

FILED

FEB 08 2020

ANGIE STARKS Clerk of District Court
BY *[Signature]* Deputy Clerk

Shiloh Hernandez
Western Environmental Law Center
103 Reeder's Alley
Helena, MT 59601
406-204-4861
hernandez@westernlaw.org

Alex Rate
Lillian Alvernaz
ACLU OF MONTANA
P.O. Box 1968
Missoula, MT 59806
406-224-1447
406-541-0294
ratea@aclumontana.org
alvernazl@aclumontana.org

David A. Bahr (Oregon Bar No. 90199)
(Application for admission *pro hac vice* forthcoming)
Bahr Law Offices, P.C.
1035 1/2 Monroe Street
Eugene, OR 97402
(541) 556-6439
davebahr@mindspring.com

Attorneys for Plaintiff

*pd
1/12*

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

ACLU of Montana)
Foundation, Inc.,)
)
Plaintiff,)
)
vs.)
)
Montana Disaster and Emergency)
Services and Montana Division of)
Criminal Investigation,)
)
Defendants.)

(email)
Cause No. CIDV-2020-155

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

**KATHY SEELEY
PRESIDING JUDGE**

COMES NOW the Plaintiff, through counsel, and for the complaint in the captioned matter, states as follows:

INTRODUCTION

1. This is an action under the Montana Public Records Act § 2-6-1001 *et seq.* and Art. II, § 9 of the Montana Constitution for injunctive and other appropriate relief and seeking the disclosure of agency records pertaining to state and local agency preparations for protests of the Keystone XL Pipeline. Defendants Montana Disaster and Emergency Services and Montana Division of Criminal Investigation improperly withheld these records from Plaintiff, American Civil Liberties Union of Montana Foundation, Inc. (ACLU-MT), and the public. ACLU-MT seeks the immediate release of the requested records.

2. President Donald Trump approved construction of the Keystone XL Pipeline as one of his first acts in office in March of 2017. As a result of this approval, pipeline opponents commenced preparations for protesting construction.

3. Public opposition to the pipeline industry was reflected by the Dakota Access Pipeline resistance at the Sacred Stone Camp in North Dakota in 2016. Responding to those protests, law enforcement agencies employed tactics that included unlawful protestor surveillance, excessive force and criminalization of the exercise of rights of expression and assembly/association guaranteed by the First Amendment of the United States Constitution and Article II, Sections 6 and 7 of the Montana Constitution.

4. ACLU-MT learned through information requests filed under the federal Freedom of Information Act that certain federal agencies are corresponding with one another in preparation for

further Keystone XL Pipeline protest opposition. Those federal agencies are contemplating closing federal property around the Fort Peck Dam in Fort Peck, Montana to halt potential protest activity.

5. Both Indigenous and environmental activist resistance is expected in response to construction of the Keystone XL Pipeline. Because Plaintiff is concerned with coordinated law enforcement tactics to respond to or prohibit protest activity, ACLU-MT submitted state-based requests for public records regarding government activity related to the Keystone XL Pipeline in Montana.

6. Based on unlawfully incomplete responses to state and federal public records requests, it appears that two state agencies are at the center of preparations for pipeline protests: Montana Disaster and Emergency Services (DES) and the Montana Division of Criminal Investigation (DCI). These two agencies have been actively coordinating with local, state, federal, and private entities to respond to pipeline protests.

7. Both agencies' response to Plaintiff's public records requests have been deficient. DES and DCI either refused to produce the requested documents or so heavily redacted them that they are unintelligible. Further, both agencies withheld requested documents without legal justification. Finally, both agencies unilaterally—and unlawfully—imposed “gag orders” for the documents that *were* produced that purport to prevent Plaintiff from sharing the disclosed information with the public.

8. ACLU-MT requested documents from DES and DCI based on a reasonable concern that they are preparing to impede the constitutionally protected exercise of free speech and impair the

right of free association in the peaceful protest to the Keystone XL Pipeline, in particular targeting and discriminating against Indigenous demonstrators. Both DES and DCI appeared repeatedly in the documents produced by federal agencies.

9. The information ACLU-MT seeks is important to the public's oversight of law enforcement activities in Montana, especially because of how little the public knows about collaboration between state agencies and private entities regarding public opposition to Keystone XL Pipeline construction.

Jurisdiction and Venue

10. This Court has jurisdiction over this action pursuant to Mont. Code Ann. § 3-5-302 and § 2-6-1009.

11. Venue is appropriate in this Court as this is the district where Defendants are located. Mont. Code Ann. § 25-2-125.

Parties

12. Plaintiff ACLU-MT is a Montana non-profit corporation, established under the laws of the state of Montana with offices in Helena, Montana and Missoula, Montana. ACLU-MT is an organization that promotes and safeguards civil rights and civil liberties. As part of its mission, it is seeking public records from the Defendants that are relevant to its work and will be disseminated to the general public.

13. Defendant Montana Disaster and Emergency Services (DES) is within the Department of Military Affairs in the executive branch of the State of Montana. DES is a public agency in possession, custody, or control of the information and records sought by ACLU-MT, and as such, it is subject to the Montana Public Records Act pursuant to Mont. Code Ann. §§ 2-6-1002(10), (11), (13), and 2-6-1006.

14. Defendant Division of Criminal Investigation (DCI) at the Montana Department of Justice (DOJ) assists the Department of Justice achieve its mission to promote public safety. DCI is a public agency in possession, custody, or control of the information and records sought by Plaintiff, and as such, it is subject to the Montana Public Records Act pursuant to Mont. Code Ann. §§ 2-6-1002(10), (11), (13), and 2-6-1006.

Facts

The Request

15. ACLU-MT submitted right to know requests to all counties through which the Keystone XL Pipeline will traverse. ACLU-MT also submitted right to know requests to various state government agencies. In this initial February 20, 2018 request, ACLU-MT sought information from the Office of the Governor, Montana Department of Justice, Montana Highway Patrol, Montana Department of Revenue, Montana Department of Fish, Wildlife, and Parks, and other county-specific entities.

16. Specifically, pursuant to Mont. Code Ann. § 2-6-1003, ACLU-MT requested the following records from the entities noted above by sending identical requests seeking:

All records and public information generated and/or maintained by Montana Disaster and Emergency Services including but not limited to, physical documents, emails, correspondence, transcripts, meeting notes, draft administrative rules, draft ordinances, procurement requests, procurement bids, and informal meeting notes regarding:

- a. Meetings involving state law enforcement and public agency officials to develop a plan of response should protestors show up in large numbers anywhere along the Keystone route in Montana once construction begins.
- b. The law enforcement “work group” related to Keystone XL protests.

- c. Trainings for local law enforcement agencies on how to use social media sites like Facebook to their advantage.
- d. Monitoring of social media postings by anti-Keystone activists so law enforcement can gather information about when and where pipeline protests might be staged and how many may initially be involved.
- e. Any mutual aid agreements between the counties involved related to potential Keystone XL protests.
- f. The Montana Petroleum Association panel entitled, “Environmental Activism: How will it play out in Montana?”
- g. Any operations plan being developed that includes a significant number of agencies. The plan will address, among other things, the law enforcement plan for both proactive and reactive response to protest activity.
- h. The specialized 3-day crowd control training being conducted in Sidney in February.
- i. CDT team meetings related to Keystone protests (ACLU-MT is unaware of what “CDT” stands for—it was referenced in agency communications).
- j. “LEO” (law enforcement officer) workgroup meetings in Glasgow in November, 2017.
- k. DES working group meetings in Glasgow in November, 2017.
- l. Field Operations training from October 2-4, 2016 at METRA Park in Billings.

Agency Responses

17. On March 1, 2018, ACLU-MT received a letter from the agencies. The agencies sent a confirmation that DOJ had received the request and a response asking that ACLU-MT clarify that request in regards to certain DOJ departments and documentation. On March 17, 2018, ACLU-MT obliged and provided the requested clarification in letter format.

18. In a letter dated May 31, 2018, ACLU-MT further narrowed the field of requested information to “seek public records and information” in the possession of DCI or the Montana Highway Patrol regarding meetings, or other activities, to develop protest response plans, including but not limited to work groups, mutual aid agreements, operations plans, and trainings.

19. On November 5, 2018, after repeated contact from ACLU-MT, DOJ provided a response letter, a small number of documents, and an extensive privilege log. The privilege log denied disclosure of over 80 documents under the Confidential Criminal Justice Information (CCJI) statutes, relying almost exclusively on Mont. Code Ann. § 44-5-103(3), (5), (6), and § 44-5-303(1).

20. Not only did DOJ’s letter improperly justify withholding and redacting documents based on the CCJI statutes, but it also stated that the documents accompanying the letter “are provided as an accommodation... The provision of those records is not a waiver of any defense available to the Department of Justice or the requirements of the CCJI statutes.” As such, it appears that DOJ’s position is that the documents it did produce may not be disseminated to the public.

21. At no time did ACLU-MT indicate to DOJ that it agreed that the information sought from the agency was CCJI or that it would—or could—be bound by DOJ’s unilateral demand that the information should be treated as confidential.

22. On December 5, 2018, ACLU-MT responded by disputing the requested information’s status as confidential criminal justice information and rebutting DOJ’s assertion that it had a statutory right to deny disclosure. This letter requested a response no later than December 31, 2018.

23. DOJ did not provide a response until April 1, 2019, after ACLU-MT sent yet another request for a status update on March 23, 2019. In its response, DOJ’s position remained unchanged. DOJ “consider[ed] those records to be privileged confidential criminal justice information records and not subject to dissemination under Montana’s ‘right to know’ laws.”

24. So far, DES has provided two additional batches of redacted documents and privilege logs that relied upon the same CCJI statutes as DOJ. With each round of documents, the disclosures provided became increasingly redacted to the point of unintelligibility and the privilege logs have failed to meaningfully address why particular CCJI statutes apply.

25. As with DOJ's production, DES provided an accompanying letter stating that the documents "are provided as an accommodation... The provision of those records is not a waiver of any defense available to the Department of Justice or the requirements of the CCJI statutes." As such, it appears that DOJ's position is that the documents it did produce may not be disseminated to the public.

26. At no time did ACLU-MT indicate to DES that it agreed that the information sought from the agency was CCJI or that it would—or could—be bound by DES' unilateral demand that the information should be treated as confidential.

27. By its actions describe above, Defendants have violated and deprived ACLU-MT of the right to examine documents of a public body and agency and continue to violate ACLU-MT's right to know, guaranteed by Article II, Section 9, Montana Constitution, and Mont. Code Ann. § 2-6-1001 *et seq.*

Legal Claims

28. Defendants' failure to promptly make available the records sought by the Request violates Montana's public records laws.

29. The failure on the part of Defendants to produce the sought-after records within a reasonable time as required by Mont. Code Ann. § 2-6-1006 constitutes a refusal to produce the records. Refusal to produce the requested records is a violation of Mont. Code Ann. § 2-6-1003 and Art. II, Section 9 of the Montana Constitution.

30. ACLU-MT has a right to timely receipt of the requested records pursuant to Mont. Code Ann. § 2-6-1006 and the Defendants have wrongfully withheld or redacted the sought-after documents. ACLU-MT therefore has a right to costs and attorneys' fees pursuant to Mont. Code Ann. § 2-6-1009.

31. ACLU-MT also seeks a declaration pursuant to Mont. Code Ann. § 27-8-101 *et seq.* that the documents DCI and DES have already produced are public records and not subject to any claims of confidentiality.

32. DES and DCI incorrectly relied on the CCJI statutes for their refusal to disclose the relevant records. The CCJI statutes are inapplicable because there is no past or ongoing criminal investigation or criminal operation here, only the potential for future protests.

33. The records at issue in this Complaint pertain to governmental surveillance of citizens joining together to peacefully protest environmentally and culturally harmful government decisions. This activity is not a crime—it is the exercise of rights of expression and assembly/association guaranteed by the First Amendment of the United States Constitution and Article II, Sections 6 and 7 of the Montana Constitution.

34. Disclosure of the records at issue in this Complaint will substantially benefit the public interest.

Requested Relief

WHEREFORE, ACLU-MT requests that this Court:

1. Order Defendants to immediately disclose the requested records in their entirety and make copies available without cost to ACLU-MT;
2. Declare that those documents already produced by DES and DCI are not confidential and as such may be disseminated to the public;

3. Award ACLU-MT its costs and reasonable attorneys' fees incurred in this action; and
4. Grant such other relief as the Court may deem just and proper.

DATED this 10TH day of February, 2020.

Respectfully submitted,



Lillian Alvernaz
Alex Rate
ACLU OF MONTANA
P.O. Box 1968
Missoula, MT 59806
406-541-0294
406-224-1447
alvernazl@aclumontana.org
ratea@aclumontana.org

Shiloh Hernandez
Western Environmental Law Center
103 Reeder's Alley
Helena, MT 59601
406-204-4861
hernandez@westernlaw.org

David A. Bahr (Oregon Bar No. 90199)
(Application for admission
pro hac vice forthcoming)
Bahr Law Offices, P.C.
1035 ½ Monroe Street
Eugene, OR 97402
(541) 556-6439
davebahr@mindspring.com

Attorneys for the Plaintiff