



# ENVIRONMENTAL QUALITY COUNCIL

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To: Environmental Quality Council  
From: Joe Carroll, Staff Attorney  
Date: December 20, 2019  
Re: Public Disclosure of FWP Data

## I. Summary

The Fish, Wildlife & Parks (FWP) Department has received public records requests for the location of animals tracked by FWP. In 2019, the Legislature passed Senate Bill 349, which bans the use of "exact coordinate location data" obtained from FWP to harm, harass, or kill fish or wildlife. Other states have prohibited or limited the disclosure of certain hunting and wildlife information. In Montana, the state constitution provides a fundamental right to examine government documents. This right is balanced against the demands of individual privacy, competing constitutional rights, and certain other exceptions.

## II. Montana Public Disclosure Law

### II.A--Overview

Montana public disclosure law relevant to this study include:

- Article II, section 9, of the Montana Constitution;
- case law articulating Article II, section 9, and individual privacy;
- competing constitutional provisions that balance against Article II, section 9;
- exceptions to Article II, section 9, detailed by delegates to the 1972 Constitutional Convention;
- 2-6-1001, MCA through 2-6-1020, MCA; and
- 87-6-222, MCA.

### II.B--Constitutional Framework

Article II of the Montana Constitution is the Declaration of Rights. Section 9 provides:

**Right to know.** No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

The Montana Supreme Court describes the right to know as a *fundamental right* that has created "a constitutional presumption that every document within the possession of public officials is subject to inspection."<sup>1</sup> Courts apply *strict scrutiny* to government actions that infringe on fundamental rights. For a statute to pass strict scrutiny, the government must show that the statute is:

- for a compelling state interest;
- closely tailored to achieving only that interest; and
- the least onerous way to achieve that interest.<sup>2</sup>

The Montana Supreme Court has explained that the delegates at the 1972 Constitutional Convention cautioned "that the right to know is not absolute," and "would be subject to interpretation and considered together with other constitutional rights and existing laws."<sup>3</sup> In addition to the individual privacy consideration, the presumption for disclosure may be overcome by:

- competing constitutional provisions;<sup>4</sup>
- attorney-client privilege and *work-product* privilege<sup>5</sup> (documents demonstrating a lawyer's mental processes);
- the state *police power* (a health/safety/welfare exception, e.g. for ongoing criminal investigations)<sup>6</sup>; and
- a *government integrity* exception (for "certain functions of government in securing property for the operation of government to serve the citizen."<sup>7</sup>).

The Montana Supreme Court has also explained that a government agency can assert the privacy interest of another.<sup>8</sup> A privacy interest requires that the individual have a subjective or actual expectation of privacy and that society is willing to recognize that expectation as reasonable.<sup>9</sup>

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<sup>1</sup>Nelson v. City of Billings, 2018 MT 36, at P17.

<sup>2</sup>See Pfof v. State (1985), 219 Mont. 206, at 222.

<sup>3</sup>Nelson, at P18 and P19.

<sup>4</sup>Id.

<sup>5</sup>Nelson, at P30.

<sup>6</sup>Nelson at P19.

<sup>7</sup>Nelson, at P21, quoting Montana Constitutional Convention, Verbatim Transcript, March 7 1972, pp. 1677-78, 1680.

<sup>8</sup>Belth v. Bennett, 227 Mont. 341, at 345.

<sup>9</sup>See, Montana Human Rights Div. v. Billings, 199 Mont. 434, at 442.

## II.C--Statutes

Title 2, chapter 6, MCA, provides the statutory framework for public records requests. Part 10 provides general provisions. Section 2-6-1003(1), MCA, states that ". . . every person has a right to examine and obtain a copy of any public information of this state." It provides exceptions for public safety and historical records.<sup>10</sup> Section 2-6-1006, MCA, requires agencies to respond in a timely manner by making the information available or providing an estimate of time and fees it will take to fulfill the request.<sup>11</sup> If an agency denies an information request, it must provide a written explanation, and the requester may file a complaint in District Court, pursuant to 2-6-1009, MCA.<sup>12</sup>

Section 2-6-1101, MCA, grants the Secretary of State rulemaking authority "to ensure the proper management and safeguarding of public records."<sup>13</sup> These rules are at Title 44, chapter 14, of the Administrative Rules of Montana.<sup>14</sup>

Title 2, chapter 6, part 15, MCA, provides processes for a state agency to protect information it maintains that is personal information of an individual.<sup>15</sup>

Section 87-6-222, MCA, is the codified version of SB 349 (2019), which prohibits use of exact coordinate location data of wildlife obtained from FWP for harming, harassing, or killing fish or wildlife. This statute does not limit public access to information, but rather limits the use or misuse of information obtained.

## III. Other Governments' Limitations on Disclosure

Below is a non-exhaustive list of wildlife location and hunting/trapping information protections enacted by some state governments, a federal agency, and foreign governments. They demonstrate a range of approaches to the limited disclosure or non disclosure of wildlife location information.

State:	Limitation:
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<sup>10</sup>2-6-1003, MCA.

<sup>11</sup>2-6-1006, MCA.

<sup>12</sup>2-6-1009, MCA.

<sup>13</sup>2-6-1101, MCA.

<sup>14</sup>See <http://www.mtrules.org/gateway/Department.asp?DeptNo=44>.

<sup>15</sup>2-6-1502, MCA.

Alaska	Prohibition on public disclosure of radio telemetry frequencies <sup>16</sup>
Nevada	Requires a formal data request process for some fish, wildlife, and habitat location information <sup>17</sup>
Oregon	<p>Presumption against disclosure of sensitive fish, wildlife and plant data, including radio frequencies used in telemetry studies</p> <p>Disclosure is allowed:</p> <ul style="list-style-type: none"> <li>• if the public interest so requires;</li> <li>• to tribal governments; or</li> <li>• for management or scientific reasons to government agencies, public utilities, colleges and universities, or to landowners to whom the information pertains<sup>18</sup></li> </ul>
Washington	Substantially similar to Oregon <sup>19</sup>

<sup>16</sup>5 Alaska Administrative Code 93.040. Available at <http://www.legis.state.ak.us/basis/aac.asp#5.93.040>.

<sup>17</sup>See NDOW Data, Nevada Department of Wildlife, *available at* [http://www.ndow.org/Nevada\\_Wildlife/Maps\\_and\\_Data/Data/](http://www.ndow.org/Nevada_Wildlife/Maps_and_Data/Data/).

<sup>18</sup>Rule 350-012-0008, Public Records Exempt From Disclosure. Available at [https://oregon.public.law/rules/oar\\_350-012-0008](https://oregon.public.law/rules/oar_350-012-0008).

<sup>19</sup>RCW 42.56.430. Fish and Wildlife. Available at <https://app.leg.wa.gov/RCW/default.aspx?cite=42.56.430>.

Wyoming	<p>Game and Fish Department may deny inspection of sensitive wildlife location data "which could be used to determine the specific location of an individual animal or group of animals."<sup>20</sup></p> <p>Requires identification information on traps, but excludes identification numbers from being public records<sup>21</sup></p> <p>Allows aggregate information on legal taking of wolves to be released, but provides that identifying information of anyone who legally takes a wolf is not a public record<sup>22</sup></p>
U.S. Geological Survey	May apply restrictions of access to threatened or endangered species data that has not been generalized or aggregated <sup>23</sup>
New South Wales	Protects sensitive endangered species locations from disclosure to third parties <sup>24</sup>
Parks Canada	Prohibition on use of radio receivers to track collared animals in Banff National Park <sup>25</sup>

## Conclusion

FWP maintains information subject to public information requests, including animal locations. The right to know is protected by the Montana Constitution and is a fundamental right, but it balances against other constitutional rights. Other states and governments have taken various

<sup>20</sup>W.S. 16-4-203(b)(viii).

<sup>21</sup> 23-2-303(d) W.S., available at <https://wyoleg.gov/statutes/compress/title23.pdf>.

<sup>22</sup>23-1-304(d)(vi), W.S., available at <https://wyoleg.gov/statutes/compress/title23.pdf>.

<sup>23</sup>Data Management, USGS, available at <https://www.usgs.gov/products/data-and-tools/data-management/proprietary-and-sensitive-data#BPs>.

<sup>24</sup> Sensitive species data policy, NSW Government, available at <https://www.environment.nsw.gov.au/topics/animals-and-plants/wildlife-management/wildlife-policies-and-guidelines/sensitive-species-data>

<sup>25</sup>Parks Canada bans wildlife photographers from using radio receivers to locate animals, Robson Fletcher, CBC News, Aug. 12, 2016, available at <https://www.cbc.ca/news/canada/calgary/vhf-telemetry-receiver-ban-banff-kootenay-yoho-1.3717595>.

approaches to protecting sensitive wildlife information. The Montana Legislature has acted to prevent misuse of exact coordinate location data.

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