

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

Case No. 1838-2003

IN RE INFORMATION REQUEST BY
THE BILLINGS GAZETTE

I. INTRODUCTION

In this matter, the Billings Gazette seeks disclosure of certain documents contained in the Human Rights Bureau (HRB) investigative file related to a human rights complaint filed by Sarah Schopfer against Yellowstone County. Schopfer objects to the disclosure of the information, arguing that she has a right to privacy that outweighs the public's right to know the information. The parties have waived formal proceedings under Mont. Code Ann. § 2-4-602(2). Based on the arguments of the parties contained in their respective briefs and an *in camera* review of the HRB file,¹ the following findings of fact, conclusions of law, and final order are made.

II. FINDINGS OF FACT

1. Yellowstone County employed Schopfer as a criminal investigator in its public defender's office.

2. Sandy Selvey, Chief Public Defender of Yellowstone County, acted as Schopfer's direct supervisor. The Yellowstone County Commissioners appointed Selvey to this position.

3. In March 2003, Schopfer filed a human rights complaint against Yellowstone County alleging sexual discrimination and harassment that ensued when she terminated a romantic relationship between herself and Selvey. According to the complaint, the relationship lasted for 3 ½ years during which time Selvey acted as Schopfer's direct supervisor. The complaint further alleges that when Schopfer refused Selvey's attempts at reconciliation, Selvey retaliated by threatening to fire Schopfer and by giving Schopfer poor performance reviews.

¹ The hearing examiner's *in camera* review of the HRB file reveals that at present, very little supporting documentation exists in the file, other than annual performance reviews for both Schopfer and Selvey which have been provided by Yellowstone County. The HRB investigator has sent out a letter to each of the parties requesting additional documentation which, as of the date of this decision, has not been provided to the HRB.

4. The contents of Schopfer's human rights complaint have been made public, as demonstrated by a Billings Gazette news article of April 3, 2003.

5. On March 19, 2003, a Billings Gazette reporter requested that the HRB permit inspection of the complaint filed in Schopfer's case and "copies of subsequent documents filed in association with this complaint, including but not limited to the response filed by the respondent (Selvey), the rebuttal filed by the petitioner and any exhibits, supporting documents or briefs filed by the parties."

6. The Gazette does not seek information about Selvey and Schopfer's relationship, performance reviews, or private sexual activity unless such information forms a part of the prosecution or defense of Schopfer's human rights charges. The Gazette does not seek to obtain information regarding third parties identified in the Human Rights case, and has specifically agreed that "to the extent that third parties are named in the materials, their identities may be redacted." Gazette reply brief, page 9. In addition, the Gazette is not trying to obtain any medical records in this present proceeding.²

7. The HRB investigation into the complaint is currently ongoing. No finding of reasonable cause or lack of reasonable cause has yet been made.

III. DISCUSSION

Article II, Section 9, of the Montana Constitution provides:

"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 provides:

"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."

²The hearing examiner infers this from the Gazette's statement that it "waives any access to medical records . . . unless those records become exhibits in a proceeding opened to the public." Gazette Reply Brief, page 8. In this proceeding, which is ancillary to the Human Rights case, there are no medical records that are part of this record.

Each of these rights are “firmly established in the Montana Constitution.” *Citizens to Recall Mayor James Whitlock v. Whitlock* (1992), 255 Mont. 517, 521, 844 P.2d 74. However, the right to know is not absolute. “The right to know provision was designed to prevent the elevation of a state czar or oligarchy; it was not designed for . . . the tyranny of a proletariat.” *The Missoulian v. Board of Regents* (1984), 207 Mont. 513, 530-31, 675 P.2d 962, 97, **citing** *Mountain States Telephone and Telegraph v. Department of Public Service Regulation* (1981), 194 Mont. 277, 289, 634 P.2d 181, 189. The Human Rights Commission has recognized the need to balance the competing interests of the public’s right to know and the individual’s right to privacy. The Commission has provided a very specific procedure to balance those competing rights when they come into conflict in a case under investigation. Admin. R. Mont. 24.8.210.³

Admin. R. Mont. 24.8.210 (3) provides that “after a finding of reasonable cause or no reasonable cause or other agency action terminating the investigation of the complaint, information obtained in the investigation of the complaint, and other information in the department file which does not relate to privacy interests protected by law, becomes public information.”

Resolving the conflict between the public’s right to know and the individual’s right to privacy requires a balancing of the “competing constitutional interests in the context of the facts of each case, to determine whether the demands of individual privacy clearly exceed the merits of public disclosure. *Missoulian, supra*, 207 Mont. **at** 529, 675 P.2d **at** 971. This in turn requires a tribunal to examine the existence and nature of the asserted privacy right and compare that right to the purposes and merits of the asserted public right to know. *Id. at* 531, 675 P.2d **at** 971-72.

A. Schopfer Has a recognized Right to Maintain the Privacy of Her Performance Reviews, Personnel Files and Specifics of her Relationship with Selvey.

The Montana Supreme Court employs a two-part test to determine whether an individual has a privacy interest protected by the Montana Constitution. The test requires an initial determination of whether an individual involved has a subjective or actual expectation of privacy. The second part requires an assessment of whether society is willing to recognize that expectation as reasonable under the circumstances. *Engrav v. Cragen* (1989), 236 Mont. 260, 262, 769 P.2d 1224, 1226, **citing** *Montana Human Rights Division v. City of Billings*, 199 Mont. 434, 649 P.2d 1283 (1982).

³Schopfer’s assertion that Admin. R. Mont. 24.9.212 controls this matter is incorrect. Admin. R. Mont. 24.8.105--which describes those rules of the Human Rights Commission that are applicable to the Human Rights Bureau--does not provide for the application of Admin. R. Mont. 24.9.212 to the Human Rights Bureau’s discharge of its responsibilities under Chapter 8 of Title 24 of the administrative rules. Furthermore, Admin. R. Mont. 24.9.212 does not apply to disposition of complaints of discrimination filed after July 1, 1997. Admin. R. Mont. 24.9.107. The only rule applicable is Admin. R. Mont. 24.8. 210.

The Gazette argues that Schopfer has no expectation of privacy in this matter. The Gazette suggests that “the facts of her complaint have been known in Billings for some time and the complaint itself has been provided to the media by a third party.” There is nothing to indicate, however, that Schopfer is the cause of this disclosure to the Billings community or that she willingly or even negligently provided the complaint information to the community. To the contrary, it appears that she has been diligent in protecting her right to privacy. The right to privacy would indeed be hollow if it could be trumped in any situation where information had been leaked to the public by third parties, no matter how diligently a person had sought to protect his or her privacy right. In this case, the public’s general awareness of the situation or the fact that a third party leaked the complaint to the community does not weigh in favor of finding that Schopfer has no reasonable expectation of privacy at stake.

The case law is clear that some of the information sought to be protected here—information regarding personnel records of Schopfer, information regarding explicit details of a romantic relationship with Selvey, and information about Schopfer’s private medical information—is the very type of information that the Montana Supreme Court has found to be constitutionally protected. **See, e.g.,** *Bozeman Daily Chronicle v. City of Bozeman Police Department*, (1993) 260 Mont. 218, 227-28, 859 P.2d 435, 441 (constitutional privacy right of victim and third parties in police report about police officer’s sexual assault of the victim exceeds merits of public disclosure). Schopfer has both an actual right to privacy and one that society recognizes as reasonable with respect to her personnel records, her private medical information, and the explicit details of her romantic relationship with Selvey. This right must be protected in fashioning a determination in this case.

B. Schopfer’s Right to Maintain the Privacy of Her Personnel Records and Specifics of the Relationship With Selvey and the State’s Compelling Interest In Eliminating Discrimination Outweigh the Public’s Right to Know This Information During The Investigation.

The Gazette requests disclosure of the explicit details of Selvey and Schopfer’s relationship, performance reviews, or private sexual activity if such information forms a part of the prosecution or defense of Schopfer’s human rights charges. To be entitled to this explicit information, the Gazette must make a showing that the public’s constitutional right to know about these details “would be furthered by public disclosure or hindered by confidentiality in this case.” *Missoulian, supra*, 207 Mont. **at** 532, 675 P.2d **at** 972.

The Gazette has failed to show that the public’s constitutional right to know would be advanced or hindered by maintaining Schopfer’s clear privacy right regarding explicit details of Selvey and Schopfer’s relationship, their several performance reviews and their personnel files during the pendency of the investigation. Unlike all of the cases cited by the Gazette, the official state investigation by the responsible state agency in this case has **not** concluded. If a finding of reasonable grounds ensues and

the matter goes to hearing, the information sought would almost certainly be made available to the public during a hearing which would be open to the public. If the HRB finds that no reasonable grounds exist for the complaint, then in any event the information sought would become public information as provided by Admin. R. Mont. 24.8.210 (3). The Gazette has made no argument nor cited any authority suggesting that the information sought must be disclosed during the investigation in order to preserve its usefulness to the public.

This last point must be weighed against another critical concern. The state has a compelling interest in eliminating illegal discrimination. The state's ability to effectively investigate human rights complaints in order to vindicate that interest could be substantially compromised if, during that investigation, highly detailed information about the case were reported to the public. HRB's ability to use that highly detailed information as an investigative tool during its interviews of witnesses in order to corroborate information and ascertain their credibility could well be lost if such information were disseminated at large during the investigatory stage. Indeed, the Montana Supreme Court has denied a public records request for release of information from ongoing criminal investigations based upon both privacy concerns of victims and witnesses and "the disastrous effect" upon ongoing criminal investigations due to public exposure of those investigations. *Engrav*, **supra**, 236 Mont. **at** 264, 769 P.2d **at** 1227; **see also**, *Bozeman Daily Chronicle*, 260 Mont. **at** 228, 859 P.2d **at** 441(citing *Engrav* and noting the disastrous effect that public exposure of ongoing investigations would have upon law enforcement's duty to protect the lives, safety and property of citizens, but holding that such considerations were not present in *Bozeman Daily Chronicle* because the investigation had already been concluded).

Admittedly, neither lives nor property would be at risk if the very explicit details about this matter were reported to the public during the investigation. Nevertheless, HRB's ability to use information as an investigative tool to corroborate witnesses' versions of events would be eviscerated, compromising its ability to carry out its duties. Weighed against the public's ability to obtain much of the information sought by the Gazette after issuance of the reasonable cause determination, the state's interest in protecting the integrity of its investigation militates against disclosure of the supporting documentation of the explicit details of Selvey and Schopfer's relationship and private sexual activity, their performance reviews and their personnel files during the investigation.

With respect to the Gazette's request for "supporting briefs," disclosure at this time would be inimical to the investigative phase of this matter. A requirement of disclosure would chill the litigant's desire to be candid, for fear that such candidness might become fodder for the front page. Moreover, any such briefing by the parties would most certainly become a public record after the HRB makes its finding with regards to reasonable cause. Thus, with respect to briefing by the parties during the investigation, the Gazette has failed to show that the public's right to know will either be

advanced or hindered by withholding such information from the public during the pendency of the HRB investigation.⁴

The Gazette's insistence that this matter is controlled by *Whitlock*, *supra*, is incorrect. In *Whitlock*, the privacy right at issue was the elected public official's claimed right of privacy in a report detailing allegations of wrong doing by that official. The court found that the official had no reasonable expectation of privacy that would outweigh the public's right to know. In this case, the person objecting to disclosure is the victim, not the alleged perpetrator. As the court in *Bozeman Daily Chronicle*, *supra*, held, the victim's privacy right with regards to certain information does outweigh the public's right to know and the trick is to balance all of the recognized competing rights.

C. *Schopfer's Privacy Right Does Not Outweigh Disclosure of Complaint, Response or Reply.*

The general nature of the charges (contained in the complaint, Yellowstone County's response, and Schopfer's reply) are things that the public has a right to know under the Montana Constitution. The decision in *Missoulian* does not provide compelling support for Schopfer's proposition that none of the information sought by the Gazette should be disclosed. *Missoulian* is distinguishable from the instant case. There is an allegation of official misconduct on the part of Selvey, similar to *Whitlock*. Schopfer's complaint, Yellowstone County's response, and Schopfer's reply are the type of information that the public has a right to know about in order to stay abreast of a public official's (Selvey's) alleged misconduct.

In addition, it does not appear that the HRB's investigation will be any further compromised by the disclosure of Yellowstone County's response or any forthcoming reply. To preserve the public's right to know and the underlying principles upon which that constitutional right is founded, disclosure of those three documents during the investigation is appropriate. *Whitlock*, *op.cit*; *Bozeman Daily Chronicle*, *op.cit*.

IV. CONCLUSIONS OF LAW

1. The department has jurisdiction. Admin. R. Mont. 24.8.210.
2. Schopfer's right to privacy does not clearly outweigh the public's right to know the contents of Schopfer's complaint, Yellowstone County's Response, and Schopfer's Reply in the Human Right's Bureaus' investigation, which should be disclosed to the Gazette.
4. Schopfer's constitutional right to maintain the privacy of the specifics of her personnel file and performance reviews, and documentation regarding the specifics of her relationship with Selvey (not otherwise revealed in the language of the complaint,

⁴ The *in camera* inspection revealed no formal pleadings in the nature of briefs. There are, however, letters written by counsel for the parties to the HRB setting out their respective positions.

response, or reply) exceeds the public's right to know at this stage of the proceeding. Specifics of Schopfer's personnel file, performance reviews and her relationship with Selvey should not be disclosed during the investigation.

V. ORDER

Based upon the foregoing, the Human Rights Bureau is directed to release a copy of Yellowstone County's response to the complaint and Schopfer's forthcoming reply to the Gazette. The Human Rights Bureau shall not release specific supporting documentation of Selvey's or Schopfer's personnel file or performance reviews, nor any supporting documentation regarding Selvey or Schopfer's relationship during the pendency of the HRB investigation. Neither shall the Human Rights Bureau disclose any briefing done by the parties during the pendency of the investigation.

DATED this 21st day of July, 2003.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By:

GREGORY L. HANCHETT
Hearing Examiner

NOTICE: You may be entitled to judicial review of this final agency decision in accordance with Mont. Code Ann. § 2-4-702 by filing a petition for judicial review in an appropriate district court within 30 days of service of the decision.

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing were served this day upon the following by depositing the same in the U.S. Mail, postage prepaid, addressed as follows:

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The undersigned hereby certifies that true and correct copies of the foregoing were served this day upon the following by the State of Montana's Interdepartmental mail service and internal electronic mail.

Marieke Beck
Legal Services Division, Department of Labor and Industry
P.O. Box 1728
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DATED this 21st day of July, 2003.

Natacha Bird