



Judge orders release of city document

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Of The Gazette Staff

| Posted: Tuesday, December 14, 2010 2:30 pm

A District Court judge has ordered the city of Billings to release a public record related to the internal affairs investigation of a former Billings Police Department employee.

But Judge Russell Fagg also gave the city and the former employee, Deanna Anthony, until Friday morning to appeal the ruling, casting doubt on whether the document will be released as ordered.

In a five-page ruling filed Tuesday, Fagg said he agreed with an attorney for The Billings Gazette that Anthony has no reasonable expectation of privacy concerning an investigation into alleged misappropriation of Police Department funds.

The newspaper filed a lawsuit Dec. 1 seeking disclosure of the documents related to the allegation against Anthony after City Administrator Tina Volek denied a written request for their release.

Fagg held a hearing on the issue Monday afternoon and issued the order Tuesday morning.

Anthony was a 16-year employee of the city who was promoted in April to senior administrative coordinator in the Police Department. In that job, Anthony had authority to purchase supplies and administer grants. She was paid \$21.59 an hour.

On May 20, Anthony was placed on paid leave after the department discovered some accounting discrepancies. The Police Department launched an internal affairs investigation, and Chief Rich St. John asked the state Division of Criminal Investigation to conduct a separate and independent probe for possible criminal charges.

The state investigation continues, a spokesman for the Attorney General's Office said Tuesday. No criminal charges have been filed in the case.

The Police Department concluded its internal investigation in late October, and Anthony was notified of her right to meet with St. John to discuss the results. That meeting was set for Nov. 12, but Anthony resigned two days before the meeting took place.

St. John has declined to discuss specifics of the allegations against Anthony. On Nov. 14, the newspaper requested copies of public records related to the internal investigation, which Volek denied on Nov. 24.

In response to the newspaper's lawsuit and at the hearing held Tuesday before Fagg, Assistant City Attorney John K. Addy agreed that the requested document is a public record, but he argued that releasing it could jeopardize both Anthony's right to privacy and the ongoing criminal investigation.

Addy noted that Anthony was not an elected public official, a police officer or a teacher — jobs that state courts have ruled involve a diminished expectation of individual privacy in matters of alleged misconduct because those jobs are positions of public trust.

Gazette attorney Martha Sheehy argued that Anthony did hold a position of public trust because she had authority to spend tax dollars on behalf of the Police Department. Such spending authority, Sheehy said, is at the heart of Montana's constitutional guarantee of open government.

Sheehy also said the concern of tainting the criminal investigation was balanced by the safeguards already in place in the judicial system.

Fagg agreed with Sheehy, finding in the written ruling that Anthony's authority to spend public money placed her in a position of public trust.

"While the court acknowledges this is one more step in broadening the definition of a 'position of trust,' it seems quite clear that a person who is entrusted with public monies would be considered a person in a position of trust," Fagg said.

Fagg also said that concerns about tainting the criminal investigation should not prevent or delay the release of public documents.

"The court could envision a situation where a criminal investigation is carried out indefinitely, just so the underlying information could not be divulged to the public," he said.

Fagg said, however, that the city and Anthony should have an opportunity to appeal the decision and possibly block the release of the documents. He gave the city and Anthony until Friday at 10 a.m. to file such actions. If no legal action is taken, the document will be released to the public, the judge said.

Anthony is represented by Billings attorney Teresa O'Connor, who did not respond to a message seeking comment on Tuesday.

City Attorney Brent Brooks said he and Addy would review the ruling and consult with Volek on Wednesday to decide if the city will appeal to the state Supreme Court.

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8 **MONTANA THIRTEENTH JUDICIAL DISTRICT COURT**
9 **YELLOWSTONE COUNTY**

10 THE BILLINGS GAZETTE, a division
11 of LEE ENTERPRISES,

12 Plaintiff,

13 vs.

14 THE CITY OF BILLINGS,

15 Defendant.

CAUSE NO. DV 10-1991

JUDGE RUSSELL C. FAGG

ORDER AND DECISION.

16 ORDER

17 For the reasons stated below,

18 **IT IS HEREBY ORDERED** that the Billings Gazette's Petition for Declaratory
19 Relief is **GRANTED**.

20 **IT IS FURTHER ORDERED** that the City of Billings' Motion for Summary
21 Judgment is **DENIED**.

22 **IT IS FURTHER ORDERED** that the Court will release the material it has
23 reviewed *in camera* to the Billings Gazette at 10:00 o'clock a.m. on December 17, 2010.

24 DECISION

25 PROCEDURAL BACKGROUND

26 The Billings Gazette filed a Verified Petition for Declaratory Relief and Petition
27 for a Writ of Mandamus on December 1, 2010. The City of Billings then filed a Motion
for Summary Judgment on December 6, 2010. Both of these motions have been

1 briefed, and the attorneys for both parties have agreed this matter is ripe for a decision.
2 A hearing was held on this matter on December 13, 2010. Both parties argued their
3 respective positions. The Court deems the matter submitted.

4 The crux of this matter is a sixteen-page due process letter to Deanna Anthony
5 (Anthony), dated October 29, 2010, regarding purchases made by Anthony in her
6 capacity as a Police Department Senior Administrative Coordinator. A large part of
7 Anthony's duties involved ordering supplies and equipment. The October 29th due
8 process letter states the City was considering disciplinary action due to Anthony's
9 alleged use of the City's purchasing card for personal purchases or use. The due
10 process letter outlined the internal investigation the Police Department had engaged in,
11 and gave Anthony the opportunity to appear at a hearing to be held November 12,
12 2010, to address these allegations. Anthony resigned her position and did not attend
13 the November 12th hearing.

14 The Billings Gazette has filed a request to release the due process letter to it.
15 Both the City and the Gazette agree the documents in question are public documents
16 subject to the right to know. Both parties also acknowledge the documents are subject
17 to public disclosure unless the demands of individual privacy clearly outweigh the
18 public's right to know. See *Becky v. Butte-Silver Bow School District 1*, 274 Mont. 131,
19 138, 906 P.2d 193, 197 (1995). The City has raised several arguments trying to protect
20 the disclosure of these documents. The Court will address those arguments one at a
21 time.

22 NO MANDAMUS FOR DISCRETIONARY ACTS

23 The City has first argued that mandamus does not lie to compel a discretionary
24 act, and the Court's *in camera* review of these documents and the determination of
25 whether the documents should be released is a discretionary act. The Court has based
26 this ruling on the Billings Gazette's Petition for Declaratory Relief, and thus the
27 mandamus argument is moot. The Petition for Declaratory Relief requested an order
requiring the City to produce the requested documents. Since the Court has granted the
Gazette's Petition for Declaratory Relief, it is not necessary to address the Writ of
Mandamus requirements.

1 ANTHONY'S REASONABLE EXPECTATION OF PRIVACY

2 For purposes of this decision, the Court has presumed Anthony has asserted her
3 right to privacy. Therefore, the two-part test which the Court must follow to balance the
4 privacy interests of the individual against the public's right to know is: (1) whether the
5 individual has a subjective or actual expectation of privacy; and (2) whether society is
6 going to recognize that expectation as reasonable. *Bozeman Daily Chronicle*, 260 Mont.
at 225, 859 P.2d at 439.

7 Montana has a line of cases where this balancing test has been developed. The
8 Billings Gazette argues Anthony has no reasonable expectation of privacy because
9 "Public employees who occupy positions of trust have no legitimate right of privacy to
10 investigations of their conduct," citing *Citizens to Recall Mayor v. Whitlock*, 255 Mont.
11 517, 844 P.2d 74, (1992); *Bozeman Daily Chronicle v. City of Bozeman Police*
12 *Department*, 260 Mont. 218, 859 P.2d 435 (1993), and *Svaldi v. Anaconda-Deer Lodge*
13 *County*, 325 Mont. 365, 106 P.3d 548 (2005). These cases involved elected public
14 officials, sworn police officers, or teachers. In each of these cases, it was determined
these individuals occupied positions of trust.

15 Thus, in this case, the issue boils down to whether Anthony occupied a position
16 of trust. The City of Billings argues that she does not occupy a position of trust because
17 she was an administrative employee, and thus far different than an elected official, a
18 sworn police officer, or a teacher. The Billings Gazette, on the other hand, argues
19 Anthony occupies a position of trust because she was in charge of the purchasing card
20 for the police department, and thus was able to spend public monies in her position.
21 The Billings Gazette contends a person who handles money is in a position of trust.
The Court agrees.

22 While the Court acknowledges this is one more step in broadening the definition
23 of a "position of trust," it seems quite clear that a person who is entrusted with public
24 monies would be considered a person in a position of trust. Thus, the two-part test set
25 forth in the *Bozeman Daily Chronicle* case has been met. The City of Billings argues
26 this ruling would mean that any public employee in the State of Montana who is
27 accused of wrongdoing is without any right to privacy. The Court disagrees. Most public

1 employees do not have the authority to spend public monies. This fact is the critical fact
2 that places Anthony in a position of public trust.

3 A CRIMINAL INVESTIGATION MAY BE COMPROMISED IF THE INFORMATION IS
4 RELEASED

5 The City of Billings also argues there is an ongoing criminal investigation into this
6 matter, and that investigation may be compromised if the due process letter is released.
7 The City correctly argues that none of the information in the due process letter can be
8 relied upon in the criminal investigation. However, it would not be appropriate to delay
9 the release of information that should otherwise properly be released simply on the
10 basis that there is an ongoing criminal investigation. While it is certainly true the criminal
11 investigation will have to be done carefully, and while it is true the criminal case (if there
12 ever is one) will need to be handled carefully, that does not change the presumption
13 that since these are public records, they should be released unless the expectation of
14 privacy outweighs the release of the information. The Court could envision a situation
15 where a criminal investigation is carried out indefinitely, just so the underlying
16 information could not be divulged to the public. While the Court in no way suggests the
17 State Investigator would delay his or her investigation, the argument that the
18 investigation should be completed before the information is released is not persuasive.

19 The State of Montana Department of Justice is cautioned to make sure
20 Anthony's Garrity statements are not part of its investigation, and the investigation is
21 derived from legitimate, independent sources. See *Kastigar v. United States*, 406 US
22 441, 92 S.Ct. 1653, 32 L.Ed. 2d 212 (1972).

23 ANTHONY AS AN INDISPENSIBLE PARTY

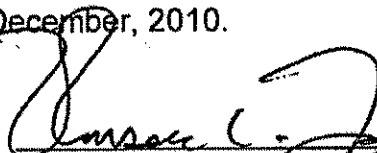
24 The City also argues Anthony is an indispensable party in this action, citing Rule
25 19(a) of the Montana Rules of Civil Procedure. The Court disagrees. The Court
26 presumes for purposes of these arguments that Anthony does object to the release of
27 the information and has exerted her right to privacy in this case. With those
presumptions in mind, it is clear Anthony's presence is not needed to afford complete
relief among the Billings Gazette and the City of Billings (the release of the information
requested), or Anthony's absence may impede her ability to protect her interest or leave

1 her with a substantial risk of incurring multiple, inconsistent obligations. The City has
2 done a commendable job of protecting Anthony's interests in this case. Furthermore,
3 Anthony has three days to request intervention and other relief, if she chooses. The
4 Court is copying Anthony's attorney, Teresa O'Connor, with this decision. Last, Anthony
5 is not subject to any obligations by the release of this information, and certainly would
6 not be subject to multiple or inconsistent obligations by release of this information.

6 CONCLUSION

7 The crux of this issue is the fact that Anthony occupies a position of public trust.
8 She is a Police Department senior administrative coordinator, with access to the City's
9 checkbook. A person who is capable of spending public money certainly occupies a
10 position of public trust. While the Court is cognizant these are only allegations at this
11 point, and the Court is very concerned about the negative exposure the release of this
12 information will bring to Anthony personally, the Court is also convinced the release of
13 the information is required under the analysis set forth by the Montana Supreme Court.
14 However, the Court has delayed the Gazette's ability to receive the information for three
15 business days to give Anthony and/or the City time to appeal this matter or request any
16 other appropriate relief.

16 DATED this 14th day of December, 2010.

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18 _____
19 Russell C. Fagg, District Court Judge

20 cc: Kelly Addy
21 Martha Sheehy
22 Teresa M. O'Connor
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