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NO. 54300-8

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

BELLEVUE JOHN DOE 11 AND SEATTLE JOHN DOES 6 & 9,

Appellants/Cross-Respondents,

BELLEVUE JOHN DOES 1-10, FEDERAL WAY JOHN DOES 1-5
AND JANE DOES 1-2, AND SEATTLE JOHN DOES 1-5, 7-8, & 10-17,
AND SEATTLE JANE DOE 1 AND JOHN DOE,

Plaintiffs/Cross-Respondents,

v.

BELLEVUE SCHOOL DISTRICT #405, FEDERAL WAY SCHOOL
DISTRICT #210, AND SEATTLE SCHOOL DISTRICT #1,

Respondents, AND

THE SEATTLE TIMES COMPANY,

Respondent/Cross-Appellant.

ANSWER OF THE SEATTLE TIMES COMPANY TO BRIEF OF
AMICUS CURIAE WASHINGTON EDUCATION ASSOCIATION

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I. INTRODUCTION

Pursuant to RAP 10.2(g), Respondent/Cross-Appellant The Seattle Times Company (“the Times”) respectfully submits this Answer to the Brief of Amicus Curiae Washington Education Association (“WEA”).

II. STATEMENT OF THE CASE

As the facts relevant to this appeal have been presented in briefs already before the Court, the Times will not restate them all here. Instead, it will highlight facts necessary to answer the brief of amicus curiae WEA.

This case arose from Public Disclosure Act (“PDA”) requests that the Times made to the Respondent school districts (the “districts”) for records regarding teachers accused of, investigated for or disciplined for sexual misconduct within the past 10 years. CP 98. Two attorneys filed four separate lawsuits against the districts on behalf of 37 current or former teachers and obtained temporary restraining orders barring release of the teachers’ names and the names of the school and school level personnel involved in or named in the investigation. CP 98.

The plaintiffs’ lawyers provided the trial court with copies of records purported to have been obtained from the districts and understood by the trial court to constitute the complete unredacted set of records responsive to the Times’ PDA requests. CP 99, 2179-2180, 2182. The trial judge understood that he had been given a complete set of the records,

stating in his Order that plaintiffs' counsel "provided the court for in camera review all of the records sought by the Seattle Times." CP 99. The court performed an *in camera* review of these records pursuant to RCW 42.17.340(3). CP 99.

As the Times indicated in its Motion to Lodge Public Records, it became clear that the trial court did not receive all of the records that were responsive to the Times' PDA requests and thus did not include them in its *in camera* review. The Times requested that unredacted records for 18 of the John Doe plaintiffs be lodged with the Court. This Court granted the Times' motion on September 14, 2004.

As part of the proceedings in the trial court, two former Seattle School District employees testified via speakerphone in open court about four of the Doe plaintiffs. The court subsequently dissolved the TRO and ordered the districts to release to the Times the records relating to 22 teachers, including identifying information. CP 99, 117-19. The court ordered disclosure where the allegations were deemed substantiated, the district issued a letter of reprimand, the record contained no evidence that the district adequately investigated the allegations, or plaintiffs' counsel could not provide proof of representation. CP 100-09.¹

¹ As WEA notes, WEA Amicus Br. at 6 n.1, Seattle John Doe 4 was among the teachers whose records the court ordered released. CP 106.

The court held that identifying information was exempt in the case of 15 of the teachers. CP 117-18. In those 15 cases, the court ruled the allegations either appeared to be false or unfounded after adequate investigation, the allegations resulted in only “letters of direction” or the actions did not involve “significant” misconduct. CP 101-08.

Notably, the court’s findings do not equate to a finding of no misconduct in all 15 cases. Instead, the court found that for seven of the teachers the allegations were “relatively minor” (Federal Way John Doe 3), the incident did not involve “significant misconduct” (Bellevue John Does 1, 4, 6 and 9) and/or resulted in a letter of direction directing the teacher to refrain from specified conduct (Bellevue John Does 2 and 7). CP 101-05.

Seattle John Doe 4 is Reese Lindquist, a past president of the WEA. According to records provided by the Seattle School District, the district notified Lindquist that it had information that he solicited and had sex with minors while they had been students in the district and later informed the Office of Superintendent of Public Instruction that it had reason to believe Lindquist “committed acts of unprofessional conduct, in soliciting and having sex with minors and other sexual misconduct.” CP 3180-81. The Times disagrees with WEA’s characterization that the only reason his records were ordered released was because his identity was known to the Times.

III. ARGUMENT AND AUTHORITY

A. Courts Reject Privacy Claims Arising out of Reports of Allegations of Misconduct by Public Employees.

The PDA’s definition of privacy, adopted in *Hearst v. Hoppe* and enshrined in RCW 42.17.255, is drawn from Restatement (Second) of Torts § 652D, the tort of publication of private facts. RCW 42.17.255, *Hearst v. Hoppe*, 90 Wn.2d 123, 136, 580 P.2d 246 (1978). Under the Restatement,

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person and (b) is not of legitimate concern to the public.

Restatement (Second) of Torts § 652D; *see Hearst*, 90 Wn.2d at 135-36.

WEA argues that the public has no legitimate concern in false and unsubstantiated allegations. WEA Amicus Br. at 15. Cases addressing privacy claims of public employees for disclosure of allegations do not support this claim. In fact, cases under Restatement § 652D – of which a “legitimate” concern to the public is an essential element – and cases looking at the reasonableness of an expectation of privacy in light of public interest and concern – both reject liability for disclosure of allegations of misconduct by public employees.

In *Rawlins v. Hutchinson Publishing Company*, for example, the Supreme Court of Kansas rejected a claim that disclosure of allegations of

misconduct by a public employee constituted an invasion of privacy under Restatement § 652D. *Rawlins v. Hutchinson Publ'g Co.*, 543 P.2d 988, 991-92 (Kan. 1975).² The court found that allegations against a police officer of misconduct while on duty – allegations that the officer denied were true – involved public facts and not private facts and thus could not support a privacy claim. *Id.* at 990, 993. The court emphasized that the rank and file police officer “was a public official, in whose conduct the public has a vital interest.” *Id.* at 992.

Similarly, courts in Montana have consistently rejected privacy claims based on allegations of misconduct by public employees, including teachers, looking to the reasonableness of the expectation of privacy in light of the public’s interest and concern. *See, e.g., Svaldi v. Anaconda-Deer Lodge County*, ___ P.3d ___, 2005 WL 277708, 2005 MT 17 (Mont. 2005); *Citizens to Recall Whitlock v. Whitlock*, 844 P.2d 74 (Mont. 1992) (no violation of privacy in disclosing sexual harassment allegations against mayor; allegations were settled without finding of fault). The Montana Supreme Court’s recognition of the need for “public disclosure of allegations against persons holding positions of great public trust,” extended to teachers: “As a teacher in the public schools, entrusted with

² For the Court’s convenience, the Times has attached out-of-state authority to the Court’s copy of this Answer.

the care and instruction of children, [the plaintiff's] position is one of public trust. Also, the allegations of misconduct, assault against her students, went directly to her ability to properly carry out her duties.” *Svaldi*, 2005 WL 277708, at * 5. Where, as in the case before the Court, the allegations go directly to individuals’ ability to carry out their public duties, there is no reason for hiding the allegations from public scrutiny. *See id.*

Washington courts have also recognized that disclosure of allegations does not necessarily implicate privacy concerns. In *Cowles Publishing Co. v. Spokane Police Department*, the Supreme Court held that “the fact that allegations have not yet been proven is not persuasive of the need to provide blanket protection for purposes of a defendant’s privacy.” 139 Wn.2d 472, 479, 987 P.2d 620 (1999), as amended on denial of reconsideration (2000) (police incident report not exempt from disclosure). The court held, “Rarely would criminal allegations so devastate the reputation of the suspect that nondisclosure would be necessary to protect against the effect of false accusation.” *Id.* at 479.

B. WEA’s Due Process Claims are Unsupported.

Citing decisions from the Ninth Circuit Court of Appeals and The U.S. Supreme Court, WEA next opines that disclosure of the requested records will trigger an onslaught of due process claims. Yet the cases

upon which WEA relies do not apply here, and the U.S. Supreme Court has expressly rejected the broad reading of due process rights that WEA seeks this Court to adopt.

The Ninth Circuit's decision in *Cox v. Roskelley*, 359 F.3d 1105 (9th Cir. 2004), and the cases cited in that 2-1 decision, addressed disclosure of termination letters that had been placed in an employee's personnel files without the benefit of the employee having a "name-clearing hearing." 359 F.3d at 1110-13. They did not address more general records of investigations into allegations of misconduct. For *Cox* to even arguably apply, the requested records would have to involve termination letters and the teachers would have to have been deprived of pre- or post-termination hearings. There has been no indication from any of the individual John Does or the districts that such termination without a hearing occurred.³

Further, WEA's attempt to create a due process claim solely by the placement or release of negative information in a public employees' files directly defies rulings of the U.S. Supreme Court. The Supreme Court has refused to recognize injury to reputation, standing alone, as a

³ Bellevue John Doe 11 claimed that he had no opportunity to be heard regarding the allegations of misconduct against him. Br. of Bellevue John Doe 11 at 48-49. Yet the records could not involve notices of termination as he states he retired after a 30-year career. *Id.* at 2.

constitutionally protected liberty interest. *See Paul v. Davis*, 424 U.S. 693, 709, 712, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976). In discussing its earlier decision in *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972), the court held,

While *Roth* recognized that governmental action defaming an individual in the course of declining to rehire him could entitle the person to notice and an opportunity to be heard as to the defamation, its language is quite inconsistent with any notion that a defamation perpetrated by a government official but unconnected with any refusal to rehire would be actionable under the Fourteenth Amendment.

...

Thus it was not thought sufficient to establish a claim under § 1983 and the Fourteenth Amendment that there simply be defamation by a state official; the defamation had to occur in the course of the termination of employment. Certainly there is no suggestion in *Roth* to indicate that a hearing would be required each time the State in its capacity as employer might be considered responsible for a statement defaming an employee who continues to be an employee.

Paul, 424 U.S. at 709-10. The court held that injury to reputation is addressed by state tort law; it “does not result in a deprivation of any ‘liberty’ or ‘property’ recognized by state or federal law.” *Id.* at 712. The court expressly rejected any implication that defamation, without more, implicates due process rights. *Id.* at 708. “If read that way, it would represent a significant broadening” of the court’s previous holdings. *Id.*

Here, even if disclosure of “stigmatizing information” could harm the teachers’ reputations – and there is no evidence to support that –

disclosure would not also deprive them of any previously held right, thus implicating due process rights. The Constitution does not require a name-clearing hearing each time allegations of misconduct simply are placed in the personnel file of a public employee, nor when the records are released pursuant to a request. Were the 9th Circuit *Cox* decision to be interpreted as requiring this – as WEA contends it should – the *Cox* decision would contradict binding U.S. Supreme Court case law. *See Paul*.

C. Neither the Facts nor the Law under the PDA Supports WEA's Position.

Contrary to WEA's oft-repeated claim, the trial court's order does not reflect that there was "no finding of misconduct." WEA Amicus Br. at 12, 14. The court found that for several of the Doe Respondents, the incidents did not involve "*significant* misconduct"; it did not find that there was no misconduct. CP 101-05 (emphasis added).

Regardless of whether the misconduct was significant or not, the records discussing specific instances of misconduct are not exempt under the PDA or decisions interpreting the PDA. The Washington Supreme Court's decision in *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993), addressed access to routine performance evaluations and not the records of investigations into allegations of misconduct that the Times requested

here. Yet *Dawson* expresses limits on when agencies can withhold employee records under RCW 42.17.310(1)(b).

In *Dawson*, the court conducted an *in camera* review and found that the requested personnel file of a deputy prosecutor did not discuss specific instances of misconduct or public job performance. 120 Wn.2d at 800. The court held that where public employees' performance evaluations do not discuss "specific instances of misconduct," disclosure would be highly offensive and not of legitimate public interest. *Id.* at 797, 801. Contrary to WEA's suggestion, the court did not hold that the PDA exemption extends to records that contain "no *substantiated* issues of misconduct" or "no finding of misconduct but rather a letter of direction." WEA Amicus Br. at 1, 8, 11 (emphasis added).⁴

⁴ WEA also errs in claiming that Washington courts have "consistently applied this policy" of redacting names "where there was no finding of misconduct after investigation of allegations of misconduct." WEA Amicus Br. at 6. The decisions that it cites from this Court and from the Supreme Court reflect no such "policy." *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993), involved performance evaluations, not records of investigations into misconduct. *Brown v. Seattle Public Schools*, 71 Wn. App. 613, 860 P.2d 1059 (1993), involved evaluations and other records, none of which are described as records of investigations into misconduct. *Koenig v. City of Des Moines*, 123 Wn. App. 285, 95 P.3d 777 (2004), involved records regarding a child victim of sexual assault, not records of investigations of allegations of sexual misconduct by public employees, and the victim's identity was redacted – not the accused's – based on a separate statute requiring redaction of the names of child victims of sexual abuse.

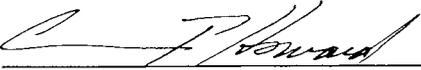
Here, unlike the performance evaluations in *Dawson*, the trial court held that the records of at least seven of the Doe Respondents discuss specific instances of misconduct, albeit – according to the lower court – not “significant” misconduct, a distinction not supported by *Dawson*. The remaining eight teachers’ records also discuss allegations of misconduct. The records are not performance evaluations; they deal specifically with misconduct. They are not exempt based on *Dawson*, and they may not be withheld under Exemption (1)(b).

IV. CONCLUSION

The Times requests that the Court consider the foregoing facts and discussion in answer to the amicus brief of WEA.

RESPECTFULLY SUBMITTED this 2nd day of March 2005.

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MAR - 2 2005

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of March, 2005 a true and correct copy of the following document was served on all parties below at the following addresses by the method indicated:

1. Answer of Seattle Times Company to Brief of Amicus Curiae of Washington Education Association:

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EXECUTED this 2nd day of March 2005, at Seattle,
Washington.

Barbara J. McAdams
Barbara J. McAdams

C

Supreme Court of Kansas.
 Paul O. RAWLINS, Appellant,
 v.
 The HUTCHINSON PUBLISHING COMPANY, a
 corporation, Appellee.
 No. 47773.

Dec. 13, 1975.

Former police officer brought action against publisher of newspaper, alleging an invasion of privacy by the publication of accounts of his alleged misconduct in office ten years before. The Reno District Court, W. A. Gossage, J., granted the publisher's motion for summary judgment, and plaintiff appealed. The Supreme Court, Foth, C., held that publication of accounts of alleged misconduct in office were 'public facts' as opposed to 'private facts'; that as a police officer plaintiff was a 'public official'; that plaintiff had no right of privacy as to the manner in which he conducted himself in office; and that the lapse of time since plaintiff was a public official did not restore his right of privacy concerning the incident occurring ten years before.

Affirmed.

West Headnotes

[1] Torts  8.5(7)

379k8.5(7) Most Cited Cases

Publication in newspaper of accounts of the alleged misconduct in office of plaintiff occurring ten years before the publication in question while he was a police officer concerned the "public life," as opposed to the "private life" of the former police officer for purposes of test to be applied in determining whether publication amounted to an invasion of privacy.

[2] Torts  8.5(8)

379k8.5(8) Most Cited Cases

Plaintiff, a former police officer who brought an action for invasion of privacy against a newspaper for the publication of accounts of his alleged misconduct in office ten years before the publication in question, was a "public official," thus waiving his right of privacy as to any conduct pertaining to his fitness for that office.

[3] Torts  8.5(2)

379k8.5(2) Most Cited Cases

Persons who are not "public officials" or "public figures" are subject to greater protection from defamatory falsehoods than those who are, so that a publisher may be required to respond in damages for defaming a "private person" even though the publication was made with some degree of culpability less than actual malice.

[4] Libel and Slander  36

237k36 Most Cited Cases

If the circumstances are such that there is a qualified privilege to communicate even defamatory falsehoods about an individual, so long as it is done without actual malice, there is an absolute privilege to communicate matters which are true.

[5] Torts  8.5(8)

379k8.5(8) Most Cited Cases

A person who assumes a public role by becoming a public official thereby waives his right of privacy as to any conduct which bears on his fitness for that office.

[6] Torts  8.5(7)

379k8.5(7) Most Cited Cases

In order to maintain an action for invasion of privacy under a theory that the defendant gave unreasonable publicity to plaintiff's private life, the facts publicized must be private, and not facts which are in the public domain.

[7] Torts  8.5(7)

379k8.5(7) Most Cited Cases

A truthful account of charges of misconduct in office by a public official cannot form the basis of an action for the invasion of privacy.

[8] Torts  8.5(7)

379k8.5(7) Most Cited Cases

The passage of time does not confer a right of privacy upon a former public official as to facts concerning the manner in which he conducted himself while in office.

[9] Torts  8.5(7)

379k8.5(7) Most Cited Cases

Publications of accounts of the alleged misconduct in office of plaintiff occurring ten years before the publications in question while plaintiff was a police

officer, were not actionable, since the former police officer was a public official while a police officer and since the alleged misconduct dealt with his conduct in office, and not with his private life, even though the action of the defendant newspaper in dredging up the episode may have been ill-advised and in poor taste.

**989 *295 Syllabus by the Court

1. In an action for invasion of privacy under a theory that the defendant gave unreasonable publicity to plaintiff's private life, the facts publicized must be private, and not facts which are in the public domain.

2. A person who assumes a public role by becoming a public official thereby waives his right of privacy as to any conduct which bears on his fitness for that office.

3. A truthful account of charges of misconduct in office by a public official cannot form the basis of an action for the invasion of privacy.

4. The passage of time does not confer a right of privacy upon a former public official as to facts concerning the manner in which he conducted his office.

5. In an action for invasion of privacy by a former police officer based on the publication of accounts of his alleged misconduct in office ten years before it is held that on the undisputed facts the publications were not actionable and the trial court correctly rendered summary judgment for the defendant.

John A. Robinson, Rauh, Thorne & Robinson, Hutchinson, argued the cause and was on the brief for appellant.

W. Y. Chalfant, Branine, Chalfant & Hyter, Hutchinson, argued the cause and was on the brief for appellee.

FOTH, Commissioner:

Paul O. Rawlins brought this action against the Hutchinson Publishing Company, publisher of the daily newspaper The Hutchinson News, for damages for the alleged invasion of his privacy. The trial court granted summary judgment in favor of the defendant newspaper, and plaintiff has appealed.

The newspaper carries a regular column 'Looking Backward' which recalls and reports news items prominent on the corresponding date 10, 25 and 50

years ago. On April 4, 1974, the column carried the following statement:

'Ten years ago in 1964. Paul Rawlins, Hutchinson policeman, was indefinitely *296 suspended for conduct unbecoming an officer by Chief Carl Spriggs for allegedly annoying a woman. He denied the charge.' - -

Six days later, on April 10, 1974, the column carried a further blurb:

'Ten years ago in 1964. Ray Bruggeman, City Manager, fired a policeman after he had been suspended a week by Chief Carl Spriggs after a complaint by a woman.'

Plaintiff alleged that during the ten years since the events of April, 1964, he had led a purely private life and enjoyed a good reputation in the community; the 1964 incident was a forgotten relic of the past. The 1974 stories, he said, were 'unwarranted invasions of the plaintiff's right to privacy, the right to be let alone, the right to be free from unwarranted publicity and the right to live without unwarranted **990 interference by the public in matters in which the public is not necessarily or legitimately concerned, and the right to be free from unwarranted appropriation or exploitation of plaintiff's personality, private affairs, and private activities.' The result of the publications, he alleged, was embarrassment, public ridicule and mental suffering for both him and his family.

In answer to a pre-trial request for admissions plaintiff admitted that the 1974 stories, although incomplete, 'fairly summarized' portions of stories run in 1964. He also admitted that the 1964 stories attached to the request 'fairly report the charges against the Plaintiff in April of 1964 and the action taken by Plaintiff's superiors at that time.'

It appears that plaintiff's problems were of considerable public interest in 1964. The first story, dealing with his suspension from duty, appeared on the newspaper's front page with a four column headline, accompanied by a picture of plaintiff in uniform. It recited the charges of misconduct while on duty, and that plaintiff denied the charges. It also recited: 'Rawlins asked that news media be brought in 'so they know what's going on.'

The second 1964 story, covering his discharge a week later, was also front page news. It carried a three column headline, and repeated the charges of misconduct while on duty and plaintiff's denials.

In rendering summary judgment for the defendant the trial court entered the following findings and conclusions:

'5. That at all times material to the articles appearing in Defendant's newspaper on April 4, 1964, and April 10, 1964, Plaintiff was a uniformed policeman and member of the Hutchinson Police Department; that the articles *297 so published in 1964 accurately reported the charges placed against Plaintiff and the action taken by his superiors in first suspending and then discharging him from his position on the police force; and that by virtue of his involvement with serious disciplinary charges and the findings made by his superiors, Plaintiff became a figure of local history and the center of a local controversy of public interest at that time.

'6. That as a uniformed officer of the Hutchinson Police Department, charged with the duty and responsibility of protecting the safety and property of the public, Plaintiff was a public and not a private person.

'7. That the publication of reports concerning the charges, suspension and discipline of Plaintiff, as a police officer, involved public, not the private affairs of Plaintiff.

'8. That the public has a continuing interest in and right to review past events of local, regional or national concern for their historical, educational, informative or entertainment value.

'9. That Defendant was privileged to publish the historical summaries of fact contained in the issues of its newspaper on April 4, 1974, and April 10, 1974, and such publication was not an unwarranted publication, and involved public affairs.'

On appeal plaintiff designates nine separate points, but as we see it they raise two controlling questions. First, were the facts which were published about him 'public facts' and not 'private facts' as found by the trial court? Second, what was the effect of the ten year period which elapsed between the occurrences of 1964 and the publications of 1974?

The questions arise because of our analysis of the four torts known collectively as 'invasions of privacy' found in Froelich v. Adair, 213 Kan. 357, 516 P.2d 993; and in Dotson v. McLaughlin, 216 Kan. 201, 531 P.2d 1. In those cases we discussed the development of the right of privacy in this jurisdiction and elsewhere, and adopted the analysis found in Prosser, Law of Torts (4th Ed.), Privacy, s 117, and reformulated in the Restatement of the Law, Second, **991 Torts (Tentative Draft No. 13) ss 652A-652E:

's 652A. MEANING OF INVASION OF PRIVACY
'THE RIGHT OF PRIVACY IS INVADED
WHEN THERE IS

'(a) UNREASONABLE INTRUSION UPON THE
SECLUSION OF ANOTHER, AS STATED IN s
652B; OR

'(b) APPROPRIATION OF THE OTHER'S
NAME OR LIKENESS, AS STATED IN s 652C;
OR

'(c) UNREASONABLE PUBLICITY GIVEN TO
THE OTHER'S PRIVATE LIFE, AS STATED IN
s 652D; OR

'(d) PUBLICITY WHICH UNREASONABLY
PLACES THE OTHER IN A FALSE LIGHT
BEFORE THE PUBLIC, AS STATED IN s 652E.'
(P. 101.)

's 652B. INTRUSION UPON SECLUSION

'One who intentionally intrudes, physically or otherwise, upon the solitude *298 or seclusion of another, or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable man.' (P. 103.)

's 652C. APPROPRIATION OF NAME OR
LIKENESS

'One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.' (P. 108.)

's 652D. PUBLICITY GIVEN TO PRIVATE LIFE

'One who gives publicity to matters concerning the private life of another, of a kind highly offensive to a reasonable man, is subject to liability to the other for invasion of his privacy.' (P. 113.)

's 652E. PUBLICITY PLACING PERSON IN
FALSE LIGHT

'One who gives to another publicity which places him before the public in a false light of a kind highly offensive to a reasonable man, is subject to liability to the other for invasion of his privacy.'
(P. 120.)

Kansas was among the first states to recognize an action for invasion of privacy, in Kunz v. Allen, 102 Kan. 883, 172 P. 532 (1918). That was a case of 'appropriation of name or likeness' and would be classified today under the Restatement's s 652C. Since then we have recognized causes of action for 'intrusion upon seclusion' (s 652B) in Froelich v. Adair, supra, and Dotson v. McLaughlin, supra; for 'appropriation of name or likeness' (s 652C) in

Johnson v. Boeing Airplane Co., 175 Kan. 275, 262 P.2d 808; and for 'publicity given to private life' (s 652D) in Munsell v. Ideal Food Stores, 208 Kan. 909, 494 P.2d 1063. (So far, it seems, all our cases which might have been categorized as 'publicity placing person in false light' under s 652E have been cast by the parties in the more traditional molds of libel or slander.)

In categorizing the allegations here, giving due attention to the Restatement's notes, comments and illustrations, we must conclude that, if anything, they allege an invasion of privacy under s 652D, as giving 'unreasonable publicity' to plaintiff's 'private life.' There was no 'intrusion upon seclusion'-there is no claim that the newspaper ever came near plaintiff's person. There was no 'appropriation' of plaintiff's name or person-the usual form of that tort is the unauthorized use of plaintiff's name or likeness for advertising or commercial purposes, or for some other benefit for which defendant ought to pay. And there is no claim here that plaintiff was put in a 'false light'-the stories are admitted to be accurate.

[1][2] We must determine, then, whether what was publicized concerned the 'private **992 life' of the plaintiff. We think it clear it did not. In 1964 plaintiff was a police officer, charged with the duties of that office. He was a public official, in whose conduct the public has a vital interest. His contention that his rank did not elevate *299 to the status of a 'public official' cannot be sustained. In a libel action brought by a patrolman against a newspaper, the Illinois Supreme Court answered such a contention in convincing language:

'It is our opinion that the plaintiff is within the 'public official' classification. Although as a patrolman he is 'the lowest rank of police officials' and would have slight voice in setting departmental policies, his duties are peculiarly 'governmental' in character and highly charged with the public interest. It is indisputable that law enforcement is a primary function of local government and that the public has a far greater interest in the qualifications and conduct of law enforcement officers, even at, and perhaps especially at, an 'on the street' level than in the qualifications and conduct of other comparably lowranking government employees performing more proprietary functions. The abuse of a patrolman's office can have great potentiality for social harm; hence, public discussion and public criticism directed towards the performance of that office cannot constitutionally be inhibited by threat of prosecution under State libel laws.' (Coursey v. Greater Niles Twp. Pub. Corp., 40

Ill.2d 257, 264-5, 239 N.E.2d 837, 841.)

The term 'public official' has been held to embrace a patrolman (Moriarty v. Lippe, 162 Conn. 371, 294 A.2d 326), a deputy sheriff (St. Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262), a deputy chief of detectives (Time, Inc. v. Pape, 401 U.S. 279, 91 S.Ct. 633, 28 L.Ed.2d 45), a police chief (Henry v. Collins, 380 U.S. 356, 85 S.Ct. 992, 13 L.Ed.2d 892), and three policemen (Hull v. Curtis Publishing Company, 182 Pa.Super. 86, 125 A.2d 644). Indeed, it has been held presumptively to include a supervisor of a county recreation area (Rosenblatt v. Baer, 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597).

All the foregoing were libel cases (except Hull, a right to privacy case). In them the 'public official' label was important in determining the necessity of showing 'actual malice' in publishing the libel, under the doctrine of New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, 95 A.L.R.2d 1412. The doctrine is based on the proposition that debate on public issues 'may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' (*Id.*, p. 270, 84 S.Ct. p. 721.) The Court there quoted Justice Frankfurter's observation that 'public men, are, as it were, public property.' (*Id.*, p. 268, 84 S.Ct. p. 720; Beauharnais v. Illinois, 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed. 919, Note 18.) The New York Times rule was extended to those who are merely 'public figures' in Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094.

[3] Persons who are not 'public officials' (or at least 'public figures') *300 are subject to greater protection from defamatory falsehood. That is, the publisher may be required to respond in damages for defaming a 'private person' even though the publication was made with some degree of culpability less than the actual malice required by New York Times. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789; Gobin v. Globe Publishing Co., 216 Kan. 223, 531 P.2d 76.

[4] Although these principles were established in the field of defamation law, they have a direct bearing on the closely related field of privacy we are dealing with here. We have held:

'Only unwarranted invasions of the right of privacy are actionable. The right of privacy does not prohibit the communication of any matter though of a private nature, when the publication is made under circumstances which would **993 render it a

privileged communication according to the law of libel and slander.' (Munsell v. Ideal Food Stores, supra, Syl. 4.)

That is to say, if the circumstances are such that there is a qualified privilege to communicate even defamatory falsehoods about an individual, so long as it is done without actual malice, there is an absolute privilege to communicate matters which are true.

[5] As to 'public officials' or 'public figures,' quite apart from the First Amendment considerations delineated in *New York Times and Butts*, it is generally held that those who voluntarily step upon the public stage thereby forego their right of privacy, at least as to their conduct in their public roles. 'A person who by his accomplishments, fame, or mode of life, or by adopting a profession or calling which gives the public a legitimate interest in his doings, affairs, or character, is said to become a public personage, and thereby relinquishes a part of his right of privacy. (*Metter v. Los Angeles Examiner*, 35 Cal.App.2d 304, 312, 95 P.2d 491; *Sidis v. F R Pub. Corp.*, (Circuit Court of Appeals, Second Circuit) 113 F.2d 806, 809.)' (*Cohen v. Marx*, 94 Cal.App.2d 704, 705, 211 P.2d 320, 321.)

The principle is recognized by the Restatement in its comment c. to s 652F (to be transferred under Tentative Draft No. 21 to s 652D):

'One who voluntarily places himself in the public eye, by engaging in public activities, or by submitting himself or his work for public judgment, cannot complain when he is given publicity which he has sought, even though it may be unfavorable to him. So far as his public appearances and activities themselves are concerned, such an individual has, properly speaking, no right of privacy, since these are no longer his private affairs.' (P. 128.)

*301 See e. g., *Bell v. Courier-Journal and Louisville Times Company*, 402 S.W.2d 84 (Ky.Ct.App.1966); *Samuel v. Curtis Pub. Co.*, 122 F.Supp. 327 (N.D.Cal.1954); *Metter v. Los Angeles Examiner*, supra.

[6][7] If a public figure foregoes his right of privacy as to his 'public appearances and activities,' a public official, a fortiori, has no right of privacy as to the manner in which he conducts himself in office. Such facts are 'public facts' and not 'private facts.' Hence, a truthful account of charges of misconduct in office cannot form the basis of an action for invasion of privacy.

[8][9] What has been said would dispose of this case

were it not for plaintiff's claim that the lapse of time since he was a public official operated to restore his right of privacy. In support he cites *Melvin v. Reid*, 112 Cal.App. 285, 297 P. 91 and *Briscoe v. Reader's Digest Association, Inc.*, 4 Cal.3d 529, 93 Cal.Rptr. 866, 483 P.2d 34. In *Melvin* the defendants made a motion picture of the early life of the plaintiff, who had been acquitted in a notorious murder case. It truthfully depicted her as a prostitute at that time, and used her true maiden name; all facts were drawn from the public record. When the picture was made she had long since abandoned her previous calling and assumed a place in respectable society. The court held that while the facts of her prior life were not private, the use of her name was actionable. Similarly, in *Briscoe* the plaintiff had hijacked a truck and 'had paid his debt to society.' Some 11 years later the defendant used his name and an account of his crime in a story about the 'business' of hijacking. In each case there was a balancing by the court of the First Amendment rights of the press and public on the one hand, against the right of privacy and society's interest in the rehabilitation of former wrongdoers on the other. The balance was struck in favor of the latter.

There is, however, considerable contrary authority, among which is the leading case of *Sides v. F-R Pub. Corporation*, 113 F.2d 806 (2d Cir. 1940). The plaintiff there had been a famous child prodigy in 1910. **994 He had lectured to distinguished mathematicians at age 11, and had been graduated from Harvard at age 16, all to the accompaniment of considerable publicity. Thereafter he sought obscurity and went to great lengths to achieve it. In 1937 *The New Yorker* magazine, in a department called 'Where Are They Now', recalled his early days of fame, recounted his subsequent attempts to conceal his identity, and described his current mode of living. As characterized by the court, 'the article is merciless in its dissection *302 of intimate details of its subject's personal life, and this in company with elaborate accounts of Sidis' passion for privacy and the pitiable lengths to which he has gone in order to avoid public scrutiny. The work possesses great reader interest, for it is both amusing and instructive; but it may be fairly described as a ruthless exposure of a once public character, who has since sought and has now been deprived of the seclusion of private life.' (Pp. 807- 8.)

The court nevertheless found no actionable invasion of his privacy. By his earlier achievements he had made himself a legitimate object of continuing public interest, and therefore 'newsworthy.' The court there

observed, 'Regrettably or not, the misfortunes and frailties of neighbors and 'public figures' are subjects of considerable interest and discussion to the rest of the population. And when such are the mores of the community, it would be unwise for a court to bar their expression in the newspapers, books, and magazines of the day.' (P. 809.)

Likewise in *Cohen v. Marx*, supra, the plaintiff 'Canvasback Cohen' had been retired from the prize ring for ten years when Groucho Marx referred to him by that name on the air. The plaintiff doubtless preferred that his former sobriquet remain forgotten. The court held, however, that he had no cause of action for invasion of privacy, saying, 'it is evident that when plaintiff sought publicity and the adulation of the public, he relinquished his right to privacy on matters pertaining to his professional activity, and he could not at his will and whim draw himself like a snail into his shell and hold others liable for commenting upon the acts which had taken place when he had voluntarily exposed himself to the public eye. As to such acts he had waived his right of privacy and he could not at some subsequent period rescind his waiver.' (*Id.*, 94 Cal.App.2d at 705, 211 P.2d at 321.)

In *Werner v. Times-Mirror Co.*, 193 Cal.App.2d 111, 14 Cal.Rptr. 208, the plaintiff claimed an invasion of privacy by a 1958 newspaper story about his impending marriage. The story recalled his tenure as city attorney almost thirty years before, and referred to the fact that he and his first wife 'were rocked by a municipal scandal in the late 1930s'. The story stated that his first wife had served a sentence for grand theft, while he had been disbarred and later reinstated as being rehabilitated. The court held that he had no cause of action. Plaintiff had been a 'public personage' and had thereby relinquished his right of privacy as to the reported *303 matters, which were of legitimate public concern. The court went on to say:

'Mere passage of time does not preclude publication of incidents of public interest from the life of one formerly in the public eye which are already public property, and such incidents, being imbedded in communal history, are proper material for recounting in the literature, journalism or other media of communication of a later day.' (Syl. 11.)

The *Werner* court quoted with approval Dean Prosser's statement in *Privacy*, 48 Cal.L.Rev. 383, 418:

' . . . There can be no doubt that one quite legitimate function of the press is that of educating

or reminding the public as to past history, and that the recall of former public figures, the revival of past events that once were news, can properly be a matter of present public interest. . . . Such decisions indicate that once a man has become a public figure, or news, he remains a matter **995 of legitimate recall to the public mind to the end of his days.'

The same result was reached in *Smith v. National Broadcasting Co.*, 138 Cal.App.2d 807, 292 P.2d 600. Plaintiff had made a report, later found to be false, of a black panther being loose in the city of Los Angeles. The report was widely publicized and created considerable community apprehension at the time. Some three months later, long after the initial commotion had died down, the incident was dramatized and reenacted on the radio program 'Dragnet.' Although his name was not used, plaintiff sued for an invasion of his privacy.

The court first found that 'plaintiff's complaint is fatally deficient in its failure to allege facts showing an infringement on any part of his private life or personality.' (P. 811, 292 P.2d p. 602. Emphasis the court's.) As to his contention that the events were no longer newsworthy because of the passage of time, the court said:

' . . . It is a characteristic of every era, no less than of our contemporary world, that events which have caught the popular imagination or incidents which have aroused the public interest, have been frequently revived long after their occurrence in the literature, journalism, or other media of communication of a later day. These events, being embedded in the communal history, are proper material for such recounting. It is well established, therefore, that the mere passage of time does not preclude the publication of such incidents from the life of one formerly in the public eye which are already public property. (Citations omitted.)' (P. 814, 292 P.2d p. 604.)

Apart from the persuasiveness of these and similar cases (see Anno., *Waiver or Loss of Right of Privacy*, 57 A.L.R.3d 16, ss 32-34), we think much of the force of *Melvin and Briscoe* is overcome by the latest pronouncement of the United States Supreme Court in *304 *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328. That was an action for invasion of privacy based on the defendant's publication of the name of a deceased rape victim who was plaintiff's daughter. A Georgia statute prohibited the publication of the name or identity of a rape victim, although the name could be

obtained from the court records. The Georgia Supreme Court had found a cause of action, based in part on the balancing test of *Briscoe*.

The Supreme Court reversed, holding the Georgia statute to conflict with the freedom of the press guaranteed by the First Amendment. The court noted that '(g)reat responsibility is . . . placed upon the news media to report fully and accurately the proceedings of government' (420 U.S. at 491-92, 95 S.Ct. at 1044.) The basis for the Court's holding was:

' . . . Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business. In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions for the publication of truthful information contained in official court records open to public inspection.' (420 U.S. at 495, 95 S.Ct. at 1046.)

Cox, as we read it, would surely dictate a different result in both *Melvin* and *Briscoe*. In both of those cases the name of the plaintiff, like the name of the victim in *Cox*, could be found in the public records. Under *Cox* names, like facts, are in the public domain when available in public records. Liability for publishing the names would be, as we see it, prohibited by the First and Fourteenth Amendments.

Cox, *Sidis*, *Cohen*, *Werner*, *Smith* and the like strike us as more sound than *Melvin* or *Briscoe*. The purpose of the tort is **996 to protect an individual against unwarranted publication of private facts. Once facts become public the right of privacy ceases. We do not see how public facts, once fully exposed to the public view, can ever become private again. We cannot conceive, for example, that any of the participants in the recent 'Watergate' scandal can ever acquire a cause of action for invasion of privacy based on a retelling of that story. We cannot make any significant distinction between a president and the myriad of lesser public officials whose scandals may make news, differing only in the size of the body politic they *305 serve. In either case official misconduct is newsworthy when it occurs, and remains so for so long as anyone thinks it worth retelling. We therefore reject the test of 'current newsworthiness,' requiring a case by case evaluation

of the current public interest, at least where the facts published are public facts concerning one who is or was a public official. Such a test would impose an intolerable burden on the press to publish at the peril of having its news judgment later declared faulty in an action for damages. The 'chilling effect' such a rule would have is apparent. - -

In this case plaintiff while a policeman was a public official. His troubles in 1964 dealt with his conduct in office, and not with his private life. The facts were at that time a matter of public concern, and were public facts. We deem it of no significance that he apparently invited the publicity they received by calling in the news media-the press was privileged to make truthful reports of allegations of misconduct in office without being invited to do so. Once these facts entered the public domain they remained there. His waiver of the right of privacy as to public facts could not be withdrawn-plaintiff could not 'draw himself like a snail into his shell.' (*Cohen v. Marx*, *supra*.)

One may well sympathize with plaintiff's plight; every man has episodes in his life he would prefer to remain forgotten. The action of the defendant newspaper in dredging up this episode may seem ill-advised and in poor taste, but that does not make it actionable. 'A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.' (*Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256, 94 S.Ct. 2831, 2839, 41 L.Ed.2d 730, 740.) Neither can it be wrought through an award of damages.

We hold that on the undisputed facts there was no invasion of plaintiff's privacy and the trial court therefore correctly rendered summary judgment for the defendant.

Affirmed.

Approved by the court.

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Supreme Court of Montana.
Antoinette SVALDI, Plaintiff and Appellant,
v.
ANACONDA-DEER LODGE COUNTY, and
Anaconda School District No. 10, Defendants and
Respondents.
No. 03-506.

Submitted on Briefs March 30, 2004.

Decided Feb. 1, 2005.

Background: Retired public school teacher sued county, alleging breach of her right to privacy and seeking damages for severe emotional distress, based upon county attorney's disclosure of his discussions with teacher's attorney in connection with deferred prosecution agreement. The District Court, Third Judicial District, Anaconda-Deer Lodge County, Ted L. Mizner, J., granted county's motion for summary judgment, and teacher appealed.

Holdings: The Supreme Court, Warner, J., held that:

(1) county attorney's statement to media that he was discussing possible deferred prosecution agreement with teacher's attorney was not tortious violation of Criminal Justice Information Act;

(2) teacher's privacy rights were not violated by county attorney's disclosure of discussions; and

(3) public's right to know outweighed teacher's right to privacy in connection with public disclosure of initial offense report.

Affirmed.

[1] Appeal and Error 893(1)

30k893(1) Most Cited Cases

Standard of appellate review of a district court's summary judgment ruling is de novo.

[2] Appeal and Error 934(1)

30k934(1) Most Cited Cases

On appellate review of a district court's summary judgment ruling, all reasonable inferences which may

be drawn from the offered proof must be drawn in favor of the party opposing summary judgment.

[3] Criminal Law 1226(2)

110k1226(2) Most Cited Cases

County attorney's disclosure to media, identifying public school teacher and stating that he was discussing possible deferred prosecution agreement with teacher's attorney, did not amount to release of public or private criminal justice information, and was not tortious violation of Criminal Justice Information Act. MCA 44-5-101 et seq.

[3] Records 31

326k31 Most Cited Cases

County attorney's disclosure to media, identifying public school teacher and stating that he was discussing possible deferred prosecution agreement with teacher's attorney, did not amount to release of public or private criminal justice information, and was not tortious violation of Criminal Justice Information Act. MCA 44-5-101 et seq.

[4] Criminal Law 1226(2)

110k1226(2) Most Cited Cases

By statute, criminal justice information is classified as either public criminal justice information, or confidential criminal justice information: "public criminal justice information" includes information of convictions, deferred sentences, and deferred prosecutions; "confidential criminal justice information" includes information related to criminal investigations or criminal intelligence, fingerprints and photographs, or any other criminal justice information not clearly defined as public criminal justice information. MCA 44-5-103(3, 13).

[5] Criminal Law 1226(2)

110k1226(2) Most Cited Cases

With some qualifications, public criminal justice information may be disseminated without restriction; the dissemination of confidential criminal justice information, on the other hand, is restricted by statute. MCA 44-5-301(1), 44-5-303.

[6] Criminal Law 1226(2)

110k1226(2) Most Cited Cases

Only those deferred prosecution agreements that are actually executed meet the statutory definition of "public criminal justice information." MCA 44-5-103(13), 46-16-130(1)(b).

(Cite as: 2005 WL 277708 (Mont.))

[7] Criminal Law  **1226(2)**
110k1226(2) Most Cited Cases

Mere discussion of a possible deferred prosecution agreement, which is one of several options available to a county attorney in handling a case, does not constitute a discussion of "criminal justice information" for purposes of the Criminal Justice Information Act. MCA 44-5-101 et seq.

[8] Criminal Law  **1226(2)**
110k1226(2) Most Cited Cases

County attorney's discussions related to the possibility that a deferred prosecution agreement may be offered do not concern "collected," "processed," or "preserved" information obtained by a criminal justice agency, and are, therefore, not protected from public disclosure by the Criminal Justice Information Act. MCA 44-5-101 et seq.

[9] Torts  **8.5(5.1)**
379k8.5(5.1) Most Cited Cases

[9] Torts  **8.5(7)**
379k8.5(7) Most Cited Cases

Privacy rights of public school teacher were not violated by county attorney's disclosure to media, identifying teacher and stating that he was discussing possible deferred prosecution agreement with her attorney, where teacher announced to her students that allegations that she had assaulted or been verbally abusive to students were worst kept secret in town, teacher was subject of school board investigation, and school board had held public meeting to discuss teacher's retirement.

[10] Torts  **8.5(7)**
379k8.5(7) Most Cited Cases

Public's right to know outweighed public school teacher's right to privacy in connection with public disclosure of initial offense report filed with respect to allegations that teacher had assaulted or been verbally abusive to students, despite fact that no criminal charges were ultimately filed against teacher, where initial offense reports were statutorily designated as public criminal information subject to public dissemination without restriction, teacher occupied position of great public trust, allegations of misconduct went directly to teacher's ability to properly carry out her duties, and nature and subject of allegations were already public knowledge. MCA 44-5-103(13)(e)(i), 44-5-301(1).

For Appellant: Edmund F. Sheehy, Jr., Cannon & Sheehy, Helena, Montana.

For Respondents: William M. O'Leary, Corette, Pohlman & Kebe, Butte, Montana.

Justice JOHN WARNER delivered the Opinion of the Court.

*1 ¶ 1 Antoinette Svaldi ("Svaldi") appeals from an order of the District Court for the Third Judicial District, Anaconda-Deer Lodge County, granting summary judgment in favor of the County, thereby dismissing her claim for severe emotional distress. We affirm.

¶ 2 We re-state and address the following issues raised by Svaldi on appeal:

¶ 3 1. Did the Anaconda-Deer Lodge County Attorney negligently breach a legal duty owed to Svaldi when he told a newspaper that he was discussing with her attorney a deferred prosecution agreement that concerned possible criminal charges against her?

¶ 4 2. Did the County Attorney negligently breach a legal duty owed to Svaldi when he revealed to a newspaper the initial offense report naming Svaldi as a possible suspect in an offense?

I. FACTUAL AND PROCEDURAL BACKGROUND

¶ 5 Prior to her retirement in May 1998, Svaldi had been teaching in the Anaconda public school system for approximately 25 years. On March 2, 1998, parents of children taught by Svaldi made an assault complaint against her to the Anaconda-Deer Lodge County Police. Several of the parents alleged Svaldi had assaulted and/or was verbally abusive to their children. A written initial offense report was created and was forwarded to the Anaconda-Deer Lodge County Attorney's Office along with a request for prosecution.

¶ 6 About the same time as the initial offense report was filed, the parents made written complaints concerning the same matters against Svaldi to the Anaconda School District ("School District"). In response to the complaints, the School District placed Svaldi on administrative leave pending investigation. The School District conducted an independent investigation and prepared an investigation report. The County Attorney, Michael Grayson ("Grayson"), obtained a copy of the School District's investigation report through an investigative subpoena.

(Cite as: 2005 WL 277708 (Mont.))

¶ 7 On or about April 27, 1998, Grayson contacted Svaldi's attorney in this matter, Mark Vucurovich ("Vucurovich"), to discuss the possible criminal prosecution and the possibility of a deferred prosecution agreement. In a letter dated April 28, 1998, Vucurovich informed Svaldi of the details of his conversation with Grayson.

¶ 8 On May 5, 1998, Vucurovich submitted a letter to Robert Brown ("Brown") the attorney for the School District, informing him that Svaldi intended to retire at the end of the 1998 school year. In the letter, Vucurovich authorized Brown to discuss Svaldi's retirement with County Attorney Grayson at a meeting scheduled between Grayson, the complaining parents and Brown. The letter also stated, "[Svaldi] is retiring based upon assurances from the School District that there will be no criminal prosecution in this matter." However, Vucurovich admitted he was aware that any decision regarding criminal prosecution would be made by the County Attorney, not by the School District.

¶ 9 On May 12, 1998, Grayson sent a letter and deferred prosecution agreement to Vucurovich. The proposed deferred prosecution agreement was for a term of two years and required Svaldi to "retire from teaching children in any capacity."

*2 ¶ 10 Subsequently, a reporter from the Anaconda Leader, an area newspaper, contacted Grayson about the case. Grayson informed the reporter that his office was discussing a deferred prosecution agreement with Svaldi's attorney in exchange for Svaldi's promise to retire from teaching. Upon request, Grayson also provided the reporter with a copy of the initial offense report. Svaldi did not sign a deferred prosecution, she retired, and Grayson did not pursue criminal prosecution.

¶ 11 Svaldi sued the County and the School District for damages alleging breach of her right to privacy and claiming damages for severe emotional distress. The School District and the County both moved for summary judgment. On April 23, 2003, the District Court entered its Opinion and Order granting summary judgment in favor of the School District and the County. Svaldi does not appeal the judgment in favor of the School District. She appeals the judgment in favor of the County.

II. STANDARD OF REVIEW

[1][2] ¶ 12 Summary judgment is proper only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of

law. Rule 56(c), M.R.Civ.P. Our standard in reviewing a district court's summary judgment ruling is *de novo*. *Renville v. Fredrickson*, 2004 MT 324, ¶ 9, 324 Mont. 86, ¶ 9, 101 P.3d 773, ¶ 9. "Accordingly, such review affords no deference to the district court's decision and we independently review the record, using the same criteria used by the district court ... to determine whether summary judgment is appropriate." *Renville*, ¶ 9. Moreover, all reasonable inferences which may be drawn from the offered proof must be drawn in favor of the party opposing summary judgment. *Renville*, ¶ 9.

III. DISCUSSION ISSUE ONE

¶ 13 **Did the Anaconda-Deer Lodge County Attorney negligently breach a legal duty owed to Svaldi when he told a newspaper that he was discussing with her attorney a deferred prosecution agreement that concerned possible criminal charges against her?**

¶ 14 Svaldi brings suit to collect damages for the County Attorney's alleged negligent violation of the Criminal Justice Information Act. Section 44-5- 101, MCA, et seq., (the "Act"). Svaldi first argues that there was a genuine issue of material fact as to whether the County Attorney was discussing with Svaldi's attorney possible agreements that the State not file charges against her in exchange for an agreement that she retire from teaching. Accordingly, Svaldi argues the District Court erred in granting summary judgment in favor of the County. Svaldi next argues that "discussions" relating to a possible deferred prosecution agreement constitute confidential, not public, criminal justice information under the Act. Therefore, County Attorney Grayson acted negligently when he told a reporter from the Anaconda Leader that he was discussing the option of a deferred prosecution agreement with Svaldi's attorney.

*3 [3] ¶ 15 The basis underlying Svaldi's claim is that Grayson breached a duty owed to her by releasing confidential criminal justice information to the press. It is not an issue of material fact whether Grayson actually had bi-lateral discussions with Svaldi's attorney, or whether Svaldi had actual knowledge of any discussions Grayson had with her attorney. The factual basis of this claim is what Grayson said to the press. The parties do not dispute that Grayson made a statement to the press, wherein he identified Svaldi, and said he was discussing a possible deferred prosecution agreement with Svaldi's attorney. There is no dispute concerning the contents

(Cite as: 2005 WL 277708 (Mont.))

of the statement. Thus, there is no material issue of fact. The issue is one of law; whether the information disseminated by Grayson constituted a tortious release of confidential criminal justice information. Therefore, the District Court did not err in concluding there were no disputed issues of material fact.

[4] ¶ 16 By statute, criminal justice information is classified as either public criminal justice information, or confidential criminal justice information. Bozeman Daily Chronicle v. City of Bozeman Police Dept. (1993), 260 Mont. 218, 222, 859 P.2d 435, 437-38. Public criminal justice information is defined in § 44-5-103(13), MCA, and includes information "of convictions, deferred sentences, and deferred prosecutions." Confidential criminal justice information is defined in § 44-5-103(3), MCA, and includes information related to criminal investigations or criminal intelligence, fingerprints and photographs, or "any other criminal justice information not clearly defined as public criminal justice information."

[5] ¶ 17 "With some qualifications, public criminal justice information may be disseminated without restriction." Bozeman Daily Chronicle, 260 Mont. at 223, 859 P.2d at 438; § 44-5-301(1), MCA. The dissemination of confidential criminal justice information, on the other hand, is restricted by statute. See § 44-5-303, MCA.

[6] ¶ 18 Svaldi asserts that only those deferred prosecution agreements that are in writing and executed by the parties as provided by § 46-16-130(1)(b), MCA, constitute public criminal justice information. She argues that since no such agreement was ever signed in this case, the information concerning the possibility of such an agreement that Grayson revealed to the newspaper reporter was not public criminal justice information, and could, therefore, not be disclosed. We agree that only those deferred prosecution agreements that are actually executed meet the definition of public criminal justice information in § 44-5-103(13), MCA. However, that does not mean that discussions related to the possible offering of a deferred prosecution agreement meet the statutory definition of confidential criminal justice information.

[7][8] ¶ 19 Mere discussion of a possible deferred prosecution agreement, which is one of several options available to a county attorney in handling a case, does not constitute a discussion of criminal justice information. Criminal justice information is defined as "information relating to criminal justice

collected, processed, or preserved by a criminal justice agency." Section 44-5-103(8)(a), MCA. A county attorney's discussions related to the possibility that a deferred prosecution agreement may be offered do not concern "collected," "processed," or "preserved" information obtained by a criminal justice agency. Therefore, such discussions are not protected from public disclosure by the Criminal Justice Information Act.

*4 [9] ¶ 20 Svaldi attempts to create an argument that her privacy rights were violated by Grayson's interview with a newspaper reporter. She cites Engrav v. Cragun (1989), 236 Mont. 260, 769 P.2d 1224, in support of her position. In Engrav this Court stated "[i]ndividuals arrested under suspicion of committing a crime and who are subsequently released without charges or incarceration must be protected from public persecution." Engrav, 236 Mont. at 266-67, 769 P.2d at 1228. While there might be circumstances in which persons suspected of having committed a crime may have a reasonable expectation that their privacy will not be violated by a release of the details of an investigation conducted by law enforcement agencies, the record makes it clear that such is not the case here.

¶ 21 Svaldi cannot seriously argue that her privacy rights were violated by Grayson. She admittedly announced to her students that the allegations against her were the "worse kept secret in town." She was the subject of a School Board investigation and the School Board held a public meeting to discuss her retirement. County Attorney Grayson did not reveal any information about the allegations against Svaldi that the newspaper and the public did not already know.

¶ 22 Accordingly, there is no material issue of fact concerning whether Grayson negligently breached a duty owed to Svaldi when he told the Anaconda Leader that he was discussing the possibility of entering into a deferred prosecution agreement with her attorney. And, no legal duty owed to Svaldi was breached by such discussion.

ISSUE TWO

¶ 23 **Did the County Attorney negligently breach a duty owed to Svaldi when he revealed to a newspaper the initial offense report naming Svaldi as a possible suspect in an offense?**

[10] ¶ 24 Svaldi argues, pursuant to a 1988 Attorney General's Opinion, the initial offense report in this case did not constitute public criminal justice

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(Cite as: 2005 WL 277708 (Mont.))

information, as Svaldi was a mere suspect and was never charged with any crime. *See* 42 Mont. Op. No. 119 Atty. Gen. 454 (1988). In this opinion, the Attorney General stated that as a general rule initial offense reports must be made publicly available, however, circumstances may arise in which these documents involve a privacy interest which clearly exceeds the public's right to know. 42 Mont. Op. No. 119, 464. This, according to the Attorney General, may be the case where an innocent person is publicly designated as a suspect in a crime. 42 Mont. Op. No. 119, 464.

¶ 25 Considering the uncontested facts of this case, we are not called on to determine if the Attorney General was correct in his 1988 opinion referenced above. We decline to do so.

¶ 26 Svaldi attempts to further support her argument by reference to *Bozeman Daily Chronicle*, 260 Mont. at 227, 859 P.2d at 441, where this Court noted "suspects" may have an expectation of privacy in "certain circumstances because criminal investigations occasionally result in the designation of the innocent as suspects, particularly in the early stages of investigation." Thus, according to Svaldi, as she was a mere suspect in this case, she had a privacy interest in the initial offense report which outweighed the public's right to know. Her reasoning is flawed.

*5 ¶ 27 Section 44-5-103(13)(e)(i), MCA, states that initial offense reports constitute public criminal justice information which can be publicly disseminated without restriction pursuant to § 44-5-301(1), MCA.

¶ 28 *Citizens to Recall Mayor James Whitlock v. Whitlock* (1992), 255 Mont. 517, 844 P.2d 74; *Great Falls Tribune Co., Inc. v. Cascade County Sheriff* (1989), 238 Mont. 103, 775 P.2d 1267; and *Bozeman Daily Chronicle* support our conclusion that the public's right to know outweighs Svaldi's right to privacy under the facts presented.

¶ 29 In *Great Falls Tribune*, a newspaper sought public disclosure of the names of three law enforcement officers disciplined for their actions in running over a suspect on a public sidewalk with a police car after the suspect fled on foot from a high-speed chase. This Court held the public's right to know outweighed the privacy interest of the officers in preventing the release of their names because police officers "occupy positions of great public trust." *Great Falls Tribune*, 238 Mont. at 107, 775 P.2d at 1269.

¶ 30 In *Bozeman Daily Chronicle*, the newspaper sought public release of the investigative documents associated with a police officer accused of sexual intercourse without consent by a cadet at the Law Enforcement Academy under the "right to know" clause of the Montana Constitution. No criminal charges were ever filed against the officer, but he was forced to resign from the police force. This Court held that even though criminal investigative information constitutes confidential criminal justice information, "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; and that, accordingly, the *Chronicle* has met its initial burden to make a proper showing to receive the confidential criminal justice information at issue." *Bozeman Daily Chronicle*, 260 Mont. at 227, 859 P.2d at 440-41.

¶ 31 The reasons for public disclosure of allegations against persons holding positions of great public trust which this Court discussed in *Great Falls Tribune*, 238 Mont. at 107, 775 P.2d at 1269, and in *Whitlock*, 255 Mont. at 522, 844 P.2d at 77, apply to Svaldi under the facts presented here. As a teacher in the public schools, entrusted with the care and instruction of children, her position is one of public trust. Also, the allegations of misconduct, assault against her students, went directly to her ability to properly carry out her duties. As in *Whitlock*, where we pointed out that the particular allegations of misconduct went directly to the public official's ability to properly carry out his duties, it is not required that the allegations against Svaldi be withheld from public scrutiny even though no criminal charges were ultimately filed against her. *Whitlock*, 255 Mont. at 522-24, 844 P.2d at 77-78.

¶ 32 Further, as discussed in Issue I, Svaldi cannot seriously claim her privacy rights were violated by the release of the initial offense report when it was already public knowledge that the allegations were against her, what the allegations were, who was involved as complainants, that she was the subject of a School Board investigation concerning the allegations, and that her intended retirement from teaching was connected to these same allegations. Grayson was justified in releasing the report.

IV. CONCLUSION

*6 ¶ 33 The Anaconda-Deer Lodge County Attorney did not breach a duty owed to Svaldi by discussing a possible deferred prosecution agreement with the Anaconda Leader, or by releasing to that

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newspaper a copy of the initial offense report. We affirm the judgment of the District Court.

We Concur: KARLA M. GRAY, C.J., PATRICIA O. COTTER, W. WILLIAM LEAPHART and JIM RICE, JJ.

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Supreme Court of Montana.
 CITIZENS TO RECALL MAYOR JAMES
 WHITLOCK, Plaintiffs and Respondents,
 v.
 Mayor James WHITLOCK, Defendant and
 Appellant,
 and
 Hamilton City Council, Edna Mae Leonard, Vivian
 Yang, Jack Edmonds, John
 Robinson, Claudia Williamson, Craig Stirling, Third
 Party Plaintiffs and
 Respondents,
 and
 John and Jane Does 1 through 10, Third Party
 Defendants and Respondents.
 No. 92-177.

Submitted on Briefs July 23, 1992.
 Decided Dec. 17, 1992.

Public interest group brought suit under Open Meetings Law against mayor and city council, and city council counterclaimed for declaratory judgment as to whether mayor's constitutional right of privacy prevented disclosure of results of investigation into his alleged harassment of city employee. The Fourth Judicial District Court, County of Ravalli, Edward McLean, J., entered order authorizing release of investigator's report, and mayor appealed. The Supreme Court, Trieweiler, J., held that: (1) district could decide city council's declaratory counterclaim, regardless of whether plaintiff's initial complaint was barred on limitations grounds, and (2) mayor did not have "reasonable expectation of privacy" in preventing disclosure of report regarding independent investigation of his alleged sexual harassment of city employee.

Affirmed.

West Headnotes

[1] Limitation of Actions  170
241k170 Most Cited Cases

District court could consider declaratory counterclaim filed by city council, for determination as to whether public official's right of privacy precluded release of document, regardless of whether public interest group's initial complaint under the Open Meeting Law was barred on limitations

grounds. MCA 2-3-213.

[2] Constitutional Law  82(7)
92k82(7) Most Cited Cases

Public's right to observe the workings of public bodies is not absolute, but may be subject to constitutional privacy interest. Const. Art. 2, § 9, 10.

[3] Constitutional Law  82(7)
92k82(7) Most Cited Cases

In deciding whether privacy interest is protected under State Constitution, Supreme Court applies two-part test: whether person involved had subjective or actual expectation of privacy; and whether society is willing to recognize that expectation as reasonable. Const. Art. 2, § 10.

[4] Constitutional Law  82(11)
92k82(11) Most Cited Cases

Mayor did not have "reasonable expectation of privacy" in results of investigation regarding his alleged sexual harassment of city employee, and could not claim overriding privacy interest in preventing disclosure of investigator's report to public. Const. Art. 2, § 9, 10.

[5] Constitutional Law  82(11)
92k82(11) Most Cited Cases

Information related to public officer's ability to perform his or her duties should not be withheld from public scrutiny based on officer's alleged privacy interest therein. Const. Art. 2, § 9, 10.

[6] Constitutional Law  82(11)
92k82(11) Most Cited Cases

Society will not permit complete privacy and unaccountability when elected official is accused of sexually harassing public employees or of other misconduct related to performance of his official duties. Const. Art. 2, § 9, 10.

[7] Judgment  183
228k183 Most Cited Cases

Motion for judgment on pleadings would be treated as one for summary judgment, where pleadings were supplemented by additional information, including witness affidavits. Rules Civ.Proc., Rule 12(c).

****75 *519** Larry W. Jones, Missoula, for defendant

and appellant.

Joan Jonkel (Jane Doe), Missoula, Richard A. Weber, Jr., Hamilton City Atty., Hamilton, for plaintiffs and respondents.

David A. Trihey, pro se.

TRIEWEILER, Justice.

Hamilton City Mayor James Whitlock appeals from a March 24, 1992, order and declaratory judgment of the Fourth Judicial District Court, Ravalli County, authorizing public disclosure of the "Toole Report" by the Hamilton City Council. On March 27, 1992, District Court Judge Ed McLean stayed enforcement of the order pending appeal. We affirm.

The issues on appeal are:

1. Was the request made by the Citizens to Recall Mayor James Whitlock to order disclosure of the Toole Report barred by the statute of limitations?
2. Was the District Court's order authorizing the Hamilton City Council to disclose the Toole Report a violation of Mayor Whitlock's individual right of privacy?
3. Was the District Court's order an improper judgment on the pleadings?

****76** Hamilton City Judge Martha A. Bethel filed a complaint with the Montana Human Rights Commission against the City of Hamilton and Mayor Whitlock in June 1990. She claimed she had been sexually harassed and discriminated against by Whitlock. The City Council hired Ken Toole, an independent investigator, to look into Bethel's allegations and prepare a report for the City Council. Following Toole's investigation and lengthy negotiations, the City entered into a mediated settlement agreement with Bethel in September 1991. The settlement included a waiver of Bethel's individual right of privacy in regard to Toole's findings, payment of her attorney's fees, and other monetary and nonmonetary considerations. The contents of Toole's investigatory report ("Toole Report") were never made public, and Bethel's complaint against Whitlock is still pending before the Human Rights Commission.

On December 3, 1991, the Citizens to Recall Mayor James Whitlock (Citizens Group) filed a complaint in District Court requesting the court to order the City

Council to release copies of the Toole Report. The City Council stated in its answer and counterclaim that the report had been kept confidential because Whitlock had invoked ***520** his constitutional right of privacy to prevent disclosure of the report's contents and to keep council meetings regarding the matter confidential and closed. Even though the settlement agreement specifically provided for disclosure of the investigation report, the City feared it would subject itself to a claim for damages for violating an individual's privacy right if the Council publicly discussed or released information related to Bethel's allegations. However, the Council, acknowledging constitutional and statutory provisions requiring open meetings and the public's right to know, stated its belief that the public's right to know in this instance clearly exceeded Whitlock's individual privacy right. Therefore, in its counterclaim, the Council requested a declaratory judgment directing public disclosure of the report and public participation in Council meetings which discussed the investigation.

At the conclusion of a hearing on March 24, 1992, the District Court agreed with the City and held that an elected official had no reasonable expectation of privacy when accused of misconduct in office. The court, therefore, concluded Whitlock's right of privacy did not outweigh the public's right to know, and authorized release of the Toole Report. On March 27, 1992, enforcement of this bench order was stayed pending Whitlock's appeal.

I

[1] Was the request made by the Citizens to recall Mayor James Whitlock to order disclosure of the Toole Report barred by the statute of limitations?

Appellant Whitlock initially raises a statute of limitations argument, claiming the Citizens Group is challenging a City Council decision, made at a closed meeting, to keep the Toole Report confidential. Whitlock notes that Montana's Open Meeting Law requires a suit seeking voidance of such a decision to be made within 30 days of the time the decision was made. Section 2-3-213, MCA. Because the Citizens Group failed to plead that it filed suit within 30 days, Whitlock claims the matter should be remanded to the lower court with an order directing dismissal of the suit, or in the alternative, ordering discovery to determine if the Citizens Group had complied with proper time frames for an Open Meeting Law challenge.

We find this argument without merit. Whitlock concedes, and we agree, that the Open Meeting Law

argument is directed only at the Citizens Group, and has no application to the City Council's request *521 for declaratory judgment on the question of whether the public's right to know outweighs Whitlock's privacy interest. Yet Whitlock maintains that because the Citizens Group remains a party in this suit, the statute of limitations argument may still be at least partially controlling.

We disagree. The City Council, as third-party plaintiffs, requested a declaratory judgment which was clearly not barred by a statute of limitations. The District **77 Court's ruling responded to the constitutional issue raised by the City, and did not address whether a statutory violation of the Open Meeting Law had occurred. Whether the claims raised by the Citizens Group, as the original plaintiffs, were barred by statutory time limitations is not relevant to the decision on appeal.

II

Was the District Court's order authorizing the Hamilton City Council to release the Toole Report a violation of Mayor Whitlock's individual right of privacy?

Both the public right to know, from which the right to examine public documents flows, and the right of privacy, which justifies confidentiality of certain documents, are firmly established in the Montana Constitution. Article II, § 9, of the Constitution defines the right of the public to know as follows:

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.

Balanced against the public right to know is the right of individual privacy, provided for in Article II, § 10, of the Montana Constitution: "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."

[2] We have held that the public's right to observe the workings of public bodies is not absolute. In The Missoulian v. Board of Regents of Higher Education (1984), 207 Mont. 513, 675 P.2d 962, we stated that the constitutional language providing exceptions to examining documents or observing deliberations requires this Court to:

[B]alance 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. *522 Under this standard, the right to know *may* outweigh the right of individual privacy, depending on the facts. [Emphasis in original.]

The Missoulian, 675 P.2d at 971.

This Court has addressed on several occasions the balancing of these competing interests, and admittedly has more than once carefully guarded against public scrutiny of very private and personal matters. See Flesh v. Mineral and Missoula Counties (1990), 241 Mont. 158, 786 P.2d 4; The Missoulian, 675 P.2d 962; Montana Human Rights Division v. City of Billings (1982), 199 Mont. 434, 649 P.2d 1283. In light of these decisions, Whitlock contends the District Court incorrectly concluded the public's right to examine the Toole Report clearly outweighed Whitlock's individual privacy right. However, in the narrow circumstances presented in this case, we disagree, and distinguish this situation from others we have considered.

[3] Whenever the Court must determine whether a privacy interest is protected under the State Constitution, we apply a two-part test: (1) whether the person involved had a subjective or actual expectation of privacy; and (2) whether society is willing to recognize that expectation as reasonable. Flesh, 786 P.2d at 8; The Missoulian, 675 P.2d at 967; Montana Human Rights Division, 649 P.2d at 1287. We will not engage in a lengthy discussion of the first prong of the two-part test because, in this case, we hold that whether or not Whitlock had an expectation of privacy, that expectation was unreasonable as a matter of law.

[4][5] There are two important reasons for this conclusion. First, Whitlock is an elected official and as such is properly subject to public scrutiny in the performance of his duties. Our previous decisions have shielded certain personnel matters from public review, and have opened those discussions only to the entity responsible for such things as hiring, disciplinary action, and supervision. When 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. In this case, the **78 sexual harassment allegations against Whitlock go directly to the mayor's, and another government official's, abilities to properly carry out their duties. Information related to the ability to perform public duties should not be withheld from public scrutiny.

This is not the first time we have suggested that public officials may occupy unique positions in regard to expectation of privacy. In Great Falls Tribune v. Cascade County Sheriff (1989), 238 Mont. 103, 775 P.2d 1267, for example, we held that while police officers have a *523 subjective or actual expectation of privacy relating to disciplinary proceedings against them, that expectation was not one which society recognized as a strong right because "law enforcement officers occupy positions of great public trust." Great Falls Tribune, 775 P.2d at 1269.

Other states' courts have similarly recognized that public officials cannot reasonably have as great an expectation of privacy as individuals who are not public servants. In Cowles Publishing Company v. State Patrol (1988), 109 Wash.2d 712, 748 P.2d 597, 605, the Washington Supreme Court described a diminished privacy interest when the information sought relates to fitness to perform a public duty. The Alaska Supreme Court has taken the same approach, recognizing that the nature and responsibility of public office opens office holders up to more exacting public scrutiny regarding the performance of their duties. City of Kenai v. Kenai Peninsula Newspapers (Alaska 1982), 642 P.2d 1316; Municipality of Anchorage v. Daily News (Alaska 1990), 794 P.2d 584.

[6] The second reason for our decision relates to the kind of information in question. In our previous decisions, we have protected information such as personnel records or job performance evaluations from public review. State v. Burns (Mont.1992), 253 Mont. 37, 830 P.2d 1318; Montana Human Rights Division, 649 P.2d at 1287-88; The Missoulian, 675 P.2d at 968-70. However, in this case, the Toole Report was the result of an investigation commissioned to explore allegations of misconduct. The Citizens Group is not seeking disclosure of information related to private sexual activity, general performance evaluations, or proceedings where Whitlock's character, integrity, honesty, or personality were discussed. While Whitlock might reasonably expect privacy in regard to those kinds of matters, society will not permit complete privacy and unaccountability when an elected official is accused of sexually harassing public employees or of other misconduct related to the performance of his official duties.

Once the determination is made as to whether a constitutionally protected privacy interest is at stake, the question is then whether the demands of

individual privacy clearly exceed the merits of public disclosure. Since we have found the privacy expectation in this particular situation unreasonable, the answer is clearly no.

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 *524 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.

After weighing the competing interests involved, we agree with the Court's determination that Whitlock's expectation of privacy is unreasonable. Therefore, we hold that the right of the public to know must be accorded greater weight than Whitlock's claim of privacy.

**79 III

[7] Was the District Court's order an improper judgment on the pleadings?

Whitlock's final argument characterizes the District Court's decision as a judgment on the pleadings because no extrinsic evidence was introduced to treat the decision as a summary judgment ruling. Rule 12(c), M.R.Civ.P. He contends, therefore, that if the Court ruled only on the information contained in the pleadings, on review the complaint "is to be construed in the light most favorable to the plaintiffs and its allegations are taken as true." Kinion v. Design Systems, Inc. (1982), 197 Mont. 177, 180, 641 P.2d 472, 474 (citing Fraunhofer v. Price (1979), 182 Mont. 7, 594 P.2d 324). Viewed in this manner, Whitlock argues the District Court's conclusion was improper and cannot be affirmed.

The City Council maintains the Court did consider matters outside the pleadings and the proper characterization of the Court's action is one of summary judgment. Since there were no issues of

fact to be determined by the Court, the City Council asserts that it was entitled to judgment as a matter of law pursuant to Rule 56(c), M.R.Civ.P., and the court's ruling should only be set aside if the opposing party can demonstrate that a genuine factual controversy exists. O'Bagy v. First Interstate Bank of Missoula (1990), 241 Mont. 44, 46, 785 P.2d 190, 191.

255 Mont. 517, 844 P.2d 74

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After reviewing the record, it is apparent that the court did have before it information in addition to the pleadings. This included Bethel's affidavit of sexual harassment; an affidavit from the City *525 Attorney verifying that Whitlock received, and therefore was aware of, the contents of the Toole Report; and affidavits from witnesses who were interviewed by Toole, waiving any privacy rights in the information contained in the report. Because the court had before it this information which was not part of the pleadings, we will consider the court's order as one for summary judgment pursuant to Rule 12(c), M.R.Civ.P.

We note that at one point during the proceedings, Whitlock moved for summary judgment in his favor, and urged consideration of some of the above-mentioned documents, admitting they supplemented the pleadings. It would be inconsistent to disregard that same information simply because another party prevailed.

Applying the standard of review for a summary judgment proceeding, we must determine whether there is any genuine issue of material fact in controversy. The material facts in this case are all undisputed. Whitlock is an elected official. He was accused by another elected official of sexual harassment. The City Council investigated the allegation and settled the other official's claim based on its investigation. The results of its investigation are included in the Toole Report.

Based on these undisputed facts, the public has a right to know, as a matter of law, what is in the Toole Report. There are no disputed issues of material fact which would preclude the entry of summary judgment.

The District Court's order and declaratory judgment directing release of the Toole Report as recommended by the Hamilton City Council is affirmed.

TURNAGE, C.J., and WEBER, HUNT and McDONOUGH, JJ., concur.