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

No. CDV-07-614

**MONTANA ENVIRONMENTAL** )  
**INFORMATION CENTER,** )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
**CITY OF GREAT FALLS,** )  
 )  
Defendant. )

Judge E. Wayne Phillips

**ORDER**

After considering the papers submitted by the parties and having heard oral argument, this Court hereby issues its Order.

**Findings of Fact**

1. Southern Montana Electric G & T Co-op (SME) and Electric City Power, Inc. (ECP), a non-profit corporation established by the City of Great Falls, have entered an agreement whereby ECP will help SME finance a coal-fired power plant (Highwood Generating Station) to be located in Great Falls. Complaint, p. 2.

2. Montana Environmental Information Center (MEIC) is a conservation organization "interested in and involved in issues related to energy conservation and sustainability at the local, state and national level." Brief in Support of Plaintiffs' Motion for Summary Judgment, p. 2.

3. MEIC member Dr. Charles Christensen was concerned about possible impacts that might result from the construction of Highwood Generating Station. He asked

1 the Great Falls City Clerk, by letter of March 8, for documents concerning Highwood,  
2 including a feasibility study and all contracts and financial agreements between SME and  
3 Great Falls. Complaint, pp. 2-3  
4

5 4. On March 9, Great Falls City Attorney, David Gliko, recommended that Dr.  
6 Christensen go to the City Clerk's office on that day to inspect the documents Dr.  
7 Christensen had asked for, except for the agreement between Great Falls and SME. Mr.  
8 Gliko wrote that the agreement would not be available until it was complete, which he  
9 expected to take place March 16. *Id.*  
10

11 5. Dr. Christensen went to the City Clerk's office on March 12. He was not  
12 allowed to examine city documents on that day because the City Clerk was out of the office.  
13 Dr. Christensen was told he would have to come back some other time. *Id.*

14 6. On April 2, 2007, Dr. Christensen asked City Attorney Gliko, by letter, for all  
15 documents in the city's possession relating to the Highwood Generating Station, particularly  
16 mentioning the feasibility study and all agreements of preliminary drafts of agreements  
17 between the City and SME. *Id.* at 4, Brief in Support of Plaintiff's Motion for Summary  
18 Judgment, p. 4.  
19

20 7. On April 3<sup>rd</sup>, the City responded via letter from Attorney Gliko and City  
21 Clerk Bourke. That letter stated that no feasibility study existed, *per se*, that the City was not  
22 required to produce preliminary drafts under § 2-4-601 (2) (ii) (c) MCA, and that Dr.  
23 Christensen was welcome to access all other documents. Complaint, p. 4, Defendant's  
24 Answer, p. 2.

25 8. On May 17 and 22, 2007, MEIC staff member Anne Hedges looked at the  
26 City's Highwood Generating Station file. At that time she was shown a file folder  
containing an agreement draft by City Clerk Bourke. Hedges was then told "she could not

1 inspect drafts of the agreement." Brief in Support of Plaintiff's Motion for Summary  
2 Judgment, p. 4.

### 3 Procedural Posture

4  
5 On May 4<sup>th</sup>, 2007, Plaintiff MEIC filed a complaint requesting the following relief;  
6 that the City of Great Falls be compelled to produce all documents in the city's possession  
7 related to the Highwood Generating Station; that the court find § 2-6-401 (2) (ii) (c) MCA  
8 unconstitutional both facially and as applied; and that the Court order Defendant to pay  
9 Plaintiffs' counsel fees under the Private Attorney General Doctrine.

10 On November 6, 2007, the Montana Newspaper Association filed a Motion for  
11 Leave to File Amicus Curiae Brief.

12  
13 On June 15, 2007, the City filed an Answer. In that Answer, the City stated that,  
14 because it had allowed Plaintiff access to all public records there is no "real controversy" at  
15 issue, that Defendant had asserted a trade secret privacy interest, that the Supreme Court  
16 has already held § 27-8-201 facially constitutional in *Becky v. Butte-Silver Bow School District*  
17 *No. 1*, 274 MT 131 (1995), and that the same statute is not unconstitutional as applied in the  
18 case at bar. Answer, ¶ 18.

19 On October 30, 2007, the Attorney General filed a Notice of Intent Not to Intervene.  
20 On November 28, 2007, Plaintiff filed a Motion for Summary Judgment. On December 27,  
21 2007 Eighth Judicial District Court Judge Julie Macek recused herself. On January 7, 2008,  
22 the Montana Newspaper Association filed an Amicus Curiae Brief. On January 10, 2008,  
23 this Court accepted jurisdiction. On Tuesday, February 5, this Court held a hearing in the  
24 matter.  
25  
26

### Summary Judgment Standard

Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." M. R. Civ. P. 56(c). "The party seeking summary judgment has the burden of demonstrating a complete absence of any genuine factual issues. *Wood v. Old Trapper Taxi*, 286 Mont. 18, 24, 952, P. 2d 1375, 1379 (1997). "Where the movant has met its burden of showing that no genuine issues of material fact exist, the opposing party bears the burden of establishing an issue of material fact by more than mere denial or speculation. (Citations omitted). All reasonable inferences which can be drawn from the evidence presented must be drawn in favor of the non-moving party (Citations Omitted.)" *Vettel-Becker v. Deaconess Med. Ctr. of Billings, Inc.*, 2008 MT 51, ¶ 27, 341 Mont. 435, ¶ 27, 177 P.3d 1034, ¶ 27.

### Parties' Arguments

The heart of Plaintiff's argument is that the City of Great Falls may not rely on § 2-6-401 (2) MCA to deny Plaintiff all drafts of an agreement between the City and SME because to do so would unconstitutionally interfere with the public's right to know and to participate in government under Article II, Section 9 of the Montana Constitution. Plaintiff asserts that the denial would do so by creating "broad categories of documents that . . . are exempt from public review without regard for whether any constitutionally protected privacy rights exceed the public's right to know." Brief, p. 7.

Plaintiff argues that the application of § 2-6-401 MCA intended by the Legislature is limited to the retention or destruction of local government records. Plaintiff argues that in reading that statute to apply to preliminary drafts of a funding agreement between itself and SME, the City has, at the outset, misconstrued the statute. *Id.*

1 Plaintiff next argues that the City of Great Falls did not simply misconstrue § 2-6-401  
2 MCA, but also applied it unconstitutionally. Brief, p. 5. The City cited that statute as  
3 justification for refusing to show Plaintiff all drafts of an agreement between the City and  
4 SME. *Id.* at 8. Plaintiff argues that Article II, Section 9 of the Montana Constitution  
5 establishes that the public's right of open access to government documents and government  
6 deliberations may be limited only by an individual's right to privacy. *Id.* at 7. Plaintiff  
7 argues that the individual right to privacy is inapplicable here because neither the City nor  
8 SME are individuals under the law. *Id.* at 11. Plaintiff emphasizes that even if the City had  
9 intended to rely upon protection of an individual privacy interest, the City has not  
10 conducted the protection of privacy versus the need for public disclosure balancing test case  
11 law requires.  
12

13  
14 Plaintiff relies upon *Becky v. Butte-Silver Bow School District No. 1* (274 Mont. 131, 136,  
15 906 P. 2d 193, 196 (1995)) to define the sequence necessary for that balancing test. Plaintiff  
16 presents that sequence as follows: the Court must first determine whether Article II, Section  
17 9 applies to the political body in question; if the answer is yes, the Court must next  
18 determine whether the documents sought are the documents of public bodies; if yes, the  
19 Court next looks to whether a privacy interest is present; if so, the Court must finally  
20 determine whether the "demands of individual privacy exceed the merits of public  
21 disclosure." *Id.* at 8. Plaintiff asserts that the Court makes this last determination based  
22 upon two considerations: whether the person involved has a subjective or actual  
23 expectation of privacy and whether that expectation is reasonable. *Id.*  
24

25 Plaintiff argues that Great Falls is obviously an entity subject to Article II, Section 9.  
26 *Id.* Plaintiff asserts that there is no statutory definition of the constitutional phrase  
"documents of public bodies," but that § 2-6-101, MCA does define "public writings."

1 Plaintiff also asserts that the Supreme Court has interpreted the term "documents of public  
2 bodies" broadly. Plaintiff argues that the agreement drafts MEIC sought from the City are  
3 "documents of public bodies" because they record acts of the City, are maintained by the  
4 City and are "somehow related" to the function and duties of the City. *Id.* at 10.

5  
6 Plaintiff disagrees with Defendant's averral in its Answer that City Attorney Gliko's  
7 letter of March 9 asserted a trade secret privacy interest. *Id.* Plaintiff argues that even if  
8 there were a legitimate trade secret at issue and even if the City could claim protection as an  
9 individual, that would be an unreasonable expectation of privacy on the City's part. *Id.* at  
10 11.

11  
12 Plaintiff also draws the court's attention to Section 8 of Article II of the Montana  
13 Constitution, averring that Section 8 "dovetails" with Section 9 in that the Constitutionally-  
14 protected right to participate in government activity created in Section 8 cannot be fully  
15 exercised without the full access to documents and deliberations guaranteed in Section 9.  
16 *Id.* at 6.

17 The heart of Defendant's argument is that although ECP, a non-profit created by the  
18 City, is a public entity, preliminary drafts of a funding agreement between SME and ECP  
19 are not public records and, therefore, no privacy interest is or need be asserted to protect  
20 those drafts from public scrutiny. Defendant's Brief in Opposition, p.6.

21  
22 Defendant argues that § 2-5-601 (2) (c), MCA specifically excludes preliminary drafts  
23 from the category of public records. *Id.* at 3. Defendant emphasizes that statutes are  
24 presumed constitutional, will be upheld unless proven unconstitutional beyond a reasonable  
25 doubt and that any possible conflict between statutory law and a constitutional provision  
26 should be reconciled when possible. *Id.* at 3-4.

1 Defendant agrees with Plaintiff that *Becky* outlines the three-step determination of the  
2 application of Article II, Section 9 of the Montana Constitution. *Id.* at 5.

3 Defendant also relies upon *Becky*, pointing to specific language to support the  
4 position that § 2-6-401 MCA does in fact define public records in a local government  
5 context. *Id.* Defendant argues that this Court should also rely on § 2-6-401 MCA to  
6 determine whether preliminary drafts of agreements are public records. *Id.* at 6.

7 Defendant agrees that the City is a public entity. *Id.* Defendant argues that the real  
8 issue here is whether the documents Plaintiff sought, all drafts of the agreement between  
9 SME and ECP, are documents of public bodies or public records. *Id.*

10 Defendant argues that the federal Freedom of Information Act (FOIA 5 USCS § 552  
11 et seq.) excludes agency preliminary drafts (exemption 5) from public records in order to  
12 allow a free exchange of ideas between agency personnel that might not be possible under  
13 constant scrutiny, that "posturing to a public audience would likely distract the process and  
14 thereby compromise the final result." *Id.* at 10.

15 Plaintiff counters that Montana law has no exception analogous to FOIA exception  
16 5. Reply, p. 1. Plaintiff argues that *Becky*, in addition to being factually distinguishable,  
17 does not support the proposition that "public records" as defined in § 2-6-401 "may be used  
18 to limit the reach of the term 'public documents' used in Article II, Section 9 of the  
19 [Montana] Constitution." Reply at 3.

20 Plaintiff emphasizes that the National Honor Society ratings records sought in *Becky*  
21 were not public records because they were generated as the result of teachers' volunteer  
22 activity and were not school records, *per se*, were not related to the function and duties of  
23 that body and, for that reason, thus were not "documents of public bodies." *Id.* at 3-4.  
24 Plaintiff argues that the records sought here are related to the function and duties of the  
25  
26

1 City. *Id.* at 5. Plaintiff argues that the *Becky* Court's references to § 2-6-401, MCA were  
2 merely dicta, that the Court's real reliance was on §§ 2-6-101 and 102, MCA, and that the  
3 Court based its decision on the unique facts before it. *Id.* at 3.

4  
5 Plaintiff concludes that *Great Falls Tribune v. Montana PSC*, 319 Mont. 38, 82 P. 3d  
6 876 (2003) and *Associated Press v. Board of Public Education*, 246 Mont. 386, 804 P.2d 376  
7 (1991) establish that the broad language of Article II, Section 9 clearly trumps statutory  
8 language and that the mere fact that it might be more convenient for the City to negotiate  
9 beyond the public's view does not alter the constitutional requirement that government  
10 conduct its business openly. *Id.* at 7-9.

11  
12 Amicus Montana Newspaper Association agrees that Great Falls is a public body,  
13 that the documents sought, in the custody and control of the city, are public documents and  
14 they are, therefore, subject to public disclosure so long as no competing individual privacy  
15 right forecloses that disclosure. Amicus Brief, pp. 5-6. Amicus, citing *Great Falls Tribune*,  
16 agrees with the Plaintiff that neither the city nor SME can claim a right to privacy since they  
17 are not natural persons. *Id.* Amicus also emphasizes that trade secret protection is not  
18 available to non-individuals. *Id.* at 13.

19  
20 Amicus agrees with Plaintiff that § 2-6-401 (2)(c) does not relate to document  
21 disclosure, merely their retention and disposal by local government entities, making that  
22 statute inapplicable to the facts and arguments at bar. *Id.* at 7. Amicus argues that it is § 2-  
23 6-101 (2) that defines "public writings," to which the Montana Supreme Court, in *Becky*,  
24 added "documents generated or maintained by a public body which are somehow related to  
25 the functions and duties of that body." *Id.* at 8. For these reasons, amicus argues that this  
26 Court can decide that § 2-6-401 (2) (c), MCA is inapplicable without addressing  
constitutionality. *Id.* at 9.



1 Amicus directs this Court's attention to a decision reached by First Judicial District  
2 Court Judge Honzel in which he held that legislative bill drafts should be open for public  
3 inspection except where individual privacy interests are implicated. *Id.* at 10. Amicus  
4 argues that if § 2-6-401 (2) (c) MCA is applicable, it is unconstitutional because it would  
5 always exclude document drafts from public scrutiny. *Id.* Amicus points out that the  
6 Montana Supreme Court has thrice held statutory limits on Article 2, Section 9  
7 unconstitutional, in *Associated Press v. Board of Public Education*, 246 Mont. 386, 804 P. 2d  
8 376, *Associated Press v. State*, 250 Mont. 299, 820 P. 2d 421, and *Great Falls Tribune*. *Id.*

9  
10 Amicus agrees with Plaintiff that federal FOIA exceptions have no counterpart in  
11 Montana law and do not apply here. *Id.* at 11.

#### 12 **Opinion and Order**

13  
14 First, the Defendant included in their answer the issue of trade secret protection.  
15 However, the matter was not raised in briefing and thus is not a question of fact which  
16 would preclude ruling on the merits of Plaintiff's complaint.

17 A court will avoid reaching constitutional issues where it is not necessary that the  
18 court do so. "It is elementary that courts should avoid constitutional questions if an issue  
19 can be resolved otherwise." *Common Cause v. Statutory Comm. to Nominate Candidates for*  
20 *Comm'r of Political Practices*, 263 Mont. 324, 329, 868 P. 2d 604, 607 (1994). Amicus MNA  
21 has argued that the questions of whether the City of Great Falls must make available all  
22 drafts of the agreement between SME and ECP is a question of law, that no material facts  
23 are in dispute and that this question of law may be resolved without reaching constitutional  
24 questions. Amicus Brief, p. 9. For the following reasons, this Court concludes that Amicus  
25 is correct; Plaintiff's access to the documents sought may be resolved by resolving the  
26

1       apparent conflict between Defendant's construction of the meaning and applicability of § 2-  
2       4-601 MCA and the plain language of §§ 2-6-101 and 102 MCA.

3               Section 2-6-102(1) MCA provides that "[e]very citizen has a right to inspect and take  
4       a copy of any public writings of this state, except as provided in 22-1-1103, 22-3-807, or  
5       subsection (3) of this section and as otherwise expressly provided by statute." Neither § 22-  
6       1-1103 nor § 22-3-807 apply here and subsection ¶ 3 of 2-6-102 refers to "[r]ecords and  
7       materials that are constitutionally protected from disclosure." Defendant has not made the  
8       argument that the preliminary drafts are constitutionally protected from disclosure, just that  
9       they are not "public records."  
10

11               The court notes here that it is not "public records" that § 2-6-102 (1) guarantees  
12       citizen access to but "public writings." Section 2-6-101 MCA defines "public writings" as  
13       "the written acts or records of the acts of the sovereign authority, of official bodies and  
14       tribunals, and of public officers, legislative, judicial, and executive. . . except records that are  
15       constitutionally protected from disclosure; [or] public records, kept in this state, of private  
16       writings, including electronic mail, except as provided in § 22-1-1103 and § 22-3-807 and  
17       except for records that are constitutionally protected from disclosure." § 2-6-101 (a-b)  
18       MCA.  
19

20               Defendant has not argued that the documents sought are constitutionally protected,  
21       just that they need not be disclosed to Plaintiff because they are "preliminary drafts," and  
22       therefore not public records subject to disclosure under § 2-6-401 MCA, which excludes "a  
23       preliminary draft" from the definition of "public record" applicable to Part 4 (Local  
24       Government Records).  
25

26               This Court agrees with Plaintiff and MNA that it need not reach constitutional  
      questions to determine that § 2-6-401 MCA provides no protection from local government

1 records from the disclosure required by § 2-6-102 MCA. First, the words, "public record"  
2 and "public writing" are not identical. "It is a settled rule of statutory construction that,  
3 where different language is used in the same connection in different parts of a statute, it is  
4 presumed that the Legislature intended a different meaning and effect." *Miskovich v. Helena*,  
5 170 Mont. 138, 148, 551 P.2d 995, 1000 (1976). The fact that a preliminary draft is not a  
6 "public record" under § 2-6-401, MCA does not therefore mean that it cannot be a "public  
7 writing" under § 2-6-102, MCA.  
8

9         Second, the statute on which Defendant relies, § 2-6-401 MCA, provides that a  
10 preliminary draft is not a public record "[f]or the purposes of this part" (part 4 of Title 2,  
11 Chapter 6.). Part 4 of Chapter 6 does not address the disclosure of documents to interested  
12 citizens. Instead, it legislates the creation of a local government records committee charged  
13 with the duties, among others, of approving, modifying, or disapproving "proposals for local  
14 government records retention and disposition schedules," (*Id.* at (1)) and "establishing a  
15 retention and disposition schedule for categories of records for which a disposal request is  
16 not required." *Id.*, at (3). To allow Part 4 of Title 2 to trump Part 1 (Public Records  
17 Generally) would fly in the face of the plain meaning of § 2-6-102 (1) MCA explicitly  
18 providing citizens the right of access to any public writing, with non-applicable exceptions.  
19  
20 *Id.*  
21

22         The Court concludes that the plain language of § 2-6-401 MCA limits the application  
23 of the definition of "public record" provided to Part 4. Defendant has simply misconstrued  
24 the statute. Whether or not Defendant will, in future, retain non-current drafts of ongoing  
25 negotiations or agreements probably will be determined by the retention and destruction  
26 provisions of § 2-6-401 MCA. However, if the City has those drafts, they must be disclosed  
pursuant to the public's constitutional right to know under Article II, Section 9.

1 Both Plaintiff and Amicus made detailed, well-constructed constitutional arguments.  
2 Defendant countered with reasonable policy arguments that disclosing every draft of every  
3 multi-draft document will be very inconvenient and onerous a burden for government, one  
4 Congress did not impose on the federal government via exception 5 to the Freedom of  
5 Information Act. As both Plaintiff and Amicus point out, federal FOIA is inapplicable to  
6 the case at bar. Exceptions to § 2-6-102, MCA do not include preliminary drafts, *per se*.  
7 Finally, the degree of inconvenience to government in remaining as open as the law requires  
8 appears a necessary by-product of the effective and open democracy the Montana  
9 Constitution was intended to foster.

#### 10 Counsel Fees

11 In its complaint, Plaintiff sought fees under the Private Attorney General Doctrine.  
12 The general rule on the award of counsel fees in Montana is the American Rule, whereby  
13 parties to a civil action do not receive counsel fees unless a specific contractual or statutory  
14 provision provides otherwise. *Martin v. SAIF Corp.*, 2007 MT 234, ¶ 22, 339 Mont. 167, ¶  
15 22, 167 P. 3d 916, ¶ 22. There are exceptions to the American Rule, rooted in the Court's  
16 broad equity powers. *Foy v. Anderson*, 176 Mont 507, 511, 580 P.2d 114, 116 (1978). The  
17 Private Attorney General Doctrine is one of these exceptions.  
18

19 The Private Attorney General Doctrine "is normally utilized when the government,  
20 for some reason, fails to properly enforce interests which are significant to its citizens. *In re*  
21 *Dearborn Drainage Area*, 240 Mont. 39, 43, 782 P. 2d 898, 900 (1989). Only prevailing  
22 parties may be awarded fees under the doctrine. *Grabow v. Mont. High Sch. Ass'n*, 2002 MT  
23 242, ¶ 14, 312 Mont. 92, ¶ 14, 59 P.3d 14, ¶ 14.  
24

25 In 1989, the Montana Supreme Court declined to require fees against a state agency  
26 under the public trust doctrine where "[t]here was no failure on [the Department of Fish,

1 Wildlife and Park's] part to comply with its duties. . . [and where it] acted in good faith and  
2 in accordance with constitutional and statutory mandates." *Dearborn* at 43, 900. Ten years  
3 after declining to apply the doctrine, the Montana Supreme Court explicitly adopted the  
4 Private Attorney General Doctrine in 1999, with its decision in *Montanans for the Responsible*  
5 *Use of the School Trust v. State ex rel. Bd. of Land Comm'rs* (hereinafter "*Montrust*"), 1999 MT  
6 263, 296 Mont. 402, 989 P.2d 800.

8 Montrust had brought suit against the State Board of Land Commissioners,  
9 challenging the constitutionality of fourteen statutes relating to the Board's management of  
10 state school lands held in trust. "Concluding that ten of the statutes challenged by Montrust  
11 violated Montana's Enabling Act and Constitution and that another statute was invalid as  
12 applied, the District Court permanently enjoined eleven statutes." *Id.* ¶ 12. The District  
13 Court did not, however, award Montrust fees.

15 On appeal, the Montana Supreme Court ultimately awarded fees to Montrust,  
16 explicitly adopting the Private Attorney General Doctrine and the three-part test for its  
17 application set forth in a case decided by the California Supreme Court, *Serrano v. Priest*  
18 (Cal. 1977), 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 315. The *Serrano* court had  
19 identified "three basic factors to be considered in awarding fees on this theory. These are in  
20 general: (1) the strength or societal importance of the public policy vindicated by the  
21 litigation, (2) the necessity for private enforcement and the magnitude of the resultant  
22 burden on the plaintiff, (3) the number of people standing to benefit from the decision." *Id.*  
23 at 421-22, 812-813.

25 The Montana Supreme Court concluded that the District Court should have  
26 awarded Montrust fees under the Private Attorney General Doctrine because

1 [f]irst, Montrust has litigated important public policies that are grounded in  
2 Montana's Constitution. Second, the State argues that it had a duty to defend  
3 the statutes in the present case; thus, the State does not dispute the necessity  
4 of private enforcement of Montana's Constitution. Nor does the State dispute  
5 the magnitude of Montrust's consequent burden. Third, Montrust's litigation  
6 has clearly benefited a large class: all Montana citizens interested in  
7 Montana's public schools.

8 *Montrust*, ¶ 67. Since *Montrust*, the Montana Supreme Court has declined, in *Sunburst Sch.*  
9 *Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, 338 Mont. 259, 165 P.3d 1079, to award fees under  
10 the doctrine because the Plaintiff, having received a multi-million dollar award, "needed no  
11 additional incentive to file this lawsuit," and "[t]he private attorney general doctrine 'was  
12 not designed as a method for rewarding litigants motivated by their own pecuniary interests  
13 who only coincidentally protect the public interest.'" *Id.* at ¶ 91.

14 The Court has since emphasized that the award of fees is appropriate "only in  
15 litigation vindicating constitutional interests." *Am. Cancer Soc'y v. State*, 2004 MT 376, ¶ 21,  
16 325 Mont. 70, ¶ 21, 103 P.3d 1085, ¶ 21. Where a challenged statute is "ineffectual rather  
17 than unconstitutional," there is no "vindication of a constitutional interest" and therefore no  
18 grounds to award private attorney general fees. *Id.* Further, the court may consider  
19 whether the party which would be charged with paying the fees is the party responsible for  
20 the constitutional violation. "[I]t would be unjust to force the Counties to pay for the  
21 unconstitutional actions of the Legislature. . . . While under the private attorney general  
22 doctrine, it may be considered equitable to award attorneys' fees. . . the inequity of imposing  
23 those fees against the Defendant Counties who neither fashioned nor passed the  
24 unconstitutional law is overriding." *Finke v. State ex rel. McGrath*, 2003 MT 48 ¶ 33, 314  
25 Mont. 314, ¶ 33, 65 P.3d 576, ¶ 33.

26 In the instant case, Plaintiff has prevailed on a very substantive public policy issue:  
whether a government entity can refuse to disclose a preliminary draft of a final document

1 which itself implicates the health and welfare of thousands upon thousands of people living  
2 within the microclimate of the proposed power plant.

3  
4 While the court did not need to address the constitutionality of the statute challenged  
5 in order to determine that Great Falls had misinterpreted it, that misinterpretation infringed  
6 upon Plaintiffs constitutional right to know about and be able to observe the workings of  
7 government. This is not a case, as in *Finke*, where a local entity carried out the will of the  
8 legislature, which will was itself unconstitutional. This is a case where the plain language of  
9 the statute was misconstrued by the entity against which fees are sought. That  
10 misinterpretation also plays a role because of the "good faith" requirement articulated in  
11 *Grabow*. *Grabow* at ¶ 14. This court finds it a much too difficult stretch to conclude  
12 Defendant acted in good faith by relying on a statute explicitly related to retention of  
13 documents for posterity; disingenuous would be a more accurate description.

14  
15 The Plaintiff had no option but to seek private enforcement of the rights of its  
16 members under the Montana Constitution. The burden on them without enforcement  
17 would have been significant as they would have been placed in a position of not adequately  
18 representing its members' rights to information potentially and significantly affecting their  
19 constitutional rights to a clean and healthy environment. This court deems that this  
20 significance rises to the magnitude required by *Montrust*.

21  
22 Regarding the first *Montrust* factor, the importance of the policy vindicated, the right  
23 to know is a fundamental constitutional right and its importance cannot be overstated.  
24 Plaintiff was required to seek enforcement of that right against the City, which has an  
25 obligation to abide by the Constitution. The court is slightly more concerned about the  
26 number of people standing to benefit from the release of all preliminary drafts of the  
agreement in the City's possession. After due consideration, the pool of beneficiaries is not


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limited to MEIC's membership but includes all those members of the public who might be affected by or interested in the physical and financial aspects of the proposed generating station, for good or for ill.

For the foregoing reasons, this court finds and concludes that the *Montrust* factors have been satisfied and hereby Grants Plaintiff's request for attorney fees.

The Clerk of Court is directed to file this Order and provide copies to counsel of record.

DATED this 12 day of June 2008.

  
\_\_\_\_\_  
DISTRICT COURT JUDGE  
Hon. E. Wayne Phillips  
P. O. Box 1124  
Lewistown, Montana 59457  
Telephone: (406) 535-8028  
Facsimile: (406) 535-6076

- c: David K. W. Wilson, Jr., Esq.
- c: Peter Michael Meloy, Esq.
- c: David V. Gliko, Esq.

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