

PRIVACY - Even if state retirees have constitutionally protected rights to privacy, when balanced against the public's right to know, those rights to privacy do not clearly exceed the merits of public disclosure;

RIGHT TO KNOW - Information such as public employees' names, addresses, salaries, job titles, merit pay, vacation and sick leave, dates of employment, and hours worked is crucial to fostering the public's trust in government;

RIGHT TO KNOW - State retirees' privacy interests in their names and benefit amounts does not "clearly exceed" the public's right to know;

MONTANA CODE ANNOTATED - Sections 2-6-101, (1);

MONTANA CONSTITUTION OF 1972 - Article II, sections 9, 10;

OPINIONS OF THE ATTORNEY GENERAL - 44 Op. Att'y Gen. No. 32 (1992), 43 Op. Att'y Gen. No. 6 (1989), 41 Op. Att'y Gen. No. 35 (1985), 38 Op. Att'y Gen. No. 109 (1980).

HELD: Retirees of the Teachers' Retirement System of the State of Montana do not have individual rights of privacy in the amounts of their retirement benefits that clearly exceed the public's right to know.

September 16, 2011

Ms. Denise Pizzini
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Dear Ms. Pizzini:

[P1] You have requested my opinion on the following question:

Whether a retiree of the Teachers' Retirement System of the State of Montana has an individual right of privacy in the amount of his or her retirement benefit that clearly exceeds the public's right to know.

[P2] According to your letter, in August, 2010, the State Administration and Veterans' Affairs Legislative Interim Committee (SAVA Committee) requested information from the Legislative Audit Division on the 100 highest annual retirement benefit amounts paid by the Montana Teachers' Retirement System (TRS) and the Montana Public Employees' Retirement System. The Legislative Audit Division provided the requested information to the SAVA Committee as a ranked listing of the 100 highest annual benefit amounts paid by each retirement system. The information provided by the Legislative Audit Division did not include any information by which individual retirees could be identified.

[P3] On August 24, 2010, the executive director of TRS received a written request via email from a media outlet, which stated in part:

Last week I was at a SAVA meeting and members reviewed a list of the top 100 annual retirement benefits to retirees. I am looking into the story a little deeper. I would like the names, job titles, government agency for the top 10 TRS retirees.

[P4] According to your letter, TRS does not gather job title information on its members and therefore could not provide that information. Otherwise, if granted, the request would match individual retirees' benefit amounts with their names and agencies.

[P5] TRS then sent written notices to the retirees at issue, inquiring whether they would be willing to waive any privacy interests they may have in the requested information and authorize TRS to disclose the information pursuant to the media request. Each TRS retiree was informed that his information would be provided pursuant to the request only if he returned a signed and notarized authorization form. TRS further indicated that a retiree's failure to respond would be construed as the individual having declined to waive his or her privacy rights and therefore declining to authorize TRS to disclose the information.

[P6] Of the ten retirees whose information was at issue, only one returned the signed and notarized authorization. That individual's information was therefore disclosed pursuant to the request. Another retiree provided a written statement to TRS specifically asserting a privacy interest. Another called TRS asserting a privacy interest. The other seven retirees provided no response. Accordingly, TRS construed their silence as declining to waive their privacy interests and authorize TRS to disclose the information.

[P7] Resolution of this question requires the balancing of two rights enshrined in Montana's constitution: the right of individual privacy and the right of the public to know and understand the workings of its government.

[P8] Article II, section 9 of the Montana Constitution grants the public's 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.

[P9] Describing the Framer's intent in adopting this section, the Court has noted, "the theme was that except as it may be limited by the right of the individual to personal privacy, there is to be in Montana a broad-based, pervasive and absolute right of citizens to know what is going on in their government and a right to participate in government untrammelled by the government itself." Bryan v. Yellowstone County Elem. Sch. Dist. No. 2, 2002 MT 264, ¶ 39, 312 Mont. 257, 60 P.3d 381.

[P10] Various statutes, such as Mont. Code Ann. § 2-6-101, specifically provide public access to government documents. Montana Code Annotated § 2-6-101(1) states, "Every citizen has a right to inspect and take a copy of any public writings of this state. . . ." The Montana Supreme Court has held that the public right to know includes the media and that the constitutional right of inspection may not be hindered based upon the gatekeeper or, in other words, the governmental record keeper's interpretation of the need or basis underlying the request. See Jefferson County v. Montana Std., 2003 MT 304, ¶ 13, 318 Mont. 173, 79 P.3d 805 and Associated Press v. Montana Department of Revenue, 2000 MT 160, ¶ 85, 300 Mont. 233, 4 P.3d 5.

[P11] Montana's right to privacy is found at article II, section 10 of the Montana Constitution, and provides, "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." The right extends to informational privacy, that is, the right of individuals to control the disclosure and circulation of personal information. Montana Shooting Sports Ass'n v. State, 2010 MT 8, ¶ 14, 355 Mont. 49, 224 P.3d 1240, (citing) St. James Community Hosp. v. District Court, 2003 MT 261, ¶ 8, 317 Mont. 419, 77 P.3d 534; Gryczan v. State, 283 Mont. 433, 449, 942 P.2d 112, 122 (1997).

[P12] It is "well established" that Montana's constitutional right to know is not absolute. Yellowstone County v. Billings Gazette, 2006 MT 218, ¶ 19, 333 Mont. 390, 143 P.3d 135 (citations omitted). The Court has recognized that the public's constitutional right to know must be weighed against any individual privacy rights that may be present.

[P13] In order to balance these interests, the Court has established a three step-process:

First, we consider whether the provision applies to the particular political subdivision against whom enforcement is sought. Second, we determine whether the documents in question are “documents of public bodies” subject to public inspection. Finally, if the first two requirements are satisfied, we decide whether a privacy interest is present, and if so, whether the demand of individual privacy clearly exceeds the merits of public disclosure.

Becky v. Butte-Silver Bow Sch. Dist. No. 1, 274 Mont. 131, 136, 906 P.2d 193, 196 (1995).

[P14] Here it is uncontested that article II, section 9 of the Montana Constitution applies to TRS. It is further conceded that the information requested constitutes “documents of public bodies” subject to public inspection.

[P15] The question presented instead turns on whether a privacy interest is present and, if so, “whether the demand of individual privacy clearly exceeds the merits of public disclosure.” Becky, 274 Mont. at 136, 906 P.2d at 196. If the demand for individual privacy clearly exceeds the public’s right to know public disclosure is not required. Yellowstone Co., ¶ 19, citing Bryan v. Yellowstone Co. Elem. Sch. Dist. No. 2, 2002 MT 264, ¶ 33, 312 Mont. 257, 60 P.3d 381.

[P16] The Montana Supreme Court has established a two-part test to determine whether an individual has a protected privacy interest under article II, section 10 of the Montana Constitution. Jefferson County, ¶ 15 (citation omitted). A person has a constitutionally protected privacy interest when he or she has a subjective or actual expectation of privacy that society is willing to recognize as reasonable. Lincoln County Comm’n v. Nixon, 1998 MT 298, ¶ 16, 292 Mont. 42, 968 P.2d 1141 (citation omitted). Under this test, if it is determined that a constitutional right to privacy exists, it must then be balanced against the constitutional right to know. Montana Health Care Ass’n v. Montana Bd. of Directors, 256 Mont. 146, 150, 845 P.2d 113, 116 (1993). As stated above, only if the demand for individual privacy clearly exceeds the public’s right to know is public disclosure not required. Yellowstone Co., ¶ 19 (citation omitted).

[P17] Good reason exists to conclude TRS retirees had some expectation of privacy in their retirement benefits. At least nine of the ten retirees either explicitly or implicitly asserted a privacy interest in the information sought. This suggests that they had at least a subjective expectation of privacy concerning their retirement benefits. Further, TRS’s own policies may have created an actual expectation of privacy on the part of the retirees. As your letter points out, generally TRS does not publish or otherwise make publicly

available the financial information and benefits of its members. Moreover, TRS's "Member's Retirement Plan Handbook" provides:

RELEASE OF INFORMATION

Most retirement and benefit information is confidential and may only be released to the member, benefit recipient, or an authorized person.

The TRS receives many requests for information from banks, accountants, attorneys, spouses, and other interested parties. Even though most requests are made on behalf of the member or benefit recipient, state law prohibits the release of any confidential information unless the member consents in writing, or we are otherwise required to release the information. Information may be released directly to the member, benefit recipient, or to another person designated by the member in writing.

[P18] However, our analysis does not end there. While TRS members may have had an expectation of privacy, that expectation is only constitutionally protected if society recognizes it as reasonable. Lincoln County, ¶ 16. Whether society would recognize TRS members' expectation of privacy in their publicly funded retirement benefits is a more difficult question.

[P19] However, it is not necessary to reach that issue today, because I conclude that even if TRS members had constitutionally protected rights to privacy, when balanced against the public's right to know, those rights to privacy do not "clearly exceed the merits of public disclosure." Yellowstone Co., ¶ 19.

[P20] It is well established through previous opinions of this office that public employees' names, addresses, salary, job titles, merit pay, vacation and sick leave, dates of employment, and hours worked may be subject to public disclosure. See 38 Op. Att'y Gen. No. 109 (1980), 41 Op. Att'y Gen. No. 35 (1985), 43 Op. Att'y Gen. No. 6 (1989), 44 Op. Att'y Gen. No. 32 (1992). Such information helps the public to understand how the state is using its tax dollars and what budget priorities the state has set for those dollars. Accordingly, such information is crucial to fostering the public's trust in government.

[P21] The present situation, involving retirees' names and retirement benefits, admittedly is somewhat different. However, it is not so different as to tip the scales to conclude that the retirees' rights to privacy now "clearly exceed[]" the public's right to know. This is particularly true in light of the fact that the Montana Supreme Court has

indicated under article II, section 9 of the Montana Constitution, the public's right to know is essentially presumed. See Bryan, ¶ 39.

[P22] In considering this question, other jurisdictions have determined that public employees lack a reasonable expectation of privacy in their retirement benefits, a largely publicly financed benefit, that would trump the public's right to know. San Diego County Employees Retirement Ass'n v. The Superior Court of San Diego County, 127 Cal. Rptr. 3d 479, 489-90 (Cal App. 2011). See also Detroit Free Press v. City of Southfield 713 N.W.2d 28, 35 (Mich App. 2005); Pulitzer Publishing v. Missouri State Employees Retirement Sys., 927 S.W.2d 477 (Mo. App. 1996); Seattle Fire Fighters Union v. Hollister, 737 P.2d 1302 (Wash. App. 1987); Mergenthaler v. Commonwealth State Employees' Retirement Bd., 372 A.2d 944 (Pa. Cmmw. 1977).

[P23] In the San Diego County case, the court provided the following explanation of the balance between the retirees' privacy interests and the public's right to know:

The names of [public] pension recipients combined with their pension amounts is not information of a personal nature. The information does not solely relate to private assets or personal decisions. Rather, the pension amounts reflect specific governmental decisions regarding retirees' continuing compensation for public service. Therefore, the pension amounts are more comparable to public salaries than to private assets. Retirees' publicly funded pensions--like their previous salaries--are of interest to the public, and only through disclosure can the public expect to prevent abuse.

San Diego County at 490 (citations omitted).

[P24] A party asserting a privacy interest in the question before me relied upon Rowland v. Commonwealth of Pennsylvania, 885 A.2d 621 (Pa. Commw. Ct. 2005) to support his position that retirees hold a constitutionally protected privacy interest in the amount of retirement benefit received that trumps the public's constitutional right to know. That case, however, is distinguishable from the question presented in this Opinion. The challenge in Rowland was to release of address, date of birth and last employer. The retirement entity had already released the names of retirees, their dates of retirement, years of credited service and monthly annuities as public documents and that release was not challenged. The Rowland case therefore does not support the contention that retirees have a constitutionally protected privacy interest in the amount of retirement benefits paid which is the question I answer here.

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[P25] Ultimately, I find the rationale of the court in the San Diego County case to be persuasive. TRS members' retirement benefits were earned while they were public employees and are subject to the same public disclosures as discussed above. Likewise, their retirement benefits are paid largely by public funds and, necessarily, subject to the public's same interest in understanding how pension funds are calculated and how the government is spending taxpayer funds.

THEREFORE IT IS MY OPINION:

Retirees of the Teachers' Retirement System of the State of Montana do not have individual rights of privacy in the amounts of their retirement benefits that clearly exceed the public's right to know.

Sincerely,

STEVE BULLOCK
Attorney General

sb/zz/jym