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DEPUTY

MONTANA TWENTY-FIRST JUDICIAL DISTRICT COURT, RAVALLI COUNTY

<p>MICHAEL E. SPREADBURY, Plaintiff, vs. KENNETH S. BELL and CITY OF HAMILTON, Defendants.</p>	<p>Cause No. DV 2010-639 /49 Department No. 2 OPINION AND ORDER</p>
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This matter came on regularly before the Court on April 29, 2011 on Plaintiff's motion for partial summary judgment. Plaintiff Michael E. Spreadbury ("Plaintiff Spreadbury") appeared, representing himself. Defendants Kenneth S. Bell ("Bell") and City of Hamilton (the "City") (collectively, "Defendants") appeared through their counsel, William L. Crowley of Boone Karlberg P.C. The Court notes initially that other motions in this action remain before the Court. Those motions will be treated in subsequent hearings, opinions and orders, as appropriate.

I. BACKGROUND

On November 16, 2010, Plaintiff Spreadbury sued Defendants for negligence (Count One), a 42 U.S.C. § 1983 claim under Article II, section 6 of the Montana Constitution and under the First

OPINION AND ORDER

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EXHIBIT A

1.12.5.11

Amendment to the United States Constitution (Count Two), a § 1983 claim for violation of Equal Protection as set forth in the Fourteenth Amendment to the United States Constitution and in Article II, section 4 of the Montana Constitution (Count Three), Abuse of Process (Count 4), Misrepresentation (Count 5), Negligent Hiring, Supervision, and Training (Count 6), Custom or Policy-Equal Protection under the Fourteenth Amendment to the United States Constitution as to Bell (Count 7), and Punitive Damages (second Count 7). *Pl's Amend. Compl.* (Doc. # 10). Although not contained as a count in Defendant's *Complaint* or *Amended Complaint*, both the *Complaint* and the *Amended Complaint* asked for "[d]eclarative judgment that City of Hamilton did violate Plaintiff[s] right to know, right to request and examine public documents in the State of Montana. Documents to be relinquished to Plaintiff in [a] time frame acceptable to the Court." *Id.*

On February 10, 2011 Plaintiff Spreadbury filed a *Motion for Declarative Judgment* (Doc. #16) and a *Motion for Summary Judgment* (Doc. # 17). Plaintiff Spreadbury's *Motion for Declarative Judgment* stated, "Plaintiff [is] entitled to declarative relief as to whether Defendants failed to release public information as prescribed in Art. II s. 9 Montana Constitution." (Doc. # 16 p. 1). The *Motion for Summary Judgment* stated that "[t]he issue of Criminal Justice Information...is an issue of law" and that "No issues of fact arise in this case [and the relevant] issue of law [will be] decided by [the Court's] decision in [Plaintiff's *Motion for Declarative Judgment*][.]"

Defendants argue that Plaintiff Spreadbury has not demonstrated that he is entitled to receive confidential criminal justice information and that a court must first determine if the merits of disclosure exceed individual privacy. Plaintiff Spreadbury counters that he has waived his own privacy interest in the requested information and therefore privacy interests are not at issue in this case. Defendants offered to make the information Plaintiff Spreadbury requested available to the Court for

an *in camera* inspection. (Doc. # 20, p. 6). In response to Defendants' offer, the Court ordered that the Defendants make the information that Plaintiff Spreadbury requested available to the Court for an *in camera* inspection. (Doc. # 30). Defendants timely provided the Court with two documents (the "Reports"), which the Court has reviewed.

The first document Defendants provided is labeled "Hamilton Police Department Case Report 1 - 209CR0002579" and is primarily concerned with a November 4, 2009 incident involving Plaintiff Spreadbury on the street outside the Bitterroot Public Library in Hamilton, Montana (the "Library Report"). The Court takes judicial notice pursuant to M.R.Evid. 202 that:

1. The State of Montana prosecuted Plaintiff Spreadbury in Montana Twenty-First Judicial District Court Cause No. DC-41-2009-154 on criminal charges stemming from the allegations in the "Library Report;"

2. On October 21, 2010, District Court Judge Douglas G. Harkin accepted Plaintiff Spreadbury's no contest plea in DC-41-2009-154 on the criminal charge of felony Intimidation in violation of § 45-5-203, MCA and imposed Judgment (DC-41-2009-154 Doc. # 81);

3. On December 16, 2010, the Montana Supreme Court issued a *Notice of Filing* in DC-41-2009-154 and such matter is currently on appeal before the Montana Supreme Court (DC-41-2009-154 Doc. # 85); and

4. On March 8, 2011, District Court Judge Karen S. Townsend ordered that Plaintiff Spreadbury's probation on his one year deferred sentence and the Judgment in DC-41-2009-154 be stayed (DC-41-2009-154 Doc. # 93) pending the outcome of Plaintiff Spreadbury's appeal to the Montana Supreme Court.

The second document Defendants provided is labeled "Hamilton Police Department Case

Report 1 - 209CR0000296.” This report is principally concerned with a February 13, 2009 incident involving Plaintiff Spreadbury at the Ravalli County Administration Building in Hamilton, Montana (the “Admin Building Report”). No criminal charges were filed in connection with the Admin Building Report.

II. DISCUSSION

As indicated above, Plaintiff Spreadbury’s *Motion for Declarative Judgment* (Doc. #16) and *Motion for Summary Judgment* (Doc. # 17) are ambiguous in certain respects. Nonetheless, the Court concludes that the motions were sufficiently clear to give Defendants adequate notice to respond through pleadings, briefing and the April 29, 2011 hearing with respect to the issue of whether and to what extent Plaintiff Spreadbury is constitutionally entitled to the Reports. Therefore, the Court deems and reformulates Plaintiff Spreadbury’s motions to together request partial summary judgment on the following issue: whether and to what extent Plaintiff Spreadbury is entitled to the Reports under Article II, section 9 of the Montana Constitution.

A. Jurisdiction

The Court has jurisdiction over Plaintiff Spreadbury’s declaratory judgment claim under the broad powers granted to it in § 27-8-201, MCA:

27-8-201. Scope of power to render declaratory judgments. Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree.

The Court may “refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the

proceeding.” § 27-8-206, MCA. When a bona fide constitutional issue is raised, a plaintiff has a right to resort to the declaratory judgment act for a determination of his rights. *Mitchell v. West Yellowstone*, 235 Mont. 104, 109, 765 P.2d. 745, 748 (1988). Plaintiff Spreadbury raises a constitutional issue under Montana’s “Right to Know” provision in Article II, section 9 of the Montana Constitution as applied to the dissemination of confidential criminal justice information in § 44-5-303, MCA. ¹ Given that Plaintiff Spreadbury has raised a bona fide constitutional issue, the Court determines that it has jurisdiction to resolve Plaintiff Spreadbury’s motion for partial summary judgment as reformulated above.

The Court notes for the record that the Court gives no opinion as to whether Plaintiff Spreadbury is entitled to the Library Report pursuant to § 46-15-322, MCA as part of the discovery process in criminal proceeding DC-41-2009-154.² The Court has no jurisdiction over such an issue because that cause is currently before the Montana Supreme Court. Prior to the appeal such cause was,

¹§ 44-5-303, MCA sets forth the procedure for dissemination of confidential criminal justice information. Section 44-5-303(5)(a) provides in pertinent part:

If a prosecutor receives a written request for release of confidential criminal justice information relating to a criminal investigation that has been terminated by declination of prosecution or relating to a criminal prosecution that has been completed by entry of judgment, dismissal, or acquittal, the prosecutor may file a declaratory judgment action with the district court pursuant to the provisions of the Uniform Declaratory Judgment Act[.]

However, § 44-5-303(6), MCA provides that:

The procedures set forth in subsection (5) are not an exclusive remedy. A person...may file any action for dissemination of information that the person or organization considers appropriate and permissible.

Therefore, Plaintiff Spreadbury has properly brought a suit requesting dissemination of confidential criminal justice information.

²The Court notes that, as discussed below, § 46-15-326, MCA places limits on the further public disclosure of witness statements and certain other information attorneys receive as part of the criminal discovery process.

and upon any remand such matter will be, before another District Court Judge. Furthermore, Plaintiff Spreadbury is represented by counsel in that cause.

B. Summary Judgment Standard

Summary Judgment shall be rendered upon motion:

if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

M. R. Civ. P. 56(c).

The moving party has the burden of establishing the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Matthews v. BJS Construction, Inc.*, 2003 MT116, ¶ 12, 315 Mont. 441, 68 P.3d 865. Issues of fact are identified by looking at the substantive law governing the proceedings. *Carelli v. Hall*, 279 Mont. 202, 207, 926 P.2d 756, 760 (1996). Once the moving party meets that burden, the burden shifts to the adverse party to present evidence, rather than mere denials, speculation, or conclusory statements, to meet its burden of raising a genuine issue of material fact. *Hadfield v. Credit Bureau of Havre, Inc.*, 1998 MT 179, ¶ 14, 289 Mont. 529, 962 P.2d 1198. The adverse party's response by affidavits, depositions or answers to interrogatories must set forth specific facts showing that there is a genuine issue for trial. M. R. Civ. P. 56(e).

C. Dissemination of the Reports Under Art. II, § 9 of the Montana Constitution

Plaintiff Spreadbury argues that (1) the submitted reports are public criminal justice information because §44-5-103(13)(e)(i) specifically includes such "initial offense reports" in the definition of "public criminal justice information;" (2) that under § 44-5-301, MCA there are no limits on the dissemination of public criminal justice information, and that (3) assuming *arguendo* that the reports are confidential criminal justice information, Plaintiff Spreadbury is entitled to receive the Reports on

the sole basis that he is a person “authorized by law” under Art. II, Section 9 of the Montana Constitution.

The Montana Supreme Court extensively discussed the constitutionally appropriate tests for obtaining purported “initial offense reports” in *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, 333 Mont. 331, 142 P.3d 864 (2006).³ As the Montana Supreme Court explained:

Assuming that these are properly treated as initial arrest reports, initial incident reports, or one of each, definitional ambiguity persists. Such ambiguity stems from the legislative classification of “criminal investigative information” as confidential criminal justice information, § 44-5-103(3)(a), MCA. “Criminal investigative information,” in turn, is defined as “information associated with an individual . . . or event compiled by a criminal justice agency in the course of conducting an investigation of a crime or crimes. It includes information about a crime or crimes derived from reports of informants or investigators or from any type of surveillance.” Section 44-5-103(6)(a), MCA.

City of Havre, ¶ 22 n.3. After the *City of Havre* case was filed, the Montana Department of Justice promulgated a definition of an “initial offense report.” *City of Havre*, ¶ 22 n.1. In addition, the Montana Department of Justice promulgated A.R.M. 23.12.203, which sets forth the scope of appropriate contents in an initial offense report:

- (1) Initial offense reports should contain the following:
 - (a) the general nature of the charges against the accused;
 - (b) the offense location;
 - (c) the name, age, and residence of the accused;
 - (d) the name of the victim, unless the offense charged was a sex crime; and
 - (e) the identity of a witness unless the witness has requested confidentiality.
- (2) Initial offense reports should not contain:
 - (a) driver’s license numbers;
 - (b) social security numbers;
 - ...
 - (e) with respect to the victim of any offense other than those described in [45-5-

³In *City of Havre*, the Montana Supreme Court ruled that a request for prospective relief involving “initial offense reports” was non-justiciable. *City of Havre*, ¶ 27. The discussion of such “initial offense reports” in *City of Havre* is therefore at least arguably dictum. However, the Court finds *City of Havre* persuasive as a recent decision involving the constitutional aspects of public requests for “initial offense reports.”

502, 45-5-503, 45-5-504, or 45-5-507 who requests confidentiality, any information other than the offense location that may directly or indirectly disclose the address, telephone number, or place of employment of the victim or a member of the victim's family.

The Montana Department of Justice also has created an "Initial Offense Report" form, by its terms revised February 2005, which the Court accepted as Plaintiff's Exhibit 1. This Initial Offense Report form contains blanks for the following information:

- General Nature of Charges
- Time of Offense
- Location of Offense
- Name of Accused
- Residence of Accused
- Name of Victim
- Sex Offense? If so, name should not be included.
- Confidentiality Requested? If so, name should not be included.
- Name of Witness
- Confidentiality Requested? If so, name should not be included
- Report Date
- Reporting Officer

Comparing the format of the Attorney General's and the Department of Justice's suggested initial offense report to the format as well as the information in the Reports, the Court notes that the Reports' contents, including the first page of each,⁴ includes information far beyond the scope contemplated by Plaintiff's Exhibit 1. Indeed, the Reports contain dates of birth, social security numbers, marked through dates of birth and social security numbers, names and addresses of witnesses without any record as to whether a right to privacy was waived, and full investigative narratives. Therefore, at a minimum, the Reports contain both public criminal justice information and confidential criminal justice information.

⁴During the April 29, 2011 hearing, the Court raised the issue of whether the first page of one or both of the Reports might be considered an initial offense report.

As the Montana Supreme Court explained in *City of Havre*, whether a report is statutorily designated as “public criminal justice information” is largely irrelevant. *City of Havre*, ¶ 22. The content contained in every report must be reviewed to determine what, if any, information is appropriate for dissemination because of the inherent tension between the constitutional “Right to Know” and the constitutional “Right to Privacy”:

Although [Plaintiff] confidently asserts that the Reports in this case have been statutorily designated as public criminal justice information, *see* § 44-5-103(13)(e)(i)-(ii), MCA (designating initial offense reports and initial arrest reports as public criminal justice information, but failing to further define either term), their proper classification is not such a simple matter. Ultimately, it matters little whether these Reports are statutorily designated as public criminal justice information, as such legislative classification cannot obviate the inherent tension between the constitutionally protected right of privacy and the constitutionally guaranteed right to know. Notwithstanding its designation as public criminal justice information, an initial offense report will sometimes contain discrete pieces of information that qualify as confidential criminal justice information, or information in which an individual, with notice of possible disclosure, has voiced her subjective expectation of privacy and for which the demands of individual privacy vastly outweigh the merits of public disclosure.

City of Havre, ¶ 22

Article II, Section 9 of the Montana Constitution, the “Right to Know” provision, provides:

[n]o 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.*

(Emphasis added).

Art II, Section 10, the “Right to Privacy” provision of the Montana Constitution, provides:

[t]he 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.

As stated in *Becky v. Butte-Silver Bow Sch. Dist. No. 1*, 274 Mont. 131, 136, 906 P.2d 193, 196

(1995), and reiterated most recently in *Bd. of Trs. v. Cut Bank Pioneer Press*, 2007 MT 115, 337 Mont. 229, 160 P.3d 482:

Any review of Article II, Section 9, of the Montana Constitution necessarily involves a three-step process. First, we consider whether the provision applies to the particular political subdivision against whom enforcement is sought. Second, we determine whether the documents in question are "documents of public bodies" subject to public inspection. Finally, if the first two requirements are satisfied, we decide whether a privacy interest is present, and if so, whether the demand of individual privacy clearly exceeds the merits of public disclosure.

Here, the parties do not dispute that Article II, section 9 of the Montana Constitution applies to the City and that the requested reports are "documents of public bodies" subject to public inspection. The reports at issue in this case were generated by the Hamilton Police Department. Consequently, the first two requirements of the Article II, Section 9 three-step process are met here.

The Court now turns to the third inquiry: whether a privacy interest is present, and if so, whether the demand of individual privacy clearly exceeds the merits of public disclosure. To determine whether a privacy interest is involved, the Court must first ascertain if the individual in question has an actual expectation of privacy. *Bozeman Daily Chronicle v. Bozeman Police Department*, 260 Mont. 218, 225 859 P.2d 435, 439 (1993). This is "purely a question of fact, which entails determining whether the individual whose privacy interest is at issue has notice of possible disclosure." *See City of Havre*, ¶ 23.

As stated in his *Motion for Summary Judgment* (Doc. # 17) and *Affidavit of Michael E. Spreadbury* (Doc. # 18) and as noted above, Plaintiff Spreadbury has waived his right to privacy in the Reports. Therefore, all information in the Reports which solely involves Plaintiff Spreadbury may be released to him without redaction.

The Court "must, nevertheless, also consider the competing privacy rights of other persons

involved in the investigation....The alleged victim and possibly witnesses and other persons have constitutional privacy rights that must be considered in the release of the investigative documents at issue.” *Bozeman Daily Chronicle*, 260 Mont. at 227, 859 P.2d at 441.

Unlike in the Attorney General’s form for an “Initial Offense Report,” the Reports do not contain an entry which indicates whether any purported victims or witnesses have requested confidentiality. The Reports, as supplied to the Court, appear to have some address, date of birth, and social security number information redacted. The Court could view these redactions as an indication that those witnesses and victims to whom the redacted information pertains did not waive their privacy rights. These redactions are insufficient, however, for the Court to conclude that any individuals appearing in one of the Reports without redacted information affirmatively waived his or her privacy rights. The Court therefore concludes that the witnesses and alleged victims in the requested reports have an actual expectation of privacy in their personal information and statements.⁵

The Court must now consider whether society is willing to accept as reasonable the actual expectations of privacy of the witnesses and alleged victims in the Reports. *Bozeman Daily Chronicle*, 260 Mont. at 225, 859 P.2d at 439. This is a determination of law that involves reasoned consideration of the specific facts underlying the dispute. *See City of Havre*, ¶ 23. The following inquiries may be relevant to evaluating the reasonableness of an individual’s expectation of privacy:

- (1) attributes of the individual, including whether the individual is a victim, witness, or accused and whether the individual holds a position of public trust
- (2) the particular characteristics of the discrete piece of information;
- and (3) the relationship of that information to the public duties of

⁵In its analysis of the Reports, the Court also treats as “witnesses” non-attorney individuals who accompany others making statements in an investigation, whether or not the reporting investigative officer determined or recorded that such an individual had relevant first hand knowledge of the incident. In doing so, the Court acknowledges both that such individuals are no less likely to expect privacy than other witnesses and that such individuals play a vital role in facilitating cooperation in a police investigation.

the individual.

City of Havre, ¶ 23 (internal citations omitted).

In the case at bar, several witnesses and victims in the reports hold positions of public trust because they are public officers or public employees. Section 2-2-103, MCA provides:

The holding of public office or employment is a public trust, created by the confidence that the electorate reposes in the integrity of public officers, legislators, and public employees. A public officer, legislator, or public employee shall carry out the individual's duties for the benefit of the people of the state.

(Emphasis added).⁶

The Court concludes that it would not be reasonable for these public officers and public employees to expect privacy in their names, titles or statements regarding possible criminal activities that they witnessed or experienced in the course of conducting their public duties. For example, the public employees in the case at bar who reported a general disturbance involving an individual on the grounds of their offices in the Ravalli County Administrative Building would be expected to report such conduct as part of their duty to the public and would reasonably expect to be held accountable for their conduct in making such a report. Similarly, the public clerk and recording officer in the case at bar who reported details allegedly occurring outside her workplace which were closely related in time and subject matter to an alleged incident occurring at her workplace (i.e., the same day, involving the same person) could not reasonably expect privacy in her report, particularly since she occupied a supervisory role.

⁶In Montana, a city or town council generally has the power to prescribe the duties of all employees of the city or town. § 7-5-4121, MCA; *but compare* § 22-1-310, MCA. The Court takes judicial notice pursuant to Mont.R.Evid. Rule 201(b)(2) and Mont.R.Evid. 202(b)(2) of the contents of the City of Hamilton Employee Handbook issued and approved by the Hamilton City Council on August 15, 2006 (the "City Employee Handbook"). *See* Hamilton, Mont. Council Minutes (Aug. 15, 2006). The Court notes that it did not consider the subsequent updates to the City of Hamilton Employee Handbook adopted by Resolution No. 1167 on December 21, 2010 because such updates were adopted after the incidents described in the Reports.

Such a supervisory officer has a duty to report such information to protect both her staff and the public at large and would reasonably expect to be held accountable for her actions in making such a report.

In contrast, the Court concludes that it would be reasonable for a person in a position of public trust to expect privacy in matters that are only tangentially related to the duties arising from their position of public trust. For example, in the case at bar, the public employee⁷ who reported an alleged incident occurring outside her place of employment which was closely connected to her role as a witness in an ongoing criminal case but was only tangentially related to her duties as a public employee, could reasonably expect privacy in some of her statements and in her identity. For example, such an employee could reasonably expect that statements and information provided to authorities that were not necessary to prosecute a crime would be protected from public disclosure, unless those statements bore directly on the performance of his or her public duties. This is particularly true because the allegations in the Library Report, as stated in that report, involved witness tampering. A witness to an ongoing criminal case would reasonably expect the justice system to take steps to protect his or her privacy in order to safeguard the judicial process.

Public officers and employees who have no reasonable expectation of privacy in their public statements and who may be contacted through their public offices may nevertheless have a protected privacy interest in other discrete pieces of information. For example, such officers and employees could reasonably expect their personal addresses and phone numbers to be kept confidential. Similarly, it

⁷The parties did not raise or assist the Court with briefing on the issue of whether library personnel are public employees as used in §2-2-103, MCA and therefore hold positions of public trust. In view of the fact that library personnel at the Bitterroot Public Library in the City of Hamilton appear to be paid through the City Finance Department, although technically employed by the Library Board (City Employment Handbook, p. 12), the Court concluded that for purposes of the constitutional analysis in this *Opinion and Order*, library personnel should be treated as if they are public employees under §2-2-103, MCA.

would be reasonable for them to expect that their social security numbers, dates of birth, and driver's license numbers would be protected as private. Such information is not in itself related to their public duties; moreover, it is information, that if released publicly, could increase their personal vulnerability, i.e., to identify theft.

With respect to the witnesses and alleged victims in this case who do not hold positions of public trust, the Court notes that such witnesses also have a reasonable expectation of privacy in their dates of birth, addresses, social security numbers, names, occupations and other identifying information. With respect to other statements of such witnesses in the case at bar, the Court concludes that under the circumstances, such individuals would reasonably expect their statements to be private to the extent the use of their statements was unnecessary to prosecute a crime.

Proceeding with the balancing portion of prong three, the Court must weigh the demand of individual privacy against the merits of public disclosure. *Bozeman Daily Chronicle*, 260 Mont. at 227, 859 P.2d at 441. The Court notes that:

Such balancing demands that the court determine the merits of publicly disclosing the discrete pieces of information at issue, which again involves a fact-specific inquiry, taking consideration of the particular context from which such disclosure will proceed. *See, e.g., Engrav v. Cragun*, 236 Mont. 260, 267, 769 P.2d 1224, 1229 (1989) (*considering the purpose for which public criminal justice information is sought* before determining that the names included on initial arrest reports need not be disseminated).

See City of Havre, ¶ 23 (Emphasis added).

A person is "authorized by law," as such term is used in § 44-5-303, MCA, to receive criminal justice information by the "Right to Know" provision of the Montana Constitution, which is self executing. *Bozeman Daily Chronicle*, 260 Mont. at 231-232, 859 P.2d at 443. Once a person "authorized by law" to request such information makes a prima facie showing that he or she is entitled to the

information, “it then becomes incumbent upon the agency or person in possession of the information to demonstrate why all or portions thereof should not be released because the rights of individual privacy outweigh the merits of public disclosure.” *Bozeman Daily Chronicle*, 260 Mont. at 227, 859 P.2d at 441. Plaintiff Spreadbury has argued that the “Right to Know” provision combined with his own privacy waiver entitles him to the Reports. Plaintiff Spreadbury stated at oral argument that he was “going to withhold the reason” for his request “other than I’m allowed to ask through the city to get it.”

As an initial matter, based on the “Right to Know” provision alone, Plaintiff Spreadbury is certainly entitled to the portions of the Reports in which there is no reasonable expectation of privacy under the Montana Constitution.

Using *City of Havre* as a guide, the Court now considers the other aspects of the particular context in which the requested “disclosure will proceed.” *See City of Havre*, ¶ 23. The Court notes that with respect to the Library Report, such report was apparently legally available to Plaintiff Spreadbury pursuant to § 46-15-322, MCA as part of discovery in DC-41-2009-154. § 46-15-322, MCA states in pertinent part that:

Upon request, the prosecutor shall make available to the defendant for examination and reproduction...the names, addresses, and statements of all persons whom the prosecutor may call as witnesses in the case in chief.

Plaintiff Spreadbury indicated during oral argument that his attorney in DC-41-2009-154 had received a copy of the Library Report, had shown it to him, but that he himself was never given the Library Report.⁸

The Court observes that with the exception of information included in a charging document, potential witness names, statements, and addresses released in criminal discovery are statutorily protected

⁸As noted above, the issue of whether the Library Report should be made available to Plaintiff Spreadbury as part of the criminal discovery process in DC-41-2009-154 is not before the Court in this action.

from disclosure unrelated to the conduct of the case:

[A]ny materials, including witness lists, furnished to an attorney pursuant to 46-15-322 through 46-15-329 may not be disclosed to the public but may be disclosed to others only to the extent necessary for the proper conduct of the case.

§ 46-15-326, MCA. The Montana Supreme Court has treated statutes as evidence in determining whether society is willing to recognize an expectation to privacy as reasonable. *See Pengra v. State*, 2000 MT 291, 302 Mont. 276, 14 P.3d 499, *superseded* in part by amend., Sec. 1, Ch. 172, L. 2001.

The names of the potential witnesses contained in the *Information* and *1st Amended Information* in DC-41-2009-154, as charging documents, are now part of the record in DC-41-2009-154.⁹ By statute, the legislature has indicated that society is not willing to recognize as reasonable, any expectation of privacy in the information contained in a charging document. Therefore, to the extent such names appear in the Library Report, they may be disclosed.

Similarly, the Court concludes that the prosecution appropriately determined that the public disclosure of the information contained in the *Motion for Leave to File Information and Affidavit in Support* dated November 18, 2009 in DC-41-2009 was necessary in order to prosecute a crime. As a result, any actual expectation of privacy in the information contained in the *Motion for Leave to File Information and Affidavit in Support* was not reasonable. Therefore, to the extent this information is also contained in the Library Report, the privacy interests involved do not clearly outweigh the merits of public disclosure.

The Court reaches a different conclusion with respect to other statements and information in the

⁹In contrast, the home addresses of the alleged victim and witnesses in the Library Report, although criminally discoverable under 46-15-322, MCA, were not contained in the *Information* or *1st Amended Information* in DC-41-2009-154. The Court concludes that the demands of individual privacy in these home addresses outweigh the merits of disclosure for an unspecified reason, even if the home addresses were available in criminal discovery.

Library Report for which a protected privacy interest exists. Under these circumstances, including Plaintiff Spreadbury's withholding of the reason for the requested disclosure, the Court concludes that the demands of individual privacy with respect to such statements and information clearly exceed the merits of public disclosure.

With respect to the Admin Building report, no charges were filed. The *Bozeman Daily Chronicle* Court, in concluding that under the circumstances the privacy rights of the alleged victim and of the witnesses outweigh the public's right to know, placed emphasis on the fact that criminal charges were not filed:

In this case, especially in view of the fact that criminal charges were not filed, the victim of the alleged sexual assault and the witnesses involved in the investigation have a subjective or actual expectation of privacy which society is willing to recognize as reasonable. Accordingly, the privacy rights of the alleged victim and of the witnesses outweigh the public's right to know and must be accorded adequate protection in the release of any of the investigative documents at issue.

Bozeman Daily Chronicle, 260 Mont. at 228, 859 P.2d at 441. The case at bar certainly does not involve an alleged rape. Indeed, the report itself indicates that the alleged events were determined to not be a crime. The Admin Building Report contains statements made by a public officer and public employees in which there was no reasonable expectation of privacy. While public officer and employee statements are involved in the Admin Building Report, the report also concerns witnesses not in positions of public trust. Upon review of the Admin Building Report, the Court determines that the privacy rights of such non-public trust witnesses clearly exceed the merits of public disclosure, particularly when Plaintiff Spreadbury has withheld the purpose for the disclosure he requested.

D. Redactions¹⁰

The Court has redacted the Reports in accordance with the above principles and analysis. With respect to the Admin Building Report, the identities and statements of witnesses have been redacted who had no independent duty (for example, a duty arising out of their status as a person in a position of public trust) for their interactions with the Hamilton Police Department. The Court did not redact statements, job titles, and names of witness and victims in positions of public trust; however, the Court did redact information unrelated to their public duties that could create a personal vulnerability, such as home addresses, home phone numbers, and social security numbers.

With respect to the Library Report, the Court did not redact the identities and statements of persons in a position of public trust who the Court determined were acting primarily in the scope of their employment in their interaction with the Hamilton Police Department. For example, the Court did not redact the name, statement, or position of a employee who accompanied the alleged victim to the Hamilton Police Department. In making this determination, the Court was persuaded by the contents of the City Employee Handbook that this employee was acting within the scope of his public duties in accompanying the victim. The City Employee Handbook includes the following pertinent provisions:

All City jobs are created in order to serve the public. The City has adopted a mission statement, which states:

The mission of the City of Hamilton is to provide for the public health and safety...of its citizens

...

¹⁰The Court notes that in Exhibit A to this *Opinion and Order* the Court highlighted in yellow those portions of the Reports that the Court received from Defendants with apparent redactions. The Court has determined that such previous apparent redactions do not require the Court to order the Defendants to provide another version of the Reports to the Court. The Court reached this conclusion under the rationales discussed in this *Order and Opinion* after determining that any portions of the Reports that might have been previously redacted contained content, given the locations of the apparent redactions, that the Court would have redacted had such content been present as part of the Court's review.

Your job was created to accomplish this goal and your personal contribution is necessary to make this a responsive...city government for the citizens of Hamilton. Service to the citizens is the reason for existence...It is essential that every citizen and fellow employee be treated with dignity and consideration.

...

All City of Hamilton employees shall be loyal to the objectives expressed by the City Council and the programs developed to attain those objectives...Public...employees..shall work in full cooperation with other public officials and employees[.]

...

Our customers (The Citizens) are among our organization's most valuable assets...Therefore, one of our first business priorities is to assist any citizen.

...

Employees should remember that job descriptions do not necessarily cover every task or duty that might be assigned[.]

...

Conduct that threatens, intimidates, or coerces another employee, a customer, or a member of the public at any time, including off-duty periods, will not be tolerated. This prohibition includes all acts of harassment.

...

All threats of (or actual) violence, both direct and indirect, should be reported as soon as possible to your immediate supervisor or any other member of management. This includes threats by employees, as well as threats by customers, vendors, solicitors, or other members of the public[.]

In reviewing these provision of the City Employee Handbook, the Court notes that the duties of City employees are not limited to duties listed in their job descriptions, City employees are expected to be loyal to the City's expressed objectives of providing for the safety and assistance of citizens, and the City requires all employees to act upon threats of violence. All evidence in the record, therefore, points to the conclusion that the City employee accompanying the alleged victim to the Hamilton Police Department was acting within the scope of his public duties. Therefore, the Court concludes that this City employee was acting in the scope of his public duty to assist citizens who have been threatened by violence in accompanying the alleged victim to the Hamilton Police Department. Accordingly, this employee, under the circumstances in this case, had no reasonable expectation of privacy in his name, occupation, or statements because such employee should expect to be held accountable to the public for his actions in

the course of performing his duties. Upon this basis, the Court did not redact such information.

With respect to the alleged victim in the Library Report, the Court redacted certain information on the basis that although the alleged victim was a public employee, the alleged victim was acting primarily as a witness in an ongoing criminal case during her interaction with the Hamilton Police Department. The Court did not redact a victim statement in the Library Report that the Court determined nevertheless directly bore on the performance of the alleged victim's duties as a public employee.

The Court also considered whether the contents of the City Employee Handbook placed a public duty upon the alleged victim to report the alleged threats of violence against her to the Hamilton Police Department that would make any expectation of privacy unreasonable. The alleged victim in the Library Report is a library employee. The parties did not raise the issue or provide briefing as to the nature of the duties of library employees. As noted in the City Employee Handbook, "LIBRARY PERSONNEL are hired by the Library Board and paid through the City Finance Department based upon the Interlocal Library Agreement." City Employee Handbook, p. 12. Pursuant to § 22-1-310, MCA:

22-1-310. Chief librarian -- personnel -- compensation. The board of trustees of each library shall appoint and set the compensation of the chief librarian who shall serve as the secretary of the board and shall serve at the pleasure of the board. With the recommendation of the chief librarian, *the board shall employ and discharge such other persons* as may be necessary in the administration of the affairs of the library, fix and pay their salaries and compensation, *and prescribe their duties.*

(Emphasis added). Therefore, library personnel are only City employees in certain respects. *See Local 2390 of Am. Fed'n of State, County, Mun. Employees v. City of Billings*, 171 Mont. 20, 555 P.2d 507 (1976). Given the failure of the parties to address this issue, the Court cannot conclude that the alleged victim had a public duty arising from the City Employee Handbook which made any expectation of privacy in her statements in the Library Report unreasonable.

Assuming *arguendo* that the City Employee Handbook applied to the library employee, the Court nonetheless determines that the alleged victim, particularly as a witness in an ongoing criminal case, was within the class of citizens that the City sought to protect by promulgating a no tolerance policy with respect to threats of violence. As such, the Court concludes that the alleged victim's expectation of privacy, under this particular set of facts, was reasonable with respect to information not contained in the *Information*, *1st Amended Information*, or *Motion for Leave to File Information and Affidavit in Support* DC-41-2009-154 and which did not bear directly on the alleged victim's performance as a public employee. Accordingly the Court did not redact the alleged victim's name (contained in the *Information* and *1st Amended Information*), statements included in the *Motion for Leave to File Information and Affidavit in Support*, and one statement referencing an earlier event at the Bitterroot Public Library.

With respect to the witness in the Library Report who the Court determined did not hold a position of public trust as a public officer or employee, the Court did not redact information, such as the witnesses's name and other information included in the *Information*, *1st Amended Information*, or *Motion for Leave to File Information and Affidavit in Support* in DC-41-2009-154. As noted above, the witness did not have a reasonable expectation of privacy in such information. However, the Court did redact certain information related to that witness (such as the witness's home address) because the Court determined that the witness had a reasonable expectation with respect in such information and concluded that the demands of individual privacy under the circumstances in this case outweighed the merits of public disclosure.

As in the case of the Admin Building Report, the Court redacted information from the Library Report, such as home addresses, home phone numbers, and social security numbers which could create a personal vulnerability.

The Court did not redact any information involving solely Plaintiff Spreadbury, including his home address, phone number, and social security number, because Plaintiff Spreadbury waived his right to privacy in connection with this matter.

E. Conclusion

As the Montana Supreme Court indicated in the *City of Havre*, the factual complexity involved in balancing the “Right to Know” in Article II, section 9 with the “Right to Privacy” in Article II, section 10 of the Montana Constitution makes prospective relief inappropriate in cases involving alleged confidential criminal justice information. *See City of Havre*, ¶17-24. The Court deems it worth noting, however, that with the Montana Department of Justice’s promulgation of A.R.M.23.12.201 and 23.12.203 and form “Initial Offense Report,” municipal police departments now have tools at their disposal that, if properly implemented, could potentially decrease the amount of private, municipal, and judicial resources required to make criminal justice information publicly available. While anyone in the possession of a so-called “Initial Offense Report” must always conduct an appropriate inquiry before dissemination to ensure that confidential criminal justice information is not improperly released, the efficiency in such an inquiry may well be increased by the implementation of carefully designed institutional mechanisms, such as the Attorney General’s form “Initial Offense Report.”

ORDER

Accordingly, it is ordered that:

1. Plaintiff Spreadbury's *Motion for Declarative Judgment* (Doc. #16) and *Motion for Summary Judgment* (Doc. # 17) are **GRANTED** to the following extent:

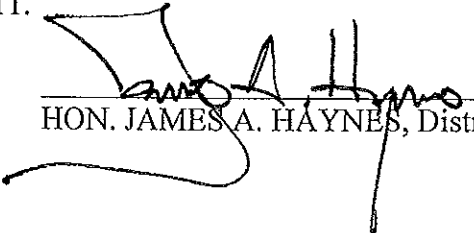
Plaintiff Spreadbury is declared entitled to the Library Report and to the Admin Building Report as redacted by this Court in accordance with this *Opinion and Order* under Article II, sections 9 and 10 of the Montana Constitution.

2. Such Library Report and Admin Building Report are attached hereto as Exhibit A. The Clerk of Court shall seal Exhibit A. The Clerk of Court may permit a party or a party's attorney to access Exhibit A without a further order from this Court. However, because Exhibit A contains unredacted information regarding Plaintiff Spreadbury and the Court concluded that Plaintiff Spreadbury only waived his privacy rights to the extent necessary to release such information to him, Exhibit A shall be sealed from the public.

3. The Clerk of Court shall seal the attachments to Document # 31 in this cause as *in camera* inspection documents. The Clerk of Court shall not permit any person, including a party or a party's attorney, to access the sealed attachment to Document # 31 without a further order from this Court.

4. Plaintiff Spreadbury's *Motion for Declarative Judgment* (Doc. #16) and *Motion for Summary Judgment* (Doc. # 17) are **DENIED** in all other respects.

DATED this 28th day of June 2011.


HON. JAMES A. HAYNES, District Judge

AR 6-28-11
cc: counsel of record
Michael E. Spreadbury, *pro se*

EXHIBIT A
REDACTED REPORTS
CONFIDENTIAL

SEALED DOCUMENT

CHECK OTHER SIDE OF FILE

Case Title: Spreadbury

Document Number: DV-10-639/49

Document Title: Sealed exhibits

Date Filed: 6-28-11