

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

Case No. 1624-2009

IN RE INFORMATION REQUEST BY
PATRICK FLAHERTY

Final Agency Decision

I. INTRODUCTION

On March 24, 2009, Patrick F. Flaherty requested a copy of the investigative findings in the Human Rights Act case of *Michael Little vs. City of Cut Bank*. Pursuant to Admin R. Mont 24.8.210, the HRB sent notice of the request to the parties' attorneys asking whether their clients objected to the release of the requested information. The City and the officer involved in the complaint objected to the release of the Final Investigative Report (FIR), asserting their right to privacy as declared in Article II, Section 10 of the Montana Constitution.

The HRB notified Flaherty that it would not be releasing the requested information due to the objections. On March 27, 2009, Flaherty requested review of the HRB's decision and the matter was transferred to the Hearings Bureau on March 30, 2009.

On April 3, 2009, the Hearings Bureau issued a notice of hearing and telephone conference in this matter. Counsel for all parties to this proceeding appeared. The parties agreed to submission of the matter on briefs and supporting documents and to informal disposition under Mont. Code Ann. § 2-4-603. The City of Cut Bank did not file any briefs in this matter, thereby waiving any objection to the release of information.

Based on the arguments of the parties in their briefs, the hearing officer issues this final agency decision.

II. FINDINGS OF FACT

1. Patrick F. Flaherty, in addition to being an attorney at law, is a member of the public.
2. Chad Milbrandt is or was a police officer with the City of Cut Bank police department.
3. The City of Cut Bank was charged with violating the Human Rights Act based on Milbrandt's interactions with Michael Little and his minor daughter.
4. On April 3, 2008, the HRB issued a final investigative report in which the

investigator found that “the allegations of Little’s complaint are supported by a preponderance of the evidence” and “recommended a finding of reasonable cause to believe unlawful discrimination in the area of governmental services based on race occurred in this case.”

5. The City of Cut Bank settled the complaint filed by Little for the sum of \$42,500.00.

III. DISCUSSION¹

When a third party seeks disclosure of documents in an HRB investigative file, Admin R. Mont. 24.8.210 vests the hearing officer 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 Department 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 officer Chad Milbrandt 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 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 FIR, the hearing officer 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, 333 Mont. 331, 142 P.3d 864.

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.

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.

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 Human Rights Commission and the department recognize 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, by adopting 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.

B. *Milbrandt's expectation of privacy is unreasonable because he holds a position of great public trust.*

Milbrandt was a police officer. As such, he was in a position of great public trust. In a line of cases beginning with *Great Falls Tribune v. Cascade County Sheriff* (1989), 238 Mont. 103, 107; 775 P.2d 1267, 1269, 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." While not articulating any 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.*

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 hearing officer finds that Milbrandt was in a position of great public trust and that his conduct resulted in the HRB finding reasonable cause to believe that the City of Cut Bank had violated the Human Rights Act. Accordingly, under this analysis, society would not find his expectation of privacy reasonable.

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. Once information is in the public record, it is essentially impossible to take it back out. Therefore, the only party who will have immediate access to the FIR, under this final decision, will be Milbrandt. He will have 20 days to review the FIR and to file a petition for judicial review. After the 20th day, the FIR will be released to Flaherty.

V. CONCLUSIONS OF LAW

1. The department has jurisdiction. Admin. R. Mont. 24.8.210.
2. Milbrandt, as a person in a position of great public trust, does not have a reasonable expectation of privacy in the contents of the Final Investigative Report.

VI. ORDER

Based upon the foregoing, the Human Rights Bureau is directed to release the FIR in *Little vs. City of Cut Bank*, Case No. 0085012664 to Patrick F. Flaherty on July 21, 2009, unless otherwise directed by court order.

DATED this 30th day of June, 2009.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ DAVID A. SCRIMM
DAVID A. SCRIMM
Hearing Officer

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