# STATE OF MONTANA
# DEPARTMENT OF LABOR AND INDUSTRY
# HEARINGS BUREAU

**Case No. 2288-2006**

IN RE INFORMATION REQUEST BY
LEE NEWSPAPERS STATE BUREAU

*Final Agency Decision Re Information Request*

## I. INTRODUCTION

On April 20, 2006, Jennifer McKee, a reporter for Lee Newspapers State Bureau (Lee), requested "all public documents stemming from a recently concluded Department of Labor & Industry Human Rights Bureau (HRB) investigation involving Rhonda Schaffer, Joe Williams, Bill Slaughter, and the DOC" contained in the files of the HRB. Pursuant to Admin R. Mont 24.8.210, the HRB sent notice of the request to Schaffer and the Department of Corrections (DOC) asking whether they objected to the release of the requested information. Both parties objected to any release of information, asserting their right to privacy as declared in Article II, Section 10 of the Montana Constitution.

The HRB notified Lee on May 10, 2006, that it would not be releasing the requested information due to the objections. On May 12, Lee requested review of the HRB's decision and the matter was transferred to the Hearings Bureau on May 15, 2006.

On May 15, 2006, the Hearings Bureau issued a notice of hearing and telephone conference in this matter. Counsel for all parties to this proceeding appeared. The hearing examiner ordered production of the HRB file, conducted a preliminary *in camera* review and provided the parties with a generic summary of the documents he inspected, identifying documents which were subject to this proceeding, and keeping photocopies of those documents in a confidential, sealed Hearings Bureau file. The parties agreed to submission of the matter after filing briefs and supporting documents and to informal disposition under Mont. Code Ann. § 2-4-603.

The *in camera* review and order also included the requirement that the HRB notify certain other individuals identified in those documents so that they could be

given the opportunity to object to the release of information. The hearing examiner also identified certain documents that were not within the scope of the information request, as they were not associated with the investigation of Schaffer's complaint.

On June 16, 2006, Joe Williams waived his right of privacy regarding the HRB's final investigation report.

Subsequent to Lee's information request, Kathleen Wright filed an additional request seeking some of the same information from the HRB, but also seeking additional information. The hearing examiner denied her motion to intervene in this matter on July 21, 2006, due to the differences in the information requested and the potential for delay.

After reviewing the parties' briefs, the hearing examiner determined that his previous order regarding his *in camera* review needed clarification, so he informed the parties that the following statement in the July 14, 2006, Order:

> [a] considerable number of the documents are either transmittal documents, internal file control documents, file notes or correspondence which do not contain any information of interest to the public in this instance.

was made in an attempt to focus the issues and not to make a final determination as to whether the documents not marked with an asterisk (*) or a pound sign (#) were public documents and should therefore be released. His clarification order stated that he would review all the documents included in the HRB investigative file in this decision. Accordingly, DOC was given additional time to supplement their "privilege log." Lee stated in both its opening and response brief that it did not want to address individual documents because it believed all should be released. Therefore, the hearing examiner did not allow or request additional pleadings.

Based on the arguments of the parties in their briefs and an *in camera* review of the investigative files, the hearing examiner issues this final agency decision.

## II. FINDINGS OF FACT

1. In September 2005, Rhonda Schaffer, an employee of the DOC, filed a claim with the Department of Labor and Industry Human Rights Bureau that Joe Williams, her immediate supervisor, and the DOC created a hostile work environment and discriminated against her based on gender.

2. Schaffer, Williams, Slaughter and the witnesses are current or former employees of the DOC.

3. At the time the complaint was filed and settlement reached, Bill Slaughter was Director of the DOC.

4. Schaffer was the Chief of the Fiscal Bureau within the Centralized Services Division of the DOC. Joe Williams was the administrator of that division and Schaffer's immediate supervisor.

5. On March 10, 2006, the HRB issued a final investigative report in which the investigator found that "the allegations of Schaffer's complaint are supported by a preponderance of the evidence" and "recommended a finding of reasonable cause to believe unlawful employment discrimination based on sex occurred in this case."

6. On April 18, 2006, Schaffer and the DOC settled her claims.

## III. DISCUSSION[1]

When a third party seeks disclosure of documents in an HRB investigative file, Admin R. Mont. 24.8.210 vests the hearing examiner with the authority and responsibility to determine whether privacy interests are, in fact, at issue and if found whether those privacy interests clearly outweigh the public's right to know about the requested information. The Montana Supreme Court has found such a process meets the requirements of due process and is the only realistic forum for many such reviews to be conducted. *City of Billings Police Dep't v. Owen*, 2006 MT 16, ¶30, 331 Mont. 10, ¶30, 127 P.3d 1044, ¶30.

This public information request case involves a determination of whether the privacy rights of Rhonda Schaffer, Joe Williams, Bill Slaughter or witnesses involved in the investigation of Schaffer's human rights complaint clearly outweigh the merits of the public's right to obtain documents contained in the files of a public agency – the HRB.

The proper procedure to protect an individual's legitimate right to privacy and to balance the public's right to know "is to conduct an *in camera* inspection of the

[1] Statements of fact in this discussion are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

documents at issue in order to determine what material could properly be released, taking into account and balancing the competing interests of those involved, and conditioning the release of information upon limits contained within a protective order." *Bozeman Daily Chronicle,* at 260 Mont. 228-229, 859 P.2d 435, 439 (citing *Allstate Ins. Co. v. City of Billings*, (1989), 239 Mont. 321, 326, 780 P.2d 186, 189).

After his *in camera* review of the entire HRB investigative file, the hearing examiner considered the characteristics of information contained therein, the context of the underlying dispute and the relationship of that information to the duties of the public officials involved. *See Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 23, ___ Mont. ___, ___P.3d ___.

The Montana Supreme Court has held that "[b]oth the public right to know, from which the right to examine public documents flows, and the right of privacy, which justifies confidentiality of certain documents, are firmly established in the Montana Constitution." *Citizens to Recall Mayor James Whitlock v. Whitlock* (1992), 255 Mont. 517, 521, 844 P.2d 74, ___.

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.

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." *Missoulian v. Board of Regents* (1984), 207 Mont. 513, 530, 675 P.2d 962, 971 *quoting Mtn. States T. and T. v. Dept. Pub. Serv. Reg.* (1981), 194 Mont. 277, 289, 634 P.2d 181, 189. The Human Rights Commission and the department have recognized the need to balance the competing interests of the public's right to know and the individual's right to privacy and have adopted a method for that balancing, Admin. R. Mont. 24.8.210.

The two levels to the inquiry are: (a) analyzing the asserted privacy interests and (b) weighing whether the individual privacy demands clearly exceed the merits of public disclosure of the investigative file.

A. Existence and Nature of the Asserted Privacy Rights

There is a two-part test to determine whether individuals have privacy interests protected by the Montana Constitution. First, the individual must have a subjective or actual expectation of privacy. Second, society must be willing to recognize that expectation as reasonable. *Havre Daily News,* ¶ 23; *Jefferson County v. Montana Standard* (2003) 318 Mont. 173 ¶15, 79 P. 3d 805; *Lincoln County Com'n v. Nixon* (1998), 292 Mont. 42, ¶16, 968 P.2d 1141; *Bozeman Daily Chronicle*, 260 Mont. 218, 859 P.2d 435; *Montana Human Rights Division v. City of Billings* (1982), 199 Mont. 434, 649 P.2d 1283. Several categories of people may have privacy rights at issue in this case: the alleged victim, Schaffer; the individuals who allegedly created the hostile work environment; and employees of the DOC who provided statements and other information during the course of the investigation. The reasonableness of an individual's expectation of privacy may be aided by an inquiry into the:

> (1) attributes of the individual, including whether the individual is a victim, witness, or accused and whether the individual holds a position of public trust (internal citations omitted); (2) the particular characteristics of the discrete piece of information and (3) the relationship of that information to the public duties of the individual.

*Havre Daily News,*¶ 23. The hearing examiner will consider all of these categories of potential privacy demands.

1. Schaffer's Privacy Rights

Schaffer asserts that her right to privacy should prevent disclosure of any of the documents in the file. Those documents include copies of performance evaluations, job applications, emails to and from Williams, notes made about communications with Williams and others, and logs describing incidents involving Williams and other individuals, including some who seek to protect the content of those documents based on their own assertions of privacy. Many of these documents were placed into the HRB file by Schaffer herself. The files also include the HRB

internal documents that have little content, but contain the names of Schaffer and other individuals. The files also contain the final investigative report and the settlement agreement executed by and between Schaffer and the DOC.

The reasonableness of Schaffer's expectation of privacy hinges on whether she waived her right to privacy by filing her claim against DOC; the effect of her status as an alleged victim of sexual discrimination; and whether her position as a bureau chief at DOC precludes protection. Schaffer's privacy interests may also depend on the type of document at issue.

a. *Waiver of the right to privacy.*

Article II, Section 4 of the Montana Constitution provides:

> Individual dignity. The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

The Human Rights Act further defines the right to be free from discrimination as a civil right and provides an exclusive remedy for violations of those rights. Mont. Code Ann. § 49-1-101 *et seq*. In this case, Schaffer is the alleged victim of sexual discrimination and a hostile work environment. In an effort to remedy her situation she filed a complaint with the HRB pursuant to the Human Rights Act. An investigation into the complaint and allegations ensued. The charging parties, in such situations, often must reveal not only their identity to the HRB, but employment information, including performance appraisals, details of a sexual nature or other facts and statements they would otherwise only reveal to their most trusted confidant.

The Montana Supreme Court has not faced the issue of whether the filing of a discrimination claim waives the claimant's right to privacy. The California Supreme Court in looking at the issue in the context of a discovery dispute held that "we cannot agree that the mere initiation of a sexual harassment lawsuit . . . functions to waive all her privacy interests." *Vinson v. Superior Ct.*, (1987) 43 Cal. 3d 833, 841, 740 P. 2d 404, 410. The California Court further held that "[p]laintiff is not compelled as a condition of entering the courtroom, to discard entirely her mantle of privacy." *Id*. "At the same time, plaintiff cannot be allowed to make her very serious

allegations without affording defendants an opportunity to put their truth to the test." *Id*. "While the filing of a lawsuit may implicitly bring about a partial waiver of one's constitutional right to privacy, the scope of such 'waiver' must be narrowly construed, so that plaintiffs will not be unduly deterred from instituting lawsuits by the fear of exposure of their private associational affiliations and activities." *Britt v. Superior Ct.* (1978) 20 Cal. 3d 844, 574 P. 2d 766.

As Lee notes, this is not a discovery dispute, but cases involving the right to privacy in the discovery context can be instructive, as they involve the conflict of two constitutional rights; the right to privacy and the right of confrontation. In this case, Schaffer may have waived her right to privacy with respect to the right to confrontation, but it is reasonable for her to expect that public disclosure of the private details of her complaint to non-parties would not occur prior to a hearing in her case.

b. *Schaffer as an alleged victim of sex discrimination may have a reasonable expectation of privacy in the information contained in the HRB investigative file.*

Two Montana Supreme Court decisions hold that crime victims have a reasonable expectation of privacy in statements made to public officials.

In *Bozeman Daily Chronicle*, the Court held:

> [i]n this case, especially in view of the fact that criminal charges were not filed, the victim of the alleged sexual assault and the witnesses involved in the investigation have a subjective or actual expectation of privacy which society is willing to recognize as reasonable. Accordingly, the privacy rights of the alleged victim and of the witnesses outweigh the public's right to know and must be accorded adequate protection in the release of any of the investigative documents at issue.

260 Mont. at 228, 859 P.2d at 441. The document sought by the newspaper was the criminal investigation report. *Id*. Similarly here, Lee seeks the investigative report and supporting documentation in the investigative file. The *Bozeman Daily Chronicle* court held that the investigative report should be released as it pertained to the officer in that case, but information about the victim and witnesses involved in the investigation should be protected. *Id*. In the underlying matter, Schaffer was not only the alleged victim, but also a party. As discussed above, Schaffer, in instituting

her claim, implicitly waived part of her right to privacy with respect to the alleged wrongdoers. However, given the private nature of some of the details of her complaint, her waiver should be narrowly construed.

In *Worden v. Montana Bd. of Pardons & Parole* (1998), the court held "a victim may have a privacy interest in a letter submitted to the Board of Pardons." ¶29, 289 Mont. 459, 463, ¶29, 962 P.2d 1157, 1163, ¶29. The Court further held that while the expectation may be reasonable, "often this interest can be served by simply redacting his or her address or telephone number." *Id*. Schaffer's complaint alleges that Joe Williams subjected her to a hostile work environment and discrimination based on her gender. She further alleges that the DOC was aware of this conduct, but did little to correct it, especially after her original complaint in 2003. While the DOC may not have admitted to the allegations, the HRB found there was reasonable cause to believe unlawful employment discrimination based on sex occurred in this case (Doc. HRB-1-A). The HRB's finding makes it reasonable to believe that Schaffer was a victim of sexual discrimination. As such, Schaffer's expectation of privacy with regard to private details of her complaint and other investigative documents is reasonable.

c. *Schaffer's expectation of privacy may be unreasonable if she holds a position of great public trust.*

Notwithstanding the fact that Schaffer was the alleged victim in the underlying matter, Lee contends that because she is a person in a position of great public trust her expectation of privacy is not one that society should find as reasonable. In a line of cases beginning with *Great Falls Tribune v. Cascade County Sheriff* (1989), the Montana Supreme Court held that certain public official's expectations of privacy may not be reasonable because they hold "positions of great public trust." 238 Mont. 103, 107; 775 P.2d 1267, 1269. While not articulating a bright-line rule for what constitutes a position of great public trust, the Court in *Great Falls Tribune* held that the officer in that case was in such a position because "the public health, safety and welfare are closely tied to an honest police force." *Id*. It further held that "if [the officer] engaged in conduct resulting in discipline in the line of duty the public had a right to know." *Id*.

In subsequent cases, the Court held that elected officials' and teachers' expectations of privacy are unreasonable when allegations of misconduct directly related to the exercise of their public duties are asserted and because they hold

positions of great public trust. *Svaldi v. Anaconda-Deer Lodge County*, 2005 MT 17, ¶ 31, 325 Mont. 365, 106 P.3d 548 (teacher found to be in position of great public trust due to her care and instruction of children); *Jefferson County,* 2003 MT 304, 318 Mont. 173, 79 P.3d 805 (Court did not use term "great public trust" but held that Commissioner's decision to violate the law questioned her judgment and ability to work with peers and to properly supervise employees)*; Whitlock*, 255 Mont. 517, 844 P.2d 74 (mayor in position of great public trust as elected official accused of sexual harassment and discrimination).

In no case has the Court found that the expectation of privacy held by a public employee, regardless of station, is unreasonable solely because they are state or local government employees. It has only found the expectation of privacy unreasonable when two elements are present: a position of public trust (or great public trust); and allegations of or actual misconduct that calls into question a person's ability to perform his or her public duties. *Y ellowstone County v. Billings Gazette*, 2006 MT 218, ¶ 21, 333 Mont. 390, ¶ 21, ___P.3d ___ .

The need to satisfy both prerequisites, a position of public trust and alleged or actual wrongdoing, is made most clear in *Missoulian* where six university presidents' expectations of privacy in statements made about them during their performance appraisals were found to be reasonable. 207 Mont. 513, 675 P.2d 962. In that case, there were no allegations of wrongdoing against the presidents and the Court found their expectations of privacy reasonable.

The Court's jurisprudence also seems to indicate that the determination actually only requires the combination of a position of public trust and alleged or actual misconduct. The position becomes one of "great" public trust depending on the severity of the alleged or actual misconduct. Ultimately, the Court will have to decide if its test truly requires a position of "great" public trust and whether that term is defined by direct accountability to voters, direct responsibility to protect Montana's citizens, or merely high position in government.

Until the Court further defines "position of great public trust," the hearing examiner is unwilling to apply that term to front-line state workers or mid-level managers who would not qualify as persons in a position of great public trust under the current analysis. The hearing examiner finds that Schaffer was not in a position of great public trust, nor accused of wrongdoing. Accordingly, under this analysis, society would find her expectation of privacy reasonable.

d. *The types of documents included in the HRB investigative file aid in the determination of the reasonableness of Schaffer's expectation of privacy.*

Many of the documents in the investigative file are of the very type that the Montana Supreme Court found to be constitutionally protected, because society recognizes the expectations of privacy as reasonable. *Montana Human Rights Division*, 199 Mont. 434, 649 P.2d 1283 (personnel files, performance evaluations, application materials); *Missoulian*, 207 Mont. 513, 530, 675 P.2d 962 (performance evaluations); *Whitlock* (performance evaluations). Schaffer's expectation of privacy in those documents in the investigative file is reasonable.

In *Pengra v. State*, the husband and daughter sought to prevent disclosure of the dollar amount of a settlement in a wrongful death action against the state stemming from the death of the wife and mother at the hands of a Montana prison probationer. 2000 MT 291 ¶21, 302 Mont. 276 ¶21, 14 P.3d 499, ¶21. The Pengras argued that "it is not fair that just because a person files suit against the state, that person loses his right to privacy." *Id.* The Montana Supreme Court held that the Pengras' expectation of privacy was not one that society would recognize as reasonable because the Legislature had enacted Mont. Code Ann. § 2-9-303 that unconditionally required disclosure of settlement amounts paid by the state.[2] *Id.*

Writing in dissent, Justice Leaphart argued that Mont. Code Ann. § 2-9-303 was unconstitutional on its face because it created an "absolute preference for the right to know" without any consideration whatsoever of the Pengras' right to privacy. *Id.* at ¶43. He further stated "[t]hat she is deemed to have waived her right to privacy if she seeks recompense for that loss [of her mother] is a constitutional tragedy." *Id.*

The case *sub judice* is distinguishable from *Pengra* because no statutory provision requires disclosure of the settlement agreement reached between Schaffer and DOC without a balancing of the right to know and the right to privacy. While Admin R. Mont. 24.9.212 provides that settlement agreements involving claims of discrimination are public information, it does so "except to the extent that they relate to privacy interests entitled to protection by law." Under *Pengra*, Schaffer would not have waived her right to privacy in the settlement agreement simply by filing a claim seeking damages for violations of her Article II, Section 4 rights. Accordingly, her

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[2] It should be noted that the 2001 Montana Legislature amended Mont. Code Ann. § 2-9-303 to limit disclosure of settlement agreements under the Tort Claims Act when "a right of individual privacy clearly exceeds the merits of public disclosure."

expectation of privacy with regard to the settlement agreement is not unreasonable. Whether her expectation of privacy in the settlement agreement and other documents in the investigative file clearly exceeds the public's right to know is analyzed in Part B of this decision.

2. Williams' and Slaughter's Privacy Rights

Schaffer's complaint alleges that the person most responsible for the hostile work environment was Joe Williams, her immediate supervisor. On June 16, 2006, he waived his right to privacy with regard to the investigative report. Williams did not file an objection to the release of any other documents, as required by Admin. R. Mont. 24.8.210. Accordingly, any documents in the investigative file that contain his name, his statements or statements about him should be released to Lee, either in full or, if necessary to protect other individuals who asserted a privacy interest in the information, in redacted form.

Schaffer's complaint focuses on Williams' misconduct, but clearly alleges some wrongdoing on the part of Director Slaughter, individually, and as director of the department. His acts or failures to act are alleged to have fostered or contributed to the hostile work environment of which Schaffer complained. Slaughter has asserted his right to privacy and objected to the release of documents in the investigative file.

Slaughter's expectation of privacy may not be reasonable if he is in a position of great public trust. Whether a director of a state agency is in a position of great public trust is not an issue the Court has addressed. However, the Court has found that elected officials accused of conduct that affects their ability to perform their public duties have a reduced expectation of privacy in related matters. *Whitlock*, 255 Mont. at 521, 844 P.2d at 74; *Jefferson County,* 318 Mont. 173 ¶15, 79 P.3d 805. Because police officers are charged with upholding the law and to have the highest level of trustworthiness, they are in positions of great public trust. *Great Falls Tribune,* 238 Mont. at 107; 775 P.2d at 1269. While Slaughter is not an elected official as was the mayor in *Whitlock*, he directly reports to the Governor, the elected head of Montana's state government. While not a police officer, he was in charge of Montana's prison system, an integral part of law enforcement. In this instance, he was the director of the department and the direct supervisor of the alleged wrongdoer.

The Court has held that when the nature of a person's job makes him "subject to public scrutiny in the performance of his duties, the public has the right to be

informed of the actions and conduct." *Whitlock,* 255 Mont. at 522, 844 P.2d at 77. The Supreme Court in *Bozeman Daily Chronicle* found that "allegations of sexual misconduct went directly to the official's ability to properly carry out his duties and, therefore, should not be withheld from public scrutiny." 260 Mont. at 226, 859 P.2d at 440. The hearing examiner wants to make it clear that the allegations against Slaughter did not involve sexual activity, however, they did involve sexual discrimination and a hostile work environment. Those allegations clearly call into question his ability to carry out his duties as director of a workforce that employs hundreds of women.

In somewhat similar circumstances, the First Judicial District found that Slaughter's predecessor, Rick Day, and his subordinate, Montana State Prison Warden Mickey Gamble, did not have a reasonable expectation of privacy in documents sought by a woman attacked by a trusty at one of the DOC's facilities. *Weeks v. State*, No. BDV-96-1433 (1st Judicial. Dist. Ct. December 22, 1997). Judge Sherlock held that Weeks had "a substantial interest in learning of the policies which allowed a dangerous offender to go unsupervised in a location where civilians temporarily resided." *Id.* Day's and Gamble's conduct under these circumstances was a "proper matter for public scrutiny." *Id*. quoting *Bozeman Daily Chronicle.* Similarly, Lee's inquiry into allegations of wrongdoing of a public official in a position of great public trust is a matter for public scrutiny.

The hearing examiner finds that Slaughter's expectation of privacy is not one society would regard as reasonable.

While persons in positions of great public trust have no expectation of privacy with regard to information directly related to the wrongdoing, other private information may remain private. *Jefferson County,* ¶15; *Whitlock*, 255 Mont. 517, 521, 844 P.2d 74. *Id*. In the underlying matter, Director Slaughter's alleged wrongdoing was associated with his contribution to, and failure to address adequately, the alleged hostile work environment. All the documents in the file that involve him are related to the alleged wrongdoing.

3. Privacy Rights of Witnesses and Other DOC Employees

a. *Private information disclosed in witness statements may be protected from disclosure.*

Numerous witnesses provided statements to the HRB during the informal investigation of Schaffer's complaint. Those statements include their observations of the conduct of Schaffer and Williams; information about incidents involving themselves or others and Schaffer and Williams; and their concerns about retaliation and the general status of the agency. DOC on behalf of all the witnesses asserts that none of these statements should be publicly disclosed.

The giving of testimony is both required by law and a public duty necessary to the welfare of the public. *Blair v. United States*, (1919) 250 U.S. 273, 281 (citing *Wilson v. United States*, 221 U.S. 361, 372). A witness may not be compelled to incriminate himself and may be excused if testifying would bring harm to him or his

family, otherwise "the witness is bound not only to attend but to tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry." *Blair* at 282 (internal citation omitted). While witnesses may also seek protective orders to limit disclosure of their testimony, the informal nature of the HRB investigation[3] could easily lead a witness to believe that their statements would be kept confidential. *See e.g.*, Mont. R. Civ. P. 26(c).

Whether a witness involved in an informal human rights complaint investigation has a reasonable expectation of privacy in statements regarding their observations of the conduct of others made to a human rights investigator or in private information provided to the investigator are not issues the Montana Supreme Court has directly addressed. The Court has, however, stated that "[p]rivacy has been defined as the ability to control access to information about oneself." Fried, *Privacy* (1968), 77 Yale L.J. 475, 482, 483 *cited in State v. Hyem* (1981), 193 Mont. 51, 62, 630 P.2d 202, 209. Thus, put another way the issue here is whether witnesses who provide private information in an informal human rights investigation lose control over information about themselves. A number of cases suggest that witnesses have a reasonable expectation of privacy in private information included in their statements given to human rights investigators.

In one of three cases involving the public's right to know handed down while the hearing examiner was drafting this decision, the Court found that the public had the right to know information about third parties contained in a party's deposition because: 1) the information went directly to the claim of the charging party; 2) the third parties had not asserted a privacy interest in the deposition testimony; and 3) the deponent was a person in a position of public trust and the information sought went directly to *his knowledge* of the third parties' job histories and official duties. *Yellowstone County*, ¶¶26 -27. Those elements are not met in this case. While some of the information sought may be directly related to Schaffer's complaint, the witnesses here have asserted a right to privacy in their private information.

In *Goyen v. City of Troy* (1996), a witness whose testimony in a closed public meeting acknowledged that "she and officer Goyen had engaged in sexual activity in or near a city patrol car while the officer was on duty and in uniform" was found to have a reasonable expectation of privacy in that testimony that society is willing to

[3] Witness statements are not taken under oath, with the aid of a court reporter or otherwise verified.

recognize. 276 Mont. 213, 222, 915 P.2d 824, 830. In *Worden v. Montana Bd. of Pardons & Parole* (1998) the Court stated:

> While we agree that encouraging the flow of information to the Board of Pardons is an important policy, we do not agree that anyone who provides information to the Board necessarily has a privacy interest that outweighs the Inmates' right to know. . . . A victim may have a privacy interest in a letter submitted to the Board of Pardons, but often this interest can be served by simply redacting his or her address or phone number. Likewise, when members of the community submit letters to the Board of Pardons expressing concern about an Inmate's possible parole, names and addresses can be removed. We conclude that each document in an Inmate's file must be examined to determine whether all or part of it is subject to the privacy exception of the right to know.

1998 MT 168 ¶29, 289 Mont. 459, 463, ¶29, 962 P.2d 1157, 1163, ¶29.

As previously discussed, the Supreme Court has also held that an accuser and witnesses to an alleged incident have a subjective privacy interest which society is willing to recognize as reasonable in an investigation focused on the accused. *Bozeman Daily Chronicle*, 260 Mont. at 230, 859 P.2d at 441.

In *Montana Human Rights Division*, the Court struck down the division's rule preventing the release of information resulting from a complaint or an investigation thereof *prior to hearing,* clearly indicating that once the matter went to a contested case hearing or trial the information was to be released to the public unless perhaps a protective order was issued. 199 Mont. at 447-448, 649 P.2d at 1290 (emphasis added). While this rule was struck down by the Court, it did so because the rule provided inadequate protection for privacy interests, and not because it found protecting the information before hearing was constitutionally or otherwise flawed.

The holdings in *Montana Human Rights Division* and *Bozeman Daily Chronicle* are consistent with an informal human rights investigative process where victims and witnesses may have a reasonable expectation of privacy in private information provided to the HRB and the formal nature of hearings and trials where testimony of alleged victims and witnesses is taken under oath and where their identities are protected only if they are at great risk of harm. It is also important to remember that

Mont. Code Ann. § 49-2-504 labels a human rights investigation as an informal process. As such, affording privacy to witnesses is appropriate until such time as a formal process is initiated.

*Montana Human Rights Division* also provides guidance on how to protect the privacy interests of witnesses "by restricting the release of information which suggests the identity of employees whose files may be used in investigating the alleged discriminatory practices by respondents." 199 Mont. at 449, 649 P.2d at 1291.

The HRB investigative file also contains information about other claims of sexual harassment or discrimination not related to Schaffer's complaint (R-55-70 and R-75). In *Montana Human Rights Division,* the Court held that employment records of employees only remotely involved in a human rights investigation were protected by the right to privacy. 199 Mont. at 443, 649 P.2d at 1288. The information in documents R-55-70 and R-75 is either a compilation of data from remotely-related individual personnel files or information directly from remotely-related individual personnel files, the type protected in *Montana Human Rights Division*. Additionally, those individuals have not been notified that the information is subject to public disclosure. The hearing examiner finds that these individuals have an expectation of privacy in those documents that society is willing to recognize as reasonable.

b. *Release of private information about witnesses may have a chilling effect on future human rights investigations.*

DOC argues that identification of witnesses or public disclosure of their statements or private information will dissuade future victims of discrimination seeking relief under the Montana Human Rights Act and dissuade witnesses from providing statements in future investigations. While the DOC cites no authority for this assertion, Lee does not argue against it. The hearing examiner finds that in this particular context, a human rights investigation involving the DOC and its leadership, such disclosures could have a chilling effect.

In *Montana Human Rights Division*, the Court held that in order for the Commission to fulfill its duties under Article II, Section 4, its power had to be "broad enough to allow a thorough scrutiny of the circumstances surrounding complaints of discrimination." 199 Mont. at 445, 649 P.2d at 1289. In so holding, the Court found a compelling state interest sufficient to invade an individual's right to privacy. Similarly here, if witness identities and personal information are not protected from

disclosure, the ability of the HRB to fully investigate other claims of discrimination may be seriously undermined.

In discussing the potential public disclosure of employment records to the Human Rights Division, the Court held that although "respondents gave their employees no assurances of confidentiality, we believe that employees would reasonably expect such communication normally would be kept confidential." 199 Mont. at 442, 649 P.2d at 1287-1288. In this case, only one witness, other than Slaughter, has asserted that they were promised confidentiality of their statements. There is also no evidence or assertion of any notice that the statements would be publicly disclosed. In such an instance where witnesses reveal otherwise private information about themselves or other non-parties gathered during an informal investigation, it is reasonable to expect such communication would be kept confidential.

In *Dorr v. Bd. of Psychologists,* the First Judicial District Court applied the same reasoning to letters submitted to the Board of Psychologists in support of a psychologist against whom a complaint had been brought. No. BDV-99-359, ¶9-10 (1st Judicial Dist. Ct., Mont., November 9, 1999). The district court found that the letter contained "personal and sensitive details which the patient may not have expressed if she did not believe the letter would remain confidential." *Dorr,* ¶11. The Board of Psychologists in *Dorr* argued:

> . . . that public policy supports their contention that society is willing to accept that persons writing letters to the Board would expect them to remain confidential. The Board occupies a position of public trust in which it regulates state psychiatrists. The Board seeks to encourage persons with concerns about the professional behavior of psychiatrists to report those concerns to the Board. The Board contends that violations might go unreported if the complainant could not be assured of strict confidentiality. This is certainly an expectation of privacy that society is willing to recognize." *Dorr*, ¶11-12.

Given the witnesses' perceptions of the hostility of the work environment and their concerns of retaliation, it is a reasonable conclusion that other parties could be dissuaded from bringing complaints seeking redress of discriminatory actions against them if their identities or private information was disclosed. Moreover, even if complaints were filed, witnesses could be reluctant to come forward willingly if

private information about themselves would be disclosed prior to a hearing or trial in the matter. The ability of others to bring claims for discrimination could be substantially reduced and investigation of claims could be considerably hampered, if not entirely derailed, if private information about witnesses suddenly appeared in the news. Persons whose conduct was blameless according to the allegations presented would be unlikely to cooperate with the process if they are actually subjected to or at reasonable risk of public disclosure of their personal and private information.

c. *Lee recognizes the reasonableness of non-disclosure of witnesses' identities.*

In its briefs, Lee does not oppose the redaction of "non-public" witness names from any documents disclosed as a result of their information request. In choosing this language Lee appears to be asserting that all "public" employee witnesses' identities should be disclosed because they hold positions of great public trust. However, under the analysis of "positions of public trust" discussed above in Part (1)(b), the witnesses in this case, other than Slaughter, are not public employees in positions of great public trust.

In view of the fact that the underlying complaint was settled just after the informal investigation was completed, but before any hearing or trial, and for the reasons cited above, the hearing examiner finds that the witnesses involved in the investigation of Schaffer's complaint have an expectation of privacy in their private information that society is willing to recognize as reasonable.

B. Balancing Individual Privacy Against the Merits of Public Disclosure

Resolving the conflict between the public's right to know and the individual's right to privacy requires the department "to balance 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. Under this standard, the right to know may outweigh the right of individual privacy, depending on the facts." *Missoulian,* 207 Mont. 513, 529, 675 P.2d 962, 970 (original emphasis); *Havre Daily News*, ¶ 23.

In balancing those interests "[I]t is apparent that there must be a step by step learning process involved, in which the administrative agencies and the courts will

determine on a case by case basis how the right to privacy and the right to know should be balanced." *Montana Human Rights Div.,* 199 Mont. at 446-447, 649 P.2d 1283. "*Montana Human Rights Division* and *Mountain States* indicate that it is appropriate and necessary to balance the competing rights in the context of the purposes, functions and needs of the governmental entity involved and the purposes and merits of the asserted public right to know." *Missoulian*, 207 Mont. at 530-531, 675 P.2d at 971.

It is important to remember that Article II, Section 9 favors disclosure, limiting disclosure only when the demand of individual privacy *clearly* exceeds the merits of disclosure. "It is the party asserting individual privacy rights which carries the burden of establishing that those privacy rights clearly exceed the merits of public disclosure." *In the Matter of T.L.S.* 2006 MT 262, ¶31, ___ Mont. ___, ___ P.3d ___ (citing *Bozeman Daily Chronicle*, 260 Mont. at 227, 859 P.2d at 441; *Worden*, ¶¶31-32).

DOC has shown that Schaffer and the witnesses have a reasonable expectation of privacy in their private information. However, the public's right to know in this case is strong. The underlying matter is related to charges of sexual harassment involving the upper echelons of a state agency and a settlement of those claims by that agency. Wrongdoing was alleged and public money was spent. Under those circumstances, Schaffer's and the witnesses' expectations of privacy must give way to the public's right to know about the nature of the allegations and what led to the government's decisions.

The hearing examiner also recognizes some information that should not be disclosed because the right to privacy clearly exceeds the merits of such a disclosure. Because the Montana Supreme Court has not addressed all the issues faced here, a review of the intent of the drafters of the right to know provision is instructive. Chairman Wade Dahood of the Bill of Rights Committee, in explaining the provision at the 1972 Constitutional Convention, stated that the right to know was not unfettered and that it reached its limits when the press invaded an individual's dignity. Tr. of the Montana Constitutional Convention Vol. 5 p. 1673-1674. He also explained that the function of the press was to be "a watch guard on the activity of government and, second to make sure that the rights of the individual citizen of a free democracy are protected" and further that the right to know was for the benefit of the people and not for the press "to sell newspapers." Tr. at p. 1673. Here, the purposes and merits of the asserted right to know involves what Delegate Dahood argued was the most important aspect of a free press - being a watchdog over our

government to ensure its actions conform to the principles of a free democracy. *See also New York Times Co. v. United States*, (1971) 403 U.S. 713, 717.

When disclosure of otherwise private information strays far from that function, where it might only serve to dissuade others from seeking redress from discriminatory practices or goes past its watch guard function and invades an individual's dignity, the demand of individual privacy clearly exceeds the merits of disclosure. *See Missoulian*, 207 Mont. at 532, 675 P.2d at 972.

It is the hearing examiner's intent to provide Lee with as much information as possible. All documents and statements of Williams and Slaughter will be released, redacting only the names of witnesses asserting a privacy interest. Schaffer's personnel records will not be released. Information not of a private nature and that only contains her name will not be redacted – the public is well aware that she filed a complaint against DOC. All but one witness statement will be released with names or other identifying information redacted.[4]

Those few documents which contain the names and private information of multiple individuals and information that might lead to the identity of those individuals will not be disclosed. In the few instances where disclosure of the information contained in a witness statement or other document exceeds "the purposes and merits of the asserted public right to know" and would unnecessarily violate an individual's dignity, that information will be redacted. The settlement agreement reached between Schaffer and the State of Montana is perhaps the single document where the public's right to know is strongest. Privacy interests in that document do not clearly outweigh that right. Accordingly, it will be released in its entirety. Information in any document pertaining to home addresses, telephone numbers and social security numbers will be redacted.

[4] Early in HRB's investigation, a witness asked to have the information they recently provided withdrawn, that it not be used for purposes of the investigation and for it to remain confidential because they feared personal and professional retaliation. While still in the HRB file, the information does not appear to have been used by the HRB to reach its finding. The information echoes other witnesses' observations that the hearing examiner intends to disclose and does not contain exculpatory evidence. Under these circumstances, this individual's expectation of privacy weighs considerably heavier than the expectations of the other witnesses who provided information in the underlying matter. Concomitantly, there is less merit to disclosure of such information when it will not help the public understand how a government decision was reached. The demand of this individual's privacy clearly exceeds the merits of public disclosure.

C. Privileges

DOC argues that 13 documents in the investigative file are subject to either the attorney-client or work product privilege or both. Lee argues that this is a public information request not a discovery dispute and further that there is no legal basis for DOC to assert either privilege.

The Montana Supreme Court has not addressed the issue of whether a state agency can assert either attorney-client or work product privileges in an information request case under Art. II, Section 9. It has found that neither privilege applies in the open meetings context and struck down a statutory provision that allowed public meetings to be closed when a governmental body was consulting with its counsel regarding litigation strategy. *See Associated Press v. Board of Public Education* (1991), 246 Mont. 386, 804 P. 2d 376. While the issues here are similar to those in *Associated Press,* the hearing examiner can dispose of the privilege issue without applying that case in this context.

"Absent a voluntary waiver or an exception, the [attorney-client] privilege applies to all communications from the client to the attorney and to all advice given to the client by the attorney in the course of the professional relationship." *Palmer by Diacon v. Farmers Ins. Exch.* (1993), 261 Mont. 91, 108-109, 861 P.2d 895, 906 (citing *Kuiper v. Dist. Ct. of the Eighth Judicial Dist.* (1981), 193 Mont. 452, 461, 632 P.2d 694, 699); *See also* § 26-1-803, MCA.

The work product privilege is governed by Rule 26(b)(3), M.R.Civ.P., and generally provides that a party may obtain discovery of documents prepared in anticipation of litigation or for trial by the other party's attorney only when the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Even if such a showing is made, "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." *Kuiper,* (1981) 193 Mont. at 463, 632 P.2d at 700.

A literal interpretation of Rule 26(b)(3), M.R.Civ.P., would confine application of the rule to those instances where discovery is sought. *Id*. However, the Court has held that "the work product rule must be given a liberal interpretation in order to

effectuate its purpose." *Id*. The Court further found that "the rule can be waived." *Id*.

As a general rule, "[a] person upon whom these rules confer a privilege against disclosure waives the privilege if the person . . . voluntarily discloses or consents to disclosure of any significant part of the privileged matter." Rule 503, M.R.Evid. *Palmer by Diacon* 261 Mont. at 112, 861 P.2d at 906. There is a two-part test for an implied waiver of attorney-client privilege: (1) the client's implied intention; and (2) the element of fairness and consistency. *PacifiCorp v. Department of Revenue* (1992), 254 Mont. 387, 396, 838 P.2d 914, 919. In *Kuiper*, the court held that if no legal action is taken to protect against wide dissemination of the materials, voluntary relinquishment of the right could be found. 193 Mont. at 460, 632 P.2d at 698.

In this case, DOC, the client, voluntarily produced 9 of the 13 documents to which it now claims an attorney-client privilege, but made no subsequent attempts to recover them. It is clear that DOC intended to disclose the documents in question.

Two of the documents to which DOC claims a privilege were provided by Schaffer. Those documents are emails sent by a DOC attorney to Schaffer, Williams and Slaughter and involve the department's response to Schaffer's complaints about Williams. The DOC attorney could not have been representing both Schaffer and Williams, so no attorney-client privilege could have attached in the first instance. The remaining two documents are copies of emails between Human Rights Bureau staff and their attorney within the Department of Labor. Once a department-created document is placed in a public file it becomes a public document, and any privilege that may have attached to that document is waived, although those documents could still be protected if an asserted privacy interest is reasonable and clearly exceeds the merits of public disclosure.

The next element to be considered is fairness and consistency. In *PacifiCorp*, the company objected to use of the [inadvertently disclosed] documents from the first time they were referred to during discovery. 254 Mont. 387, 838 P.2d 914. The Court held that "DOR knew well in advance of trial that use of the documents was an issue, and therefore, should not be surprised or unprepared because of their exclusion." *Id*. at 397, 920.

Here, DOC made no attempt to keep the nine documents it submitted from being disclosed to Lee until the eleventh hour. And to this day, DOC has made no attempt to have them returned. No one has sought the return of the other four

documents. Accordingly, it would be unfair to now withhold these 13 documents from the public based on an assertion of attorney-client privilege. Accordingly, the hearing examiner finds that any privileges that may have attached to the 13 documents has been waived.[5]

## IV. DELAYING PUBLIC DISCLOSURE

Mont. Code Ann. § 2-4-702(2)(a) empowers an aggrieved party to file a petition for judicial review of this final agency decision within 30 days after service of this decision. Schaffer and DOC expressed concern during these proceedings about disclosure of the documents before they had the opportunity to ask for a stay to seek judicial review. Once information is in the public record, it is essentially impossible to take it back out, particularly when the requesting party is a news entity that seeks the information to provide it to the public. Therefore, the only parties who will have immediate access to the disclosed documents, under this final decision, will be the HRB, Schaffer and DOC[6]. They will have 20 days to review the documents proposed for release and to file a petition for judicial review. That will allow the parties asserting privacy rights an opportunity to seek a stay before the documents are placed in the public record. After the 20th day, the documents will be released to Lee, which can then exercise its right to seek judicial review.

## V. CONCLUSIONS OF LAW

1. The department has jurisdiction. Admin. R. Mont. 24.8.210.

2. Williams has waived any privacy right.

3. Slaughter, as a person in a position of great public trust, does not have a reasonable expectation of privacy.

4. Schaffer's expectation of privacy in an informal investigation conducted by the HRB is one that society would find reasonable.

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[5] Public disclosure of the 13 documents based on the public's right to know is subject to the analysis in Part I of this decision.

[6] For the benefit of the parties an index listing all the documents in the HRB file and their disposition is included with this decision.

5. Witnesses involved in the investigation of Schaffer's complaint have an expectation of privacy in private information they provided that society would find reasonable.

6. Individuals identified in documents R-55-70 and R-75 have an expectation of privacy that society would find reasonable.

7. Schaffer and the witnesses have an expectation of privacy in the information not disclosed that clearly exceeds the merits of public disclosure.

8. Individuals identified in documents R-55-70 and R-75 have an expectation of privacy that clearly exceeds the merits of public disclosure.

## VI. ORDER

Based upon the foregoing, the Human Rights Bureau is directed to maintain a sealed copy (attached to HRB's copy of the decision) of the disclosed documents contained in the investigative file compiled in response to Schaffer's complaint of illegal discrimination filed against the Department of Corrections. The Human Rights Bureau shall not open the disclosed documents to the public record until November 24, 2006.[7] Copies of the disclosed documents are also provided, as non-public records, to Schaffer and DOC, with their copies of this decision. All copies of the disclosed documents provided to the parties are to remain sealed until November 24, 2006. Unless otherwise directed by court order, on November 24, 2006, the Hearings Bureau will release a copy of the redacted documents to Lee. The Human Rights Bureau shall not release any other information from the file, unless otherwise ordered.

DATED this 2nd day of November, 2006.

DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

By: /s/ DAVID A. SCRIMM

[7] The 20-day time period for review ends on November 23, 2006, Thanksgiving day. Accordingly, the disclosed documents will be made available to Lee and the public on November 24, 2006, the next business day.

David A. Scrimm, Hearing Examiner
Hearings Bureau
Montana Department of Labor and Industry

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.

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