MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

THE MONTANA POLICY INSTITUTE, a Montana corporation, Petitioner, v. STATE OF MONTANA; DEPARTMENT OF ADMINISTRATION; and JANET KELLY, as Director for the Department of Administration, Respondents.	Cause No. ADV-2011-806 **DECISION AND ORDER ON PETITION FOR WRIT OF MANDAMUS**

Hearing on the above-entitled petition for writ of mandamus was held on December 14, 2011. Petitioner was represented by Arthur V. Wittich, and Respondents were represented by Michael P. Manion. The parties were given an opportunity to submit additional briefs following the hearing, and the matter is now ready for decision.

Respondents had previously filed a motion for summary judgment, however the issues raised in that motion are subsumed in the merits of the petition.

BACKGROUND

Petitioner (Policy Institute) made a request of the Montana Department of Administration (Department) for information about state employee compensation, specifically the actual pay rate of state employees, including each employee's actual yearly base pay as well as each employee's actual yearly total pay broken down by (a) base, (b) overtime/comp. pay, (c) other salary, (d) bonus pay, (e) buyout/early retirement, and (f) other compensation, including but not limited to reimbursements and travel.

The Department's deputy director refused the request stating that the current state payroll system, which is computerized, was not set up to create customized reports. Communications between the parties prior to the filing of the present petition indicated that the Department did not have adequate staff to customize its reports and that such customization would take about 30 hours of time and about $723 to produce. Policy Institute was willing to pay the cost. The Department's refusal to comply with Policy Institute's request resulted in the present petition.

STANDARD

A writ of mandamus is extraordinary and may be granted only when the person seeking to invoke it is entitled to have a party perform a clear legal duty and there is no speedy or adequate remedy in the ordinary course of law. Section 27-26-102, MCA; *Smith v. County of Missoula*, 1999 MT 330, ¶ 28, 297 Mont. 368, 992 P.2d 834. Whether to grant or deny a writ of mandate is a legal conclusion. *Becky v. Butte-Silver Bow Sch. Dist. No. 1*, 274 Mont. 131, 135, 906 P.2d 193, 195 (1995).

A two-part standard must be satisfied for the issuance of a writ. *Id.* The writ is available where a party who applies for it is entitled to the performance of a

clear legal duty by the party against whom the writ is sought. If there is a clear legal duty, the district court must grant a writ of mandate if there is no speedy and adequate remedy available in the ordinary course of law. Section 27-26-102, MCA; *Smith*, ¶ 28.

As discussed below, the Department has a clear legal duty to provide public documents. At issue is whether this duty encompasses a request for information that is contained within the Department's database, but is not readily available via a report already prepared by the Department. Also at issue is whether Policy Institute has a speedy and adequate remedy in the ordinary course of law, thereby making a writ inappropriate.

DISCUSSION

The Department's Duty under Montana Law

The parties do not dispute that the information requested by Policy Institute is public information. Article II, section 9, of the Montana Constitution states: "**Right to know**. 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." Section 2-6-102, MCA, states: "**Citizens entitled to inspect and copy public writings.** (1) Every citizen has a right to inspect and take a copy of any public writings of this state, except as provided in 22-1-1103, 22-3-807, or subsection (3) of this section and as otherwise expressly provided by statute."

The exceptions in the statute do not apply to this case.

The issue here is whether the Department is obligated under Montana law to provide the public information described above to Policy Institute in the requested format. The Department's counsel explained to the Court that the

information requested is all contained in the Department's computer files, but that no single file or document contains all the information. The Department would have to reformat its programs to provide spreadsheets containing the specific data requested.

The Montana Supreme Court has yet to address this issue. However other jurisdictions have done so, with different results. For example, the New York Supreme Court held that New York's Freedom of Information Law requires public agencies to make available its computer files containing public information if requested, and, further, to reprogram their databases to produce fields of information possessed and maintained within their databases for purposes of redacting confidential information. *N.Y. Rifle & Pistol Ass'n, Inc. v. Kelly*, 831 N.Y.S. 2d 348 (2006), rev'd on other grounds, 863 N.Y.S.2d 439 (2008); *N.Y. Pub. Interest Research Group, Inc.,v. Cohen*, 729 N.Y.S.2d 379 (2001). Other jurisdictions have held similarly: *Hamer v. Lentz*, 547 N.E. 2d 191 (Ill. 1989) (if necessary, the agency must create a computer program that would generate the requested information); *State ex rel. Stephan v. Harder*, 641 P.2d 366 (Kan. 1982) (when requested data was stored with confidential information, the agency was required to either delete the confidential information from the existing record or extract the requested information); *The Tennessean v. Elec. Power Bd. of Nashville*, 979 S.W.2d 297 (Tenn. 1998) (the governmental agency was required to produce its computerized public customer information in the format requested); *Bd. of Educ. of Newark v. N.J. Dep't of Treasury*, 678 A.2d 660 (N.J. 1996) (the agency was required to create computer programs necessary to provide requested information contained in the agency's data bank).

Other states held differently: *Office of State Ct. Admin'r v. Background Info. Servs., Inc.*, 994 P.2d 420 (Colo. 1999) (under Colorado Records Act, agency was not required to manipulate its computer records to extract exempt information so as to

release the balance of the data); *State ex rel. Kerner v. State Teachers Retirement Bd.*, 695 N.E.2d 256 (Ohio 1998) (state agency was not required to create new record by searching and compiling information from existing records).

In *Seigle v. Barry*, 422 So.2d 63, 66-67 (Fla. 1982), the Florida District Court of Appeals adopted a somewhat neutral rule:

> [A]ccess to computerized records shall be given through the use of programs currently in use by the public official responsible for maintaining the public records. Access by the use of a specially designed program prepared by or at the expense of the applicant may obviously be permitted in the discretion of the public official. . . . In the event of refusal of the public official to permit access in this manner, the circuit court may permit access pursuant to the same statutory restraints where
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> (1) available programs do not access all of the public records stored in the computer's data banks; or
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> (2) the information in the computer accessible by the use of available programs would include exempt information necessitating a special program to delete such exempt items; or
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> (3) for any reason the form in which the information is proffered does not fairly and meaningfully represent the records; or
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> (4) the court determines other exceptional circumstances exist warranting this special remedy.

The Montana Supreme Court has interpreted the public's right to know broadly, stressing that all citizens have an absolute right to observe and examine the operation of agencies of government and that this right is limited only by the constitutional right to privacy. *Mont. Health Care Ass'n v. State Fund*, 256 Mont. 146, 150, 845 P.2d 113, 116 (1993) (citing *Allstate Ins. Co., v. City of Billings*, 239 Mont. 321, 325, 780 P.2d 186, 188 (1989)). Montana's statutory and constitutional rights to public records embody the state's strong commitment to access to public records. These laws should therefore be liberally construed to effect that commitment. Moreover, it makes little sense to maintain computer systems that have large capacities for storage of information and the capability to produce that information quickly, while quibbling about the physical format of the information requested rather than the intent

of the right to know laws. The Court concludes that the most liberal application of the public's right to know applies to the state of Montana and requires the Department to provide the information requested by Policy Institute.

A related issue is whether the information requested by Policy Institute is a "public writing" or "document" within the meaning of Section 2-6-102, MCA, and Article II, section 9, of the Montana Constitution. At the time of the enactment of the Montana Constitution, before the arrival of the computer age, public records and documents were maintained as hard copies. Section 2-6-110, MCA, has been amended to include electronically stored and produced material:

> (1) (a) Except as provided by law, each person is entitled to a copy of public information compiled, created, or otherwise in the custody of public agencies that is in electronic format or other nonprint media, including but not limited to videotapes, photographs, microfilm, film, or computer disk, subject to the same restrictions applicable to the information in printed form. . . .

Currently, most information retained by public agencies is contained in computerized files and data banks. No reasonable person would assert that Montana's constitutional and statutory rights to public information do not apply to computerized information. Any computerized information that is obtained and maintained by the agency as required by law is subject to the public's right of access.

The Department advised the Court that some of the data requested by Policy Institute is not available in any of the currently formatted files, although the information is contained in its data banks. Policy Institute has no other way to obtain that public information than from the Department's computers.

As previously noted, it would take about 30 hours and $723 to produce the information in the requested format. Although it may be argued in some cases that information requested by a member of the public in a particular format is too

burdensome for the agency in time and money to be reasonable, the Court does not believe Policy Institute's request is that oppressive, particularly since Policy Institute is willing to pay the cost of production.

The Court concludes that the Department has a clear legal duty to provide the information requested by Policy Institute, and therefore the first requirement for a writ of mandamus is satisfied.

Whether Policy Institute Has a Speedy and Adequate Remedy

The second requirement for mandamus relief is that there is no speedy or adequate remedy in the ordinary course of law. Section 27-26-102(2), MCA. The Department asserts that Policy Institute has an adequate remedy at law and thus a writ of mandamus is not appropriate.

The Montana Supreme Court has indicated that mandamus against a public officer or body is a more adequate remedy than a declaratory judgment because mandamus commands performance, while a declaratory judgment simply pronounces the duty to be performed. *Allen v. Madison Co. Comm'n*, 211 Mont. 79, 89, 684 P.2d 1095, 1100 (1984); *State ex rel. Konen v. City of Butte*, 144 Mont. 95, 102, 394 P.2d 753, ___ (1964). On this basis, the Court concludes that the second requirement for a writ of mandamus is met, and mandamus is a proper remedy in this case.

DECISION

Based on the foregoing law and discussion, the Court concludes that Policy Institute's petition for mandamus should be granted.

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IT IS THEREFORE ORDERED that the petition is GRANTED in accordance with this decision, and that costs and attorney fees are awarded to Policy Institute pursuant to Section 27-26-402, MCA.

DATED this 27 day of January 2012.

DOROTHY McCARTER
District Court Judge

pc: Arthur V. Wittich
Michael P. Manion

T/DMc/mt policy institute v state d&o.wpd