

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

Case No. 406-2010

IN RE INFORMATION REQUEST BY
CHRIS PURCELL

Final Agency Decision

I. INTRODUCTION

This matter arises as a result of Chris Purcell's request that the Human Rights Bureau disclose to her (1) the interviewing score sheets from her interview for the position of Centralized Intake Bureau Chief and (2) a copy of the questions that were posed to all of the interviewees and the model answers to those questions.¹ These three documents were provided to the Human Rights Bureau by the Montana Department of Health and Human Services (DPHHS) as part of the Human Rights Bureau's investigation into Purcell's human rights complaint against DPHHS. The matter was assigned to this hearing officer for determination of whether the information should be disclosed.

By written notice (contained in each party's opening brief), each party waived formal contested proceedings under §2-4-603, MCA, and agreed to submit this matter upon written briefs. Purcell filed an opening brief on September 22, 2009, DPHHS filed its response on October 6, 2009, and Purcell filed a reply brief on October 14, 2009. Based upon the facts as set forth by the parties in their briefs, and having considered the applicable legal authorities, the following findings of fact, conclusions of law, and order are made.

¹ Purcell initially also sought the "scoring sheets" from Mark Laramore's interview (the person who, from the group of applicants that included Purcell, was selected to fill the position of Centralized Intake Bureau Chief). However, in the process of briefing this issue, Purcell has apparently dropped her request for this information, noting "[i]f the state does not wish to provide me with the Oral Interview Rating Forms from the interview of Mark Laramore absent a court order, at this time I accept that." Purcell's opening brief, page 4. She reiterated this position in her reply brief, noting "I can see that there may be an issue with the release of the information surrounding Mark Laramore." Purcell's reply brief, Page 3. Accordingly, the hearing officer will not analyze the information regarding Mark Laramore as Purcell is not pursuing that information at this time.

II. FINDINGS OF FACT:

1. Purcell, along with several other applicants, including Mark Laramore, applied for the position of Centralized Intake Bureau Chief at DPHHS. Oral interviews were conducted among the applicants using a set of questions that were prepared by DPHHS personnel prior to the scheduled interviews.

2. The same three DPHHS employees were part of the interview panel and interviewed each one of the candidates. In interviewing the candidates, the interviewers utilized the questions and model answers described in the previous paragraph. The interviewers compared the applicant's answers to model interview answers in order to score each of the applicants. The interviewers' ratings of each applicant's answers were recorded on an "Oral Interview Rating Form."

3. After completing the interviews, Mr. Laramore was chosen for the position. Purcell believed that the decision not to hire her was motivated by unlawful age discrimination. As a result, in April, 2009, she filed a complaint with the Montana Human Rights Bureau alleging age discrimination. That investigation is presently pending before the Human Rights Bureau.

4. As part of the investigation process, DPHHS provided the Human Rights Bureau with the questions asked of the applicants during the interview process. DPHHS also provided the Human Rights Bureau with the model answers and the Oral Interview Rating Form used to rate Purcell's answers. DPHHS provided this information with the caveat that it should not be disclosed to Purcell or anyone else without a properly executed court order.

III. DISCUSSION

In her request, Purcell seeks disclosure of the questions utilized during the interviews, the model answers and the Oral Interview Rating Forms prepared by the interviewers to rate her answers. She does not seek any other applicant's answers. DPHHS opposes this request, arguing that the questions, which Purcell has already heard in her interview, the model answers and her interview rating form should not be disclosed because DPHHS has a legitimate business need to reuse the procedures and criteria and disclosure to Purcell would jeopardize the agency's ability to select the best candidate for the position within the meaning of Admin. R. Mont. 2.21.3728. In reply, Purcell disagrees as a factual matter that the agency reuses the questions and model answers and further argues that the selection process cannot be jeopardized as the candidate has already been selected.

The administrative rules which regulate information requests recognize that “in some cases, the interest of a person in viewing material related to a complaint or gathered as part of the investigation will compete with individual privacy interests.” Admin. R. Mont. 24.8.210.

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.

Admin R. Mont. 24.9.212 (1) requires the department to maintain the confidentiality of privacy interests “entitled to protection by law.”

There is no question that DPHHS has no constitutional privacy right at stake in the information which Purcell has requested. The Montana Supreme Court has recognized that the term “individual privacy embodied in the constitutional section applies only to human individuals only, not state or corporate entities. *Great Falls Tribune v. Montana Public Service Commission*, 2003 MT 359, ¶38, 319 Mont. 38, 82 P.3d 876. It is also clear, however, that where some other statute or rule provides protection against disclosure, a state entity may be able to assert the protection of such a statute. 2003 MT ¶38.

As no individual privacy interest is at stake in this case, DPHHS is necessarily relegated to arguing that it may withhold the requested documentation from Purcell under the auspices of Admin. R. Mont. 2.21.3728. The hearing officer does not find this rule to be a compelling basis for withholding the information in this matter.

Taking the criteria of Admin. R. Mont. 2.21.3728 in reverse order, Purcell is correct in arguing that the selection process cannot be hindered in its efforts to select the best candidate since the selection process has already occurred. In the face of Purcell’s clear constitutional right to examine the documents under Article II, Section 9, DPHHS’ argument that future interviews may be at stake is simply too

speculative. This leaves consideration of the agency's need to reuse the questions and model answers for future applicant screening.

Without any countervailing considerations (such as limitations placed upon Purcell's use or dissemination of the information), DPHHS' business concerns might cause the hearing officer to determine that the information sought should not be disclosed. However, DPHHS' business concerns do not stand unopposed in this case. First, the concerns are mitigated by the fact that Purcell has already heard the questions in her interview for the position. Second, Purcell is correct in arguing that she should be able to review information which she provided to DPHHS about herself. *See, e.g., Pacific Corp v. Department of Revenue (1992)*, 254 Mont. 387, 838 P.2d 914 (holding that tax audits performed on a claimant by other states which were utilized by the Montana Department of Revenue to determine that the claimant had not paid sufficient license taxes were discoverable by the claimant in the claimant's action disputing the DOR's determination despite the existence of a Montana statute which specifically provided that such information was confidential and available only to certain governmental entities). *See also, for persuasive value only, City of Billings v. Owen*, DV 03-218, Thirteenth Judicial District Court of Montana City, 2006 Mont. Dist Lexis 985. Third, the Supreme Court has recognized that the use of appropriate use of protective orders can help to alleviate potential violations of privacy interests. *See, e.g., Montana Human Rights Division v. City of Billings (1982)*, 199 Mont. 434, 449, 649 P.2d 1283, 1291 (recognizing that protective orders may be fashioned that permit the disclosure of available information while at the same time protecting privacy interests of third parties). Fourth, Purcell has articulated a very compelling interest of permitting her to fully present her concerns regarding her discrimination complaint at the investigative proceeding which determines the existence of reasonable cause. The consequences of a "no reasonable" cause finding are substantial because such a finding places additional procedural hurdles in front of a complainant (such as the potential inability to pursue her claim in the far less expensive forum of an administrative proceeding when compared to a district court). Purcell should not have to hope that the Human Rights Investigator can "connect the dots" of pieces of information which might otherwise be presented in a cohesive context by Purcell if she had access to certain information.

Weighing Purcell's right to know and DPHHS' concerns of confidentiality, the hearing officer finds that disclosure of the information Purcell seeks is appropriate if limitations regarding dissemination are placed upon her. The hearing officer has been presented with no suggestion by either party that Purcell will not abide by such

restrictions and the hearing officer is satisfied that she will comport with any limitation imposed upon the dissemination of the information.

IV. ORDER

Accordingly, it is ordered that the Human Rights Bureau will provide Purcell with copies of the questions, model answers and her oral interview rating sheet. Purcell shall not copy those documents nor disseminate them to any person other than counsel, an appropriate investigating agency, court or other such forum. Purcell shall not use them for any purpose other than pursuing her claims in her Human Rights Complaint.

DATED this 15th day of October, 2009.

DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT

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GREGORY L. HANCHETT
Hearing Officer

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.