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**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

<p>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.</p>	<p>Cause No. ADV-2011-806 DECISION AND ORDER ON PETITION FOR WRIT OF MANDAMUS</p>
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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.

1 **BACKGROUND**

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

9 The Department's deputy director refused the request stating that the
10 current state payroll system, which is computerized, was not set up to create
11 customized reports. Communications between the parties prior to the filing of the
12 present petition indicated that the Department did not have adequate staff to customize
13 its reports and that such customization would take about 30 hours of time and about
14 \$723 to produce. Policy Institute was willing to pay the cost. The Department's
15 refusal to comply with Policy Institute's request resulted in the present petition.

16 **STANDARD**

17 A writ of mandamus is extraordinary and may be granted only when the
18 person seeking to invoke it is entitled to have a party perform a clear legal duty and
19 there is no speedy or adequate remedy in the ordinary course of law. Section
20 27-26-102, MCA; *Smith v. County of Missoula*, 1999 MT 330, ¶ 28, 297 Mont. 368,
21 992 P.2d 834. Whether to grant or deny a writ of mandate is a legal conclusion.
22 *Becky v. Butte-Silver Bow Sch. Dist. No. 1*, 274 Mont. 131, 135, 906 P.2d 193, 195
23 (1995).

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

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

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

10 DISCUSSION

11 **The Department's Duty under Montana Law**

12 The parties do not dispute that the information requested by Policy
13 Institute is public information. Article II, section 9, of the Montana Constitution
14 states: "**Right to know.** No person shall be deprived of the right to examine
15 documents or to observe the deliberations of all public bodies or agencies of state
16 government and its subdivisions, except in cases in which the demand of individual
17 privacy clearly exceeds the merits of public disclosure." Section 2-6-102, MCA,
18 states: "**Citizens entitled to inspect and copy public writings.** (1) Every citizen has
19 a right to inspect and take a copy of any public writings of this state, except as
20 provided in 22-1-1103, 22-3-807, or subsection (3) of this section and as otherwise
21 expressly provided by statute."

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

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

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

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

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

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

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

6 [A]ccess to computerized records shall be given through the use of
7 programs currently in use by the public official responsible for
8 maintaining the public records. Access by the use of a specially designed
9 program prepared by or at the expense of the applicant may obviously be
10 permitted in the discretion of the public official. . . . In the event of
11 refusal of the public official to permit access in this manner, the circuit
12 court may permit access pursuant to the same statutory restraints where

13 (1) available programs do not access all of the public records
14 stored in the computer's data banks; or

15 (2) the information in the computer accessible by the use of
16 available programs would include exempt information necessitating a
17 special program to delete such exempt items; or

18 (3) for any reason the form in which the information is proffered
19 does not fairly and meaningfully represent the records; or

20 (4) the court determines other exceptional circumstances exist
21 warranting this special remedy.

22 The Montana Supreme Court has interpreted the public's right to know
23 broadly, stressing that all citizens have an absolute right to observe and examine the
24 operation of agencies of government and that this right is limited only by the
25 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

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

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

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

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

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

25 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

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

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

7 **Whether Policy Institute Has a Speedy and Adequate Remedy**

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

12 The Montana Supreme Court has indicated that mandamus against a
13 public officer or body is a more adequate remedy than a declaratory judgment because
14 mandamus commands performance, while a declaratory judgment simply pronounces
15 the duty to be performed. *Allen v. Madison Co. Comm'n*, 211 Mont. 79, 89, 684 P.2d
16 1095, 1100 (1984); *State ex rel. Konen v. City of Butte*, 144 Mont. 95, 102, 394 P.2d
17 753, ___ (1964). On this basis, the Court concludes that the second requirement for a
18 writ of mandamus is met, and mandamus is a proper remedy in this case.

19 **DECISION**

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

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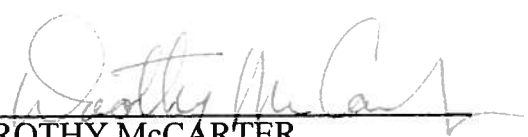
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IT IS THEREFORE ORDERED that the petition is GRANTED in
accordance with this decision, and that costs and attorney fees are awarded to Policy
Institute pursuant to Section 27-26-402, MCA.

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