

Special City Commission Meeting

Mayor Stebbins presiding

CALL TO ORDER: 3:00 PM

PLEDGE OF ALLEGIANCE

ROLL CALL: City Commissioners present: Dona Stebbins, Bill Bronson, Bill Beecher and John Rosenbaum. Commissioner Jolley was excused. Also present were the City Manager, City Attorney, and the City Clerk.

OLD BUSINESS

JUDGE E. WAYNE PHILLIPS' ORDER, RE: MONTANA ENVIRONMENTAL INFORMATION CENTER VS. CITY OF GREAT FALLS

City Attorney, David Gliko, provided case background and information regarding why this matter was litigated. He assured the Commission it was not because of anyone's figment of imagination, mere desire, or out of thin air, and certainly not by anyone's disingenuousness in the City. It was based on State law. Specifically, § 2-6-401(2)(c), MCA, and the 1995 Montana Supreme Court Decision in Becky v. Butte-Silverbow School District. The District Court has decided that the City was in error in that process. The Court does not support it with any cited precedence or any further authority. Mr. Gliko stated, since all the decisions rendered in the arena of public right to know since the adoption of the Montana Constitution in 1972, he wondered how the Court would come to its conclusion without the citation of any supporting authority. Mr. Gliko suggested it might be because the primary supporting precedence was the Becky case and the Court's decision would struggle in trying to distinguish the Becky case because, as he stated, it defines public record from the very statute that the City relied upon.

In making its decision, Mr. Gliko reminded the Commission to take into consideration what he said about the Becky case and State legislation, but also understand that the Montana Supreme Court has been very vigorous in coming down on the side of the public's individual rights and, especially, the right to know.

The District Court also went on to award Plaintiff's attorney fees in this case. Section 2-3-221, MCA, allows the prevailing party a constitutional challenge to be awarded attorney's fees. Mr. Gliko reported that he received an Affidavit this week from the Plaintiff's attorney claiming fees in the amount of \$9,620. If this matter were appealed and if Plaintiff's won on appeal, Mr. Gliko informed the Commission that the City would also, presumably, be required to pay their attorney's fees.

Mr. Gliko discussed some of the practical implications of the Court's decision of this case. Specifically, what is the definition of a draft. Exemption (5) of the Federal Freedom of Information Act exempts draft documents from public record. There have been several Federal Court decisions interpreting that provision. Mr. Gliko cited Chicago v. U.S. Nuclear Regulatory Commission and read the rationale from that decision. The 1995 Denver Law Review also provided a concise summary of exemption (5) of the Federal Freedom of Information Act, and Mr. Gliko explained the deliberative process.

Mr. Gliko reported that is the rationale and basis of supporting the Federal exemption. It does not control our State law or the Montana Constitution. However, Mr. Gliko submits it is a relevant consideration when this Commission or the Supreme Court should choose to consider whether or not our draft documents should also be open to public access.

Another issue to discuss relates directly to public access of documents. Subsequent to the filing of this legal action, SME, through their attorney, filed a series of affidavits claiming trade secret protection for SME documents in the custody of the City. They did that pursuant to the Uniform Trade Secrets Act, § 30-14-401, MCA. Mr. Gliko read the definition of trade secret, quoting from 402. Essentially, a trade secret is any information that has economic value and disclosure of which would prejudice the owner of that information. There is a remedy in the statute under 403 that states a party complainant can seek injunctive relief to prevent the disclosure of such trade secrets. But, if the disclosure were made, there are damages, pursuant to § 30-14-404, MCA. Mr. Gliko reported that this is serious, particularly with the great value under consideration for the power company industry, and the marketing value of electricity. Mr. Gliko advised the Commission that the City is obliged to honor and respect the trade secret claim by SME.

Mr. Gliko reported that the attorney for SME faxed a letter to him today. He read a portion of the letter that stated: "This letter is sent to you on behalf of Southern Montana Electric Generation and Transmission Cooperative, Inc. ("SME") to request that, regardless of the City's decision whether to appeal this ruling, the City not make available to the public the documents and categories of documents and information for which it has claimed confidentiality." Mr. Gliko concluded that this is a complex matter, as constitutional issues always are difficult to deal with.

Mayor Stebbins asked if any Commissioners had any questions for Mr. Gliko.

Commissioner Bronson stated that Judge Phillips' Decision seems limited to the scope of whether or not draft documents should be provided to the public. The Court has not addressed any particular document request where the assertion of trade secret protection has been made and then had to resolve the question of whether or not it is a trade secret or confidential and should be protected. Mr. Gliko responded that was correct. SME did not file their affidavits claiming trade secret protection until after this suit was filed. It wasn't a fact in existence at the time. It could not possibly have been a part of the case, and the Complaint was never amended to include the issue of trade secrets.

Commissioner Bronson stated his understanding of how the issue of trade secrets and other confidential information was to be addressed pursuant to the PSC decision by the Supreme Court. Mr. Gliko agreed and stated there is another check and balance involved. When the affidavit is filed with the government entity claiming a trade secret protection, then the government entity also has to review the documentation in light of the affidavit to verify the legitimacy of that trade secret claim. City staff has done that with regard to the affidavits filed by SME.

Commissioner Beecher asked if there was a time limit when something becomes a formal part of the file as opposed to somebody's thoughts to themselves. Mr. Gliko responded that there is no statutory timeline. He thought that would vary from department to department and individual to individual. Except for the exclusions made pursuant to the statute – 404, unless it is specifically excluded thereby, any document in the custody of a government agency is presumably a public record. Mr. Gliko read the exclusions from the statute. Commissioner Beecher asked Mr. Gliko if it was his thought that if someone was in a meeting and took notes, until that information became part of a document that was in the public file, was it exempt

from the availability to the public. Mr. Gliko responded that, if it doesn't fall within one of the exemption categories, then he would conclude that it was in the public domain in the custody of a government entity and would be a public record.

Mr. Gliko stated that he made statements critical to the District Court's Decision. He didn't want to leave the Commission with the impression that he felt that decision was the only consideration to be made here – the statute, the Becky case, and so on. The Montana Court has been very vigorous in upholding the Montana Constitution. He is also not saying that this would be a slam dunk case if the Commission chose to appeal. It would be a very tall hill to climb. But, he is saying that there is strong argument in support of it.

Commissioner Beecher asked for clarification about documents in the possession of the City that SME is claiming are exempt from the public because of trade secrets. Mr. Gliko responded that the Supreme Court has already passed upon this issue in 2003 in the matter of Great Falls Tribune vs. Public Service Commission and they upheld the Trade Secrets Act. They did not do it on the basis of Article II, Section 9, of the Constitution, with regard to the right to know, vis-à-vis the right to privacy. They turned, instead, and upheld it pursuant to due process and equal protection clauses of the State and Federal Constitutions. Due process and equal protection clauses are typically relevant to property rights. If anyone is going to challenge a claimed trade secret, they are going to know that the Constitutional issue involved has been settled. The only question is whether there is a real economic issue involved.

Commissioner Rosenbaum stated that this is a narrow scope of interest here. But, if expanded to all City departments and offices, would the documents, permits, information submitted by individuals, be considered draft documents; and, are there individual expectations of privacy doing business with the City that, due to this ruling, would become debilitating or prejudicial. Mr. Gliko stated that his question zeros in exactly on the practical aspects of this decision that he spoke of and the Federal Freedom of Information Act, exemption 5, and the quotes from the Federal Court. Commissioner Rosenbaum asked if this would interest Montana League of Cities and Towns, and inquired where the State stood on this issue. Mr. Gliko answered that this decision was rendered in the Eighth Judicial District Court and is binding only in this district. Outside of the Eighth Judicial District, it is merely precedence. It would take a Montana Supreme Court decision to make it binding statewide.

Commissioner Beecher asked City Manager Doyon that, assuming the Commission chose not to appeal, is there a process, or will there be a process in place to review the requests with the idea that the City is not violating any trade secret or law that would put the City in jeopardy; and, does the City have an expense recapture structure if it got a lot of requests that took a lot of staff time. City Manager Doyon responded not yet. Staff is working on that now and it will come before the Commission. Right now, an individual would only be charged the copy fees. With regard to the first question, Mr. Doyon stated that there is a process in place. It starts, essentially, with in-house staff and/or City Attorney review.

Commissioner Beecher asked Mr. Gliko if the legal expenses submitted by CCE appear to be reasonable. Mr. Gliko responded that they do not appear disproportionate and appear to be reasonable.

Commissioner Bronson commented that it is his inclination not to appeal Judge Phillips' Decision. But, that being said, he doesn't want that comment to be construed as being contrary to anything that Mr. Gliko has said here. Commissioner Bronson stated that he doubts that the Supreme Court would look at the policy considerations favorably and would not be sympathetic.

Commissioner Beecher moved, seconded by Commissioner Bronson, that the Great Falls City Commission not appeal the Decision regarding the case in front of them.

Mayor Stebbins opened a 15 minute comment period.

Wally Bell, 1425 8th Avenue South, commented that he has seen this issue divide the community. He agrees with the decision not to appeal.

Neil Taylor, 3417 4th Avenue South, CCE – MEIC member, commended the decision not to appeal the Court decision.

Ed McKnight, 906 3rd Avenue North, commended the Commission for their thoughtful deliberation. Mr. McKnight stated he is confused with the issue of document retention versus trade secrets. Commissioner Bronson stated that the motion made and seconded is strictly not to appeal this decision. Commissioner Bronson explained the process to assert trade secret protection and referenced the PSC case. This Commission is not resolving that matter one way or another today.

Ron Mathson, 122 Treasure State Drive, CCE – MEIC member, commended the Commission on the direction the proceedings have taken. He feels draft documents are important to be viewed by the public to see the direction that things are moving before the final deliberation.

John Hubbard, 615 7th Avenue South, commented that the public has a right to know and cited the Freedom of Information Act.

Tim Gregori, General Manager SME, commented that, if the Commission should decide to appeal, he requested that the letter faxed today be entered into the record. Mr. Gregori stated that the decision deals with a narrow scope of information. It does not mean all documents that the City has in its possession are now open to public scrutiny and public record. There is some very important trade secret information contained in the documents and is why they went through the process of filing the affidavits. Since the advent of the Energy Policy Act of 1992 and subsequent FERC Orders 2000 and 2001, the electric utility administration has been very competitive.

ADJOURNMENT

There being no further business to come before the Commission, **Commissioner Beecher moved, seconded by Commissioner Rosenbaum, that the special meeting of July 23, 2008, be adjourned at 4:03 p.m.**

Motion carried 54-0.

Mayor Stebbins

City Clerk

Minutes Approved: August 5, 2008

