Montana Legislative Services Division

Legal Services Office

PO BOX 201706
Helena, MT 59620-1706
(406) 444-3064
FAX (406) 444-3036

Date: April, 16, 2018
To: Special Select Committee on State Settlement Accountability
From: Julianne Burkhardt, Staff Attorney
Re: Legal analysis on the Constitutional Privacy and Right to Know provisions regarding state employee termination settlements

Memorandum

This memo is provided in response to an April 3, 2018, request by Rep. Ron Ehli, acting chairperson for the Special Select Committee on State Settlement Accountability, for a legal analysis on the constitutional privacy and right to know provisions regarding state employee termination settlements. Legal Director Todd Everts is preparing a separate memo detailing the legal analysis on the investigative authority of the Montana Legislature and its committees, including the investigative authority of the legislative auditor.

While a presumption of constitutionality applies to legislative investigations, citizens are entitled to all protections related to privacy, liberty, and property in the context of these investigations. For further details on legislative investigations and the methods available to the Montana Legislature for conducting such investigations, please see Mr. Everts' memo.

I. Relevant Constitutional and Statutory Provisions

A. Article II, Section 9, Mont. Const. 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.

B. Article II, Section 10, Mont. Const. Right of privacy. 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.

C. 2-6-1002, MCA, Definitions. As used in this chapter, the following definitions apply:

(1) "Confidential information" means information that is accorded confidential status or is prohibited from disclosure as provided by applicable law. The term includes information that is:

(a) constitutionally protected from disclosure because an individual privacy interest clearly exceeds the merits of public disclosure;

(b) related to judicial deliberations in adversarial proceedings;

(c) necessary to maintain the security and integrity of secure facilities or information systems owned by or serving the state; and

(d) designated as confidential by statute or through judicial decisions, findings, or orders.

(2) "Constitutional officer" means the governor, lieutenant governor, attorney general, secretary of state, superintendent of public instruction, or auditor, who are the constitutionally designated and elected officials of the executive branch of government.

(3) "Constitutional officer record" means a public record prepared, owned, used, or retained by a constitutional officer.

(4) "Essential record" means a public record immediately necessary to:

(a) respond to an emergency or disaster;

(b) begin recovery or reestablishment of operations during and after an emergency or disaster;

(c) protect the health, safety, and property of Montana citizens; or

(d) protect the assets, obligations, rights, history, and resources of a public agency, its employees and customers, and Montana citizens.

(5) "Executive branch agency" means a department, board, commission, office, bureau, or other public authority of the executive branch of state government.

(6) "Historic record" means a public record found by the state archivist to have permanent administrative or historic value to the state.

(7) "Local government" means a city, town, county, consolidated city-county, special district, or school district or a subdivision of one of these entities.

(8) "Local government records committee" means the committee provided for in 2-6-1201.

(9) "Permanent record" means a public record designated for long-term or permanent retention.

(10) "Public agency" means the executive, legislative, and judicial branches of Montana state government, a political subdivision of the state, a local government, and any agency, department, board, commission, office, bureau, division, or other public authority of the executive, legislative, or judicial branch of the state of Montana.

(11) "Public information" means information prepared, owned, used, or retained by any public agency relating to the transaction of official business, regardless of form, except for confidential information that must be protected against public disclosure under applicable law.

(12) "Public officer" means any person who has been elected or appointed as an officer of state or local government.

(13) "Public record" means public information that is:

(a) fixed in any medium and is retrievable in usable form for future reference; and

(b) designated for retention by the state records committee, judicial branch, legislative branch, or local government records committee.

(14) "Records manager" means an individual designated by a public agency to be responsible for coordinating the efficient and effective management of the agency's public records and information.

(15) "State records committee" means the state records committee provided for in 2-6-1107.

D. 2-6-1003, MCA, Access to public information - safety and security exceptions

- Montana historical society exception. (1) Except as provided in subsections (2) and (3), every person has a right to examine and obtain a copy of any public information of this state.

(2) A public officer may withhold from public scrutiny information relating to individual or public safety or the security of public facilities, including public schools, jails, correctional facilities, private correctional facilities, and prisons, if release of the information jeopardizes the safety of facility personnel, the public, students in a public school, or inmates of a facility. A public officer may not withhold from public scrutiny any more information than is required to protect individual or public safety or the security of public facilities.

(3) The Montana historical society may honor restrictions imposed by private record donors as long as the restrictions do not apply to public information. All restrictions must expire no later than 50 years from the date the private record was received. Upon the expiration of the restriction, the private records must be made accessible to the public.

E. 2-9-303, MCA, Compromise or settlement of claim against state. (1) The department of administration may compromise and settle any claim allowed by parts 1 through 3 of this chapter, subject to the terms of insurance, if any. A settlement from the self-insurance reserve fund or deductible reserve fund exceeding $10,000 must be approved by the district court of the first judicial district except when suit has been filed in another judicial district, in which case the presiding judge shall approve the compromise settlement.

(2) All terms, conditions, and details of the governmental portion of a compromise or settlement agreement entered into or approved pursuant to subsection (1) are public records available for public inspection unless a right of individual privacy clearly exceeds the merits of public disclosure.

(3) An employee who is a party to a compromise or settlement entered into or approved pursuant to subsection (1) may waive the right of individual privacy and allow the state to release all records or details of the compromise or settlement, such as personnel records, that pertain to the employee personally and that would otherwise be protected by the right of individual privacy subject to the merits of public disclosure.

II. Analytical Framework

A. Cases implicating the public right to know provision of Article II, Section 9, of the Montana Constitution are analyzed using a three-step process first outlined in *Becky v. Butte-Silver Bow School Dist. No. 1,* 274 Mont. 131, 136, 906 P.2d 193, 196 (1995).

> 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. *Yellowstone County v. Billings Gazette,* 2006 MT 218, ¶ 18, 333 Mont. 390, 395, 143 P.3d 135, 139 (citing: *Becky*, 274 Mont. 131, 136, 906 P.2d 193, 196).

Frequently in situations involving state employee termination settlements the first two steps in the analysis would be met (unless the issue revolves around actual personnel files or similar documents), leaving the question of whether a privacy interest is implicated, and, if so, whether the demand of individual privacy exceeds the merits of public disclosure. The latter is similar to the framework for analysis under the right to privacy provision of Article II, Section 10, of the Montana Constitution, which is discussed below.

B. Cases implicating the right to privacy provision of Article II, Section 10, of the Montana Constitution are analyzed using a two-part process.

> [W]hether the person involved had a subjective or actual expectation of privacy and whether society is willing to recognize that expectation as reasonable. *Missoulian v. Board of Regent*s, 207 Mont. 513, 522, 675 P.2d 962, 967 (1984) (citing: *Montana Human Rights Division v. City of Billings*, 199 Mont. 434, 649 P.2d 1283, 1287 (1982)).

C. The Montana Supreme Court has recognized:

> From these cases and our constitutional language certain principles of law emerge. The right of individual privacy is a fundamental constitutional right expressly recognized as essential to the well-being of our society. The constitutional guarantee of individual privacy is not absolute. It must be interpreted, construed and applied in the light of other constitutional guarantees and not in isolation. The right of individual privacy must yield to a compelling state interest. *Montana Human Rights Commission*, 199 Mont. at 444, 649 P.2d at 1288 (citing *State ex rel. Zander v. District Court*, 181 Mont. 454, 458-459, 591 P.2d 656, 660 (1979)).

D. When a court analyzes issues related to the conflict between the right to know provision of Article II, Section 9, Mont. Const., and the right of privacy found in Article II, Section 10, Mont. Const, the court must carefully consider the facts and constitutional interests of each individual situation.

> The more specific closure standard of the constitutional and statutory provisions requires this Court to balance the competing constitutional interests in the context of the facts of each case, to determine whether the demands of individual privacy clearly exceed the merits of public disclosure. Under this standard, the right to know may outweigh the right of individual privacy, depending on the facts.
>
> Before balancing these interests, however, it must be determined more precisely what interests are at stake. This determination includes consideration of various facets of the public interest and is required by the language of the right to know provision, which calls for a balancing of the "demands of individual privacy" and the "merits of disclosure." *Missoulian*, 207 Mont. at 529, 675 P.2d at 971.

III. Privacy of Public Employees

Personnel records and employment files of public employees are generally confidential. This is because such records generally contain:

> [R]eferences to family problems, health problems, past and present employers' criticism and observations, military records, scores from IQ tests and performance tests, prison records, drug or alcohol problems, and other matters, many of which most individuals would not willingly disclose publicly. Some testing and disclosure (e.g., past employment records, prison records, drug or alcohol use) is a necessary part of many applications for employment; other information may be compiled by present employers or may be submitted by an employee in explanation of absence from work or poor performance on the job. It is clear that there is frequently pressure upon an employee to communicate these matters to his employer in the privacy of his boss's office or on an application for employment or promotion. *Missoulian*, 207 Mont. at 524, 675 P.2d at 968 (citing *Montana Human Rights Commission*, 199 Mont. at 442, 649 P.2d at 1287).

Additionally, performance ratings and evaluations are generally confidential:

> [F]irst, to protect the right of privacy of the government employee; second, because the evaluations are subjective opinions of the performance of the employee that vary with the person giving the rating; third, public disclosure would impede receiving candid evaluations; and fourth, a supervisor could use the public nature of these ratings as a vindictive mechanism against employees he disliked. The lack of objective criteria, the potential for vindictiveness, the lack of an opportunity for the employee to rebut statements made in the rating, and a substantial potential for abuse leads to the conclusion that these ratings should be kept confidential. *Missoulian*, 207 Mont. at 526, 675 P.2d at 969-71 (citing *Trenton Times Corp. v. Board of Education*, 138 N.J. Super. 357, 351 A.2d 30 (1976)).

Finally, maintaining privacy in these types of matters also encourages employee candor and in many cases can promote a more productive workplace.

Although "mere status does not control the determination," elected officials and those employees exercising great public trust generally have a lower expectation of privacy than other state employees. *Missoulian*, 207 Mont. at 526, 675 P.2d at 969 (addressing privacy interests of university presidents).

In *Citizens to Recall Whitlock v. Whitlock*, 255 Mont. 517, 844 P.2d 74 (1992), the Court reasoned that "[w]hen a person is elected to public office, the general public has that responsibility, and it is then their right to be informed of the actions and conduct of their elected officials." *Whitlock*, 255 Mont. at 522, 844 P.2d at 77. *Whitlock* involved the elected mayor of Hamilton, Montana, who was accused of sexual harassment by the Hamilton city judge. The case was settled and the complaining witness waived confidentiality. A citizens group sought a copy of the independent investigation report that was prepared regarding the allegations. After determining that Whitlock's expectation of privacy was unreasonable the Court ordered the

investigative report be released and stated:

> The merits of publicly disclosing the Toole Report are substantial. Not only is the public entitled to be informed of the actions and conduct of their elected officials, but in this instance the information sought involves a matter in which the City has already settled with the complainant. Though the settlement was reached without a finding of fault or liability on the part of any party, the City admits it perceived a substantial risk of loss and concluded it was in the best interests of the City to settle the claim. Since public funds were used to settle the dispute and may be used to indemnify Whitlock for his attorney fees, the public is entitled to know the precise reason for such an expenditure. Given the strong considerations in favor of public disclosure, and the fact that the demand of individual privacy is absent in this instance, there is no justification for denying the public the right to review the contents of the Toole Report. *Whitlock,* 255 Mont. at 524, 844 P.2d at 78.

This analysis has also been applied beyond elected officials to employees who occupy "positions of great public trust" such as police officers. *Great Falls Tribune Co., v. Sheriff*, 238 Mont. 103, 107, 775 P.2d, 1267, 1269 (1989). More recently, the Court has applied this doctrine to a police officer accused of the rape of a police academy cadet, *Bozeman Chronicle v. City of Bozeman*, 260 Mont. 218, 869 P.2d 435 (1993); a DUI arrest of a county commissioner, *Jefferson County v. Montana Standard*, 2003 MT 304, 318 Mont. 173, 79 P.3d 805; a teacher's alleged abuse of students, *Svaldi v. Anaconda Deer Lodge*, 2005 MT 17, 325 Mont. 365, 106 P.3d 548; a sex discrimination case involving the county public defender's office regarding the deposition of the interim director of the public defender's office, *Yellowstone County v. Billings Gazette*, 2006 MT 218, 333 Mont. 390, 143 P.3d 135; and a police department clerk accused of misusing city funds, *Billings Gazette v. City of Billings*, 2011 MT 293, 362 Mont. 522, 267 P.3d 11.

However, a recent decision from the United States District Court involving Montana's campaign laws draws a sharper distinction between elected officials and unelected political appointees and state employees. After noting that "[a]ll public employees in Montana, from the Governor, to university presidents, to town clerks, serve in positions of public trust", Judge Morris held that the Director of Commerce enjoyed "the same presumption of privacy in employment-related matters as a public university president." *Tschida v Mangan*, 2017 U.S.Dist. Lexis 206732, p. 6. While the analytical framework is somewhat different, the case is instructive because the Court ultimately decided that the confidentiality provision of 2-2-136(4), MCA, which addresses the enforcement of ethics violations against public employees, violated the First Amendment of the United States Constitution as it applied to elected officials only, and not to even high-level government appointees. Incidentally, then Justice Morris wrote the dissent in *The Billings Gazette v. City of Billings*, 2011 MT 293, ¶ 40, and expressed the same position, namely that all public employees hold positions of public trust. This position has not been adopted by the Montana Supreme Court.

Employees who do not work in areas dealing with public safety or handle large sums of money, may enjoy greater privacy rights than employees who hold positions of public trust. In another case involving the Billings Gazette in 2013, the Court held that five city employees who were disciplined for accessing pornography on their computers had a reasonable expectation of

privacy in their identifying information that outweighed the public's right to know. *Billings Gazette v. City of Billings*, 2013 MT 334, 372 Mont. 409, 313 P.3d 129.

In discussing whether the five employees' expectation of privacy was an expectation society was willing to recognize as reasonable, the Court stated that the analysis requires:

> reasoned consideration of the specific facts underlying the dispute. To provide but a few examples, the following inquiries may prove relevant in evaluating the reasonableness of an individual's expectation of privacy: (1) attributes of the individual . . . and whether the individual holds a position of public trust; (2) the particular characteristics of the discrete piece of information; and (3) the relationship of that information to the public duties of the individual. *Billings Gazette*, 2013 MT 334, ¶ 21 (citing *Havre Daily News v. Havre*, 2006 MT 215, ¶ 23, 333 Mont. 331, 142 P.3d 864).

From this discussion, it is even more apparent that issues related to privacy determinations are not formulaic and are always decided on a case-by-case basis. In this case, after noting that matters related to employee misconduct can be protected from the public right to know, the Court reasoned:

> Here, the Employees are not elected officials, high-level management, or department heads, nor is there evidence that any specific duty alleged to have been violated related to the performance of a public trust function. The information being sought is merely their identities in relation to internal disciplinary action for a violation of office policy. We hold that society would be willing to accept as reasonable a public employee's expectation of privacy in his or her identity with respect to internal disciplinary matters when that employee is not in a position of public trust, and the misconduct resulting in the discipline was not a violation of a duty requiring a high level of public trust. *Billings Gazette*, 2013 MT 334, ¶ 50.

It is also important to note that the investigative records and corrective action forms had already been released. Only the names and identifying information of the employees and third parties were redacted. *Billings Gazette*, 2013 MT 334, ¶ 17.

While only a court can determine matters of constitutionality, it is possible to discern some patterns. First, elected officials have the lowest expectation of privacy, particularly when they are accused of wrongdoing. *See generally Whitlock*. Likewise, in situations involving the misconduct of elected officials where a settlement is reached, the complainant waives confidentiality, and public money is used to settle the dispute, the balance is going to weigh heavily in favor of disclosing investigative information. *See Whitlock*, 255 Mont. at 523-24, 844 P.2d 74, 78. Second, documents such as personnel files and evaluation records are categories of information that are most likely to be protected even where the information sought deals with an individual who holds a position of great public trust. *See Missoulian*, 207 Mont. at 524-26, 675 P.2d at 968-71. Third, information related to third parties will often be protected. *See generally Billings Gazette*, 2013 MT 334, *Yellowstone County*, ¶ 24. Finally, in looking at all of the cases analyzed collectively, employees who do not handle large sums of money as part of their job and do not work in the area of public safety, are likely to have the greatest privacy protection. As

mentioned above, each case where the right to know and the right to privacy of Article II, Sections 9 and 10, of the Montana Constitution are in collision is decided on its own unique set of facts.

IV. 2-9-303, MCA, Compromise or settlement of claim against the state.

> (1) The department of administration may compromise and settle any claim allowed by parts 1 through 3 of this chapter, subject to the terms of insurance, if any. A settlement from the self-insurance reserve fund or deductible reserve fund exceeding $10,000 must be approved by the district court of the first judicial district except when suit has been filed in another judicial district, in which case the presiding judge shall approve the compromise settlement.
>
> (2) All terms, conditions, and details of the governmental portion of a compromise or settlement agreement entered into or approved pursuant to subsection (1) are public records available for public inspection unless a right of individual privacy clearly exceeds the merits of public disclosure.
>
> (3) An employee who is a party to a compromise or settlement entered into or approved pursuant to subsection (1) may waive the right of individual privacy and allow the state to release all records or details of the compromise or settlement, such as personnel records, that pertain to the employee personally and that would otherwise be protected by the right of individual privacy subject to the merits of public disclosure.

Only one case regarding the interpretation of this statute has come before the Montana Supreme Court. *Pengra v. St.*, 2000 MT 291, 302 Mont. 276, 14 P.3d 499. This case came before the Court on an appeal of the denial of an *ex parte* motion to seal the terms of the settlement agreement that resolved the Plaintiff's suit against the state of Montana.

Pengra involved a suit against the state of Montana for negligence following the rape and murder of the plaintiff's wife by a prison probationer. Plaintiff argued that release of the terms of the settlement agreement would be harmful to his and his daughter's emotional health. Plaintiff's daughter was a minor at the time of the decision. After applying the balancing test utilized where the right of privacy conflicts with the right to know, the Court determined that minors do not have a greater right of privacy in settlement agreements and that the privacy rights of the plaintiff and his daughter do not clearly outweigh the public's right to know. *Pengra*, 2000 MT 291, 302 Mont. 276, 282-83, 14 P.3d 499, 502-03.

In rendering this decision, the Court stated:

> Compelling policy reasons support disclosure of settlement amounts in tort actions with the State. Disclosure of such agreements provides an irreplaceable opportunity for taxpayers to assess the seriousness of unlawful and negligent activities of their public institutions. The taxpayers are entitled to know how much they must pay for such actions or inactions. And without muzzling the entire legislative process and all those involved in obtaining the appropriation to pay the

> claim, it appears that whatever privacy right the settling party has will be compromised, anyway, when the legislature appropriates the funds to pay the settlement. *Pengra*, 2000 MT ¶ 20.

The Court noted that the plaintiff's subjective expectation of privacy was "discredited by the surrounding circumstances of this case. Pengra took no steps to keep private his lawsuit against the State, and in fact requested a jury trial in the District Court." Further plaintiff's counsel admitted that had the settlement offered by the State been insufficient, the case would have gone to a public jury trial. *Pengra*, ¶ 18. Thus, at issue was simply the settlement amount and presumably the settlement documents themselves although the opinion does not state this fact.

In considering 2-9-303(2) and the *Pengra* decision, several considerations emerge. First the phrase "governmental portion of a compromise or settlement agreement" is still basically undefined. 2-9-303, MCA. From *Pengra* we can surmise that if the test balancing the right of individual privacy with the merits of disclosure is met, the settlement amount and most likely the settlement document itself are public. This analysis is also based on the important public policy reasons supporting disclosure such as assisting taxpayers in understanding the "seriousness of unlawful and negligent activities of their public institutions." *Pengra*, ¶ 18. However, the precedential value of the decision in *Pengra* is somewhat limited because the names of the plaintiff and his daughter as well as the basic facts of the case were already public because the case was a matter of public record filed in District Court. In other words, *Pengra* does not speak to discovery of the facts underlying a given settlement agreement. It is also important to recognize that in *Pengra*, as in each of the other cases analyzing Article II, Sections 9 and 10, of the Montana Constitution, the Court engages in a careful analysis of the nuances of the case in rendering its opinion.

V. Conclusion

Each situation where information related to employee termination settlements is requested triggers an analysis under the right to know or the right to individual privacy provisions of Article II, Sections 9 and 10, of the Montana Constitution. This includes requests for the "governmental portion of a compromise or settlement agreement". 2-9-303(2), MCA. While there are discernable patterns and certain factual situations, as discussed in this memo, where it is more likely that disclosure will be required or allowed, each case will be decided under its own unique set of factual circumstances.

Cl0099 8108jbba.