STATE OF IDAHO)
County of KOOTENAI)ss

FILED_____

AT_____ O'Clock _____M
CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

ALLIED BAIL BONDS, INC., an Idaho Corporation, *Plaintiff*, vs. **DAVE MCDOWELL, Finance Director, Kootenai County,** *Defendants*.	Case No. **CV 2009 3743** **MEMORANDUM DECISION AND ORDER DENYING DEFENDANT'S RENEWED MOTION TO DISMISS**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

On May 20, 2009, Allied Bail Bonds Inc. (Allied) filed its "Application for Order Requiring Disclosure of Public Records", alleging defendant Kootenai County Finance Director Dave McDowell (McDowell) "deliberately and in bad faith, did not respond to the request for public documents as required by statute." Application for Order Requiring Disclosure of Public Records, p. 3. On October 1, 2009, McDowell filed his Notice of Compliance and listed the records he had produced to date. On October 5, 2009, Judge Hosack entered an Order requiring Allied's counsel to provide McDowell's counsel with a list or copy of all documents and records possessed by Allied (or received from Kootenai County, its bank, or other agents) which are responsive to the original public records request contained in Allied's November 18 and 19, 2009, emails addressed to McDowell. October 15, 2009, Order, pp. 1-2. Judge Hosack went on to

order McDowell was then to determine if any records were missing and provide those records which were not exempt from disclosure within 14 days. *Id.,* p. 2.

On November 10, 2009, McDowell filed his initial motion to dismiss pursuant to I.R.C.P. 12(b)(6), arguing there was no remaining dispute or controversy following his disclosure and filing of his Notice of Compliance. Motion to Dismiss, p. 2. At hearing on McDowell's motion to dismiss, Judge Hosack denied the motion to dismiss but also ordered Allied to file a written motion regarding Allied's purported remaining claim for attorney's fees arising out of the failure to disclose the records sought and set such motion for hearing before January 31, 2010. The language used by Judge Hosack was as follows:

> IT IS FURTHER ORDERED that the Plaintiff's counsel shall prepare, file and serve whatever motion or hearing he feels appropriate to set forth his client's claim for attorney fees, costs and fines; Plaintiff's counsel shall schedule said motion or hearing not later than January 31, 2010;
>
> IT IS FURTHER ORDERED that in the event Plaintiff's counsel is unable to obtain a hearing date from the Court to hear the aforementioned motion or hearing prior to January 31, 2010, Plaintiff's counsel may seek relief from the Court to extend deadline.

December 21, 2009, Order, p. 1. Both Allied's and McDowell's attorney approved the form of this Order. McDowell's motion to dismiss was denied without prejudice, "preserving the Defendant's right to file a renewed Motion to Dismiss." Order Denying Motion to Dismiss, p. 1. Following Judge Hosack's retirement, the case was automatically assigned to Judge Simpson who took over Judge Hosack's cases. Following the voluntary self-disqualification of Judge Simpson, this matter was reassigned to the undersigned.

Following the December 21, 2009, Order, Allied took no further action. Allied failed to notice up any motion for hearing and Allied failed to file any motion. On May

10, 2010, this Court on its own initiative scheduled the matter for a status conference to be held on June 22, 2010. Following the June 22, 2010, status conference, this Court scheduled the remaining issues for a one-day court trial to be held on October 25, 2010.

On August 26, 2010, McDowell filed his Renewed Motion to Dismiss and brief in support thereof. McDowell moved this Court to dismiss the instant action pursuant to I.R.C.P. 12(b)(1), 12(b)(6), 16(i), and 37(b) for lack of subject-matter jurisdiction, lack of any remaining dispute or controversy, and because Allied violated Judge Hosack's Order that any matter regarding attorney fee, costs, and/or fines be scheduled for hearing no later than January 31, 2010. On September 2, 2010, Allied filed its Objection to Defendant's Renewed Motion to Dismiss on September 2, 2010. Oral argument on the Renewed Motion to Dismiss was held on September 9, 2010.

II. ANALYSIS.

A. Standard of Review.

The standard for reviewing a dismissal for failure to state a cause of action pursuant to I.R.C.P. 12(b)(6) is the same as the standard for reviewing a grant of summary judgment. See *Idaho Schs. For Equal Educ. v. Evans*, 123 Idaho 573, 578, 850 P.2d 724, 728 (1993); *Rim View Trout Co. v. Dep't. of Water Resources*., 119 Idaho 676, 677, 809 P.2d 1155, 1156 (1991). The grant of a 12(b)(6) motion will be affirmed where there are no genuine issues of material fact and the case can be decided as a matter of law. See *Moss v. Mid-American Fire and Marine Ins. Co.,* 103 Idaho 298, 302, 647 P.2d 754, 758 (1982); *Eliopulos v. Idaho State Bank,* 129 Idaho 104, 107-08, 922 P.2d 401, 404-05 (Ct.App.1996). When reviewing an order of the district court dismissing a case pursuant to I.R.C.P. 12(b)(6), the non-moving party is

entitled to have all inferences from the record and pleadings viewed in its favor, and only then may the question be asked whether a claim for relief has been stated. See *Idaho Schs. for Equal Educ*., 123 Idaho at 578, 850 P.2d at 729; *Miles v. Idaho Power Co.,* 116 Idaho 635, 637, 778 P.2d 757, 759 (1989). "The issue is not whether the plaintiff will ultimately prevail, but whether the party 'is entitled to offer evidence to support the claims.' " *Orthman v. Idaho Power Co*., 126 Idaho 960, 962, 895 P.2d 561, 563 (1995) (quoting *Greenfield v.. Suzuki Motor Co. Ltd.,* 776 F.Supp. 698, 701 (E.D.N.Y.1991)).

Whether a court has properly dismissed a case for lack of jurisdiction pursuant to I.R.C.P. 12(b)(1) is a question of law over which reviewing courts exercise free review. *Downey Chiropractic Clinic v. Nampa Restaurant Corp.,* 127 Idaho 283, 285, 900 P.2d 191, 193 (1995); *Meisner v. Potlach Corp.,* 131 Idaho 258, 260, 954 P.2d 676, 678 (1998).

B. Lack of Subject Matter Jurisdiction.

McDowell first argues that this Court lacks the subject matter jurisdiction to rule on Allied's claims because of a failure to exhaust all administrative remedies. Memorandum in Support of Renewed Motion to Dismiss, p. 7. It is McDowell's contention that Allied's failure to submit its public records requests on the proper request form to the proper records custodian is fatal to its claim. *Id.,* pp. 9-10. McDowell argues:

> Mr. McDowell requested that Allied submit all of his public records requests on the official public records request form, in order to manage public records requests. Mr. McDowell did not deny the request of Mr. Davis, but simply asked that the appropriate public records request form be utilized on all of Allied's requests. Mr. McDowell, after consulting with legal counsel, informed Mr. Davis that he must submit any request for public records on the public records request form. Mr. Davis has refused to do so. As such, this Court lacks subject matter jurisdiction.

Id. Allied responds:

> The County has failed to explain why the e-mail requests were not sufficient, and what authority supports the argument that the County can simply ignore a public records request not provided on its form. More importantly, the County asked Allied to explain what it was after, and Allied did. No objection was received to the form of that explanation, and no records were produced.

Plaintiff's Objection to Defendant's Renewed Motion to Dismiss, p. 3.

Idaho Code § 9-338 establishes the right each person has to examine and copy any public record of this state. I.C. § 9-338(1). The Code section states no records custodian may make any inquiry of any person applying for a public record, but "[t]he person may be required to make a written request and provide their name, a mailing address and telephone number." I.C. § 9-338(4). While it may be that the County can require public records requests to be on a certain form, for orderly processing and clarity, McDowell points to no authority in support of its claim that Allied is subject to being dismissed because this Court lacks jurisdiction because Allied failed to use that form. At oral argument, counsel for McDowell cited the Court to *Adams County Abstract Co. v. Fisk,* 117 Idaho 513, 788 P.2d 1336 (1990), to support McDowell's argument that the custodian of the record is free to make rules regarding public records requests. Indeed, that is what the Idaho Supreme Court said:

> Thus, the Court stated, the statutes should be construed to "enable the custodian of public records to formulate regulations necessary to protect the safety of the records against theft, mutilation or accidental damae, to prevent inspection from interfering with the orderly function of his office and employees and generally to avoid chaos in the record archives." *Id.* [citing Burce v. Gregory, 65 Cal.2d 666, 56 Cal.Rptr. 265, 270, 423 P.2d 193, 1999 (1967)] We agree.

While Idaho Code § 9-338(4) allows the request be required to be made in writing, accompanied by the requestor's name, address, and telephone number, *Fisk,* at least in

dicta, allows the agency to require the request be made in a more particular fashion. And while this interpretation of *Fisk* may have significant bearing on the later issue of attorney fees, nothing in *Fisk* would mandate dismissal based on any lack of jurisdiction by this Court merely because Allied failed to use the required form for its public records request.

The Idaho Supreme Court presumes all public records are subject to disclosure and all exemptions are narrowly construed. *State v. Yzaguirre,* 144 Idaho 471, 481, 163 P.3d 1183, 1192 (2007) (citing *Federated Publications, Inc. v. Boise City,* 128 Idaho 459, 915 P.2d 21, 25 (1996)). McDowell has not claimed the request was for exempt materials, only that the County request form was not used and the request was purportedly made of the wrong individual. Memorandum in Support of Renewed Motion to Dismiss, pp. 8-9. ("Allied was informed, through counsel, that it may submit a public records request to the custodian, on the applicable public records request form, via facsimile or electronic mail, if available, and upon making prior arrangements with the custodian."). And, the Idaho Supreme Court has stated:

> Whether an official is a "designated custodian" or is simply a custodian by virtue of the official's custody, control or authorized access to public records is irrelevant because the identification of the custodian is only necessary to determine who may designate the photocopying equipment to be used (I.C. § 9-338(2)); who must give a certified copy of the record or furnish a reasonable opportunity to inspect the record (I.C. § 9-338(3)); who verifies the identity of the person making the request (I.C. § 9-338(4)); who shall extend to the requestor reasonable comfort and facility (I.C. § 9-338(5)); who shall try to prevent alteration of the record while it is being examined (I.C. § 9-338(6)); who shall designate office hours for inspection of the record (I.C. § 9-338(7)); and who may require advance payment of copying costs (I.C. § 9-338(8)).

Idaho Conservation League, Inc. v. Idaho State Dept. of Agriculture, 143 Idaho 366, 369, 146 P.3d 632, 635 (2006) (holding the question of who was custodian had no bearing on whether the documents sought were exempt from disclosure.) McDowell

only argues he was not the proper custodian peripherally; his counsel states in a November 21, 2008, letter to Allied's counsel that the request was sent to an inactive general county email address. Nonetheless, the County and McDowell were aware of the requests on or about the dates they were made.

McDowell fails in his motion to dismiss in this claim of lack of jurisdiction based on failure to exhaust administrative remedies. Although the authority cited by McDowell in his brief does hold the failure to submit a Freedom of Information Act request to an agency divests a Court of subject matter jurisdiction, there is no support for the contention that such a request must be made on a certain form lest it be rendered invalid for purposes of failure to exhaust remedies and corresponding lack of jurisdiction by the reviewing court.

C. Remaining Dispute or Controversy.

McDowell next argues that despite Allied's failure to submit the proper request form, all records at issue have been produced to Allied. Memorandum in Support of Renewed Motion to Dismiss, p. 10. McDowell states he received Allied's letter clarifying and explaining which documents remained outstanding and, "[a]fter Allied's clarification, Mr. McDowell produced the records and filed a Notice of Compliance with the Court on October 1, 2009." *Id.* Allied responds McDowell's argument is frivolous and "the County and Allied specifically agreed in open court that the records would be produced and that the issue of the bad faith denial and attorneys [sic] fees would be the subject of the trial." Plaintiff's Objection to Defendant's Renewed Motion to Dismiss, p. 3.

I.C. § 9-344 governs court costs and attorney's fees associated with public records requests. The Code states in part:

> In any such action, the court shall award reasonable costs and attorney fees to the prevailing party or parties, if it finds that the request or refusal to provide records was frivolously pursued.

I.C. § 9-344 (2). It appears form the Court minutes that Judge Hosack did not wish to reach the merits of Allied's claim at hearing on the previous motion to dismiss. What is clear is that the issue of attorney's fees remained following Judge Hosack's denial of McDowell's motion to dismiss. Questions of material fact remain with regard to whether McDowell's refusal to provide the requested records was frivolously pursued.

C. Judge Hosack's Order and Motion-filing Deadline.

McDowell's final argument is that Allied failed to abide by Judge Hosack's Order requiring Allied to prepare and file any motion dealing with fees, costs or fines and schedule hearing on such motion before January 31, 2010. Memorandum in Support of Renewed Motion to Dismiss, pp. 10-11. McDowell argues Allied did not schedule any hearing with the Court before this deadline and did not seek relief from the Court to extend the deadline. *Id.,* p. 11. Allied responds it complied with Judge Hosack's Order to best of its abilities in light of Judge Hosack retiring on December 31, 2010, and Allied's counsel's having requested a hearing date on the day following Judge Hosack's Order having been made. Plaintiff's Objection to Defendant's Renewed Motion to Dismiss, pp. 3-4. At oral argument, counsel for Allied was simply unable to understand that Judge Hosack's rule had not been complied with. Allied in fact simply did not schedule any hearing with the Court before this deadline and did not seek relief from that Court's deadline before that deadline passed.

Idaho Rule of Civil Procedure 6(b) states:

> When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the parties, by written stipulation, which does not disturb the orderly dispatch of business or the convenience of the court, filed in the action,

> before or after the expiration of the specified time period, may enlarge the period, or the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but the time may not be extended for taking any action under rules 50(b), 52(b), 59(b), (d), (e) and 60(b) except to the extent and under the conditions stated in them.

I.R.C.P. 6(b) (emphasis added). The rule requires a party demonstrate good cause for an enlargement of time to perform an act when leave is sought for such enlargement of time before the expiration of the time specified in a Court Order; when a motion is made after expiration of the time specified, the party must go beyond a good cause showing and demonstrate excusable neglect. At oral argument on September 9, 2010, counsel for Allied failed to demonstrate either "good cause" or "excusable neglect."

On December 22, 2009, Judge Hosack entered his Order Denying the Motion to Dismiss, and in that order set the January 31, 2010, deadline for a hearing on Allied's motion for fees, costs or fines. On January 6, 2010, this Court entered the Administrative Order reassigning all cases heard by Judge Hosack, who retired on December 31, 2010, to Judge Simpson. On February 3, 2010, Judge Simpson voluntarily disqualified himself from this matter; and this matter was reassigned to this Court on February 8, 2010. In light of the delay between this Court's assigning Judge Simpson on January 6, 2010, and Judge Simpson's self-disqualification on February 3, 2010, it was unlikely that Allied's hearing on its motion would have been heard within the deadline set forth by Judge Hosack. However, there is nothing in the record indicating why Allied failed at any time, either before the January 31, 2010, deadline, or at any time thereafter, to simply *file* a motion as required by Judge Hosack's Order or

why Allied failed at any time to in any way seek relief from the deadline in Judge Hosack's Order.

However, simply because Allied's counsel violated Judge Hosack's December 22, 2010, Order, does not mean McDowell is entitled to dismissal. In actuality, Allied has sought an evidentiary hearing and/or court trial on the issue of costs and fees all along. Thus, the hearing Judge Hosack was requesting Allied schedule and provide notice of, was simply a hearing on the entire merits of the case remaining at that time. That being the case, since Judge Hosack did not specifically mention that failure to comply with that order would result in dismissal of the entire case, it would not be fair to dismiss the case at this time on the ground that Allied failed to comply with that December 22, 2010, Order. A court can involuntarily dismiss an action under I.R.C.P. 41(b) for "…failure by the plaintiff to prosecute or to comply with these rules or any order of court…" but only after defendant moves for such dismissal. I.R.C.P. 41(b). McDowell has made such a motion in this case. While a trial court has discretion to "…sanction a party for failure to comply with discovery orders *or pretrial orders*…", and while dismissal of an action is permissible for discovery violations under I.R.C.P. 37(b)(C), imposition of dismissal, the ultimate sanction is not without limits. *Adams v. Reed,* 138 Idaho 36, 39, 57 P.3d 505, 508 (Ct.App. 2002). The court must consider 1) whether lesser sanctions would be ineffective (and the Court hasn't been asked to make that assessment nor has the Court been given any evidence of such by McDowell) and at least one of the following aggravating factors; 2) whether there has been a clear record of delay (that has not been established by McDowell as pertains to Allied), and at least one aggravating factor (delay resulting from intentional conduct, delay caused by

plaintiff personally, or delay causing prejudice to defendant, none of which were discussed in briefing or at oral argument).

While there has been no good cause shown by Allied, much less any evidence of excusable neglect shown by Allied to justify their failure to abide by the deadlines in Judge Hosack's Order, dismissal is not warranted because McDowell has not shown the factors set forth in *Reed*. Violation of Judge Hosack's Order by Allied may be sanctionable, but there has been no discussion as to what other sanctions short of dismissal may be appropriate, as required by *Reed*.

III. CONCLUSION AND ORDER.

For the reasons stated above, Defendant's Renewed Motion to Dismiss must be denied.

IT IS HEREBY ORDERED Defendant's Renewed Motion to Dismiss must be DENIED.

Entered this 10th day of September, 2010.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of September, 2010, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	**Fax #**	**Lawyer**	**Fax #**
Arthur Bistline	665-7290	Darrin L. Murphey	446-1621

_____
Jeanne Clausen, Deputy Clerk