Montana Law Review Online

Volume 86 Article 1

9-11-2024

PREVIEW: O'Neill v. Gianforte: *Is executive privilege a threat to Montana's unique constitutional right to know?*

PREVIEW; O'Neill v. Gianforte: *Is executive privilege a threat to Montana's unique constitutional right to know?*

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The Montana Supreme Court will hear oral argument in *O'Neill v. Gianforte* on Friday, September 13, 2024, at 9:00 a.m. at The Wilma Theatre in Missoula, Montana. Dale Schowengerdt and John Semmens are expected to appear on behalf of Defendant-Appellant Governor Greg Gianforte. Constance Van Kley, Raph Graybill, and Rylee Sommers-Flanagan are expected to appear on behalf of Plaintiff-Appellee Jayson O'Neill.

I. INTRODUCTION

In *O'Neill v. Gianforte* the Court will determine whether the First Judicial District Court erred when it denied Defendant-Appellant Governor Gianforte's cross-motion for summary judgment in full and granted Plaintiff-Appellee Jayson O'Neill's motion for summary judgment in part, ruling that no executive privilege exists in Montana and O'Neill is entitled to obtain pre-decisional government documents under Montana's constitutional right to know. The right to know is set out in Article II, Section 9 of the Montana Constitution, and states: "[n]o 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."[1] This decision may either change Montana's constitutional right to know, or solidify it, giving it more deference than ever.

The main issue in this matter is whether the district court correctly interpreted the Framers' intent and relevant case law when it determined exceptions to the right to know must pre-exist Montana's Constitution and therefore, since executive and deliberative process privileges do not, neither can be used to deny the public access to internal documents passed between the Governor's Office and executive agency staff or the state's legal team. The Court's decision will significantly impact all Montanans and their right to access and examine documents held by a public body.

Section II of this Preview outlines the factual and procedural background of the case and the district court's reasoning; Section III summarizes the parties' arguments; Section IV provides an analysis of the arguments; and Section V concludes by acknowledging the interests of

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[1] MONT. CONST. art. II, § 9.

both parties and the impact a new privilege and an exception to the right to know could have on future Montana governors and members of the public.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

On May 13, 2021, shortly after the 2021 legislative session, Plaintiff-Appellee Jayson O'Neill submitted a public information request to the Governor's Office requesting access to "any 2021 Agency Bill Monitoring Forms ("ABMs") sent to or from (1) any member of the Governor's legal staff or (2) Lieutenant Governor Juras."[2] The Governor's Office denied O'Neill's request, claiming the ABMs and related correspondence were protected in their entirety under the attorney-client privilege.[3]

O'Neill responded by asserting the Montana Constitution does not permit a government entity to categorically withhold a public document because some of its content may implicate the attorney-client privilege.[4] O'Neill "requested that the Governor produce the responsive documents and withhold information through redaction and/or a privilege log."[5]

The Governor again claimed that the documents were entirely privileged, and that redacted ABMs and related correspondence, or a privilege log of the same, would "still 'disclose which bills were reviewed, and by whom, with the effect of chilling candid legal communication among agency counsel.'"[6] The Governor drew parallels to executive privilege and deliberative process privilege and stated he would only "produce the responsive documents and a privilege log 'to a court for *in camera* review if directed by that court.'"[7]

B. Procedural Background

O'Neill filed a complaint against the Governor to compel him to produce the documents and challenged "whether Montana law permitted Montana's Governor to protect this narrow category of documents."[8] He focused the briefing for his summary judgment motion on whether

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[2] Order on Cross Motions for Summary Judgment at 2, *O'Neill v. Gianforte*, No. DV-2021-951 (Mont. Dist. Ct. Dec. 14, 2022) [hereinafter District Court Order] (citing Complaint, Exhibit A (emails between J. O'Neill and G. Gelinas)).
[3] *Id.* at 2 (citing Complaint, Exhibit B (letter from A. Milanovich to J. O'Neill (July 9, 2021))).
[4] *Id.* (citing Complaint, Exhibit C (letter from J. O'Neill to A. Milanovich (July 22, 2021))).
[5] *Id.*
[6] *Id.* (quoting Complaint, Exhibit D (letter from A. Milanovich to J. O'Neill (Sept. 2, 2021))) (internal quotations omitted).
[7] *Id.* at 2–3 (quoting Complaint, Exhibit D (letter from A. Milanovich to J. O'Neill (Sept. 2, 2021))).
[8] Appellant's Opening Brief at 2, *O'Neill v. Gianforte*, No. DA-23-0555 (Mont. Jan. 12, 2024).

Montana law recognizes executive privilege.[9] Governor Gianforte filed a cross-motion for summary judgment focusing on the same.[10] On December 14, 2022, the district court granted Plaintiff-Appellee O'Neill's motion in part and denied Defendant-Appellant Governor Gianforte's motion in full.[11] In its ruling, the district court ordered the Governor to provide responsive documents and a privilege log for an *in camera* review so that it could examine the degree to which the documents were covered by the attorney-client privilege.[12] The district court further ruled, as a matter of law, there is no form of executive privilege in Montana.[13]

Following the summary judgment decision, a Montana executive agency attorney, Cort Jensen, contacted the Governor's Office with personal knowledge of historical context establishing how the ABMs originated as pre-decisional communications and were internally used.[14] After hearing from Cort Jensen, rather than produce the documents for *in camera* review, the Governor filed a Rule 60(b) motion for relief from the district court's order based on newly discovered evidence.[15]

On August 7, 2023, the district court denied the Governor's Rule 60(b) motion.[16] Additionally, on September 22, 2023, the district court certified its summary judgment order as final.[17] The Governor then appealed to the Montana Supreme Court.[18]

C. The District Court's Reasoning

The question presented to the district court was

> whether a form and related communications shared between executive branch agencies and the Governor are subject to public disclosure under Montana's constitutional right to know . . . or if they are entirely privileged under one or more privilege doctrines: (1) the executive communications privilege, (2) the deliberative process privilege, or (3) the attorney-client privilege.[19]

The district court centered its denial of the Governor's motion on the intent of the Framers and case law behind Montana's right to know provision.

The district court first considered whether the ABMs and related correspondence are categorically exempt from the right to know under some form of executive privilege.[20] In an attempt to align with the Framers'

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[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] District Court Order, *supra* note 2, at 18.
[13] *Id.* at 17.
[14] Appellant's Opening Brief, *supra* note 8, at 2.
[15] Appellee's Answer Brief at 3, *O'Neill v. Gianforte*, No. DA-23-0555 (Mont. Mar. 12, 2024).
[16] Appellant's Opening Brief, *supra* note 8, at 2.
[17] *Id.* at 3.
[18] *Id.*
[19] District Court Order, *supra* note 2, at 1.
[20] *Id.* at 8.

intent, the district court reasoned that a privilege can shield a public body, such as the Governor, from the public's right to know only if the Montana Constitutional Convention "'deliberations *clearly indicate[d]*' that privilege would survive the Constitution's enactment."[21] To this point, the district court emphasized the delegates explicitly discussed the attorney-client privilege, the privilege protecting judicial deliberations, and confidential criminal justice information, but "[a]t no time did the delegates discuss executive or gubernatorial privileges that would exempt the Governor's deliberations or any documents pertaining to them."[22] The district court reasoned that the United States Supreme Court did not recognize executive privilege until 1974, and therefore, "it is not clearly indicated that the Framers even knew of executive privilege, let alone intended it to survive Montana Constitution's enactment."[23]

The district court next addressed the Governor's assertion of deliberative process privilege. It was unpersuaded by the Governor's argument that the current case is analogous to cases where the judicial deliberative process privilege has been successfully asserted.[24] The district court rejected the Governor's argument that this case is analogous to *Mclaughlin v. Montana State Legislature*[25] because in this matter "it is not a rival branch of government requesting the documents, but a 'person.'"[26]

The district court next addressed the Governor's public policy argument that executive privilege serves the public interest "by allowing the Governor and agency staff to have frank discussions, allowing them to 'freely exchange facts, (sometimes conflicting) analysis, and criticism with each other while debating proposed government actions.'"[27] The district court reasoned that, while the Governor's argument could be true as a matter of policy, "it does not comport with the plain language of the right to know provision, nor does it align with the Framers' intent."[28] Ultimately, the district court found O'Neill made a more persuasive policy argument that is closely aligned with the Framers' intent of an open government.[29] The district court stated:

> If Montana courts were to recognize the kind of privilege the Governor has described, it is unclear whether *any* documents in the Governor's control would remain subject to disclosure. Recognizing a broad executive privilege would effectively gut the right to know as it applies

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[21] *Id.* at 10 (quoting Nelson v. City of Billings, 412 P.3d 1058, 1066 (Mont. 2018)) (emphasis added).
[22] *Id.*
[23] *Id.* (citing *Nelson*, 412 P.3d at 1066).
[24] *Id.* at 13.
[25] 493 P.3d 980 (Mont. 2021).
[26] District Court Order, *supra* note 2, at 13 (citing MONT. CONST. art. II, § 9).
[27] *Id.* at 14 (quoting Defendant's Combined Brief in Support of Defendant's Cross Motion for Summary Judgment, & In Opposition to Plaintiff's Motion for Summary Judgment at 12, *O'Neill v. Gianforte*, No. DV-2021-951 (Mont. Dist. Ct. July 1, 2022)).
[28] *Id.*
[29] *Id.*

> to the Executive Branch because every document may inform the Governor's decision making in some way.[30]

Finally, the district court addressed the Governor's assertion of the attorney-client privilege.[31] The district court considered whether every state attorney in Montana's executive branch is the Governor's attorney and whether the AMBs were kept within the confines of the attorney-client privilege.[32] To answer its questions, the district court held that "an *in camera* review is necessary to determine who sent what, to whom, and whether they are within" the Governor's legal staff, and therefore subject to the privilege.[33] Upon the district court's inspection, O'Neill would be entitled to receive documents that are not protected by the attorney-client privilege.[34]

III. SUMMARY OF ARGUMENTS

A. Governor Gianforte's Arguments

Governor Gianforte raises one issue on appeal: "[d]oes Montana law recognize an executive privilege that protects from public disclosure documents Montana's Governor uses during pre-decisional deliberations containing frank advice from agency staff about whether the Governor should sign or veto proposed legislation?"[35]

The crux of the Governor's argument is that the district court erred when it determined executive privilege should not be an exception to the right to know because such a privilege is deeply rooted in the American legal system and necessary for the integrity of government.

1. Constitutional Argument

In his opening brief, Governor Gianforte argues that the Framers of the Montana Constitution drafted the right to know intending for courts to flesh out exceptions over time.[36] The Governor asserts executive privilege and/or deliberative process privilege meet exception criteria previously recognized by the Montana Supreme Court and intended by the Framers.[37] The Governor describes executive and deliberative process privilege as creating a protected space for him to receive "unflinching advice" and

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[30] *Id.* at 15 (emphasis added).
[31] *Id.*
[32] *Id.* at 16.
[33] *Id.* at 16–17.
[34] *Id.* at 18.
[35] Appellant's Opening Brief, *supra* note 8, at 1.
[36] *Id.* at 12.
[37] *Id.*

"blunt criticism" when making decisions about State policy so he can properly fulfill his constitutional duties.[38]

a. The Framers' Intent

The Governor first asserts the right to know was never intended to be absolute.[39] The Framers recognized that the parameters of the right to know would be interpreted over time in the context of particular factual situations in accord with the framework of true constitutional principles.[40] The Governor suggests the Framers recognized two bases for exceptions to the right to know: (1) exceptions that are deeply rooted in the American legal system, such as in common law;[41] and (2) privileges that are necessary for the integrity of government.[42]

The Governor contends the district court added a "twist" when it concluded "privileges can be recognized only when the Framers 'clearly indicated' [the privileges'] existence."[43] He suggests there is nothing within the Constitutional Convention debates that shows the Framers intended to compile a comprehensive list of privileges that would survive the right to know.[44] Rather, the Framers tasked the courts with refining exceptions rooted in common law and necessary for the integrity of government.[45] The Governor argues executive privilege and deliberative process privilege fall into both categories.[46]

b. American Legal System Roots

The Governor next makes a historical argument that executive privilege is so well-grounded in common law that "[l]egal scholars have traced executive privilege roots to the centuries-old English 'crown privilege.'"[47] In addition, at least 12 state courts recognize executive privilege, despite having statutes or constitutional provisions establishing a right to access government documents, and the United States Supreme Court and federal circuit courts also recognize the privilege.[48] "Those state and federal courts acknowledge that the common law and separation of

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[38] *Id.* at 15.
[39] *Id.* at 17.
[40] *Id.* (citing Nelson v. City of Billings, 412 P.3d 1058, 1065–66 (Mont. 2018) (quoting 7 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 2489 (1981)).
[41] *Id.* at 18 (quoting *Nelson*, 412 P.3d at 1067–68).
[42] *Id.* (quoting *Nelson*, 412 P.3d at 1066).
[43] *Id.* at 19 (quoting District Court Order, *supra* note 2, at 9–10).
[44] *Id.* at 19–20.
[45] *Id.* at 20.
[46] *Id.*
[47] *Id.* at 21 (quoting Matthew W. Warnock, *Stifling Gubernational Secrecy: Application of Executive Privilege to State Governors*, 35 CAP. UNIV. L. REV. 983, 986–87 (2007)).
[48] *Id.* at 22.

powers provides a narrow space for candid and exhaustive policy debates outside public scrutiny."[49]

c. Necessary for the Integrity of Government

The Governor next maintains that if pre-decisional deliberations are subject to public disclosure, he will not get candid advice from the executive agency staff members who are best qualified to give it.[50] Human nature dictates Montana's executive agency staff would be "unwilling to provide frank advice to the Governor if doing so could expose themselves and their agencies to legislative retaliation, litigation, or other criticism focused on unfiltered, pre-decisional discussions that could be taken out of context or misunderstood."[51]

The Governor argues he and his staff "rely on the advice and deliberations in the ABMs to determine whether the Governor should exercise his constitutional veto power."[52] He states the information Montana governors receive from ABMs is the type of information "specifically contemplated by Article VI, Section 15," which provides the Governor "may require information from officers of the executive branch upon any subject relating to the duties of their respective offices."[53] In short, the Framers adopted Article VI, Section 15 to ensure the Governor had enough information to intelligently engage in private deliberations with executive agency staff, which in turn, allows him to make the best decisions for the public.[54] The Framers never suggested those deliberations must be made public.[55] Rather, the Framers intended to enhance the Governor's constitutional powers under Article VI, Section 15, and they could not have logically intended to undermine the exercise of those powers by requiring the Governor's pre-decisional documents to be made public.[56]

The Governor further argues deliberative process privilege is not unlike the privilege protecting judicial deliberations.[57] "A Montana court is protected from public observation when engaged in private judicial deliberations prescribed by Montana's Constitution, and documents related to such deliberations are not allowed to become public" because such public disclosure would erode the ability of courts to do their job

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[49] *Id.* at 22–23.
[50] *Id.* at 27.
[51] *Id.* at 27–28 (citing Times Mirror Co. v. Super. Ct., 813 P.2d 240, 245–46 (Cal. 1991); United States v. Nixon, 418 U.S. 683, 705 (1974)).
[52] *Id.* at 28 (citing MONT. CONST. art. VI, § 10).
[53] *Id.* at 28–29 (quoting MONT. CONST. art. VI, § 15).
[54] *Id.* at 29.
[55] *Id.*
[56] *Id.* at 29–30.
[57] *Id.* at 31.

effectively.[58] The Governor argues this same type of protection should apply to the Montana Governor when "engaged in specific deliberations prescribed by Montana's Constitution."[59] Just as the judicial branch finds it necessary to keep their deliberations private in order to do their job effectively, the Governor argues keeping executive deliberations private is necessary for the executive branch.[60]

The Governor then refutes the district court's distinction of these facts to those in *McLaughlin*. The Governor claims the district court "misses the point" because a private person requesting documents from the executive branch through the judicial branch is essentially the same as the legislative branch requesting documents from the executive branch because both circumstances "upset[] the delicate balance of the separation of powers" that executive or deliberative process privilege seek to protect.[61]

To bolster his arguments, the Governor claims the executive branch will not go unchecked if Montana recognizes an executive or deliberative process privilege.[62] The Governor defends that the executive privilege is a qualified privilege and proposes three safeguards to prevent its abuse: (1) the privilege only applies to a narrow class of pre-decisional and deliberation documents; (2) the privilege is always subject to review; and (3) a court can order production of the privileged documents upon a showing of sufficient need.[63]

B. O'Neill's Arguments

The core of Plaintiff-Appellee O'Neill's argument is that the Montana Constitution favors transparency and public accountability. He states, "[t]he very concept [of executive or deliberative process privilege] is hostile to our constitutional system of government, through which the Governor serves and is accountable to the people—not the other way around."[64] O'Neill also argues the Governor has not met his burden of proof and his appeal should be rejected due to fatal procedural defects.[65]

1. Constitutional Argument

O'Neill asserts the Montana Constitution is plain and clear: "the Governor and state agencies need no protection from the public. Their

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[58] *Id.* (citing McLaughlin v. Mont. State Legis., 493 P.3d 980, 994–95 (Mont. 2021)).
[59] *Id.* at 31–32.
[60] *Id.* at 32.
[61] *Id.*
[62] *Id.* at 33.
[63] *Id.*
[64] Appellee's Answer Brief, *supra* note 15, at 13.
[65] *Id.* at 15.

potential power is the very reason for the public's right to know; not the basis for a new, categorical exception to it."[66]

O'Neill argues the Framers intended the right to know to be unique[67] and extend to government deliberations.[68] He asserts there is no historical evidence of an executive privilege existing prior to or being written into Montana's Constitution.[69] Furthermore, he argues the Governor's policy arguments cannot "override the plain text of the Constitution."[70]

a. Montana's Unique Right to Know Provision

In short, "Montana's right to know has no equal."[71] "Only Montana has a provision that does not anticipate legislative restrictions [to government documents.]" [72] O'Neill argues the Framers intended to "essentially [declare] a constitutional presumption that every document within the possession of public officials is subject to inspection" [73] evidenced by the Framers' explicit desire to "'creat[e] an atmosphere of openness in government' because transparency would increase 'confidence in government.'"[74]

O'Neill adds, the right to know extends to all "documents generated or maintained by a public body which are somehow related to the function and duties of that body." [75] O'Neill contends ABMs are created and maintained by state agencies and are "related to the function and duties" of those agencies and the Governor's office.[76] They are precisely the type of documents the Framers intended to fall firmly within the scope of the right to know. [77] "O'Neill's information request implicates his constitutional right to know, and the requested information is presumptively subject to inspection."[78]

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[66] *Id.* at 16.
[67] *Id.*
[68] *Id.*
[69] *Id.* at 17.
[70] *Id.*
[71] *Id.* at 21.
[72] *Id.* at 21–22.
[73] *Id.* at 23 (quoting Bryan v. Yellowstone Cnty. Elem. Sch. Dist. No. 2, 60 P.3d 381, 390 (Mont. 2002)).
[74] *Id.* at 22–23 (quoting 5 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 1670 (1981)).
[75] *Id.* at 23 (citing Becky v. Butte-Silver Bow Sch. Dist. No. 1, 906 P.2d 193, 197 (Mont. 1995)).
[76] *Id.* at 24 (citing *Becky*, 906 P.2d at 197).
[77] *Id.*
[78] *Id.* (citing *Bryan*, 60 P.3d at 390; Nelson v. City of Billings, 412 P.3d 1058, 1065 (Mont. 2018)).

b. No Historical Support for Executive and Deliberative Process Privilege

O'Neill argues the Court need not look further than its own case law when deciding if an executive privilege exists in Montana.[79] The Montana Supreme Court has "expressly held that the right to know is 'unique, clear and unequivocal' and accordingly the Court 'refuses to resort to law from other forums' in its interpretation."[80] As such, other courts' decisions should not be binding in Montana.[81] O'Neill asserts a more pointed question, which is whether an executive or deliberative process privilege was contemplated by the Framers and exists under the Montana Constitution.[82]

O'Neill argues that for a privilege to be valid, it must pre-exist Montana's Constitution.[83] "In contrast to long-recognized privileges, executive and deliberative process privilege were not 'ingrained in Montana's legal landscape at the time the 1972 Montana Constitution was drafted and ratified.'"[84] In fact, executive privilege was not recognized on a federal level until *United States v. Nixon*,[85] two years after the Montana Constitution was ratified.[86]

To directly refute executive privilege, O'Neill argues executive privilege is a modern development and is not based in historical fact.[87] The idea of executive privilege arises from the separation of powers, and while it is true that claims of privilege are likely to increase the judiciary's entanglement in executive branch functions by requesting citizens to go to court before they can review gubernatorial communications, the "Governor does not need the Court to protect him from the people he serves."[88] "And while the Governor argues that he would benefit from secrecy, the Framers drafted the right to know because they knew the people would benefit from transparency."[89]

To directly refute deliberative process privilege, O'Neill argues its historical support is directly "repugnant" to Montana's constitutional right to know.[90] Deliberative process privilege derives from "crown privilege" which existed because the King of England was not accountable to anyone.[91] The Governor, on the other hand, "serves at the pleasure of the

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[79] *Id.* at 27.
[80] *Id.* (quoting Associated Press v. Bd. of Pub. Educ., 804 P.2d 376, 379 (Mont. 1991)).
[81] *Id.*
[82] *Id.* at 28.
[83] *Id.* at 28–29 (citing *Nelson*, 412 P.3d at 1068))
[84] *Id.* at 29.
[85] 418 U.S. 683 (1974).
[86] Appellee's Answer Brief, *supra* note 15, at 29.
[87] *Id.* at 30.
[88] *Id.* at 32 (citing Babets v. Sec'y of Exec. Off. of Hum. Servs., 526 N.E. 1261, 1263 (Mass. 1988)).
[89] *Id.*
[90] *Id.* at 34.
[91] *Id.*

people, in whom political power is vested and from whom all political power is derived."[92] "The people are entitled to information about the job the Governor is doing on their behalf."[93]

Lastly, O'Neill argues executive and deliberative process privilege are not necessary for the integrity of government.[94] "Popular sovereignty, the concept that the people are 'their own Governors' and not merely the governed, finds an enforcement mechanism in the constitutional right to know, through which the people may 'arm themselves' with knowledge about the government that serves them." [95] Executive privilege or deliberative process privilege would gut this mechanism, leaving the public in the dark.[96] Simply put, the Framers' view that transparency breeds confidence in government and enhances popular sovereignty is the correct one, evidenced by a functioning executive without any special privileges for over 50 years.[97]

c. The Governor's Burden of Proof

O'Neill next argues the Governor has not met his burden of proof because he does not explicitly identify which privilege he asserts.[98] In response to O'Neill's information request, the Governor only cites the attorney-client privilege.[99] On appeal, the Governor asserts either the executive or deliberative process privilege would exempt from the right to know communications related to gubernatorial decision-making between agencies and the Governor.[100] The Governor does not demonstrate how courts should review claims for executive privilege, even now.[101] "In the right to know context, the burden falls on the government to prove that a privilege applies." [102] That burden cannot be met here where the government "categorically" denied a public information request then fails to identify and define its burden of proof.[103]

2. The Jensen Declaration

O'Neill's last argument is that Cort Jensen's declaration should be stricken. The Governor cites to the testimony of Cort Jensen throughout

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[92] *Id.* (citing MONT. CONST. art. II, § 1).
[93] *Id.*
[94] *Id.* at 35.
[95] *Id.* at 25.
[96] *Id.* at 18.
[97] *Id.* at 35.
[98] *Id.*
[99] *Id.* at 35.
[100] *Id.* at 36.
[101] *Id.* at 38.
[102] *Id.* (citing Bryan v. Yellowstone Cnty. Elem. Sch. Dist. No. 2, 60 P.3d 381, 390 (Mont. 2002); Nelson v. City of Billings, 412 P.3d 1058, 1070 (Mont. 2018)).
[103] *Id.*

his opening brief, but the Governor cannot rely on the Jensen declaration as part of his appeal because the testimony was not offered to the district court at summary judgment; rather, it was filed six months later through a Rule 60(b) motion.[104] The Governor does not appeal the denial of his Rule 60(b) motion, and the district court did not certify the issue for immediate appeal.[105] Therefore, the Montana Supreme Court must reject the Cort Jensen declaration and strike it from the Governor's opening brief.[106] Further, O'Neill challenges, if the information Jensen provided is to be considered relevant to the current dispute, it should have been relevant to the Governor when he denied O'Neill's information request.[107] O'Neill asserts the Governor's maneuvers around civil procedure should not disturb the district court's order.[108]

IV. ANALYSIS

A. Context, Issue, & Roadmap

The right to know is located within Montana's Constitution under the declaration of rights, Article II, Section 9. The right is not absolute. However, executive privilege is nowhere to be found in Montana's Constitution and has not been established in Montana by case law or statute. As a case of first impression, the question the Court must grapple with is whether Montana should recognize an executive privilege for a narrow class of documents which advise the Governor to sign or veto legislation.

This analysis discusses the Framers' intent behind the right to know and whether the Montana Constitution leaves room for an executive privilege. It then highlights two of many options for the Court and their potential implications on Montanans' right to know: first, the Court could establish an executive privilege in Montana, pivoting from its prior interpretation of the right to know, which would change how Montanans exercise this right; and second, the Court could refuse to establish an executive privilege, leaving the right to know untouched and intact while affirming the district court's order.

B. The Framers' Intent

The intent of the Framers controls the Court's interpretation of a constitutional provision.[109] The Court must discern the Framers' intent

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[104] *Id.* at 39–40.
[105] *Id.* at 40.
[106] *Id.* at 39.
[107] *Id.* at 43.
[108] *Id.*
[109] Nelson v. City of Billings, 412 P.3d 1058, 1064 (Mont. 2018) (citing Keller v. Smith, 553 P.2d 1002, 1006 (Mont. 1976)).

from the plain meaning of the language used and may resort to extrinsic aids only if the express language is vague or ambiguous.[110] In the context of clear and unambiguous language, the Court has long held it must determine the constitutional intent not only from the plain meaning of the language, but also in light of "historical and surrounding circumstances under which the Framers drafted the Constitution, the nature of the subject matter they faced, and the objective they sought to achieve."[111] The Montana Supreme Court has held the language of Article II, Section 9 is "unique, clear, unambiguous," and "speaks for itself without the requirement for extrinsic aids or rules of construction."[112]

The Framers drafted Article II, Section 9, in broad and general terms.[113] "In its report to the whole convention, the Bill of Rights Committee explained that the purpose of the provision was to 'presume the openness of government documents and operations' in order to combat 'government's sheer bigness, [which] threatens the effective exercise of citizenship.'" [114] The Framers recognized, however, that like other fundamental rights protected in the federal and state constitutions, the parameters of the right to know would be interpreted "over time in the context of particular factual situations."[115] During debate on Article II, Section 9, the delegates acknowledged instances, unrelated to individual privacy concerns, in which the right to know would not apply, including when "necessary for the integrity of government."[116] However, the "convention deliberations clearly indicate that the Framers did not intend for Article II, Section 9, to abolish, supersede, or alter pre-existing legal privileges applicable to government proceedings and documents."[117]

It seems the Framers intended to establish exceptions to the right to know in particular factual situations only if those exceptions are necessary for the integrity of government and do not override a pre-existing privilege. As to this, the Governor asserts policy arguments explaining why executive privilege is necessary for the integrity of the government, as long as certain safeguards are in place. However, O'Neill likewise presents policy arguments as to why the right to know is essential to the public and how an executive privilege endangers that right. The Court's decision will ultimately come down to which policy best aligns with the Framers' intent in creating the right to know: public transparency or a strong and protected executive branch.

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[110] *Id.*
[111] *Id.* (citing Rankin v. Love, 232 P.2d 998, 1000 (Mont. 1951)).
[112] *Id.* at 1063 (quoting Great Falls Trib. v. Dist. Ct. of Eighth Jud. Dist., 608 P.2d 116, 119 (Mont. 1980)).
[113] *Id.* at 1065.
[114] *Id.* (citing MONTANA CONSTITUTIONAL CONVENTION, BILL OF RIGHTS COMMITTEE PROPOSAL 613 (1972)).
[115] *Id.* at 1066.
[116] *Id.* (citing 5 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 1678 (1981)).
[117] *Id.*

The Governor further argues executive privilege should be an exception to the right to know because it is deeply rooted in the American legal system. He uses this reasoning because the Court in *Nelson v. City of Billings*[118] justified the attorney-client privilege as an exception to the right to know due to its deep legal roots. However, the *Nelson* Court only demonstrated the "deep roots" of attorney-client privilege because it pre-existed the Montana Constitution and is necessary for the integrity of government. Thus, it seems the Framers did not intend for privileges deeply rooted in the American legal system to serve as exceptions to the right to know.

Further, the district court held an executive privilege cannot be established in Montana because the Framers did not "clearly indicate" the privilege in their deliberations. Yet, the *Nelson* Court set forth: "[t]he convention deliberations clearly indicate that the Framers did not intend for Article II, Section 9, to abolish, supersede, or alter pre-existing legal privileges applicable to government proceedings and documents."[119] From this language, it seems the Framers did not intend the only exceptions to the right to know to be those that were "clearly indicated" during the constitutional deliberations. This leaves the door open for the Governor to persuade the Court that the district court wrongly interpreted the Framers' intent, and that an executive privilege will not abolish, supersede, or alter pre-existing privileges, and therefore should be recognized in Montana.

Based on the interpretation and analysis above, if the Court were to establish an exception to the right to know that is not tied to a narrow individual privacy interest, it will need to couch its analysis in a privilege that is necessary for the integrity of government.

C. Establishing a Narrow Executive Privilege

Notwithstanding the above, if the Court were to grant an executive privilege as necessary for the integrity of government, it will likely narrow its decision specific to these facts.

To avoid effectively gutting the right to know, as the district court and O'Neill predict will occur if an executive privilege is upheld, the Court will have to provide strict parameters, such as limiting the privilege to only apply to certain 2021 ABMs, as opposed to recognizing executive privilege as a doctrine. This will likely raise more concerns and litigation in the future if the current Governor or future governors attempt to expand the privilege, deny records, and further chip away at the right to know.

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[118] 412 P.3d 1058, 1064 (Mont. 2018).
[119] *Id.* at 1066.

D. Preserving the Right to Know

On the other hand, the Court could favor O'Neill's argument that exceptions to the right to know must pre-exist Montana's Constitution, and because executive or deliberative privilege do not, they cannot be exceptions. This is the most likely outcome considering "the right to know is a fundamental right subject to the highest degree of protection."[120] It is unlikely the Court will jeopardize this fundamental right; even the slightest possibility that an executive privilege will be abused or hinder government transparency will likely prevent the Court from establishing an executive or deliberative process privilege.

Article II, Section 9 protects the right to observe all deliberations of public bodies and agencies. The ABMs are exactly that—documents used in deliberating. The Governor's position renders Article II, Section 9's protections meaningless.

If an executive privilege is not recognized, the right to know will likely remain untouched; the district court's order will be affirmed; and the matter will be remanded for an *in camera* review of the documents, where only true attorney-client communications will be redacted. In other words, O'Neill may be afforded redacted access to his requested ABMs.

V. CONCLUSION

The issue in *O'Neill v. Gianforte* presents a question of first impression for the Court and stands to alter the current interpretation and exercise of Montana's right to know. Given Montana's incomparable and unique right to know provision, the Montana Supreme Court will consider this issue carefully, provide clarity on the Framers' intent to the parties and Montanans, and determine whether our constitutional right to know is at risk from establishing an executive privilege.

[120] *Id.* at 1064 (citing Walker v. State, 68 P.3d 872, 883 (Mont. 2003)).