

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

Case Nos. 650-2012, 652-2012
and 679-2012

IN RE INFORMATION REQUESTS BY
LEE TICKELL, BILL LACROIX AND
MICHAEL HOWELL

FINAL AGENCY DECISION

I. INTRODUCTION

The requesters in this matter seek disclosure of the complaint and amended complaint of Geoffrey Mahar in his political discrimination against the Ravalli County Attorney and Ravalli County. Mr. Mahar objected to disclosing the complaint and amended complaint.

The parties waived hearing in this matter and elected to proceed informally upon written briefs. Mahar filed a timely opening brief and the requesters filed a timely responsive brief. Mahar was given the opportunity to file a reply brief (but not required to do so). Mahar chose not to file a reply brief.

The hearing officer has conducted an in camera inspection of the complaint and amended complaint. Based on arguments of the parties set forth in their respective briefs, the hearing officer concludes that disclosure of the complaint and amended complaint is required by law for the reasons set forth below.

II. FINDINGS OF FACT

1. On March 29, 2011, Mahar, a Ravalli Deputy County Attorney, filed a discrimination complaint with the Department of Labor and Industry Human Rights Bureau (HRB) alleging that William Fulbright, Ravalli County Attorney, and Ravalli County discriminated against him on the basis of Mahar's political activity in violation of Mont. Code Ann. ¶49-3-201. He amended that complaint on July 1, 2011.

2. On August 24, 2011, prior to the HRB issuing a final investigative report, the parties settled the matter through the HRB's fast track mediation procedure. Thereafter, the settlement agreement was made public.

3. The complaint contains Mahar's specific factual allegations which Mahar contended supported his discrimination complaint. Among those factual allegations, two other persons besides Mahar, neither of whom are parties to the complaints, were identified by name in the complaints.

4. In his complaint and amended complaint, Mahar specifically acknowledged his "understanding that once [the] complaint is filed, it may be accessible to the public."

5. The Ravalli County Attorney and Ravalli County never filed any objection to the release of the information sought in this case though they were advised of their ability to do so and specifically directed to do so in a letter from the Human Rights Bureau to each party dated September 15, 2011.

III. DISCUSSION¹

The requesters seek disclosure of the complaint and amended complaint which Mr. Mahar filed in his human rights complaint. The settlement agreement between the parties is available to the public (and has actually been disclosed to the public) under Mont. Code Ann. § 2-9-304 (which provides that settlements of claims against a political subdivision are public records unless a right of individual privacy clearly exceeds the public's right to know).

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.

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).

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.

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, LLC v. City of Havre*, 2006 MT 215, ¶ 23, 333 Mont. 331, 341, 142 P.3d 864, 871. 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.

A. Mahar's Privacy Rights in the Information Contained in the Complaint

Mahar objects to the release of the complaint and amended complaint on the basis that it contains private information about his employment which he asserts should be protected. He has cited no case law in support of his propositions. Neither the complaint nor the amended complaint contains information about Mahar 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); *Missouliau*, 207 Mont. 513, 530, 675 P.2d 962 (performance evaluations); *Whitlock* (performance evaluations). Rather, the information contained in the complaint and amended complaint are the facts upon which he alleged political discrimination by the county and the county attorney. None of the information pertains to information from his personnel file or his performance evaluations.

In *Matter of Pengra*, 2000 MT 291, 302 Mont. 276, 14 P.3d 499, the Montana Supreme Court, in ascertaining the reasonableness of the individual's subjective expectation of privacy noted that Pengra's claim of a subjective expectation of privacy in a settlement agreement was "discredited by the surrounding circumstances of [Pengra's] case." ¶18. Specifically, the court found that Pengra took no steps to keep his lawsuit private and in fact requested a jury trial in district court. The court further noted that had Pengra's case not settled, he would have gone forward with his public jury trial of the case. *Id.*

In a similar vein here, Mahar acknowledged in the complaints themselves that he understood that the complaints might become public and that it was not his wish

to create any strife in the work place by filing the complaint. Had the matter gone to hearing, the allegations of the complaint would have become public through the hearing process in the Hearings Bureau which is open to the public. Mahar does not have a reasonable expectation of privacy in the amended complaints.

B. Privacy Interests of the County Attorney and the County

Stated simply, neither the county attorney (in his public capacity, which is the only capacity in which he was named in Mahar's complaint and amended complaint) or Ravalli County have a protectable privacy right in the complaints. The lack of the county attorney's privacy right is evident from the Montana Supreme Court's decision in *Whitlock*, supra. Likewise, Ravalli County, as a political subdivision of the state, has no protectable privacy interest. *Whitlock*, supra, and *Admin R. Mont.* 24.8.210(3).

C. Privacy interests of third parties.

Mahar asserts in Paragraph three of his written objection that the complaints contain information about third person non-parties which is entitled to protection. Mahar does not state which portions of the complaints contain information in which third person non-parties would have a reasonable expectation of privacy. With the exception of the names of two persons (as noted in the findings of fact), no other non-parties are named or otherwise described such that they could be identified. And Mahar does not explain how the factual allegations relating to the two named persons evoke any concerns about violation of their privacy rights that would clearly outweigh the public's rights to know the contents of the complaints.

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. 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, ¶131, 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 Mahar has no subjective expectation of privacy in the complaint or amended complaint, and neither the county attorney or the county has a cognizable privacy interest, the only remaining issue is the privacy rights of third parties identified in the complaints. 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 Mahar's political beliefs involving the county and the county attorney. Redaction of the names of the two persons is adequate to protect any privacy rights they may have and does not impact the gist of the complaints. Accordingly, Mahar's contention that privacy interests of third person non-parties prohibits disclosure of the complaints to the requesters is rejected.

IV. CONCLUSIONS OF LAW

1. The department has jurisdiction. Admin. R. Mont. 24.8.210.
2. Mahar's expectation of privacy with respect to his complaint is not one that society would find reasonable.
3. Any privacy interests of third person non-parties can be adequately protected by redacting their names from the complaints.
4. Neither the county attorney or the county has no protectable privacy interest at stake here. Whitlock, supra.
5. The requesters are entitled to receive a copy of the complaint and amended complaint, redacted only in the removal of the names of the two persons who are not parties to the complaint.

V. ORDER

Based upon the foregoing, on December 15, 2011, the Hearings Bureau will disclose the complaint and amended complaint, with the names of the two non-parties redacted, by forwarding copies of the redacted complaints to all parties. Disclosure will occur on that date unless a party (1) obtains a stay from an appropriate higher authority before December 15, 2011 or (2) obtains a stay from this tribunal before that date.

DATED this 30th day of November, 2011.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT
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.