

DA 19-0235

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 299

UNIDENTIFIED POLICE OFFICERS 1 , 2, AND 3,

Petitioners,

v.

THE CITY OF BILLINGS,

Respondent and Appellant,

THE BILLINGS GAZETTE and KTVQ COMMUNICATIONS, LLC,

Intervenors and Counter-claim/Cross-Claim
Petitioners and Appellees,

v.

UNIDENTIFIED POLICE OFFICERS 1, 2, AND 3;
and THE CITY OF BILLINGS,

Counterclaim and Cross-claim Respondents.

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and For the County of Yellowstone, Cause Nos. DV 18-0556,
DV 18-0557, and DV 18-0558
Honorable Donald L. Harris, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Michael J. Lilly, Bridget W. leFeber, Berg Lilly, PC, Bozeman, Montana

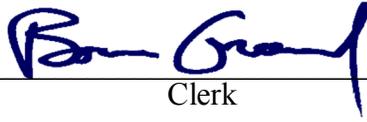
For Appellees:

Martha Sheehy, Sheehy Law Firm, Billings, Montana

Submitted on Briefs: December 11, 2019

Decided: December 31, 2019

Filed:



A handwritten signature in blue ink, appearing to read "Ben Gray", is written over a horizontal line. The signature is stylized and cursive.

Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 The City of Billings appeals the Thirteenth Judicial District Court’s award of attorney’s fees to the Billings Gazette and KTVQ Communications, LLC (“media companies”), after they secured for public release the names of three Billings police officers who were disciplined for having sexual relations with a city clerk. Applying our deferential standard of review to decisions on recovery of fees under § 2-3-221, MCA, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 In April 2018, a Gazette reporter learned that City of Billings police officers had been investigated and disciplined for having sexual relations with a City employee. The reporter contacted Billings Police Chief Rich St. John, who confirmed the story and named the female employee involved. Chief St. John declined at that time to name the three officers. The Gazette ran a story on April 19, 2018, reporting that three City police officers had been suspended without pay for having sex on City property. The article reported that one of the incidents, involving an on-duty officer, occurred in a police car in a private lot, and the other two incidents—involving both an on-duty and an off-duty officer—occurred in the area of the police department records storage in the City Hall basement. The Gazette chose not to identify the female employee.

¶3 Gazette Editor Darrell Ehrlick contacted City Attorney Tom Pardy the same day, requesting documents about the investigation and demanding the identities of the three involved officers. After review and discussion with other City personnel, Pardy agreed to

disclose the dates of the sexual contact and the names of the three disciplined officers. Pardy agreed further to release additional information about the discipline after redacting pertinent documents to protect other privacy interests. Pardy advised Ehrlick that he would have the information available for pickup on April 23, 2018, at 3:00 p.m.

¶4 On April 20, a Friday, each of the three officers filed a separate motion for temporary restraining order (“TRO”) with the District Court late in the afternoon, seeking protection of his identity. Each petition, though, identified the officer by name in the caption. The officers simultaneously filed motions to seal their identities from the public pending court proceedings on their TRO requests. The motions advised that the City Attorney had been contacted and did not object. The Gazette learned the following Monday, April 23, that the District Court had issued the TROs that morning, prohibiting the City from releasing the officers’ identities. The court set a show-cause hearing for May 3 (later continued to May 14). It entered a separate order of protection at the same time, sealing the files “to be opened only upon Court order after good cause is shown.”

¶5 The media companies moved to intervene in the officers’ TRO actions and filed a counterclaim and cross-claim against the City, seeking a declaration that the public’s right to know clearly outweighed the alleged privacy interests the officers asserted and an order making the requested documents available for inspection to the media companies. The media companies also sought immediate release of all redacted documents the City provided to the court for in camera review. They requested attorney’s fees and costs for enforcing the public’s right to know pursuant to both §§ 2-3-221 and 27-8-313, MCA.

¶6 After several recusals and substitutions of judge, the District Court held the show-cause hearing on May 14, 2018, at which time it ordered release of the officers' identities. Following its subsequent in camera review, the court ruled on the disclosure of documents the City had provided. It thereafter granted the media companies' request for fees and costs, awarding a total of \$10,052.70. The court declined to award any fees or costs the media companies incurred to recover their fees and costs.

STANDARD OF REVIEW

¶7 When reviewing a decision on attorney's fees under § 2-3-221, MCA, "[w]e will not substitute our judgment for that of a district court unless that court 'clearly abused its discretion.'" *Friedel, LLC v. Lindeen*, 2017 MT 65, ¶ 5, 387 Mont. 102, 392 P.3d 141 (quoting *Billings High Sch. Dist. No. 2 v. Billings Gazette*, 2006 MT 329, ¶ 23, 335 Mont. 94, 149 P.3d 565). A district court abuses its discretion if the court acts arbitrarily, without employment of conscientious judgment, or exceeds the bounds of reason, resulting in substantial injustice. *Friedel, LLC*, ¶ 5 (citations omitted).

DISCUSSION

¶8 The District Court awarded fees to the media companies under the authority granted by § 2-3-221, MCA. That section provides:

A person alleging a deprivation of rights who prevails in an action brought in district court to enforce the person's rights under Article II, section 9, of the Montana constitution may be awarded costs and reasonable attorney fees.

The parties do not dispute the authority this section provides for an award of fees in this case, only its application under the circumstances.

¶9 We have “declined to articulate firm guidelines” for a district court’s consideration in ruling on a fee request under § 2-3-221, MCA, though we have required that the court provide the rationale for its decision. *Shockley v. Cascade Cty.*, 2016 MT 34, ¶ 8, 382 Mont. 209, 367 P.3d 336; *Yellowstone Cty. v. Billings Gazette*, 2006 MT 218, ¶¶ 30-31, 333 Mont. 390, 143 P.3d 135. The District Court in this case relied heavily on well-established law regarding a law enforcement officer’s diminished expectation of privacy in matters involving the officer’s conduct; the City’s consent to the officers’ TROs (without prior notice to the Gazette), despite already having acknowledged and agreed that their identities should be publicly released; and the fact that the City already had disclosed the identity of the City clerk with whom the officers were alleged to have had sexual relations. “Based upon the specific facts and circumstances of this case,” the court held that requiring the City to pay the Gazette’s fees “serves the important purposes of holding the City accountable and enabling public entities to spread these costs to the public.”

¶10 The City urges this Court to reverse the fee award, claiming the District Court made numerous errors in its findings and failed to recognize the simple fact that the City never refused to disclose the officers’ identities. The City argues that its stipulation to the TROs simply reflected what this Court has recognized is a government entity’s appropriate response when faced with a demand for public disclosure of what is asserted to be private information: wait until a court has conducted the constitutional balancing test between individual privacy interests and the public’s right to know. *See Bozeman Daily Chronicle v. City of Bozeman Police Dep’t*, 260 Mont. 218, 229-30, 859 P.2d 435,

442 (1993). The media organizations counter that the City impermissibly requests this Court to substitute its judgment for that of the District Court and has not identified any clear error that warrants reversal under the governing standard of review.

¶11 Thirty years ago, we acknowledged that “it is not good public policy to recognize an expectation of privacy in protecting the identity of a law enforcement officer whose conduct is sufficiently reprehensible to merit discipline.” *Great Falls Tribune Co. v. Cascade Cty. Sheriff*, 238 Mont. 103, 107, 775 P.2d 1267, 1269 (1989). We emphasized that “[t]he public health, safety, and welfare are closely tied to an honest police force. The conduct of our law enforcement officers is a sensitive matter[,] so that if they engage in conduct resulting in discipline for misconduct in the line of duty, the public should know.” *Great Falls Tribune Co.*, 238 Mont. at 107, 775 P.2d at 1269. We extended this holding in *Bozeman Daily Chronicle* to an officer disciplined for off-duty conduct, again emphasizing the “position of great public trust which law enforcement officers occupy.” 260 Mont. at 226, 859 P.2d at 440. In that case, we upheld the trial court’s determination that allegations of sexual misconduct “went directly to the police officer’s breach of his position of public trust [and] that, therefore, this conduct is a proper matter for public scrutiny[.]” *Bozeman Daily Chronicle*, 260 Mont. at 227, 859 P.2d at 440. We frequently cite the law enforcement example when considering whether a public employee or official possesses an expectation of privacy that society is willing to accept as reasonable. *See Billings Gazette v. City of Billings*, 2013 MT 334, ¶ 45, 372 Mont. 409, 313 P.3d 129; *Billings Gazette v. City of Billings*, 2011 MT 293, ¶¶ 19-20, 362

Mont. 522, 267 P.3d 11; *Yellowstone Cty.*, ¶¶ 21-23; *Citizens to Recall Whitlock v. Whitlock*, 255 Mont. 517, 523, 844 P.2d 74, 78 (1992).

¶12 Recognizing “the damned-if-you-do, damned-if-you-don’t choice” that public agencies face when responding to a request for potentially private information, we afford considerable deference to the trial courts in deciding whether an award of fees is warranted in a given case. *Bozeman Daily Chronicle*, 260 Mont. at 231-32, 859 P.2d at 443-44. We have upheld the denial of fees where the district court determined that the public entity took a “reasonable approach to resolve a right-to-know matter,” *Friedel, LLC*, ¶ 9, and when the State “faced . . . a dilemma” in resolving asserted privacy interests when responding to a request for settlement information. *Pengra v. State*, 2000 MT 291, ¶¶ 26-27, 302 Mont. 276, 14 P.3d 499. The settling plaintiff in *Pengra* had moved to seal the terms of the settlement while the parties were still working out the details of the agreement. Several media organizations intervened and demanded public disclosure. The district court held a hearing at which the media organizations and the plaintiff presented argument. *Pengra*, ¶ 5. Although the district court denied the motion to seal, it denied fees against the State. We affirmed, noting that the State’s “sole offense” was its failure to object to the asserted privacy right. *Pengra*, ¶ 26.

¶13 The City points out that, similar to the State’s position in *Pengra*, it never opposed the media organizations’ request for disclosure of the officers’ identities. But, unlike the terms of the settlement in *Pengra*, the matter of disclosure was well-settled in our precedent. And the City’s actions in stipulating to the TROs led to additional litigation that the District Court concluded could have been avoided. Taking as true the City’s

protestations that it acted in good faith and worked diligently to secure release of public information without jeopardizing any individual right to privacy or exposing itself to litigation from the officers, a conservative and good faith effort to comply with the law “will not preclude a discretionary award of attorney’s fees under § 2-3-221, MCA.” *Bozeman Daily Chronicle*, 260 Mont. at 232, 859 P.2d at 443-44 (citing *Associated Press v. Bd. of Pub. Educ.*, 246 Mont. 386, 393, 804 P.2d 376, 380 (1991)). Because the public benefits from receiving full disclosure of relevant information secured by a reporter’s efforts, we have upheld a discretionary award of fees to “properly spread” the cost of litigation “among the beneficiaries.” *Bozeman Daily Chronicle*, 260 Mont. at 232, 859 P.2d at 444.

¶14 In this case, the City’s prompt actions likely kept the fee award to a modest sum. Though the City faced an unusual procedure when the officers went to court first and included their names in their own pleadings, the process was not the media companies’ doing, and the media companies prevailed in securing the release of public information. Under all the circumstances, we cannot conclude that the District Court abused its discretion in making a statutory award of fees.

¶15 Finally, the media organizations seek recovery of their fees on appeal. The statute authorizes a fee award for a party’s efforts to secure the release of public information. The District Court held that the media organizations were not entitled to fees for time spent recovering their fees, and the media organizations did not appeal that ruling. As the appeal involves exclusively the recovery of attorney’s fees, we likewise decline to award fees on appeal. Costs are authorized as a matter of course by M. R. App. P. 19(3).

CONCLUSION

¶16 The District Court's January 23, 2019 Judgment awarding the media organizations a collective total of \$10,052.70 in costs and attorney's fees is affirmed.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH

/S/ JAMES JEREMIAH SHEA

/S/ LAURIE McKINNON

/S/ DIRK M. SANDEFUR