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Legal Opinion 2015-023

TO: Mayor John Engen; Mike Brady; Scott Hoffman; Mike Colyer; Chris Odlin; Richard Stepper; Laurie Clark; Dale Bickell; Ginny Merriam; and Steve Johnson

CC: Legal Department Staff

FROM: Jim Nugent, City Attorney

DATE July 29, 2015

RE: Release of the name of the Missoula Police Officer involved in a Caras Park Celtic Festival incident who is the subject of Missoula City Police investigation.

FACTS:

An incident occurred this past weekend at the Celtic Festival at Caras Park in downtown Missoula that was recorded on a cell phone that news media have been playing on TV that involved physical interactions between a person who was dancing rather wildly amongst people, including families, sitting on one of the grassy slopes and an off duty city police officer. The City of Missoula police department is currently conducting an investigation of the incident. Members of the news media requested information concerning the police investigation, including the name of the off duty police officer involved in the incident

ISSUE:

During the city police investigation of the Caras Park incident, may the public learn who the off duty city police officer is who is being investigated?

CONCLUSION:

Yes, during the city police investigation of the incident in Caras Park the public may learn who the off duty city police officer is who is being investigated. The incident occurred at a public park during a public Celtic festival. The Montana Constitutional Right to Privacy is not absolute and does not completely protect a police officer from disclosure of their name during a police investigation about an off duty incident that occurred in a public park at a public festival.

LEGAL DISCUSSION:

Several Montana Supreme Court cases note that police officers hold positions of great public trust in our society and that therefore their respective right to privacy is more limited or restricted.

Article II, sections 9 and 10 of the Montana Constitution are entitled “RIGHT TO KNOW” and “RIGHT TO PRIVACY”. These two sections of the Montana Constitution state as follows:

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.

Section 10. RIGHT OF PRIVACY. The right of individual privacy is essential to the well-being of a free society and shall not be infringed on without the showing of a compelling state interest.”

The Montana Supreme Court in *Great Falls Tribune v. Cascade County Sheriff* (1989) 238 Mont. 103, 775 P. 2d 1267, at 1269 stated:

“Law enforcement officers occupy positions of great public trust . . . (and) . . . the public has a right to know when law enforcement officers act in such a manner as to be subject to disciplinary action. The public health, safety, and welfare are closely tied to an honest police force. The conduct of our law enforcement officers is a sensitive matter so that if they engage in conduct resulting in discipline for misconduct in the line of duty, the public should know. We conclude that the public’s right to know in this situation represents a compelling state interest.”

The *Great Falls Tribune v. Cascade County sheriff* case involved several law enforcement officers being disciplined as a result of their actions during a chase and apprehension of a suspect. The Montana Supreme Court upheld the district court order to disclose the names of the law enforcement officers on the basis that law enforcement officers who have been disciplined have only a minimal right to privacy that is easily outweighed by the people’s right to know.

Later the Montana Supreme Court in *Bozeman Daily Chronicle v. City of Bozeman Police Department* 260 Mont. 218, 859 P. 2d 435(1993) relied on its prior decision in *Great Falls Tribune* to order release of the name of an off duty City of Bozeman police officer who had been accused by a cadet at the Montana Law Enforcement Academy when it was located in Bozeman of having sexual intercourse without consent as well as the release of the initial offense report after a prosecutorial investigation had been concluded, no criminal charges filed and the Bozeman police officer had resigned. Even though no criminal charges were filed against the Bozeman police officer, the prosecutor’s investigation recommended that the Bozeman police officer not be allowed to continue to work in law enforcement “because of (his) inappropriate use of his position in relation to contacts with women”.

There also are other Montana Supreme Court decision examples of the names of off duty police officer involved in off duty misconduct being made public. The Montana Supreme Court in *In Re Raynes*, 215 M 484, 698 P. 2d 856(1985) involved a Great Falls police officer's off duty misconduct. The police officer had been on the Great Falls police force for 18 years; but was found to have engaged in conduct unbecoming a police officer pursuant to his off duty private hypnosis business. The off duty police officer was engaging in sexual relations with his hypnosis clients. Part of the investigative finding was that the police officer used his status as a police officer to gain the trust and confidence of his victims.

Another Montana Supreme Court decision involving off duty misconduct by police officers is *Gentry v. Helena* 237 M 353, 773 P. 2d 309(1989). The Gentry case involved two off duty Helena police officers who had been basically out on the town for more than eight (8) hours drinking alcoholic beverages while making the rounds of Helena bars. They were accused of harassing at least one citizen while making their rounds of Helena bars. A third on duty police officer gave the two off duty police officers a ride to their vehicle. Then all three police officers attempted to cover up the events, including lying to the Helena police commission. The Helena police commission found that all three police officers lied to the Helena police commission and that two Helena police officers were guilty under the citizen complaints about their conduct. The Helena police commission recommended suspension. The Helena city manager instead fired the three police officers.

Basically the Montana Supreme Court has indicated that law enforcement officers occupy positions of great public trust in our society and that alleged breaches of that public trust are a proper matter for public scrutiny through public access to names and investigative reports after the investigation is complete and any proceedings associated with the investigation are concluded. More recently the Montana Supreme Court in *Billings Gazette v. Billings* (2011) 2011 MT 293, 362 Mont. 522, 267 P. 2d 435 held that a Billings police department administrative secretarial position was a position of public trust; because the person had access to and the ability to use a City of Billings credit card. The City of Billings administrative support staff person had utilized the City of Billings credit card for personal purchases. The City of Billings internally investigated and after the conclusion of its investigation issued a 16 page due process letter to the City of Billings employee concerning the investigation of her conduct. The Montana Supreme Court indicated that the employee's alleged misconduct went directly to a breach of her position of public trust and that the internal investigation result once concluded was a proper matter for public scrutiny.

Here in these specific factual circumstances, the off duty police officer's conduct being investigated occurred in a public park at a public Celtic festival event and was in part recorded on a citizen's cell phone. The recording has been played on local TV many times for several days. There may be some citizen concern about whether excessive force occurred and/or whether any force was appropriate in the factual circumstances. Based on these specific factual circumstances the name of the police officer should be released to the public. However, it is premature to be releasing the city police department's internal investigation; since it is not complete and no decisions or determinations as to any course of action based on the investigation have been made yet.

CONCLUSION:

Yes, during the city police investigation of the incident in Caras Park the public may learn who the off duty city police officer is who is being investigated. The incident occurred at a public park during a public Celtic festival. The Montana Constitutional Right to Privacy is not absolute and does not completely protect a police officer from disclosure of their name during a police investigation about an off duty incident that occurred in a public park at a public festival.

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/s/

Jim Nugent, City Attorney

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