

Confidentiality of Corporate License Tax Information
Great Falls Tribune, et al. v. Montana Public Service Commission

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On December 18, 2003, the Montana Supreme Court, in *Great Falls Tribune v. Montana Public Service Commission*, 2003 MT 359, 319 Mont. 38, 82 P.3d 876 (2003) ("the decision"), held that the individual privacy exception to the public's right to know provision in Article II, section 9, of the Montana Constitution is limited to natural human individuals only. A nonhuman corporate entity may enjoy confidentiality of its property interests, such as trade secrets, which are protected against taking by government without due process under the Montana and U.S. Constitutions.

Constitutional and Statutory Provisions

Article II, section 9, of the Montana Constitution reads:

Section 9. 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.

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

Section 10. Right of privacy. 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.

Article II, section 17, of the Montana Constitution reads:

Section 17. Due process of law. No person shall be deprived of life, liberty, or property without due process of law.

Section 30-14-402, MCA, reads, in part:

30-14-402. Definitions. As used in this part, unless the context requires otherwise, the following definitions apply:

...

(4) "Trade secret" means information or computer software, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Section 15-31-506, MCA, reads:

15-31-506. Copy of federal return required -- report of amended federal return. Every corporation shall, upon request of the department of revenue, furnish a copy of its federal income tax return and the computation schedule filed for the taxable year or years that the department may specify in its request. If the amount of a corporation's taxable income reported on its federal income tax return or the computation schedule filed for a taxable year is changed or corrected by the United States internal revenue service or other competent authority, the corporation shall file an amended Montana return with the department within 90 days after receiving official notice of the change or correction. A corporation filing an amended federal income tax return changing or correcting its taxable income for a taxable year shall also file an amended Montana return with the department within 90 days after filing an amended federal income tax return.

Section 15-31-511, MCA, reads:

15-31-511. Confidentiality of tax records. (1) Except as provided in this section in accordance with a proper judicial order or as otherwise provided by law, it is unlawful to divulge or make known in any manner:

(a) the amount of income or any particulars set forth or disclosed in any return or report required under this chapter or any other information relating to taxation secured in the administration of this chapter; or

(b) any federal return or information in or disclosed on a federal return or report required by law or rule of the department of revenue under this chapter.

(2) (a) An officer or employee charged with custody of returns and reports required by this chapter may not be ordered to produce any of them or evidence of anything contained in them in any administrative proceeding or action or proceeding in any court, except:

(i) in an action or proceeding in which the department is a party under the provisions of this chapter; or

(ii) in any other tax proceeding or on behalf of a party to an action or proceeding under the provisions of this chapter when the returns or reports or facts shown in them are directly pertinent to the action or proceeding.

(b) If the production of a return, report, or information contained in them is ordered, the court shall limit production of and the admission of returns, reports, or facts shown in them to the matters directly pertinent to the action or proceeding.

(3) This section does not prohibit:

(a) the delivery of a certified copy of any return or report filed in connection with a return to the taxpayer who filed the return or report or to the taxpayer's authorized representative;

(b) the publication of statistics prepared in a manner that prevents the identification of particular returns, reports, or items from returns or reports;

(c) the inspection of returns and reports by the attorney general or other legal representative of the state in the course of an administrative proceeding or litigation under this chapter;

(d) access to information under subsection (4); or
(e) the director of revenue from permitting a representative of the commissioner of internal revenue of the United States or a representative of a proper officer of any state imposing a tax on the income of a taxpayer to inspect the returns or reports of a corporation. The department may also furnish those persons abstracts of income, returns, and reports; information concerning any item in a return or report; and any item disclosed by an investigation of the income or return of a corporation. The director of revenue may not furnish that information to a person representing the United States or another state unless the United States or the other state grants substantially similar privileges to an officer of this state charged with the administration of this chapter.

(4) The department shall on request:

(a) allow the inspection of returns and reports by the legislative auditor, but the information furnished to the legislative auditor is subject to the same restrictions on disclosure outside that office as provided in subsection (1); and

(b) deliver corporation income tax data to the legislative fiscal analyst and the office of budget and program planning, but the information furnished to the legislative fiscal analyst and the office of budget and program planning is subject to the same restrictions on disclosure outside those offices as provided in subsection (1).

(5) A person convicted of violating this section shall be fined not to exceed \$1,000 or be imprisoned in the county jail for a term not to exceed 1 year, or both. If a public servant, as defined in 45-2-101, is convicted of violating this section, the person forfeits office and may not hold any public office or public employment in the state for a period of 1 year after conviction.

Discussion

Supreme Court Decisions

In 1981 the Montana Supreme Court decided *Mtn. States Tel. & Tel. v. Dept. of Public Service Regulation*, 194 Mont. 277, 634 P.2d 181, 38 St. Rep. 1479 (1981), holding that a corporation, as well as a natural person, can assert the right-to-privacy exception to the constitutional right to know under Article II, section 9, of the Montana Constitution. That holding, together with *Belth v. Bennett*, 227 Mont. 341, 740 P.2d 638, 44 St. Rep. 1133 (1987), which held that an agency can assert another's privacy interest, provides some of the reason for the confidentiality provisions of the corporation license tax under section 15-31-511, MCA.

In December 2003 the Montana Supreme Court revisited the question of a corporation's right of privacy under Article II, section 9, of the Montana Constitution. Newspaper groups sued the Public Service Commission to release papers that the Montana Power Company, now Northwestern Energy, had filed in conjunction with its responsibilities as the default energy supplier. In conjunction with the filings, MPC had requested, and the PSC granted, a generic protective order to prevent disclosure of trade secrets and confidential proprietary information that had economic value to MPC, its default supply customers, bidders, contract holders, or combinations of them. The generic protective order was a broadly drafted order to cover any

confidential information that was filed or which may later be requested during the PSC process. The court considered five issues:

First, whether nonhuman entities have a constitutional right of privacy that must be balanced with the public's constitutional right to know under Article II, sections 9 and 10, of the Montana Constitution. The court overruled *Mtn. States Tel. & Tel. v. Dept. of Public Service Regulation*, supra, and stated that the right of privacy was limited to individuals and not nonhuman entities. The court went on to say that nonhuman entities do have federal and state due process rights that prevent them from being deprived of their property--trade secrets--without due process. This property apparently can be trade secrets or other confidential proprietary information. That property may not be taken for public use without just compensation, and that rationale forms the legal grounds through which nonhuman entities can seek protection of confidential information.

Second, whether the media was required to exhaust administrative remedies before bringing the suit to court. The Supreme Court held that the PSC, being the administrative agency knowledgeable and qualified to examine the documents, was the proper party to make determinations as to whether the documents contained trade secrets or other confidential proprietary information that is constitutionally protected property.

Third, whether the PSC's procedure of generic orders unconstitutionally shifted the burden of proof to the public to show that documents were not confidential. The Supreme Court said that the PSC had an affirmative duty to make all of its records available to the public unless specific findings are made by the PSC that documents contain trade secrets or confidential proprietary information is a property interest requiring constitutional due process protection. The corporation filing documents must seek protection supported by filing an affidavit that shows prima facie that the materials contain property rights that are subject to protection. The affidavits may not be merely conclusory and must be specific enough for the agency and any objecting parties to understand the nature and basis of the claim of confidentiality. The agency has the affirmative duty to review the records and the affidavits and make an independent determination as to whether the records are in fact protected property rights. Generic methods will not work; each claim must be reviewed by the agency.

Fourth, whether the statutory definition of "trade secret" can be used to define a property right subject to confidentiality. The Supreme Court said that a trade secret is a form of property, and filing with a state agency does not change its confidential nature. The agency must review the material to determine if, considering the circumstances set forth in the statutes, it is a protected property right.

Finally, whether the confidentiality of the MPC documents were constitutionally protected. The Supreme Court remanded for proceedings based upon the holdings in the first four issues.

In summary, the Supreme Court held:

A corporation does not have a right of individual privacy.

Information that is a property right, such as a trade secret or some other type of confidential information, is subject to due process protections against disclosure.

Any grant of confidentiality must be determined on a case-by-case basis upon detailed application by the corporation and after independent review by the agency.

Application to Corporation License Tax Returns

Is a corporation license tax return a public document?

If a corporation license tax return is not a document subject to the right to know provisions of Article II, section 9, of the Montana Constitution, then there is no duty to disclose them. In *Becky v. Butte-Silver Bow School Dist. No. 1*, 274 Mont. 131, 906 P.2d 193 (1995), the Montana Supreme Court determined that records relating to admission to the National Honor Society in Butte High School were not "documents of public bodies." The Supreme Court said that since the National Honor Society documents were neither created by nor maintained by the school district and since the documents are not related to the function and duties of the school district, it had no clear legal duty to produce the documents. The Supreme Court held that "[a]lthough 'documents of public bodies' is not defined in the Montana Constitution, it must reasonably be held to mean documents generated or maintained by a public body which are somehow related to the function and duties of that body." The Court did look at definitions of "public writings" in section 2-6-101, MCA, and "public records" of local governments in section 2-6-401, MCA.

In *Great Falls Tribune v. Montana Public Service Commission*, supra, there was no discussion as to whether the material filed with the PSC constituted "documents of public bodies". The documents were not prepared by the PSC but were filed for use related to the functions and duties of the PSC.

A corporation income tax return is similar to the materials filed in the decision. A return is not created by the Department of Revenue but filing a return is mandatory under section 15-31-111, MCA; penalties may be assessed for nonfiling or filing a false or fraudulent return under section 15-31-543, MCA; and the returns are retained by the Department for statute of limitations purposes under sections 15-1-103 and 15-31-509, MCA. Corporation income tax returns maintained by the Department of Revenue are certainly related to the function and duties of the Department of Revenue under section 15-1-202, MCA. (See *Worden v. Mt. Board of Pardons and Parole*, 1998 MT 168 at ¶20, 289 Mont. 459, 962 P.2d 1157 (1998).)

It might be worthwhile to investigate the "documents of a public body" approach. Perhaps the public records section could be amended to provide that a document that is not created by a governmental agency but by a private entity for informational use by the government is not considered a "document of a public body."

Confidentiality of other governmental tax information such as federal income tax returns

Federal income tax returns must remain confidential when provided to state tax agencies under 26 U.S.C. § 6103. The online printed version of that section is 71 pages long. It details how the federal returns and the information on the returns must remain confidential when released to state tax agencies. Under section 15-31-506, MCA, a corporation must, when required by the Department, furnish a copy of its federal income tax return. The statute is permissive--the federal

return is not required to be filed with the state return unless requested by the Department. Submission of a federal return by taxpayer is subject to the same confidentiality provisions as if the return was supplied by the IRS. All of a federal return is confidential: taxpayer identity; nature, source, or amount of income; payments; etc. Under federal preemption doctrine set forth in Article VI of the U.S. Constitution, this material retains its confidential nature even in the hands of a state agency. A state law or constitutional provision in conflict with federal law is preempted by the federal law. As noted, the federal law treats information on the form, as well as the form, as confidential. If a Montana return specifically requires information from a federal form, that information retains its confidential nature.

The Department also uses tax information from other states, particularly in relation to allocation and apportionment of income to Montana. This is information gathered in a state where returns are confidential, where no property interest determination was made, and by a nonfederal agency, so its law does not preempt Montana law. In the hands of the Department of Revenue, under the current decision, the information is not confidential unless a protected property right is claimed for the information. How will affected nonhuman agencies be able to inspect the information and apply for confidentiality and have the Department make an independent determination of the existence of the property right?

Individual privacy concerns and pass-through entities

The tax advantage of a subchapter "S" corporation or other pass-through entity is that taxable income is not subject to taxation on both the corporate and individual level. Pass-through entities are subject to the tax provisions in Title 15, chapter 30, part 11, MCA. The income passes through to the taxpayers and is subject to individual income taxes. Under section 15-30-1102, MCA, a return of a pass-through entity must list the shareholders or owners and their distributive share of income. The pass-through entity may file a composite return on behalf of all the shareholders or owners under section 15-30-1112, MCA. The return is filed by a nonhuman entity, but the tax consequences and information relate primarily to individuals (unless the shareholders or owners are other pass-through entities--but those pass-through entities have individuals as shareholders or owners). The individual shareholder or owner does have an individual right of privacy that could prevent disclosure of individual information on pass-through entity income tax returns.

State legislative options

In *Great Falls Tribune v. Montana Public Service Commission*, the Montana Supreme Court held that, except for information that comprises confidential property interests, documents relating to a nonhuman entity held by a public agency are affirmatively required to be disclosed. In the decision at ¶39, the Supreme Court specifically states, "nothing in Article II, Section 9 requires disclosure of trade secrets and other confidential proprietary information where the data is protected from disclosure elsewhere in federal or state constitutions or by statute." In the opinion, this sentence is the only one that implies that confidentiality can be imposed by statute.

The rest of the opinion talks in terms of property interests that are constitutionally protected. The following sentence in the opinion reads, "For example, a non-human corporate entity may enjoy confidentiality of its property interests under Montana statutory law, such as the Uniform Trade Secrets Act . . . or protection against the 'taking' of private property for public use without just compensation under the federal and state constitutions."

The Montana Supreme Court in *In Re Lacy*, 239 Mont. 321, 780 P.2d 186 (1989), recognized that the Legislature could, by statute, provide guidelines relating to circumstances in which legitimate expectations of privacy are involved. In *Worden*, supra at ¶22, the Montana Supreme Court held that any rule that would allow the state to determine conclusively whether a right of privacy clearly outweighs the interest in public disclosure would be unconstitutional. A document must be examined on a case-by-case basis to determine whether all or part of it is subject to the privacy exception (*Associated Press Inc. v. Department of Revenue*, 2000 MT 160, 300 Mont. 233, 4 P.3d 5 (2000)). The decision at ¶¶ 56 and 57 requires a case-by-case determination by an agency after application by affidavit from a nonhuman entity to determine whether protected property rights are involved. Under the rationale for determining protected privacy issues on a case-by-case basis rather than broadly through statute, it would not be permissible to draft a statute that establishes detailed protected classes of property.

The only constitutional exception to production of public documents is the right of privacy when "the demand of individual privacy clearly exceeds the merits of public disclosure." In *G.F. Tribune v. G.F. Public Schools*, 255 Mont. 125, 841 P.2d 502 (1992), the Montana Supreme Court declared a collective bargaining exemption to the open meeting law unconstitutional. It held that the exemption was an impermissible attempt by the Legislature to extend the grounds upon which a meeting may be closed. The open meeting provision is part of the same sentence of the Constitution as the public documents provision; the same holding would apply to any attempts by the Legislature to extend the grounds for withholding a document. The Supreme Court did discuss the trade secrets law in Title 30, chapter 14, part 4, and the how the Legislature had defined a trade secret. It is my opinion that the Legislature may define what constitutes property and thus have some role in determining the type of material could be subject to protection, but the Legislature does not have the authority to establish a blanket confidentiality statute based on property rights.

Just as the Montana Supreme Court uses the constitutionally-based "protected property rights" argument in this circumstance, in *Worden*, supra at ¶ 36, the Court adopted the assertions of the Department of Corrections that it had "legitimate penological interest" in certain documents and information on prisoners based on Article II, section 28, of the Montana Constitution, and those documents were exempt from disclosure. With this in mind, it may be possible to boot-strap provisions of some other Montana or U.S. constitutional section into an argument that allows corporate tax returns to be confidential and that isn't related to privacy and avoids the case-by-case analysis required for the "protected property rights" exemption.

Constitutional changes

An amendment to the Montana Constitution would provide the most wide-reaching method of addressing the holding of the decision. Article II, section 9, of the Montana Constitution could be amended to delete the word "individual", thus allowing privacy rights to all entities. The section could also be amended to allow explicit legislative authority to determine exceptions for disclosure of documents.

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