

CONSTITUTIONS - Right to privacy regarding merit pay awarded pursuant to plan devised by school district trustees;

EDUCATION - Merit pay of school district administrators;

EMPLOYEES, PUBLIC - Right to privacy regarding merit pay of school district administrators;

PRIVACY - Constitutional right to privacy regarding merit pay of school district administrators;

PUBLIC FUNDS - Merit pay of school district administrators awarded pursuant to plan, appropriated from school district general fund;

SCHOOL BOARDS - Right to privacy regarding board of trustees' plan allowing for merit pay;

SCHOOL DISTRICTS - Right to privacy regarding merit pay awarded pursuant to plan devised by school district trustees;

MONTANA CODE ANNOTATED - Section 20-3-324(8);

MONTANA CONSTITUTION - Article II, section 10;

OPINIONS OF THE ATTORNEY GENERAL - 38 Op. Att'y Gen. No. 109 (1980).

HELD: The administrators of School District No. 7 do not have a constitutionally-protected right to privacy regarding the amount of merit pay awarded to them pursuant to the district's

Leadership Evaluation and Compensation Plan.
Therefore, the amounts should be disclosed to
the public.

13 November 1985

Mike Salvagni
Gallatin County Attorney
Law and Justice Center
615 South 16th Street
Bozeman MT 59715

Dear Mr. Salvagni:

You requested my opinion on the following question:

Is the Board of Trustees of School District
No. 7 required to disclose the amount of merit
pay awarded to an administrator of the
district under its Leadership Evaluation and
Compensation Plan when the amount of merit pay
is based upon a performance evaluation of the
administrator?

The "administrators" include principals, assistant
principals, directors, supervisors, and the assistant
superintendent. "Merit pay" is awarded in addition to
the administrators' regular salary pursuant to the
Leadership Evaluation and Compensation Plan adopted by
the school trustees.

The school district trustees have the power to adopt and
administer the annual budget of a school district.
§ 20-3-324(8), MCA. It is pursuant to this power that
the trustees developed the Leadership Evaluation and
Compensation Plan, which allows for merit pay following
evaluation of the administrators.

Article II, section 10, of the Montana Constitution
states:

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.

As to this privacy right, the Montana Supreme Court has
stated that it applies to a two-part test to determine

whether a person has a constitutionally-protected privacy interest. First, a person must have had a subjective or actual expectation of privacy regarding the subject. Second, society must be willing to recognize that expectation as reasonable. Missoulia v. Board of Regents, 41 St. Rptr. 110, 116, 675 P.2d 962, 967 (1984).

The amount of merit pay awarded in this situation is directly related to the evaluation score of an administrator; the amount may vary with each administrator. Because the amount is directly affected by the outcome of a performance evaluation, the administrator may have an expectation that the amount of merit pay would not be disclosed.

However, such an expectation may not be reasonable. Reasonableness must be determined according to all relevant circumstances, including the nature of the information sought. Missoulia, 41 St. Rptr. at 117, 675 P.2d at 968. In the Missoulia case, the court found a reasonable expectation of privacy where the privacy interest involved was in job performance evaluations of university presidents. The evaluations contained information obtained from university staff and employees, the university presidents, and Board of Regents members regarding performance of a president and his administration. The evaluations, which were composed of written reports and interviews, included statements about sensitive, personal matters. Evidence supported the contentions that the reports and interviews were conducted with an expectation of confidentiality that was crucial to the evaluation process.

In Montana Human Rights Division v. City of Billings, 199 Mont. 434, 649 P.2d 1283 (1982), the Montana Supreme Court found a reasonable expectation of privacy in personnel records which included various types of personal information. The Court stated:

It may well be unreasonable for an employee to expect that this information will never be divulged to prospective employers. It does not necessarily follow that, therefore, this information is unprotected by the right of privacy under all other circumstances, even where an employee can reasonably expect it

will not be divulged, such as in an investigation or during a public hearing in which the employee is only remotely involved. The right of privacy turns on the reasonableness of the expectation, which may vary, even regarding the same information and the same recipient of that information. [Emphasis in original.]

199 Mont. at 443, 649 P.2d at 1288. In the situation at hand, the amount of merit pay awarded would be disclosed, not the particulars of the evaluation of the administrator. Whereas the latter would involve personal matters which would give rise to a greater and more reasonable expectation of privacy, the former, in many ways, resembles the basic salary of a public employee.

The merits of disclosure of a state employee's title, dates and duration of employment, and salary were discussed in 38 Op. Att'y Gen. No. 109 at 375 (1980). I concluded that such matters should be publicly disclosed, stating at 379:

In this case, the slight demand of individual privacy does not outweigh the great merit of allowing the public to know who its employees are, what their jobs are, and how much they are being paid. Disclosing such information increases public confidence in its government, and consequently increases government's ability to serve the public.

Similarly here, the merit pay is essentially money paid by the public. As with the base salaries of the administrators, the total sum of money available for the Leadership Evaluation and Compensation Plan is appropriated as part of the school budget. Thus, the Plan is funded by public monies.

It would be unreasonable for the administrators to expect that the amount of merit pay, derived from public monies, would be more private than their base salaries. Such information does not include personal or sensitive matters regarding the administrators. Because an expectation of privacy regarding the amount of merit pay awarded according to the Plan would be unreasonable, there is no constitutionally-protected right to privacy

in this case. With this conclusion, I need not reach the issue of whether the privacy right involved outweighs the public's right to know the actions of the school district.

THEREFORE, IT IS MY OPINION:

The administrators of School District No. 7 do not have a constitutionally-protected right to privacy regarding the amount of merit pay awarded to them pursuant to the district's Leadership Evaluation and Compensation Plan. Therefore, the amounts should be disclosed to the public.

Very truly yours,

MIKE GREELY
Attorney General