

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

Case No. 483-2012

IN RE INFORMATION REQUEST BY
HARLOWTON TIMES-CLARION

Final Agency Decision Re Information Request

I. INTRODUCTION

On August 15, 2011, Shirley Wegner, editor of the Harlowton Times-Clarion, (Clarion, requested “the charges and settlement agreement pertaining to the Everett Misner versus Wheatland County case filed with the Human Rights Bureau.” Pursuant to Admin R. Mont 24.8.210, the HRB sent notice of the request to Everett Misner and to Linda Hickman, Wheatland County attorney, (County) 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.¹

The HRB notified the Clarion on August 29, 2011, that it would not be releasing the requested information due to the objections. On September 1, 2011, the Clarion through its attorney, Mike Meloy, requested review of the HRB’s decision and the matter was transferred to the Hearings Bureau on September 7, 2011.

On September 12, 2011, the Hearings Bureau issued a notice of hearing and telephone conference in this matter. Counsel for all parties to this proceeding appeared at the September 20, 2011 conference. The hearing officer determined that the County did not have standing to assert an objection to the release of the settlement agreement pursuant to Admin. R Montana 24.8.210(3). 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 parties agreed that Misner would have until October 14, 2011 to file a brief in support of his objection to the release of the settlement agreement based on

¹ The settlement agreement contains a non-disclosure provision that may be the primary reason the parties objected to its release.

Misner's privacy interests. Counsel for the Clarion, Mr. Meloy would have until October 28, 2011 to file a response brief. On September 30, 2011, the Hearings Bureau received a document from Mr. Meloy requesting the complaint as well as the settlement agreement. The hearing officer maintained the briefing schedule. After reviewing the parties' briefs and conducting an in camera review of the complaint and the settlement agreement, the hearing officer held a conference with the parties' attorneys hoping to resolve the matter by stipulation. Subsequent to that conference Mr. Meloy has informed the hearing officer that his client has no objection to the hearing officer redacting one particular clause of the complaint.

Based on the arguments of the parties in their briefs and an in camera review of the requested documents, the hearing officer issues this final agency decision.

II. FINDINGS OF FACT

1. On November 22, 2010, Everett Misner, an employee of Wheatland County Sheriff's Department, filed a claim with the Department of Labor and Industry Human Rights Bureau (HRB) alleging that the Wheatland County Sheriff's Office and Sheriff James Rosenberg discriminated and retaliated against him on the basis of his political beliefs.

2. Prior to the HRB issuing a final investigative report, the parties settled the matter on July 5, 2011.

III. DISCUSSION²

When a third party seeks disclosure of documents in a 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 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 Misner, the County and third parties whose names or identities are disclosed in the complaint or settlement agreement outweigh the merits of the

² 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.

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 requested documents, 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, 341, 142 P.3d 864, 871.

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, 78.

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, Misner; the individuals who allegedly created the hostile work environment; and parties whose names or identities are disclosed in the documents. 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 officer will consider all of these categories of potential privacy demands.

1. Misner's Privacy Rights

Misner's only objection to the release of the settlement agreement is based on his agreement to not do so pursuant to its terms. His contractual obligations are simply insufficient to prevent disclosure of documents in the public record. Additionally Misner does not object to the release of the complaint based on his own privacy interests. Instead, Misner argues that the privacy interests of others named

in the complaint have privacy interests that should be protected. Misner asserts their rights under Amin. R. Mont 24.8.210(c).

Neither the complaint nor the settlement agreement contains information about Misner that the Montana Supreme Court has found to be constitutionally protected. Montana Human Rights Division, 199 Mont. 434, 649 P.2d 1283 (personnel files, performance evaluations, application materials); Missoulain, 207 Mont. 513, 530, 675 P.2d 962 (performance evaluations); Whitlock (performance evaluations). Accordingly, Misner's expectation of privacy in those documents is unreasonable.

2. Privacy interests of third parties.

Montana Human Rights Division 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.

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." Missoulain, 207 Mont. 513, 529, 675 P.2d 962, 970 (original emphasis); Havre Daily News, ¶ 23.

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, 334 Mont. 146, 155, 144 P.3d 818, 825 (citing Bozeman Daily Chronicle, 260 Mont. at 227, 859 P.2d at 441; Worden, ¶¶31-32).

Since Misner has either waived or has no subjective expectation of privacy in the requested documents and the county, based on ARM 28.8.210 (3), has no standing to assert a privacy interest, the only remaining issue is the privacy rights of third parties identified in the complaint or the settlement agreement. Third parties 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 discrimination, harassment and retaliation associated with Misner's political beliefs involving the upper echelons of county government and a settlement of those claims. However, since the Clarion has agreed to the redaction of the information related to third parties, their information will not be released.

IV. CONCLUSIONS OF LAW

1. The department has jurisdiction. Admin. R. Mont. 24.8.210.
2. Misner's expectation of privacy with respect to his complaint is not one that society would find reasonable.
3. Persons named in documents that stem from the investigation of Misner's complaint have an expectation of privacy in private information that society would find reasonable.
4. The County has no standing to object to the release of the settlement agreement.
5. The Harlowton Times-Clarion is entitled to receive a copy of the settlement agreement and the redacted complaint in this matter.

V. ORDER

Based upon the foregoing, the Human Rights Bureau is directed to maintain an unredacted sealed copy of the complaint in the investigative file compiled in response to Misner's complaint of illegal discrimination. The Hearings Bureau will release a copy of the settlement agreement and the redacted complaint to the Clarion.

DATED this 10th day of November 2011.

DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

By: /s/ DAVID A. SCRIMM
David A. Scrimm, Hearing Officer