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Legal Opinion 2017-012

TO: Mayor John Engen; Dale Bickell; Steve Johnson; Laurie Pfau; Marty Rehbein; Kirsten Hands; Kelly Elam; John Wilson; Lori Hart

CC: Department Attorney

FROM: Jim Nugent, City Attorney

DATE April 20, 2017

RE: Public employee names, addresses, salary, job titles, merit pay, vacation and sick leave, dates of employment, and hours worked are examples of public record information pertaining to public employees in Montana

FACTS:

The City of Missoula is and will be experiencing non-public government operations becoming municipal government operations. EKO Compost (now Garden City Compost) and Mountain Water Company current employees transitioning to public employee status are subject to Montana public record and public right to know law with respect to their salaries and compensation.

ISSUE(S):

Are salaries and compensation of municipal local government employees in Montana public record information that the public has a public right to know?

CONCLUSION(S):

Yes. When employees of EKO Compost (now Garden City Compost) and Mountain Water Company become municipal City of Missoula employees, they become public employees and it is well established in Montana for examples that public employee names, addresses, salary, job titles, merit pay, vacation and sick leave, dates of employment, and hours of work are public record subject to public disclosure.

LEGAL DISCUSSION:

Article II, section 9 of the Montana Constitution is entitled "RIGHT TO KNOW". This Constitutional provision states:

“Section 9. 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.

Montana Attorney General Steve Bullock noted in 54 Opinion Attorney General No. 3(2011) page 3, paragraph 9, when discussing the Montana Constitutional Convention members’ intent with respect to Article II section 9 “RIGHT TO KNOW”:

“(P 9) Describing the Framers’ intent in adopting this section, the (Montana Supreme) 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 UNTRAMMELED BY THE GOVERNMENT ITSELF’. Bryan v. Yellowstone County Elementary School District No. 2, 2002 MT 264, paragraph 39, 312 Mont. 257, 60 P. 3d 381(2002)” (*Emphasis added*)

Attorney General Steve Bullock then stated at page 5, paragraph 20 of this 2011 Montana Attorney General Opinion that:

“(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.”

Pursuant to subsection 2-15-501(7) MCA, a Montana Attorney General Opinion “is controlling unless overruled by a state district court or the supreme court.” There are numerous examples of specific Montana Attorney General formal opinion public record holdings pertaining to public employees and the public right to know with respect to public employees’ employment, salary, compensation, etc. These examples include:

- (1) 38 Opinion Attorney General No. 109(1980) HELD: (1) A state employee’s title, dates and duration of employment, and salary are public information.
- (2) A state agency may require that requests for disclosure of a state employee’s title, dates and duration of employment, and salary be in writing. However, the agency may not require that justification for the request be given.

- (2) 41 Opinion Attorney General No. 35(1985) HELD: The administrators of School District No. 7 do not have a constitutionally-protected right to privacy regarding the amount of merit pay awarded to them pursuant to the district's Leadership Evaluation and Compensation Plan. Therefore, the amounts should be disclosed to the public.
- (3) 43 Opinion Attorney General No. 6 (1989) HELD: Payroll record information, including the names, addresses, and wages of private employees working on a publicly funded project, that is reported to the Department of Highways is subject to public disclosure. The social security numbers of those employees are not subject to public disclosure.
- (4) 44 Opinion Attorney General No. 32(1992) HELD: County time records which show an employee's name, the department for which the employee works, and the hours worked, including claims for vacation, holiday, or sick leave pay, are subject to public disclosure.
- (5) 54 Opinion Attorney General No. 3(2011) 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.

Public employees' employment, salaries and compensation are paid for with public monies. The public has a public right to know how its public monies are being spent.

Also, in addition to Article II, section 9 of the Montana Constitution, there are Montana statutory provisions that establish a public right to know information about public government operations. For example, title 2, chapter 6, Montana Code Annotated is entitled "PUBLIC RECORDS". This chapter sets forth several provisions of Montana state law pertaining to public records and public information. Subsection 2-6-1002(11) MCA defines "public information" as meaning "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."

In addition, Montana municipal government state law, section 7-1-4144 MCA is entitled "PUBLIC RECORDS". Section 7-1-4144 MCA states:

7-1-4144. Public records. (1) Except as provided in subsection (2), all records and other written materials in the possession of a municipality shall be available for inspection and reproduction by any person during normal office hours. The governing body may impose reasonable fees for providing copies of public records.

(2) Personal records, medical records, and other records which relate to matters in which the right to individual privacy exceeds the merits of public disclosure shall not be available to the public unless the person they concern requests they be made public.

(3) Except as provided by law and as determined by the chief law enforcement administrator, law enforcement records which relate to matters in which the right to individual privacy or law enforcement security exceeds the merits of public disclosure shall not be available to the public.

Personal medical information of a public employee as well as the public employee's social security number are examples of the very limited information about public employees that is not public record and there is no public right to know. Information such as personal medical conditions and social security numbers may be redacted from any public record that is being made available for public review pursuant to the public's right to know.

CONCLUSION(S):

Yes. When employees of EKO Compost (now Garden City Compost) and Mountain Water Company become municipal City of Missoula employees, they become public employees and it is well established in Montana for examples that public employee names, addresses, salary, job titles, merit pay, vacation and sick leave, dates of employment, and hours of work are public record subject to public disclosure.

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/s/

Jim Nugent, City Attorney

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