Martha Sheehy
SHEEHY LAW FIRM
P. O. Box 584
Billings, Montana 59103-0584
Telephone: (406) 252-2004
Fax: (866) 477-5953
msheehy@sheehylawfirm.com

Attorney for The Billings Gazette

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

THE CITY OF BILLINGS, a Montana Municipal Corporation, Plaintiff, -vs- BILLINGS GAZETTE COMMUNICATIONS, a division of LEE ENTERPRISES, and JOHN and JANE DOES 1 through 10, Defendants.	Cause No. DV 14-0964 Judge Michael G. Moses **THE BILLINGS GAZETTE'S BRIEF IN OPPOSITION TO MOTION FOR PROTECTIVE ORDER AND REQUEST FOR ORDER COMPELLING DISCOVERY**

INTRODUCTION

On June 26, 2014, the Billings Gazette ("the Gazette") requested public documents from the City of Billings. Rather than responding to the Gazette, the

City filed this lawsuit and then filed a dispositive motion for summary judgment. In response to that motion, the Gazette asserted that the motion was not ripe. At the hearing on the motion on November 13, the Gazette informed the Court and counsel that it needed to conduct discovery to determine its position with respect to the City's lawsuit. This Court asked the Gazette to include a discovery request which requests documents after the date of the initial request, June 26. The Court continued the hearing, and the City agreed to provide redacted copies of the subject documents.

At the hearing on November 13, the Gazette noted that this case had taken a strange posture, because the Gazette had made no effort to obtain the documents in question other than sending the initial document request. When the City filed suit, the Gazette had not determined whether to take additional measures to obtain the documents or seek the identities of the employees. The Gazette made clear that it did not have enough information to take a position regarding the weighing of the public's right to know and the individual privacy interests. The Gazette indicated that it would seek discovery not only to defend the claim brought by the City, but to determine whether the Gazette would seek information concerning the documents or the identities of the employees. In short, the Gazette intended to clarify and possibly limit its request upon receipt

of discovery, thereby limiting the scope of review required of the Court.

On November 19, 2014, the Billings Gazette propounded upon the City a modest set of discovery comprised of twelve interrogatories and five requests for production. In response, the City refused to answer a single portion of any of the 17 discovery requests and impermissibly moved this Court for a protective order without prior notice to the Gazette. (See City's Responses, Ex. B, City's Motion for Protective Order). The City's motion and brief do not cite a single authority to support the protective order.

The Gazette requests that the protective order be denied as inappropriate under Rule 26 (c); that the Court issue an order compelling the City to answer discovery pursuant to Rule 26(c)(2); and that fees associated with this motion be awarded to the Gazette pursuant to Rule 26 (c)(3) and Rule 37a(5).

I. THE CITY HAS NOT ESTABLISHED ANY BASIS FOR A PROTECTIVE ORDER.

In its motion, the City seeks a protective order based on six grounds. None of the reasons cited by the City supports the issuance of protective order.

1. "The City has filed and briefed a dispositive motion that is likely to result in a determination of all rights asserted by the parties." (City Motion, p. 1)

The City asserts that it is absolved from answering discovery because the

City has filed a dispositive motion. Just the opposite is true. The purpose of discovery is to promote the ascertainment of the truth and ultimate disposition of the lawsuit. "Discovery fulfills this purpose by assuring the mutual knowledge of all relevant facts gathered by both parties which are essential to proper litigation". *Murphy Homes, Inc. v. Muller*, 2007 MT ¶67, 337 Mont. 411, 162 P.3d 106. The City thwarts this purpose by refusing to answer any discovery regarding the City's own contentions. Rule 56(f) specifically contemplates delaying summary judgment proceedings while discovery is conducted. "Absent discovery, [a party] has no adequate access to this evidence, and therefore no way to shield herself from a premature summary judgment motion." *McCray v. Maryland Dept. Of Transp.*, 741 F.3d 480, 484 (4th Cir. 2014).

In response to the City's motion for summary judgment, the Gazette established that the motion was not ripe and requested the opportunity to propound discovery regarding the City's claims. This Court granted the Gazette's request at the hearing on November 13, and continued the hearing on the motion for summary judgment, holding that the City had not supplied enough information to the Court for adjudication. The Court asked the Gazette to include requests which would render the document requests continuing in nature.

Absent discovery, the Gazette has absolutely no information with which to

address the weighing of interests requested by the City. The City has provided no facts and no redacted documents to the Gazette. The City has not identified or explained what privacy interests are at issue. Now the City has refused to respond to discovery seeking information necessary to the weighing of these putative yet unknown privacy interests.

Rule 56(f) provides support for this Court's November 13 action of delaying decision on the summary judgment motion. Rule 56(f) permits the Court to delay or stay proceedings on a summary judgment motion to allow a party to conduct discovery needed to defend a case. The Gazette is entitled to discovery to ascertain the facts underlying the contentions in the City's complaint. This Court acknowledged and approved the Gazette's request to conduct discovery on November 13, 2014. The City cannot now avoid answering the discovery based on the pending summary judgment motion.

The Gazette has not waived its right to hearing on the summary judgment motion. The Gazette's discovery requests are narrowly tailored to ascertain the facts behind the City's complaint against the Gazette. The City has initiated this lawsuit and now refuses to allow the Gazette the most basic legal process afforded a civil defendant: discovery.

2. **"The Gazette is now seeking to engage in discovery by serving lengthy and detailed requests for production of documents and interrogatories. . . ., and by way of those discovery requests it seeks to usurp this Court's sole and exclusive authority to adjudicate the proper balance between the Individual Right of Privacy and the Public Right to Know." (City Motion, p. 1)**

The discovery requests are neither lengthy nor detailed. The Gazette propounded seventeen discovery requests, several at the request of the Court to specifically request documents after June 26. The remaining fourteen discovery requests seek information directly related to the contentions made by the City in their Complaint against the Gazette. The Gazette has a right to determine the factual bases for City's contentions. As a party forced into a lawsuit by the City, the Gazette has a right to discover the basis of the complaint against it.

The Gazette does not seek to usurp the Court's role. The Gazette, as a defendant in the lawsuit, must defend the City's claim that the individual's privacy interests outweigh the public's right to know. The law is well settled: Public employees who occupy positions of trust have no legitimate right of privacy to investigations of their conduct. *Citizens to Recall Whitlock v. Whitlock*, (1992), 255 Mont. 517, 844 P.2d 74; *Bozeman Daily Chronicle v. City of Bozeman Police Dept.*, (1993), 260 Mont. 218, 859 P.2d 435; *Svaldi v.*

Anaconda-Deer Lodge County, 2005 MT 17, ¶31, 325 Mont. 365, ¶31, 106 P.3d 548, ¶31.

The Gazette cannot defend – or even determine its position – without discovery of non-confidential information about the discipline imposed, the employee's jobs, the rate of pay, the investigation conducted and the results of that investigation. While the Court must eventually balance the interests, the parties to the lawsuit have the right and the standing to argue the merits of that balancing. *Schoof v. Nesbit*, 2014 MT 6, 373 Mont. 226, 316 P.3d 831. Newspapers and other media have long been held to stand in the shoes of the public for purposes of seeking access to public documents. *See, e.g.*, *Bozeman Daily Chronicle v. Police Department* (1993), 260 Mont. 218, 224, 859 P.2d 435, 438; *Great Falls Tribune v. Cascade County*, (1989) 238 Mont. 103, 775 P.2d 1267.

With respect to the interrogatories, the City asserts blanket denials and boilerplate objections, most of which are without merit on their face. How does revealing the type of discipline imposed upon an anonymous employee jeopardize the employee's privacy? (Ex. B, Interrogatories No. 3, No. 10). How does describing the process of the investigation invade privacy rights? (Ex. B, Interrogatory No. 4, 9). How does describing the amount, nature and source of

the funds at issue in the investigation invade privacy rights? (Ex. B, Interrogatory No. 5). How does a description of the "property" at issue invade privacy rights? (Ex. B, Interrogatory No. 6). Whether the employees had access to City funds is not protected by privacy. (Ex. B, Interrogatories 7 and 8).

With respect to the requests for production, the City again posited boilerplate objections and blanket refusals to produce documents. The City made no attempt to provide a privilege log establishing the basic facts about the types and kinds of documents which it has produced to the Court for inspection. Such tactics are insufficient to assert a privilege. *See Burlington Northern & Santa Fe Ry. Co. v. U.S. Dist. Court for District of Montana*, 408 F.3d 1142, 1147 (9th Cir. 2005, Montana). The City did not even provide redacted documents, though such documents were already provided to the Court.

The discovery requests seek information concerning contentions made by the City in a lawsuit initiated by the City. Privacy interests do not protect the general information sought. And even if privacy interest are at stake, the documents can be produced subject to restrictions, such as to the identity of the person investigated.

The City's objections to the discovery requests do not justify the complete lack of response. Having brought this lawsuit, and having pled certain specific

allegations, the City must support its allegations in the Complaint upon request of the Defendant.

3. **"Until the court rules on the pending dispositive motion and determines that proper balance, the City should be relieved of the time, annoyance, undue burden and undue expense involved in responding to . . . time-consuming discovery procedures which would expose the city to claims by individuals that the City has invaded and unlawfully violated their Individual Right to Privacy."**

4. **"Compelling the City to respond to plaintiff's [sic] production requests and other discovery requests before resolution of defendant's [sic] pending dispositive motion will cause undue burden and expense to defendant [sic] and will result in the unnecessary expenditure of attorney's fees and costs and may lead to protracted litigation by the City with individuals claiming their rights have been violated...." (City Motion, pp. 1-2).**

The City repeatedly and incorrectly refers to itself as the defendant in this case. The City initiated this action, and requires the Gazette to incur fees in defending. The Gazette has not compelled the City to participate in this lawsuit, but once the City brought suit, the City is subject to the rules of discovery.

Essentially, the City argues that it can bring a lawsuit and then refuse all discovery to the defendant until the Court decides the ultimate issue in the case. Under the Rules of Civil Procedure, the Gazette is entitled to discover bases of the City's claim using interrogatories and requests for production. Rule 26(a), M.R.Civ. P. The scope of discovery is broad. Rule 26(b)(1) allows discovery of

"any non-privileged matter that is relevant to any party's claim or defense." The information sought need not be admissible at trial. *Id.*

The Gazette's discovery requests fall well within the scope of discovery, seeking relevant information concerning the City's claims. Moreover, seventeen discovery requests cannot be deemed annoying or unduly burdensome. As the objecting party, the City "must do more than simply intone the familiar litany that the discovery sought is burdensome, oppressive, or overly broad." *Kellogg Brown & Root Services, Inc. v. United States*, 117 Fed. Cl. 1, 5 (Fed. Cl. 2014). "Broad allegations of harm, unsubstantiated by specific examples, are insufficient to justify issuance of a protective order." *Lakeland Ptnrs, LLC v. United States*, 88 Fed. Cl. 124, 133 (2009). The City, having initiated a lawsuit, cannot claim that the expense of engaging in routine discovery precludes the Gazette from the most basic due process. Moreover, the fact that the City may engage in other litigation does not preclude discovery in this litigation.

Most importantly, meaningful discovery responses would very likely reduce the amount of work required of the Court in its document review. As indicated in court on November 13, the Gazette intended to clarify and possibly limit its request upon receipt of information pertinent to the weighing required by Montana law. Because the Gazette has NO information regarding the City's

claims, the Gazette cannot currently determine its position regarding the weighing, except in a theoretical way.

5. **"The Gazette has other means to obtain much of the information it seeks to compel the City to produce because they have contended from the outset that they have a confidential informant who has related information about the 2014 Employer's Solid Waste Investigation to them." (City Motion, p. 2)**

This contention does not state a valid objection to discovery. The City initiated a lawsuit, and as a result, the Gazette is entitled to discovery from the City. The Rules require the City to respond to discovery regardless of the defendant's other sources of information. Moreover, the Gazette has never contended that it has a "confidential informant" or any source with respect to the City's lawsuit against the Gazette.

5. **(Sic) "The City has in good faith attempted to confer with Martha Sheehy, counsel for the Gazette, in an effort to resolve the dispute without the Court's action, but such efforts have been unproductive.**

This assertion is incorrect. On November 20, Mr. Addy contacted me via voicemail asking whether or not he should redact many emails for the Court's *in camera* review. He followed up with an email saying he wanted to focus on due process letters and corrective action documents in his redacted production to the court. I responded that the City did not have to provide the emails at this point. I

followed up with the following email on December 12:

> To confirm my quickly related info from the post office counter:
>
> Do not redact / produce the emails at this time. I reserve the right to request the emails at a later date. I will be able to be much more specific about my request when I receive responses to my discovery requests, which should be due next week.
>
> I continue to assert that I am entitled to (1) discovery responses; and (2) redacted documents provided to court, before any decision is made by the judge.
>
> Thanks, Kelly. Let me know if you have any questions.

While all of our communications are cordial, Mr. Addy and I have never discussed the discovery. We have only briefly discussed – and resolved – the issues regarding redaction of copies for the Court. Mr. Addy has never informed me that he would object to the discovery requests or file a motion for a protective order. He has never proposed alternate discovery procedures. He has never requested accommodation or taken issue with any of the interrogatories or Requests for Production 4 and 5.

As indicated in my email to Mr. Addy of December 12, I awaited discovery responses to determine how the Gazette would proceed. The Gazette fully expected to receive meaningful responses to discovery on December 19, and was surprised, to say the least, that the City refused to answer all or part of any of the requests AND filed this wasteful and meritless motion for a protective order. The

Gazette propounded discovery in an effort to limit the issues which need to be resolved by the Court.

Seeking resolution of a discovery dispute is a prerequisite to seeking a protective order. Rule 26c (1), M.R.Civ. P. The City did not inform the Gazette of any disputes or objections regarding the discovery requests until December 19, when the City objected to each and every request and filed this motion for a protective order.

II. THE RULES REQUIRE DENIAL OF THE PROTECTIVE ORDER, IMPOSITION OF A MOTION TO COMPEL, AND AN AWARD OF FEES TO THE GAZETTE.

As shown above, the City has failed to establish any legal grounds for a protective order. The grounds cited by the City lack any legal merit. The City cites no authority. Moreover, the City failed to advise the Gazette of this motion and seek resolution prior to filing it.

The motion for a protective order should be denied. Rule 26 allows the Court to instead issue an order to compel the City to respond to the requests. "If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery." Rule 26(c) (2), M.R.Civ. P.

In addition, the Court should award the Gazette attorney fees incurred in

responding to this meritless motion. Fees are appropriate pursuant to Rule 26 (c)(3) and Rule 37(a) (5).

DATED 30th day of January, 2014.

SHEEHY LAW FIRM

By _____
MARTHA SHEEHY
P. O. Box 584
Billings, Montana 59103-0584
Attorney for The Billings Gazette

CERTIFICATE OF SERVICE

This is to certify that on the 30th day of January, 2014, a copy of the foregoing was served by electronic means upon:

John "Kelly" Addy
City of Billings
P.O. Box 1179
Billings, MT 59103

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Martha Sheehy