Conservation Voters*. That document read, in pertinent part:

... Junque files typically include emails between the legislator and legislative staff, lobbyists, stakeholders, or other third parties regarding the drafting of the bill. The junque files may also include documents of draft language provided to the bill drafter. The Legislative Services Division has always responded promptly to a request for a junque file, while also informing the legislator that a junque file has been requested and provided.

This summer, however, a District Court judge issued a 30-page order that held that a legislator's communications between the legislator and legislative staff, lobbyists, stakeholders, or other third parties is considered privileged. ...

The purpose of this document is to inform you of your rights under this order to exercise your privilege as a legislator to not provide communications that are subject to legislative privilege to the public. ...

If you wish to waive your privilege as a legislator to not provide communications that are subject to legislative privilege to the public, please sign below and return this document to Legislative Services Executive Director Jerry Howe. If we do not receive this waiver from you, we will assume you wish to exercise your legislative privilege and we will not provide privileged communications regarding your bill drafts.

9/24/2024 MLS memo to legislators attached as Ex. 7 to CR28.

¶ 21 Senator Majority Leader Fitzpatrick waived privilege as to LC0224, one of the bills he had requested. This resulted in Plaintiff Saslav ultimately obtaining a complete, unredacted copy of Senator Fitzpatrick's request for that bill.

¶ 22 The LCo244 bill draft request shows what an unredacted bill draft request looks like:

Bill Draft Request
Requester: Fitzpatrick, Steve
Submitted Date: 2024-09-11T17:35:08.94
By Request Of: null
Subject: LIA
Priority: 0
Position Request: false
Position: MAJORITY_LEADER
Short Title: Revise civil liability laws
Description: Please contact Alan Olsen for text of the legislation.
Uploaded Documents:
Drafter:
Contact People: Name: Alan Olsen Phone Number: (406) 320-1385 Email: alan.olsen@northwestern.com
Ex. A-5 008

Ex A-5 008 to CR14. The “Contact People” field contained the phone number and email address for a person who was apparently employed in the private sector. The “Description” field indicated the contact person at Northwestern would be providing at least some of the bill’s eventual text.

¶ 23 Other legislators did not waive privilege, which resulted in Legislative Services redacting some of the information in the files requested by the original Plaintiffs and the Intervenor Media Plaintiffs.

¶ 24 This, for example, is the redacted bill draft request Legislative Services produced for LCO013:

Bill Draft Request
Requester: Ellsworth, Jason
Submitted Date: 2024-08-09T17:50:58.418
By Request Of:
Subject: PROP
Priority: priority
Position Request: false
Position: PRESIDENT
Short Title: Generally revise subdivision laws
Description: [REDACTED]
Uploaded Documents:
Drafter:
Contact People:
Name: [REDACTED]
Phone: [REDACTED]
Email: [REDACTED]

Ex A-1 005 to CR14.

¶ 25 Since this past Fall, Legislative Services has been producing complete, unredacted junque files for what Mr. Coles describes as “agency bills.” It will most likely produce that same information for “committee bills.”

¶ 26 Legislative Services has not been redacting or withholding bill drafts when such requests actually exist as of the request for the junque file.

¶ 27 Legislative Services has not been redacting the name of the legislator who requested the bill.

¶ 28 Legislative Services has not been redacting the names of Legislative Services attorneys or staff who have worked on the bill.

¶ 29 When no bill draft exists yet, the “Short Title” and “Description” are the only indicators of the purpose of the bill. Redacting either field hides the purpose of the legislation from members of the public who would otherwise have a constitutional right to review and understand it.

¶ 30 Legislative Services has also been redacting the names of designated “Contact People” – individuals who are neither legislators nor Legislative Services employees, likely employed in the private sector - who the requesting legislator has designated to work closely with Legislative Services on the drafting of the bill. These people can be, but are not always, lobbyists.

¶ 31 Legislative Services has also been redacting the names of lobbyists who are working with the requesting legislator on the proposed bills.

¶ 32 The names of these contact persons and lobbyists are a valuable indicator of the bill’s political support, its chances of passing, and how quickly it will move during the Session.

¶ 33 There is no evidence of Legislative Services taking longer than 14 days to produce either a redacted or an unredacted junque file.

¶ 34 Legislative Services employs attorneys and research analysts. It has roughly ten attorneys. They report to Chief Legal Counsel Everts, who in turn reports to Executive Director Howe. The roughly twelve research analysts report to Research Director Rachel Weiss, who in turn reports to Executive Director Howe. Mr. Howe reports to the Legislative Council.

¶ 35 Legislative Services makes its own hiring, firing, and disciplinary decisions.

¶ 36 Neither the legislative leadership nor any individual legislator has the authority to hire, fire, or discharge individual Legislative Services employees other than Mr. Howe.

¶ 37 Legislative Services employees have kept confidential their one-on-one *oral* discussions with individual legislators.

¶ 38 From the foregoing findings, the Court now makes the following:

II. Conclusions of Law

¶ 39 The Court has personal jurisdiction over these parties and subject-matter jurisdiction over this case and this dispute.

¶ 40 The Montana Constitution provides:

Right to know. *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).

¶ 41 The current litigation is about the right to examine public documents, not the right to observe public deliberations.

¶ 42 The only qualification in the foregoing constitutional right to examine public documents is “when the demand of individual privacy clearly exceeds the merits of public disclosure. unqualified. Art. II, § 9, *supra*. No one in this case suggests the case has anything to do with anyone’s right of individual privacy.

¶ 43 This provision does not require the person who wants to examine public documents to have what the government thinks is a valid, legitimate, or laudable purpose for doing so. Art. II, § 9, *supra*.

¶ 44 Similarly, nothing in the constitutional language requires the person who wants to examine public documents to agree not to use that information to publicly criticize the legitimacy or validity of government action. *Id.*

¶ 45 In 1995, the Montana Environmental Information Counsel sued the Environmental Quality Council and the Legislative Council to compel those state agencies to allow MEIC to examine bill drafts and associated documents during at the *outset* of the bill drafting process. *MEIC*, p.1. The agencies resisted, saying they would make that information available to MEIC *after the conclusion of that year's Session*. Rejecting this, Judge Honzel explained:

It is clear to the Court that the issue raised in this action does not involve just LC 838. Rather, it raises the much broader public policy question of whether the public's constitutional right to know under Article II, Section 9, extends to bill-draft files in the hands of the Legislative Council, EQC, or any other government agency or subdivision.

MEIC, p.5.

¶ 46 Judge Honzel further rejected the agencies' argument that the constitutional right to know conflicted with the speech and debate immunity set out in Article V, Section 8:

The Court does not find these two constitutional provisions to be in conflict. This action is not about questioning legislators regarding any "speech or debate" in the legislature. The lawsuit does not seek to prohibit the respondents from doing their job. It does not seek to tell respondents how to draft a bill. It does not seek to restrict the legislature from making a bill-drafting request or from introducing a bill. And it does not seek to obtain information from a legislator's personal files. The issue presented relates only to whether the MEIC or any other member of the public is entitled to examine documents in the files of two statutorily-created councils during the bill-drafting process.

MEIC, pp. 6-7.

¶ 47 Judge Honzel continued:

Respondents argue that providing 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.” Respondents seem to suggest that early public knowledge of what may come before the legislature would somehow be detrimental. The Court does not share that view. Neither did the framers of our constitution. They 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.

MEIC, p.11.

¶ 48 Judge Honzel ultimately concluded that “MEIC and other members of the public have the right to examine draft bills and associated documents during the drafting process” and further that MIC and other members of the public had the right to inspect documents in [the agencies’] custody pursuant to any bill-draft request.” *MEIC*, p.12.

¶ 49 The current case is about a new non-statutory Legislative Services policy developed in-house by attorneys in response to Judge Abbott’s *Conservation Voters* order. No legislator asked for the policy or participated in its development. Consequently the usual presumptions in favor of the constitutionality of *the Legislature’s enactments* do not apply here.

¶ 50 This case, unlike the *Conservation Voters* case before Judge Abbott, involves a free-standing demand to view the contents of files about proposed legislation that have been opened and maintained at public expense by public employees who do not have ongoing one-on-one confidential relationships with particular individual legislators.

¶ 51 Judge Abbott’s *Conservation Voters* order mentions junque files three times. The first reference notes that the plaintiffs in that case believed they had to subpoena Senator Regier and his documents because the junque files contained no relevant documents shedding any light on his motives and factual bases. *Conservation Voters*, p.3, lns 13-15. The second reference is in a footnote explaining what a junque file is. *Id.*, p.3, footnote 2. And the third reference is to Legislative Services’ longstanding practice of “allow[ing] public access to junque files.” *Id.*, p.21, lns 1-2. Judge Abbott did not hold that junque files are confidential or non-public.

¶ 52 Judge Abbott reasoned that Article V, § 8 “confers an absolute *testimonial* privilege for state legislators regarding their legislative acts.” *Id.*, p.15, lns 19-20 (emphasis added).

¶ 53 Judge Abbott then clarified that
A party may not compel the production of *nonpublic* documents that contain a legislator’s deliberations and motivations or would be tantamount to questioning the legislator about their deliberations and motivations.
Id., p.20, lns 6-9 (emphasis added).

¶ 54 Significantly, Judge Abbott did not hold anywhere in his order that Judge Honzel’s *MEIC* s decision was incorrect or that any of the out-of-state authority Judge Abbott was applying to the *deposition subpoena* suggested that any portion of Legislative Services junque files is confidential or not otherwise subject to the constitutional right to know.

¶ 55 Judge Abbott ruled - correctly, in this Court’s view - that the system cannot tolerate haling a legislator into a deposition or court hearing to be adversely examined about the motives and factual bases for his official legislative actions, or compelling him to produce his personal documents for inspection at that deposition or hearing.

¶ 56 The current litigation, unlike *Conservation Voters*, is not about compelled testimony or compelled document production at a deposition or court hearing. It is about documents held in *public* files maintained on *public* servers by *public* employees at *public* expense.

¶ 57 The current litigation does not implicate individual legislators' privacy interest in any private documents they may create, receive, or maintain to assist in the performance of their legislative duties.

¶ 58 The current litigation does not implicate the privacy of individual legislators' oral discussions with Legislative Services employees.

¶ 59 Legislative Services and the Intervenor Defendants do not challenge the Plaintiffs' standing.

¶ 60 A preliminary injunction is available when

(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.”

Mont. Code Ann. § 27-19-201(1) (as amended by S.B. 191 (Ch. 43) (2023)) (emphasis added).

¶ 61 **Likely to Succeed on the Merits.** For the past 30 years following the *MEIC* decision, legislators, the Legislative Council, Legislative Services, lobbyists, journalists, and the public all understood that these were public documents. *Conversation Voters*, which was about compelled testimony and compelled document production in support of that compelled testimony, mentioned junque files only three times in passing. It did not transform what everyone previously understood to be *public* documents into *non-public* documents.

¶ 62 **Irreparable Harm.** “For the purposes of a preliminary injunction, the loss of a constitutional right constitutes an irreparable injury.” *Planned Parenthood of Mont. v. State*, 2024 MT 227, ¶ 32, 418 Mont. 226, 557 P.3d 471.

¶ 63 **Balance of Equities.** Legislative Services, legislators, lobbyists, journalists, and the public all understood for the past 30 years that these files were subject to the constitutional right to examine public documents. The new policy is non-statutory; legislators did not ask for it and were not involved in developing it. Legislative privilege is personal to the legislator; it does not protect lobbyists and cannot be used to obscure private sector influence. Requiring Legislative Services to follow the *MEIC* decision simply restores the previous 30-year status quo.

¶ 64 **Public Interest.** The right to examine public documents is obviously critical to the way the framers of the Montana Constitution balanced the burdens of the government with the rights of the governed. “The government suffers no harm from an injunction that merely ends unconstitutional practices and/or ensures that constitutional standards are implemented.” *Planned Parenthood*, ¶ 36.

¶ 65 For similar reasons, Mont. Code Ann. § 27-19-103 does not apply. The new policy results from in-house discussions by attorneys. No enactment by the Legislature requires it. Therefore enjoining it does not “prevent the execution of a public *statute*” within the meaning of subsection (4). And Judge Abbott’s *Conservation Voters* order did not concern public files. Therefore enjoining the new policy and returning to the previous *MEIC* status quo does not “prevent the exercise of a public ... office ... in a lawful manner” within the meaning of subsection (6).

¶ 66 Mandamus is available

to compel the performance of an act that the law specially 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 or office to which the party is entitled and from which the party is unlawfully precluded by the lower tribunal, corporation, board, or person.

Mont. Code Ann. § 27-26-102(1).

¶ 67 Mandamus issues “when there is not a plain, speedy, and adequate remedy in the ordinary course of law.” Mont. Code Ann. § 27-26-102(2).

¶ 68 Mandamus is available only to compel the performance of a clear legal duty – one that is ministerial rather than discretionary. *Smith v. Missoula County*, 1999 MT 330, ¶ 28, 297 Mont. 368, 992 P.2d 834.

¶ 69 The act sought to be compelled here – permitting public examination of public documents – has been a clear legal duty since the 1995 *MEIC* decision. Legislators, Legislative Services, journalists, and the public all understood after *MEIC* that the constitutional right to examine public documents included the materials now maintained in junque files. The 2024 *Conservation Voters* order, which mentioned junque files only three times in passing without holding that privilege applied to those files, did not transform what everyone previously understood to be *public* documents into *non-public* documents. There is no other plain, speedy, and adequate remedy because the 2025 Session is already well underway and will end in a few weeks.

¶ 70 Neither side seriously contends that the *in camera* inspection procedure set out in *O’Neill v. Gianforte*, 2025 MT 2, ¶¶ 25-28, --- Mont. ---, --- P.3d. ---, applies here. *MEIC* did not require or even suggest any such procedure.

¶ 71 From the foregoing Findings and Conclusions, the Court now makes the following:

III. Order

¶ 72 Plaintiffs' *Motion for a Preliminary Injunction* is **GRANTED**. Defendants Legislative Services Division, Jerry Howe, and any of their agents, officers, employees, successors, and all persons acting in concert with each or any of them are immediately **RESTRAINED** and **PROHIBITED** from enforcing any aspect of the September 2024 Legislative Services junque files policy pending resolution of Plaintiffs' request that Defendants be permanently enjoined from enforcing the policy.

¶ 73 Plaintiffs' *Application for a Writ of Mandate* is **GRANTED**. Defendants Legislative Services Division, Jerry Howe, and any of their agents, officers, employees, successors, and all persons acting in concert with each or any of them are **ORDERED** to produce the complete, unredacted contents of junque files requested by Plaintiffs David Saslav and Kaylee Hafer and the Intervenor Media Plaintiffs within five business days of this *Order*. Consistent with past practice, in camera review of the documents is unnecessary.

¶ 74 Defendants Legislative Services Division, Jerry Howe, and any of their agents, officers, employees, successors, and all persons acting in concert with each or any of them are ordered to produce the complete, unredacted contents of junque files requested by any member of the public without delay and consistent with past practice.

Electronically Dated and Signed Below

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