
Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

RUSSELL WAYNE MCHENRY,)
) Case No. **CV 2016 1127**
)
) *Petitioner,*)
) **MEMORANDUM DECISION AND ORDER**
) **DENYING RESPONDENTS' MOTION TO**
 vs.) **DISMISS, AND DECISION ON**
 KOOTENAI COUNTY SHERIFF'S) **PETITIONER'S PETITION FOR RELIEF**
 DEPARTMENT, ET AL,) **UNDER IDAHO PUBLIC RECORDS ACT**
)
) *Respondents.*)
)

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on the "Petition for Relief Under Idaho Public Records Act" filed by Petitioner Russell McHenry (McHenry) on February 4, 2016. McHenry seeks an order from the Court compelling Respondents Kootenai County Sheriff's Department and/or the Kootenai County Sheriff's Office Records Custodian to provide documents requested on August 29, 2015, and on September 3, 2015, pursuant to the Idaho Public Records Act. Petition for Relief Under Idaho Public Records Act, p. 1.

The August 29, 2015, request was made in writing by Frank Davis (Davis); the September 3, 2015, request was made in writing by McHenry. *Id.*, Exhs. A, B. Both Davis and McHenry list the same mailing address on their request forms. Pursuant to Idaho Code § 74-101(14) "requester" is defined as "the person requesting examination and/or copying of public records pursuant to section 74-102, Idaho Code." I.C. § 74-101(14). McHenry is the "requester" regarding his September 3, 2015, request. The

Court has not been cited to any authority, nor has any argument been made, as to why McHenry cannot file a petition based upon Davis' written request.

Specifically, the following records were requested from the Kootenai County Sheriff's Office: "... all financial deposits for Dylan Thomas William, D.O.B. 4-23-1992[.] Please include deposits into Dylan['] s trust, commissary, phone, and any other account that he has while incarcerated from March 13 to 8-7-15" and "for Ryan Patrick Hoffman born in 1977 please provide an electronic copy of his inmate trust account activity including all deposits during April 2015 through July 2015". *Id.*, Exhs. A, B. Both requests were denied. *Id.* The notice of denial in response to the request for William's records provided: "The requested record is exempt from disclosure pursuant to Idaho Code §§ 74-104 thru 74-111 and/or 74-124". *Id.*, Exh. A. The notice of denial in response to the request for Hoffman's records provided: "The requested record is exempt from disclosure pursuant to Idaho Code §§ [sic] 74-113(3)(e)". *Id.*, Exh. B.

On February 4, 2016, McHenry filed the instant Petition for Relief Under Idaho Public Records Act. Pursuant to Idaho Rule of Civil Procedure 5(f), McHenry provided proof of service to the Court on February 5, 2016. Affidavit of Service, p. 1. According to the Affidavit of Service, "[o]n the 5th day of **February 2016**, I [Jonathan Arnold] personally served copies [o]f the Summons and Petition for relief under Idaho public records act to The Kootenai County Sheriff's Records Division on the 5th day of February 2016". Affidavit of Service, p. 1 (emphasis in original).

On February 16, 2016, Darrin L. Murphey filed a Notice of Special Appearance on behalf of the Respondents. It was accompanied by a Motion to Dismiss pursuant to Idaho Rules of Civil Procedure 12(b)(5), 4(d)(5) and 4(i)(2), for lack of proper service of process upon the Respondents. McHenry has not responded to the Motion to Dismiss.

Hearing on this matter was held on March 2, 2016. The time within which this Court must set a hearing is prescribed in a constricted manner by statute. Idaho Code § 74-115(1) mandates: “The time for responsive pleadings and for hearings in such proceedings shall be set by the court at the earliest possible time, or in no event beyond twenty-eight (28) calendar days from the date of filing.” Given the February 4, 2016, filing of the “Petition for Relief Under Idaho Public Records Act”, the March 2, 2016, hearing was timely.

For the reasons set forth below, the Court denies the Respondents’ Motion to Dismiss and pursuant to Idaho Code § 74-116(1), and orders the Respondents to disclose the records sought by Petitioner by 5:00 p.m. on March 4, 2016.

II. STANDARD OF REVIEW.

“The procedures and standards of review applicable to judicial review of state agency and local government actions shall be as provided by statute. When judicial review of an action of a state agency or local government is expressly provided by statute but no stated procedure or standard of review is provided in that statute, then Rule 84 provides the procedure for the district Court's judicial review.” I.R.C.P. 84(a). Idaho Rule of Civil Procedure 84(e) provides the method of judicial review of an agency action as follows:

When judicial review is authorized by statute, and statute or law does not provide the procedure or standard, judicial review of agency action shall be based upon the record created before the agency. When the authorizing statute provides that the district court may take additional evidence itself upon judicial review, the district court may order the taking of additional evidence upon its own motion or motion of any party to the judicial review.

I.R.C.P. 84(e). Idaho Code § 74-116(1) authorizes judicial review of the denial of a public records request by an agency and provides:

Whenever it appears that certain public records are being improperly withheld from a member of the public, the court shall order the public official charged with withholding the records to disclose the public record or show cause why he should not do so. The court shall decide the case after examining the pleadings filed by the parties and such oral arguments and additional evidence as the court may allow. The court may examine the record in camera in its discretion.

I.C. § 74-116(1).

The Idaho Supreme Court set forth the appellate standard of review in *Wade v. Taylor*, 156 Idaho 91, 320 P.3d 1250 (2014): “When considering an appeal from a public records request, this Court will not set aside the district court’s findings of fact unless they are “clearly erroneous, which is to say that findings that are based upon substantial and competent, although conflicting, evidence will not be disturbed on appeal.” *Id.* at 96, 320 P.3d at 1255 (*citing Bolger v. Lance*, 137 Idaho 792, 794, 53 P.3d 1211, 1213 (2002)). The Idaho Supreme Court continued: “This Court exercises free review over questions of law, including the interpretation of a statute.” *Id.* (*citing, Ward v. Portneuf Med. Ctr., Inc.*, 150 Idaho 501, 504, 248 P.3d 1236, 1239 (2011)).

III. ANALYSIS.

A. The Respondents’ Motion to Dismiss is Denied Because Idaho Rule of Civil Procedure 4(d)(5) is Inapplicable to the Petition.

Respondents move to dismiss the Petition for Relief Under Idaho Public Records Act for failure to properly effectuate service of process under Idaho Rules of Civil Procedure 4(d)(5), 4(i)(2) and 12(b)(5). Rule 12(b)(5) of the Idaho Rules of Civil Procedure governs the requirements for raising the defense of lack of insufficiency of service of process and provides: “Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except . . . insufficiency of service of process,” which shall be made by motion. I.R.C.P. 12(b)(5). A motion for

insufficiency of service of process must be made “prior to filing a responsive pleading and prior to filing any other motion, other than a motion for an extension of time to answer or otherwise appear or a motion under Rule 40(d)(1) or (2)” or it is waived. I.R.C.P. 12(g)(1). “It is not waived, however, by being joined with one or more other motions or by filing a special appearance as provided in Rule 4(i)(2).” *Id.* A party generally appears when he or she voluntarily appears or serves any pleading. I.R.C.P. 4(i)(1). When a party generally appears, he or she voluntarily submits him or herself to the personal jurisdiction of the court. *Id.* Filing a motion for insufficiency of service of process under Idaho Rule of Civil Procedure 12(b)(5) does not constitute a general appearance, but rather a special appearance. I.R.C.P. 4(i)(2). “Special appearances” are governed by Rule 4(i)(2) of the Idaho Rules of Civil Procedure, which provides in pertinent part:

The filing of a document entitled “special appearance,” which does not seek any relief but merely provides notice that the party is entering a special appearance to contest personal jurisdiction, does not constitute a voluntary appearance by the party under this rule if the party files a motion under Rule 12(b)(2), (4), or (5) within fourteen (14) days after filing such document, or within such later time as the court permits.

I.R.C.P 4(i)(2).

On February 16, 2016, Respondents filed a Notice of Special Appearance in compliance with Idaho Rule of Civil Procedure 4(i)(2). Moreover, Respondents filed a timely Motion to Dismiss under Rule 12(b)(5), contesting service of process. As such, Respondents’ Motion to Dismiss must be considered by the Court prior to considering McHenry’s Petition for Relief Under Idaho Public Records Act.

Respondents contest proper service of process alleging McHenry failed to comply with Idaho Rule of Civil Procedure 4(d)(5). Specifically, Respondents contend:

The Kootenai County Sheriff’s Department is not a political subdivision of the State of Idaho, and the Kootenai County Sheriff’s Office Records

Custodian, Idaho, is not a political subdivision or a named individual. Ben Wolfinger is the elected Sheriff of Kootenai County. . . . Ben Wolfinger, the Kootenai County Sheriff, has not been served with process in this action.

Motion to Dismiss, pp. 1-2. Idaho Rule of Civil Procedure 4(d)(5) provides in pertinent part: “Upon any other governmental subdivision, municipal corporation, or quasi-municipal corporation or public board **service shall be made by delivering a copy of the summons and complaint** to the chief executive officer or the secretary or clerk thereof.” I.R.C.P. 4(d)(5) (emphasis added).

However, in this case McHenry has filed a petition contesting the denial of access to public records. Idaho Code § 74-115 sets forth the recourse for a person when their request for a public record has been denied. It provides:

The sole remedy for a person aggrieved by the denial of a request for disclosure is to institute proceedings in the district court of the county where the records or some part thereof are located, to compel the public agency or independent public body corporate and politic to make the information available for public inspection in accordance with the provisions of this chapter. **The petition** contesting the public agency's or independent public body corporate and politic's decision shall be filed within one hundred eighty (180) calendar days from the date of mailing of the notice of denial or partial denial by the public agency or independent public body corporate and politic.

I.C. § 74-115(1) (emphasis added). Because Idaho Code § 74-115(1) authorizes judicial review of an agency's action, Idaho Rule of Civil Procedure 84 applies. I.R.C.P. 84(a)(1). Idaho Rule of Civil Procedure 84(b)(1) sets forth the procedure for filing a petition for judicial review. It provides in pertinent part:

. . . Judicial review is commenced by filing a petition for judicial review with the district court, and the petitioner shall concurrently serve copies of the notice of petition for judicial review upon the agency whose action will be reviewed and all other parties to the proceeding before the agency (if there were parties to the proceeding). Proof of service on the agency and all parties shall be filed with the court in the form required by Rule 5(f).

I.R.C.P. 84(b)(1). This rule does not require the petitioner to file a complaint and summons, as the request is for the review of an agency decision, not a new lawsuit against the agency. Under that rule, the petitioner is required to “serve copies of the notice of petition for judicial review upon the agency whose action will be reviewed”. *Id.*

McHenry served a copy of the Petition for Relief Under Idaho Public Records Act to the Kootenai County Sheriff’s Records Division, the agency whose action will be reviewed. Affidavit of Service, p. 1. This was confirmed by the Affidavit of Roxie A. Reinking, the Records Specialist for the Kootenai County Sherriff, who attested she was provided with a copy of the Petition in the lobby of the Sheriff’s Office. Affidavit of Roxie A. Reinking, p. 2, ¶ 3. Moreover, Petitioner filed proof of service upon the agency with the Court pursuant to Idaho Rule of Civil Procedure 5(f). Affidavit of Service, p. 1. Unlike service of a complaint and summons per Rule 4(d)(5), Rule 84(b)(1) does not provide any specific means for how a petition for judicial review must be served upon the agency. See I.R.C.P. 84. As such, this Court finds McHenry complied with the service requirements of Idaho Rule of Civil Procedure 84(b)(1).

While McHenry also served a summons upon the Kootenai County Sheriff’s Records Division with the copy of the petition for judicial review, since a summons is not appropriate for a petition for judicial review, improperly including it does not convert the petition for review to a compliant and summons, subject to the service requirements of Idaho Rule of Civil Procedure 4(d)(5).

Accordingly, the Court denies the Respondents’ Motion to Dismiss.

B. Petition for Judicial Review.

A “public record” is defined as “any writing containing information relating to the conduct or administration of the public’s business prepared, owned, used or retained by any state agency, independent public body corporate and politic or local agency

regardless of physical form or characteristics.” I.C. § 74-101(13). The Idaho Supreme Court further expanded that broad statutory definition when stating, “... our legislature has broadly defined public records; other records and writings may qualify even if they do not meet this definition.” *Cowles Pub. Co. v. Kootenai Cty. Bd. of Cty. Comm'rs*, 144 Idaho 259, 263, 159 P.3d 896, 900 (2007).

In this case, the following records were requested from the Kootenai County Sheriff's Office: “... all financial deposits for Dylan Thomas William, D.O.B. 4-23-1992[.] Please include deposits into Dylan[']s trust, commissary, phone, and any other account that he has while incarcerated from March 13 to 8-7-15” and “for Ryan Patrick Hoffman born in 1977 please provide an electronic copy of his inmate trust account activity including all deposits during April 2015 through July 2015”. Petition for Relief Under Idaho Public Records Act, Exhs. A, B.

The requested records meet the first part of the definition of “public record” because they are writings that contain information relating to the conduct or administration of the public's business. The public may have a legitimate interest in these specific records for inmates housed at the county jail because, presumably, the trust and commissary deposits become county money, deposited into a county bank account, for use in a county program. If that is the case, then the Sheriff's Department is accountable for the finances in its bank accounts and is required to keep an accurate accounting. In doing so, the county must keep records of the deposits made by inmates.

Moreover, the request records are similar to, but not included as prisoner records that are exempt from disclosure under Idaho Code § 74-106(16). That exemption excludes “[r]ecords of the financial status of prisoners pursuant to

subsection (2) of section 20-607, Idaho Code” from public disclosure. I.C. 74-106(16).

Idaho Code § 20-607(2) provides:

Before seeking any reimbursement under this section, the sheriff shall develop a form to be used for determining the financial status of prisoners. The form shall provide for obtaining the age and marital status of the prisoner, the number and ages of children of the prisoner, the number and ages of other dependents, type and value of real estate, type and value of real and personal property, type and value of investments, cash, bank accounts, pensions, annuities, salary, wages and any other personal property of significant cash value. The county shall use the form when investigating the financial status of a prisoner and when seeking reimbursement.

I.C. § 20-607(2). By including this exemption in Chapter 1, Title 74 of the Idaho Code, the legislature has found that the information contained in Idaho Code § 20-607(2) is a public record, but such record is exempt from disclosure. The records sought by McHenry from the Respondents is very similar to the type of information contained in Idaho Code § 20-607(2). As such, a strong inference can be made that the records requested satisfy the first portion of the definition of a public record.

Turning to the second portion of the definition, “prepared, owned, used or retained by any state agency, independent public body corporate and politic or local agency”, the requested records also satisfy this part of the definition. According to Exhibit B attached to the Affidavit of Darrin L. Murphey, the Sheriff is apparently able to produce the “financial trust account records of specific inmates”, as Murphy writes: “Regarding your request for the financial trust account records of specific inmates, the Sheriff will produce such records to you upon receipt of a release authorizing such signed and notarized by the individual inmate.” Affidavit of Darrin L. Murphey, Exh. B. Moreover, the Kootenai County Sheriff’s Office Public Records Request Form has boxes where the party reviewing the request can inform the petitioner that the record is not known to exist or that the Kootenai County Sheriff’s Office is not the custodian of the requested

record. Neither box was checked for either request under review by this Court. Therefore, the requested records are public records as defined by Idaho Code § 74-101(13).

Having determined that the records are public records, the Court must next determine whether Respondent has proven these records are exempt from disclosure.

“Every person has a right to examine and take a copy of any public record of this state . . . except as otherwise expressly provided by statute.” I.C. § 74-102(1). It is “presume[d] that all public records are open for examination unless expressly exempted by statute.” *Cowles*, 144 Idaho at 265, 159 P.3d at 899 (*citing Magic Valley Newsps, Inc. v. Magic Valley Regl. Med. Ctr.*, 138 Idaho 143, 144, 59 P.3d 314, 315 (2002); *Federated Publications, Inc. v. Boise City*, 128 Idaho 459, 463, 915 P.2d 21, 25 (1996)). Such exemptions are to be narrowly construed. *Wade v. Taylor*, 156 Idaho 91, 97, 320 P.3d 1250, 1256 (2014). The burden is on the agency denying the request for a public record to demonstrate that the requested document meets one of the narrowly-construed exemptions. *See, Hymas v. Meridian Police Dept.*, 156 Idaho 739, 745, 330 P.3d 1097, 1103 (Ct. App. 2014) (*citing Bolger v. Lance*, 137 Idaho 792, 797, 53 P.3d 1211, 1216 (2002)). If the requested record meets an exemption, the agency denying the request to examine or copy the public record must notify the petitioner that the request was denied in part or in its entirety and “shall indicate the statutory authority for the denial and indicate clearly the person's right to appeal the denial or partial denial and the time periods for doing so.” I.C. § 74-103(4).

Here, the September 3, 2015, request for records about Dylan Thomas William was denied on September 4, 2015. Petition for Relief Under Idaho Public Records Act, Exh. A. The basis for the denial was as follows: “The requested record is exempt from

disclosure pursuant to Idaho Code §§ 74-104 thru 74-111 and/or 74-124”. *Id.* The August 29, 2015, request for Ryan Patrick Hoffman’s records was denied on September 2, 2015. *Id.*, Exh. B. The request was denied pursuant to Idaho Code § 74-113(3)(e). *Id.*

The notice of denial for Dylan Thomas William’s records does not comply with the requirements of Idaho Code § 74-103(4), as it fails to indicate which specific statutory exemption prevents the disclosure of the requested record. Respondents have the burden of demonstrating which narrowly-construed exemption encompasses the requested record. Respondents failed to meet their burden because they listed all possible exceptions contained within Chapter 1, Title 74 of the Idaho Code and did not disclose the specific exemption that applies.

While Respondents did provide a specific statutory exemption, Idaho Code § 74-113(3)(e), in its notice of denial for the records of Ryan Patrick Hoffman, that statute is inapplicable to the requested records. Idaho Code § 74-113(3)(e) is titled “Access to Records About a Person by a Person”, and provides:

(3) The right to inspect and amend records pertaining to oneself does not include the right to review: . . .

(e) Records of a prisoner maintained by the state or local agency having custody of the prisoner or formerly having custody of the prisoner or by the commission of pardons and parole.”

I.C. § 74-113(3)(e). This exemption only precludes disclosure of records about a prisoner to that prisoner, which is not the case here. As this exemption is inapplicable, Respondents have failed to meet their burden of proving that the requested documents fit within one of the narrowly-construed exemptions.

The Court finds the records sought by petitioner are public records, and are not covered by any exemption. Idaho Code § 74-116(1) reads:

Whenever it appears that certain public records are being improperly withheld from a member of the public, the court shall order the public official charged with withholding the records to disclose the public record or show cause why he should not do so. The court shall decide the case after examining the pleadings filed by the parties and such oral arguments and additional evidence as the court may allow. The court may examine the record in camera in its discretion.

I.C. § 74-116(1). Because the Respondents chose to file their Motion to Dismiss, Respondents have not substantively responded to McHenry's Petition for Relief Under Idaho Public Records Act, other than at oral argument, and those arguments were not persuasive. Pursuant to Idaho Code § 74-116(1), this Court makes its determination that the requested public records were improperly withheld from McHenry. The Court orders the Respondents to either disclose the records sought by Petitioner by 5:00 p.m. on March 4, 2016. I.C. § 74-116(1).

C. The Court's Concerns Over the Privacy Interests of Dylan Thomas William, and Ryan Patrick Hoffman.

Similar to Idaho Code 74-113(e), which, as discussed above, prohibits the disclosure of prisoner records maintained by a state or local agency having or formerly having custody of a prisoner *to the prisoner* which the records are about, Idaho Code § 74-105(14) prohibits the disclosure of prisoner records maintained by a state or local agency having or formerly having custody of a prisoner *to a different prisoner who is still in custody*. Specifically, Idaho Code § 74-105(14) states, "[r]ecords of a prisoner or former prisoner in the custody of any state or local correctional facility, when the request is made by another prisoner in the custody of any state or local correctional facility" are exempt. I.C. § 74-105(14).

Reading those sections together, a prisoner cannot request records from a state or local agency about him/herself, and a prisoner (while currently in custody) cannot request records from a state or local agency about another prisoner. However, the

Court can find no exemption that would prohibit the disclosure of prisoner records maintained by a state or local agency having or formerly having custody of said prisoner to any third party (as long as that third party is not presently in custody).

It is illogical that a prisoner cannot get his or her own records and a prisoner cannot get another prisoner's records (if the requesting prisoner is currently in custody), but any third party can get any prisoner's records. It is illogical that the person requesting the records would be the determining factor and not the *contents* of the records. As written under Idaho Code § 74-101 *et seq.*, the Idaho Public Records Act, any third party, who is not currently a prisoner in the custody of any state or local correctional facility, can request records of a prisoner or former prisoner in the custody of any state or local correctional facility. That leads to an absurd result.

The Court is uncertain if the inmates whose records are sought generally have a constitutional right to privacy in the records under the Fourth Amendment. Normally, financial information is sensitive and a general member of the public has a reasonable expectation of privacy. The Court is uncertain if that would extend to the trust, commissary and phone account records for inmates since the inmates are in custody and records sought are about financial information solely pertaining to them being in custody. The Court cannot find any cases about inmates specifically, only the duty banks have to prevent disclosure of such information about members of the general public who bank with them. *See Peterson v. Idaho First Nat'l Bank*, 83 Idaho 578, 367 P.2d 284 (1961).

The Court has found case law where the Court discussed an inmate's reasonable expectation of privacy while incarcerated, but in those cases it was the inmate who was asserting the privacy right. *See State v. Brown*, 155 Idaho 423, 313

P.3d 751 (Ct. App. 2013). No one presently before the Court at this time has standing to make that argument.

However, at oral argument, the Court reviewed the requested records *in camera* and has determined that no privacy interest is implicated.

IV. CONCLUSION AND ORDER.

For the reasons stated above, the Court denies Respondents' Motion to Dismiss and, pursuant to Idaho Code § 74-116(1), and orders the Respondents to disclose the records sought by Petitioner.

IT IS HEREBY ORDERED the Respondents' Motion to Dismiss is DENIED.

IT IS FURTHER ORDERED that pursuant to Idaho Code § 74-116(1), the Respondents must disclose the records sought by Petitioner by 5:00 p.m. on March 4, 2016.

Entered this 2nd day of March, 2016.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of March, 2016, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Fax #</u>	<u>Lawyer</u>	<u>Fax #</u>
Russell McHenry, Pro Se	765-9405	Kootenai County Prosecutor-Legal Services Dept	208-446-1621

Jeanne Clausen, Deputy Clerk