

1 Hon. John C. McKeon
2 District Judge
3 17th Judicial District
4 P.O. Box 470
5 Malta, MT 59538
6 Telephone: (406) 654-1062

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8 MONTANA ELEVENTH JUDICIAL DISTRICT, FLATHEAD COUNTY

9 STATE OF MONTANA, 10 Plaintiff, 11 vs. 12 GREGORY D. BARKUS, 13 Defendant.	No. DC-09-468C ORDER TO DENY MOTION FOR CONTINUANCE ORDER TO AUTHORIZE RELEASE OF EDITED VERSION OF PSI
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14 Pending is request of Citizens for Responsibility and Ethics in Washington ("CREW")
15 for release of the presentence investigation report ("PSI"). The Court has previously
16 determined that CREW met its initial burden to show entitlement to the PSI and ordered
17 responsive pleadings.¹ Subsequent to the *Order for Response*, the Court received the
18 following:

- 19 1. Motion for Continuance dated October 16, 2012 and filed on behalf of Defendant
20 Gregory D. Barkus ("Barkus") by counsel of record.
- 21 2. Letter from Barkus to the Court dated October 16, 2012.
- 22 3. State's Response to CREW Request for PSI dated October 22, 2012.

23 On due review, the Court denies the Motion for Continuance and issues this order to
24 release an edited version of the PSI.

25

¹ See *Order for Response* dated October 9, 2012.

1 The *Order for Response* set an October 23, 2012 deadline for response. In his Motion,
2 Barkus seeks continuance of this deadline on the grounds of (1) conflict with counsel's
3 schedule, (2) complexity of issues and lack of Montana precedence, (3) lack of due process in
4 relation to the various witnesses and individuals identified in the PSI and (4) inappropriate
5 political motive for the request. Further, Barkus states in this Motion that should the same be
6 denied, he intends to submit a letter for the Court's consideration and "will stand on that
7 letter." Since the Motion is denied, the October 16, 2012 Barkus letter is considered his
8 response. Nonetheless, the Court will address the grounds stated in Barkus' Motion as well as
9 his letter.

10 CREW's request indeed appears to be politically motivated. As stated in the *Order for*
11 *Response*, this case involved government officials in positions of trust. Further, CREW claims
12 to be a non-profit corporation committed to responsible and ethical government and to
13 protecting the right of citizens to be informed about activities of their government officials.
14 CREW has standing to assert – and does assert – the Right to Know provision under Article II,
15 § 9 of the Montana Constitution.² With this standing, the request is appropriate whether or not
16 motivated by politics.

17 The government officials include Barkus, a state senator at the time of the offense, and
18 Dennis Rehberg ("Rehberg"), a U.S. Congressman. Rehberg was a victim and the Court takes
19 judicial notice that he is currently in a contested race for a U.S. Senate seat with Election Day
20 being November 6, 2012. As noted by Barkus in his letter, delay in acting on the CREW
21 request likely makes the information less desirable. These circumstances certainly do not
22 justify delay solely upon conflict with counsel's schedule.

23 Further, the issues raised by CREW's request do not justify continuance. The PSI is
24 confidential criminal justice information. §§ 44-5-103(8)(a), 44-5-103(7)(a), 44-5-103(3)(d),
25 46-18-111(1)(a), 46-18-113(1), MCA. There is a procedure in Montana law for dissemination

² No person shall be deprived of the right to examine documents ... of all public bodies or agencies of state government and its subdivision, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure. Article II, § 9, Montana Constitution. See also § 44-5-303(1) & (6), MCA.

1 of confidential criminal justice information based on written finding that the demands of
2 individual privacy do not clearly exceed the merits of public disclosure. § 44-5-303(1), MCA.
3 Further, various Montana cases have recognized this procedure. See cases cited in *Order for*
4 *Response*.

5 The demands of individual privacy here involve those individuals identified in the PSI,
6 including but not limited to Barkus, his family members, victims, witnesses, investigators and
7 citizens writing letters of support. In his letter, Barkus asserts an appropriate and proper
8 privacy interest in personal financial information and his family information. He also asserts
9 lack of relevance, the privacy interests of individuals who wrote letters in his support and the
10 need within our criminal justice system to protect the integrity (“openness and truthfulness”) of
11 a PSI. The State’s response supports the asserted privacy interests.

12 In its response, the State identifies nine (9) areas of information contained within the
13 PSI that should not be disclosed. The Court agrees and finds that in each of those nine areas,
14 the demands of individual privacy exceed the merits of public disclosure. Further, the Court
15 finds other information within the PSI where those demands of individual privacy exceed
16 merits of public disclosure.

17 However, there remains information within the PSI where the merits of public
18 disclosure exceed any privacy interest. Prior to authorizing disclosure of that information, the
19 Court gives consideration to Barkus’ arguments regarding individual due process rights and the
20 need to protect the integrity of a PSI.

21 The Court notes that neither of these matters is specifically identified as an exception to
22 the Right to Know provision in Article II, § 9 of the Montana Constitution. However, the
23 Montana Supreme Court has held that the Right to Know is not absolute and despite the
24 inclusion of the “individual privacy” language in Article II, § 9, there are other “weighty or
25 compelling” constitutional rights that compete with the “public’s right to know.” *Great Falls*
Tribune v. Mont. PSC, 2003 MT 359, ¶ 30, citing *State ex rel. Smith v. District Court* (1982),
201 Mont. 376, 383, 654 P.2d 982, 986.

1 Due process of law is one of those other constitutional rights that compete with the
2 public's right to know. Article II, § 17, Montana Constitution.³ A fundamental requirement of
3 due process is the opportunity to be heard "at a meaningful time and in a meaningful manner."
4 *Mathews v. Eldridge*, (1976), 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed. 2d 18. The three
5 individuals providing victim impact statements⁴ and those authoring the 24 letters of support
6 contained within the PSI are not parties to this action and neither CREW nor any other
7 person/entity has brought a disclosure action naming them as parties. The public disclosure of
8 their statements without providing them the opportunity to be heard not only impacts their
9 privacy rights but would violate their fundamental due process right. With the limited
disclosure herein, that fundamental due process right is protected.

10 The stated correctional and sentencing policy of this state include to punish each
11 offender commensurate with the nature and degree of harm caused, to hold the offender
12 accountable, to protect the public, to provide restitution, reparation, and restoration to the
13 victim and to encourage and provide opportunities for offender self-improvement and
14 reintegration back into a community. § 46-18-101(2), MCA. Sentences must also be
15 consistent, understandable and neutral with respect to race, gender, religion, national origin
16 and social or economic status. § 46-18-112(3)(a) (c), MCA. In order to make an informed
17 decisions that conforms with this policy and directive, the Court must have a PSI that includes
18 significant information that might otherwise be considered private, such as a defendant's social
19 history, characteristics, circumstances, needs and potentialities and the harm caused to a
20 victim, the victim's immediate family and members of the community. § 46-18-112(1), MCA.
21 Accurate information is needed in each of these areas. The encouragement of openness and
22 truthfulness in providing this information is an important reason behind the PSI confidentiality
23 provision found in § 46-18-113(1), MCA. The limitations provided on the public disclosure
of the PSI are consistent with this need.

24
25 ³ No person shall be deprived of life, liberty, or property without due process of law. Article II, § 17, Montana Constitution.

⁴ Although the probation officer preparing the PSI gave him the opportunity to do so, Rehberg did not provide a victim impact statement.

1 The final issue raised by Barkus is relevance. Neither this Court nor Barkus can ignore
2 the fact that Barkus and Rehberg were public officials at the time of this offense of Criminal
3 Endangerment, this felony offense involved serious bodily injury and knowingly engaging in
4 conduct that created substantial risk of serious bodily injury and that due to the contested U.S.
5 Senate race, there remains considerable public interest regarding this offense. Indeed, after
6 CREW's request, a similar disclosure request from a national news agency, the Associated
7 Press ("AP"), has been received. These circumstances make relevant the public disclosure of
8 an edited version of the PSI.


9 The Court finds no reason to delay this matter further. Likewise, the Court finds that
10 the AP request is substantially the same as the CREW request and that this order should apply
11 to that request as well. Finally, the Court finds that although dissemination of confidential
12 criminal justice information carries with it a responsibility to maintain its security "unless
13 otherwise ordered by the court," there is good reason here to otherwise order. § 44-5-303(3),
14 MCA. The circumstances of the offense have already been widely reported. Sentencing in
15 this matter has concluded. Time for appeal has expired.

16 For the foregoing reasons and pursuant to § 44-5-303(1), MCA, **IT IS HEREBY**
17 **ORDERED that:**

- 18 1. Defendant's Motion for Continuance is DENIED.
- 19 2. Upon payment of reasonable copy cost, the Clerk is authorized to release to
20 CREW and AP an edited version of the PSI. The edited version shall exclude
21 the following information:
 - 22 a. Barkus' address, phone numbers, and Identification information found
23 on the first page.
 - 24 b. Barkus' Background information found on page 2.
 - 25 c. Comments on Barkus' Health and Chemical Use found on bottom of
page 5 and top of page 6.
 - d. Barkus' Psychological Information and Significant Family/Marital
Information found on page 6.
 - e. Barkus' Financial Profile found on page 7.

- 1 f. Probation Officer's description of Barkus' in first 2 sentences of second
2 paragraph of her Evaluation/Recommendation.
- 3 g. Barkus' personal information (address, phone number, and date of birth)
4 found on page 1 of attached State of Montana Watercraft Accident
5 Report.
- 6 h. Personal information (addresses, dates of birth, and phone numbers) for
7 the victims, witnesses, and investigators listed on page 2 of the attached
8 Watercraft Accident Report.
- 9 i. Personal information (addresses, phone numbers, dates of birth, social
10 security numbers) for Barkus, victims, and witnesses listed in attached
11 FCSO Investigative Reports.
- 12 j. Attached victim impact statements of Dustin E. Frost, Kristin Smith and
13 Kathy Barkus.
- 14 k. All attached letters of support.
- 15 l. Personal information (home address, phone numbers, religious
16 affiliations) for consultant Richard H. Snyder, P.E. listed in attached
17 resume.
- 18 3. With respect to the edited version of PSI, CREW and AP shall not have the
19 responsibility for security set forth in § 44-5-303(3), MCA.
- 20 4. The Clerk shall forthwith fax and send a copy of this Order to counsel of record.

21 DATED this 24th day of October, 2012.

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24 John C. McKeon
25 District Court Judge