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MAR 17 2022
VALERIE J. HORNSVELD
CLERK
DEPUTY *Audrey Pymale*

**MONTANA FIRST JUDICIAL DISTRICT COURT
BROADWATER COUNTY**

BROADWATER COUNTY, MONTANA,

Plaintiff,

v.

PERSONS WITH AN INTEREST IN
THE RELEASE OF CONFIDENTIAL
CRIMINAL JUSTICE INFORMATION
PERTAINING TO THE INVESTIGATION
AND PROSECUTION OF JASON
ELLSWORTH: (JASON ELLSWORTH,
HELENA INDEPENDENT RECORD),
ET AL.

Defendants.

Cause No.: CDV-2022-02

**ORDER FOLLOWING
IN CAMERA REVIEW**

On January 20, 2022, Plaintiff Broadwater County filed a
complaint for declaratory judgment seeking a determination from the Court
regarding the dissemination of confidential criminal justice information. Named

1 Defendants are Jason Ellsworth and Helena Independent Record and other
2 persons with an interest in the release of such information.

3 According to the complaint, the action was precipitated by two
4 requests from a newspaper reporter from the Independent Record for the file
5 relating to misdemeanor charges against Jason Ellsworth. Broadwater County
6 asked to file a copy of the investigative file with the Clerk of Court, under seal,
7 pending further Court order. The Court ordered the investigative file to be
8 submitted for review. The file is contained on a thumb drive. The file consists of
9 the following:

- 10 1. A Montana Highway Patrol dashcam video dated January
11 25, 2021;
- 12 2. A Montana Highway Patrol dashcam video dated May 23,
13 2021;
- 14 3. Documents contained in a file labeled Evidence +
15 Dissemination eDiscovery1, 31 pgs.;
- 16 4. Documents contained in a file labeled Evidence +
17 Dissemination eDiscovery2, 10 pgs.;
- 18 5. Document contained in a file labeled Evidence +
19 Dissemination + Form+-+Media, 1 pg.;
- 20 6. IAJUDGMENTORDERBOOKANDRELEASEMOTIONT
21 OWITHDRAWPLEA.pdf, 5 pgs.;
- 22 7. Motion+to+Dismiss+Charges.pdf, 2 pgs.;
- 23 8. Screenshot+2021-05-25+161253.jpg, 1 pg.; and
- 24 9. Recording of short voicemail from Jason Ellsworth to
25 Trooper Gifford.

1 A brief in opposition to the release was filed by Defendant
2 Ellsworth. The Court has reviewed the investigative file and concludes that a
3 redacted version of the file should be released to Helena Independent Record and
4 other interested persons.

5 DISCUSSION

6 The public right to know and the right of individual privacy are
7 addressed in the Article II, §§ 9 and 10, of the Montana Constitution. Section 10
8 states: "The right of individual privacy is essential to the well-being of a free
9 society and shall not be infringed without the showing of a compelling state
10 interest."

11 No less important is the public's right to know, set forth in Article
12 II, § 9: "No person shall be deprived of the right to examine documents or to
13 observe the deliberations of all public bodies or agencies of state government and
14 its subdivisions, except in cases in which the demand of individual privacy
15 clearly exceeds the merits of public disclosure."

16 The Supreme Court has recognized the constraints associated with
17 the right to know when individual privacy is implicated. In *Lincoln County*
18 *Commission v. Nixon, et al.*, 1998 MT 298, 292 Mont. 42, 968 P.2d 1141, the
19 Court stated:

20 The 'right to know' is not an absolute right. It is balanced by
21 the 'demand of individual privacy,' a right which is also guaranteed
22 by Montana's Constitution: 'The right of individual privacy is
23 essential to the well-being of a free society and shall not be infringed
24 without the showing of a compelling state interest.' Art. II, Sec. 10
25 Mont. Const.

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1 A constitutionally protected privacy interest exists when a
2 person has a subjective or actual expectation of privacy which
3 society is willing to recognize as reasonable. (citation omitted).

4 *Lincoln County*, ¶¶ 15-16.

5 The right to know and the right of privacy are often competing
6 rights, necessitating a balancing analysis. Many Montana cases address the
7 balancing of the right to know and the right to privacy, covering factual situations
8 ranging from confidential criminal justice information to job evaluations. In
9 *Great Falls Tribune Co., Inc. v. Cascade County Sheriff*, 238 Mont. 103, 775
10 P.2d 1267 (1989), the Supreme Court affirmed a district court decision involving
11 a request by the Great Falls Tribune for the names of three police officers who
12 were disciplined for irregularities in a high-speed chase and apprehension. The
13 district court balanced the rights of individual privacy and the public right to
14 know in reaching its conclusion that the names should be released. On appeal,
15 the Supreme Court stated: “[t]his Court has used a two-part test in determining
16 whether a person has a constitutionally-protected privacy interest. First, we
17 determine whether the person has a subjective or actual expectation of privacy.
18 Next, we evaluate whether society is willing to recognize that expectation as
19 reasonable.” *Id.*, 238 Mont. at 105, 775 P.2d at 1268.

20 Defendant Ellsworth does not address the balancing test. He has
21 filed a brief contending the case is not “completed” under Mont. Code Ann. § 44-
22 5-303(5) because he received a deferred imposition of sentence. According to
23 Ellsworth, the case will only be completed once Ellsworth has met all conditions
24 and the case is dismissed. The Court disagrees. Section 44-5-303(5) authorizes a
25 prosecutor to file a declaratory action as was done here “relating to a criminal

1 investigation that has been terminated by declination of prosecution or relating to
2 a criminal prosecution that has been completed by entry of judgment, dismissal,
3 or acquittal, or if the disclosure may be in the public interest.” First, the case is
4 complete, there is no prosecution pending, and a judgment is included in the file.
5 Second, Ellsworth ignores the phrase of the statute “or if the disclosure may be in
6 the public interest.” *Id.* Ellsworth also contends that further briefing should occur
7 “later.” There will be no additional opportunity for briefing. The law is well-
8 settled and has been discussed in many cases. The facts of the case are not
9 complex and are established by the investigative file itself.

10 Therefore, the Court will proceed to balancing the right of privacy
11 against the public’s right to know.

12 1. Subjective or actual expectation of privacy

13 The Court will assume that, because of his objection,
14 Ellsworth is asserting his expectation of privacy. The Court finds that the first
15 prong of the test is met – Ellsworth has a subjective or actual expectation of
16 privacy in the investigative documents at issue.

17 2. Whether society is willing to recognize the expectation as
18 reasonable

19 The inquiry with respect to reasonableness must be
20 conducted within the context of factual situation set forth in each case. As the
21 Supreme Court stated in *Billings High School District No. 2 v. Billings Gazette*,
22 2006 MT 329, ¶ 17, 335 Mont. 94, 149 P.3d 565:

23 More importantly, the determination of whether the public has
24 the right to examine particular documents in the face of asserted
25 individual privacy rights entails a fact-specific inquiry to ascertain
whether the individual involved has a subjective or actual

1 expectation of privacy which society is willing to recognize as
2 reasonable and, if so, whether that expectation of privacy clearly
3 exceeds the merits of public disclosure of the documents under the
4 circumstances. Because this inquiry must be undertaken within the
5 context of the facts of each case, it cannot be said that there is a
reasonable expectation that the same action--comprising the same
factual scenario--will arise again. (citations omitted)

6 In *Bozeman Daily Chronicle v. City of Bozeman Police*
7 *Department*, 260 Mont. 218, 859 P.2d 435 (1993), the Supreme Court concluded
8 that the position of public trust held by a police officer alleged to have committed
9 a criminal act, albeit while off duty, was such that there existed a compelling
10 state interest in the release of the investigative information surrounding the
11 incident. The Court recognized the corresponding need to protect the privacy
12 rights of the victim of the act. The Court held regarding the police officer:

13 Similarly, in the instant case and notwithstanding that the police
14 officer was off-duty at the time of the alleged incident, the nature of
15 the alleged misconduct ran directly counter to the police officer's
16 sworn duty to uphold the law, to prevent crime, and to protect the
17 public. . . .We hold that, notwithstanding the police officer's
18 resignation, such alleged misconduct went directly to the police
officer's breach of his position of public trust; that, therefore, this
conduct is a proper matter for public scrutiny. . . .

19 *Bozeman Chronicle*, 260 Mont. at 227, 859 P.2d 435, 440.

20 Citing the *Bozeman Chronicle* case, the Supreme Court, in
21 *Jefferson County v. Montana Standard*, 2003 MT 304, 318 Mont. 173, 79 P.3d
22 805, determined that a county commissioner had no expectation of privacy in
23 records relating to her arrest for driving under the influence of alcohol and
24 driving with an expired license. The Court based its determination again on the
25 position of public trust held by the commissioner, stating:

1 While Sevelstad's driving habits may not pertain to her position as a
2 County Commissioner, her decision to violate the law directly relates
3 to her ability to effectively perform her job duties. That is,
4 Sevalstad's decision to violate the law questions her judgment. Her
5 violation of the law may also have an effect on her ability to work
6 effectively with her peers and to properly supervise other employees.
7 Society will not permit complete privacy and unaccountability when
8 an elected official is accused of misconduct which is related to the
9 performance of his or her public duties. Therefore, we conclude that
because the information sought by Montana Standard relates to
Sevalstad's ability to perform her duties as a County Commissioner,
any expectation of privacy she has regarding such information is
unreasonable.

10 *Jefferson County*, ¶ 17. The weighing analysis ended there. The Supreme Court
11 stated:

12 Once it is determined that a constitutionally protected privacy
13 interest is at stake, it is appropriate to consider whether the demands
14 of individual privacy clearly exceed the merits of public disclosure.
15 However, because we have determined that Sevalstad's privacy
16 expectation was unreasonable under these circumstances, her
individual privacy rights clearly do not exceed the merits of public
disclosure in the instant case.

17 *Jefferson County*, ¶ 18.

18 Ellsworth is an elected State Senator who was charged with three
19 misdemeanors and pled guilty to obstructing a peace officer. The obstructing
20 charge alleged that he used his position as a senator in the obstruction. The
21 traffic offenses were dismissed, and Ellsworth received a deferred imposition of
22 sentence for obstruction of a peace officer. The Court finds that Ellsworth
23 occupies a position of public trust, and that the crime to which he pled guilty
24 directly bears upon his position. An expectation of privacy in the investigation of
25 these charges is unreasonable under these circumstances, and his individual

1 privacy rights do not exceed the merits of public disclosure. However, the Court
2 does conclude that the information contained in number 4 above, "Documents
3 contained in a file labelled Evidence + Dissemination eDiscovery2, 10 pgs." is
4 not relevant to the charges at hand. Number 4 contains an Omnixx Force
5 Message report (a report intended for law enforcement use) that includes NCIC
6 and State Sources. Most of the report is redundant to Ellsworth's driving record
7 contained in Number 3 above. Any additional information is twenty or more
8 years old and is not relevant to the Broadwater County case. Ellsworth's right to
9 privacy in those documents outweighs the public's right to know.

10 Based on the foregoing, **IT IS HEREBY ORDERED** that:

11 1. Broadwater County shall provide to Helena Independent
12 Record or other interested persons, a copy of the file items listed above, **with the**
13 **exception of number 4**, "Documents contained in a file labelled Evidence +
14 Dissemination eDiscovery2, 10 pgs."

15 2. Broadwater County will also redact any social security
16 numbers, driver license numbers and dates of birth. It appears the social security
17 numbers have already been redacted but driver license numbers and dates of birth
18 have not been redacted. Broadwater County shall verify that these items are
19 redacted.

20 3. All costs of reproduction shall be the responsibility of The
21 Independent Record or other interested person requesting the file.

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4. A copy of the investigative filed as submitted, without redactions, shall be filed under seal with the Broadwater County Clerk of District Court so that the record is clear if an appeal is filed.

5. All parties shall bear their own costs and attorney fees.

DATED this 17 day of March 2022.


KATHY SEELEY
District Court Judge

The Clerk of Court is directed to deliver conformed copies to the following:

cc: Jania Hatfield, Acting Broadwater County Attorney
hand-delivered

David M. McLean, Esq.

via email to: dave@mcleanlawmt.com *emailed*

emailed clutter@co.brazos.tx.us
mt.us
3/17/2022
ap