

First Judicial District Court  
228 Broadway, 2nd Floor  
Helena MT 59601

GREAT FALLS MT 594  
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**FILED**

JUN 10 2020

ANGIE SPARKS, Clerk of District Court  
By **JREUGERS** Deputy Clerk

**MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY**

ACLU OF MONTANA  
FOUNDATION, INC.,

Plaintiff,

v.

MONTANA DEPARTMENT OF  
EMERGENCY SERVICES AND  
MONTANA DIVISION OF  
CRIMINAL INVESTIGATION,

Defendants.

Cause No.: CDV-2020-155

**ORDER ON DEFENDANT'S  
MOTION TO DISMISS**

On February 7, 2020, the American Civil Liberties Union of Montana Foundation, Inc. (ACLU) filed a Complaint for Declaratory and Injunctive Relief against Montana Disaster and Emergency Services (DES) and Montana Division of Criminal Investigation (DCI). The complaint was filed because of Defendants' failure to comply with Plaintiff's requests for information.

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1 Defendants filed a motion to dismiss pursuant to Mont. R. Civ. P.  
2 12(b)(6) arguing Plaintiff has failed to state a claim upon which relief may be  
3 granted.

#### 4 LEGAL STANDARD

5 A motion to dismiss under 12(b)(6) allows the court to examine only  
6 whether a claim has been adequately stated in the complaint. *Meagher v. Butte-*  
7 *Silver Bow City-County*, 2007 MT 129, ¶ 15, 337 Mont. 339, 160 P.3d 552. A  
8 complaint is considered in a light most favorable to plaintiffs, with allegations of  
9 fact taken as true. *Pederson v. Rocky Mountain Bank*, 2012 MT 48, ¶ 8,  
10 364 Mont. 258, 272 P.3d 663. The court is, however, under no duty to take as  
11 true legal conclusions. *Cowan v. Cowan*, 2004 MT 97, ¶ 14, 321 Mont. 13,  
12 89 P.3d 6. “A court should not dismiss a complaint for failure to state a claim  
13 ‘unless it appears beyond doubt that the plaintiff can prove no set of facts’ in  
14 support of the claim that would entitle the plaintiff to relief.” (citation omitted)  
15 *Cowan*, ¶ 10.

#### 16 BACKGROUND

17 On February 20, 2018, the ACLU submitted right to know requests to  
18 various state agencies. On March 1, 2018, the ACLU received a response from  
19 the agencies in which clarification was sought and subsequently provided by the  
20 ACLU. On November 5, 2018, the DCI provided some documents and an  
21 extensive privilege log denying disclosure of over eighty documents under  
22 Montana’s Confidential Criminal Justice Information (CCJI) statutes. Over the  
23 course of months, Plaintiff was provided some additional material, much of  
24 which was heavily redacted, and which included the admonition that the  
25 documents were provided “as an accommodation... The provision of these

1 records is not a waiver of any defense available to the Department of Justice or  
2 the requirements of the CCJI statutes.”

3 The ACLU disputed application of the CCJI statutes and was  
4 unsuccessful in gaining access to additional unredacted documentation. Having  
5 concluded that DES and DCI are the agencies with the relevant information, the  
6 complaint was filed. Plaintiff seeks timely production of the records requested,  
7 attorney fees for wrongful withholding of the documents sought, and a  
8 declaration that the documents already produced are public documents and not  
9 subject to confidentiality laws.

#### 10 DISCUSSION

11 Plaintiff seeks disclosure of public “agency records pertaining to  
12 state and local agency preparations for protests” pursuant to Mont. Code Ann.  
13 § 2-6-1003. The request encompasses various types of communications and  
14 documentation regarding plans to respond to protests against construction of the  
15 Keystone XL Pipeline.

16 Defendants argue the information sought from Plaintiff is protected  
17 from disclosure because it is confidential criminal justice information under state  
18 law. Defendants assert that the information is not included in the definition of  
19 “public criminal justice information” found at Mont. Code Ann. § 44-5-103(13)<sup>1</sup>.  
20 Montana Code Annotated § 44-5-103 defines confidential criminal justice  
21 information as including “criminal intelligence information” and “criminal  
22 investigative information.”

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23  
24 <sup>1</sup> “Public criminal justice information” means: (a) information made public by law; (b) information of court record  
25 and proceedings; (c) information of convictions, deferred sentences, and deferred prosecutions; (d) information of  
postconviction proceedings and status; (e) information originated by a criminal justice agency, including: (i)  
initial offense reports; (ii) initial arrest records; (iii) bail records; and (iv) daily jail occupancy rosters; (f)  
information considered necessary by a criminal justice agency to secure public assistance in the apprehension of a  
suspect; or (g) statistical information.

1 (3) "Confidential criminal justice information" means:

- 2 (a) criminal investigative information;  
3 (b) criminal intelligence information;  
4 (c) fingerprints and photographs;  
5 (d) criminal justice information or records made confidential by law; and  
6 (e) any other criminal justice information not clearly defined as public  
7 criminal justice information.

8 (4) (a) "Criminal history record information" means information about  
9 individuals collected by criminal justice agencies consisting of identifiable  
10 descriptions and notations of arrests; detentions; the filing of complaints,  
11 indictments, or informations and dispositions arising therefrom; sentences;  
12 correctional status; and release. It includes identification information, such as  
13 fingerprint records or photographs, unless the information is obtained for  
14 purposes other than the administration of criminal justice.

\* \* \*

11 (5) (a) "Criminal intelligence information" means information  
12 associated with an identifiable individual, group, organization, or event compiled  
13 by a criminal justice agency:

14 (i) in the course of conducting an investigation relating to a major  
15 criminal conspiracy, projecting potential criminal operation, or producing an  
16 estimate of future major criminal activities; or

17 (ii) in relation to the reliability of information including information  
18 derived from reports of informants or investigators or from any type of  
19 surveillance.

20 (b) Criminal intelligence information does not include information  
21 relating to political surveillance or criminal investigative information.

22 (6) "Criminal investigative information" means information associated  
23 with an individual, group, organization, or event compiled by a criminal justice  
24 agency in the course of conducting an investigation of a crime or crimes. It  
25 includes information about a crime or crimes derived from reports of informants  
or investigators or from any type of surveillance. It does not include criminal  
intelligence information.

Defendants assert the records sought contain information compiled  
from investigations "projecting potential activities," "producing an estimate of

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1 future major criminal activities” or information compiled from “reports of ...  
2 investigators” or “surveillance.” Defendants argue the laws related to the right to  
3 know public information are inapplicable because the information requested as  
4 identified in the complaint is not public, but is criminal justice information as  
5 defined above and is consequently confidential and protected by law from  
6 disclosure.

7 Central to Defendant’s argument is the assertion that the  
8 information sought is related to future activities which might be criminal.  
9 Defendants point out that it is not a “fact” as alleged by Plaintiff in the complaint  
10 that all future potential protest activities will be peaceful. Defendants contend  
11 the complaint cannot be taken on its face because Plaintiff asks for information  
12 related to potential criminal activity and such information is protected, not public  
13 information which they have a right to receive from Defendants. Defendants  
14 conclude that because Plaintiff asks for protected CCJI information, the  
15 complaint is deficient as not stating a claim upon which relief may be granted.

16 This Court disagrees. Plaintiff and others have a right to  
17 “peacefully protest environmentally and culturally harmful government  
18 decisions.” Complaint, ¶ 33. Montana’s Constitution provides a broad guarantee  
19 of the public’s “right to know,” examine documents and observe deliberations of  
20 public agencies except in specific clear instances when individual privacy which  
21 exceeds the merits of public disclosure.<sup>2</sup>

22 On its face, the complaint does not trigger an analysis of the CCJI  
23 statutes. Simply claiming the information sought is CCJI information does not  
24 necessarily make it so. The legal analysis of Plaintiff’s claims as presented by  
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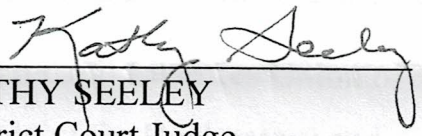
<sup>2</sup> Mont. Const. Art. II, § 9.

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1 Defendants goes beyond the complaint. The complaint seeks information  
2 including meeting(s) involving law enforcement and public agency officials, a  
3 law enforcement work group, trainings regarding how to use social media,  
4 mutual aid agreements related to potential protests, a Montana Petroleum  
5 Association panel, any operations plan in development, a 3-day crowd control  
6 training, CDT team meetings, law enforcement officer workgroup meeting, DES  
7 working group meetings and field operations training. Complaint, ¶ 15.  
8 Potential future activities are not relevant in determining whether Plaintiff  
9 pleaded sufficient facts in support of claims of entitlement to public information  
10 which was not provided. On its face, the complaint should not be dismissed for  
11 failure to state a claim upon which relief may be granted.

12 ORDER

13 Based on the foregoing, Defendants' motion to dismiss is  
14 **DENIED.**

15  
16 DATED this 9 day of June 2020.

17  
18   
19 KATHY SEELEY  
20 District Court Judge

21 pc: Shiloh Hernandez, 103 Reeder's Alley, Helena, Montana 59601  
22 Alex Rate/Lillian Alvernaz, P.O. Box 1968, Missoula, Montana 59806  
23 David A. Bahr, 1035 ½ Monroe Street, Eugene, Oregon 97402

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