

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

Case No. 1651-2012

IN RE INFORMATION REQUEST BY
THE ASSOCIATED PRESS

HEARING OFFICER'S ORDER

I. Background of this Information Request Proceeding

The Associated Press (“A.P.”) made a written request for information to the Montana Department of Labor and Industry’s Human Rights Bureau (“HRB”), regarding Long v. Phillips and Long v. Office of the Court Administrator, which are HRB Case Nos. 0120105283 and 0120105282, respectively. Long (who has represented herself through this entire proceeding) and Phillips (who has been represented through this entire proceeding) objected to production of any HRB file documents in response to the request.¹ HRB forwarded the information request to the Department’s Hearings Bureau for this contested case proceeding.

After conferring with Long and Phillips, and with Matt Brown, the A.P. reporter who made the request for information, the Hearing Officer ordered the Human Rights Bureau (“HRB”) to produce all documents in its investigative files as of the date of the information request for in camera inspection, filing a list of all the documents produced with the production, and serving (by email) Long, Phillips and Brown with copies of the list only. Brown, it should be noted, was observing the proceedings, but not participating as an advocate for A.P. HRB complied.

Further telephone conferences led A.P. to file and serve an updated request for all documents containing information about the claims and defenses in the cases as of the date of the updated request (April 3, 2012). The Hearing Officer then ordered HRB to produce, for in camera inspection, all of the new documents added to the investigative files after the date of the original request up through the date of the updated request (April 3, 2012), filing and serving upon Long, Phillips and Brown (by email) an updated list of ALL documents produced either time. HRB complied, and the Hearing Officer sealed both productions pending the decision.

¹ Counsel for Phillips in this case also represented O.C.A. in the underlying HRB investigations, which were done in one proceeding. As far as the Hearing Officer is concerned, Phillips’ counsel spoke also for O.C.A. in this proceeding.

2. HRB's Updated Spreadsheet of Documents Produced, the Printout Accompanying this Order, How this Order Will Reference the Documents HRB Produced, and the Preservation of the Documents Produced by HRB for in Camera Inspection

HRB's original list of documents produced and its updated list of documents produced were each formatted as Excel spreadsheets. HRB's updated spreadsheet supersedes the original spreadsheet.

Displayed on a computer screen as an Excel spreadsheet, the HRB updated spreadsheet has numbered rows (beginning with "1") down the page, and lettered columns (beginning with "A") across the page. Depending upon the formatting assigned to a print command, a printout of the documents listed in the spreadsheet might appear with the numbering of the rows and the lettering of the columns, or without them. The Hearing Officer is using the numbers of the rows in the spreadsheet to identify HRB Documents in this information request proceeding.

Enclosed with this Order, is a printout (formatted from a portion of HRB updated spreadsheet, copied into Adobe ("pdf") formatting, consisting of the entire list of all the documents produced by HRB for in camera inspection ("the printout"). The printout is captioned "Disclosure Status, Human Rights Bureau in camera Production of Investigative File Documents as of April 3, 2012, Long v. Phillips and Long v. O.C.A., Documents 1-190." The printout itself is redacted by the removal of the name of the author of the two 1-page statements that comprise Document 183. That redaction was made by the Hearing Officer's August 7, 2012, order.² After this section of the order, Document numbers in the printout will be used to identify documents upon which this order rules. The rest of this section of the order discusses the reasons for using the Document numbers in the printout (from this point through the last full paragraph on page 5), and then describes how the documents produced in camera have been preserved (the rest of page 5 and page 6, up to the end of this section).

The 190 numbered lines of the HRB's updated spreadsheet are used as the numbers of the 190 listings in the current printout. In front of each "Doc. [number]" or number (where there is no document) appears one or more capital letters in bold text. As defined in the key appearing on the first page of the printout, before the list of "Doc."s begins, "D" means the document is disclosed in its entirety, without

² The printout with the current order, which includes the redaction made in accord with the August 7, 2012, order, is not the same as the printout which accompanied that order. The earlier printout was a three-page document formatted in Courier rather than Arrus and labeled "List of Human Rights Bureau Investigative File Documents, As of Date of Updated A.P. Information Request (April 3, 2012), Long v. Phillips and O.C.A." The original HRB updated spreadsheet is preserved and sealed in the Hearings Bureau file in paper and electronic (Excel) formats.

redactions; “DR” means the document is disclosed, but with portions of it redacted; “CS” means the contents of the document is summarized with the document itself not disclosed; “ND” means the document is neither summarized nor disclosed; and “X” means there is no document corresponding to that number, so there is nothing to disclose.

The only reason for this lengthy explanation of the designations of the documents is that over the course of the investigation, and now in this contested case, the documents have been referenced in a number of different ways.

Long supported two of her written submissions to HRB (Documents 27 and 160) with extensive paper attachments. She identified and referred to the paper attachments by the handwritten numbers she placed (with some omissions) on the first page of each such paper attachment.

HRB, in its updated spreadsheet (and its original spreadsheet as well, for the paper attachments to Document 27), gave each paper attachment a consecutive number in the spreadsheet.

In assigning numbers to the paper attachments she submitted with both Document 27 and Document 160, Long sometimes put the handwritten word “Exhibit” in front of the number. Sometimes she put the handwritten word “Attachment” in front of the number. Sometimes there were no written words with the numbers. In HRB’s updated spreadsheet, Long’s paper attachments are identified as “Exhibit [No.],” for the paper attachments to Document 27, and for the paper attachments to Document 160, starting each set of identified “Exhibits” with the number “1”. In the current printout, both sets of paper attachments are identified as “Long’s Exhibit [No.],” starting each set of identified “Long’s Exhibits” with the number “1”.

For a few of Long’s multi-page paper attachments submitted with one or the other of the two written submissions, she wrote exhibit or attachment numbers on each page, with or sometimes without per page numbering of the attachments pages. In at least one or two instances, her handwritten pagination included numbering errors.

A few of Long’s paper attachments had different document numbers elsewhere on the first page of the attachment. Document 101 is a photocopy of a two-page series of emails between Long and Phillips. It is labeled “Exhibit 73” at the bottom of the first photocopied page, which was its numerical designation by Long as the 73rd paper attachment to Document 27, her September 12, 2011, letter to HRB. That same photocopied first page of Document 101 also had “32” handwritten at the top, for some other purpose. There is also some potential confusion with

handwritten pagination, as can readily be seen by comparing the two kinds of handwritten numbering found on the second through eighteenth pages of Document 102 (in blue at the bottoms of the pages, and in black at the tops of the pages).

There are no Documents 78 and 85. For those lines in the HRB updated (and original) spreadsheet, HRB put in the consecutive exhibit numbers that Long skipped in numbering her paper attachments to her Document 27. She did not submit an Exhibit 51 (skipping in her numbering from 50 to 52) and she did not submit an Exhibit 57 (skipping in her numbering from 56 to 58). Since HRB used a column each for the notations about those missing exhibit numbers, those numbered columns became numbers of “documents” that didn’t exist.

Similarly, in her numbered paper attachments to Document 160 (her undated rebuttal letter to HRB, replying to the response of Phillips and O.C.A. to her charges), Long did not use exhibit numbers 19 (noted as “missing” in her “Rebuttal Exhibit Index” which is part of Document 160) and exhibit number 20 was apparently a CD of photos taken by the “stealth cam,” printed out as part of HRB’s in camera production (Documents 16-17). Thus, there is neither a document for “exhibit 19” nor a document for “exhibit 20” in the numbered paper attachments to Document 160. HRB did not note these omissions on numbered columns in its updated spreadsheet, so the omissions did not generate two HRB “document” numbers with no documents.

Document 111, O.C.A.’s answer to Long’s complaint against it (received by HRB on January 10, 2012), also had five attachments, listed and assigned numbers “1” through “5” at the bottom of page 9 of the answer. HRB did not keep the five attachments together immediately following the answer. Instead, HRB placed orange tabs on blank pages immediately in front of the first pages of those five attachments to O.C.A.’s answer, at the various spots within its investigative file where those five attachments were filed.

Attachment “1” was the France investigative report for O.C.A., Document 156, which is being disclosed. The France investigation was also identified in the production as the only “Side Five” Document in the O.C.A. investigative file. “Side Five” is where confidential documents are routinely placed in HRB investigative files.

Attachment “2” consisted of various correspondence and emails, arranged in chronological order, and which were labeled by O.C.A. counsel as attachments “21A” through “27” (listed in the current printout as “Answer Attachments 2-1A”, “2-1B”, and then “2-2” through “2-7”). Documents 112 through 117 are attachments 2-1A through 2-7, which are being disclosed.

Attachment “3” consisted of two affidavits to the Judicial Standards Commission, which are Documents 152 and 153. Those documents are confidential under J.S.C. rules and are not being disclosed. The names of the authors are revealed in multiple documents that are being disclosed, so it would be pointless to redact the names of the authors from the printout.

Attachment “4” was the transcript of Long’s temporary restraining order hearing, Document 154, which is being disclosed.

Attachment “5” is Long’s first amended complaint in the Tenth Judicial District, Document 155, which is being disclosed.

In filing written objections to disclosure of certain Documents with the Hearings Bureau, Phillips used HRB’s updated spreadsheet numbers as short hand references to the Documents, but put the word “Exhibit” in front of the number instead of using “Document” in front of the number. Thus, Document 102, in the Hearing Officer’s final list as well as in the HRB updated spreadsheet of its in camera productions, becomes “Exhibit 102” in Phillips’ objections, and on the photocopy of Document 102 upon which Phillips marked the portions to which he objected in various colored markers (according to the color key he developed to identify which objection applied to which marked section).

All of these multiple methods of identifying various documents could be confusing to the reviewer, which is why this order, in its rulings, adheres entirely to the Document numbers in the printout with this order.

HRB also included sticky notes attached to various Documents within its in camera production, apparently to designate where documents were located in the multi-sided HRB investigative file for the Long v. Phillips case and likewise for the Long v. O.C.A. case (“Side 1,” “Side 2,” etc., for each file). These sticky tabs were stuck to the first page of each Document that presumably was the top page on one of the 5 sides in each of the two investigative files. All of the sticky notes, the blank sheets of paper with orange numbered tabs (1 through 5) and the “SIDE FIVE” sheet have been discarded. Where documents appear in the Human Rights investigative files, and what labels are upon them, are of no moment to members of the public who either will or will not have access to the documents.

The three-ring binder that contains the entire HRB in camera production will itself remain SEALED and will be returned to HRB, with a copy of the pertinent language from the sealing order on its cover in large bold letters, as part of HRB’s records, when the Hearings Bureau files herein are closed. HRB has advised the Hearing Officer that its in camera production consists of the original file documents. Aside from the numbered labels in the lower right-hand corners of the first pages of

each document, and the three holes punched in them for placement in the 3-ring binder, their condition is unchanged. There are also pale green sheets separating the Documents at each 10-count (before the first, eleventh, twenty-first, etc., document). Each such separating sheet has a label indicating that “Documents 1-10” or “11-20” follow that dividing sheet. The Hearing Officer believes this may aid any reviewers of the documents to find and examine each document as may be needed.

A second three-ring binder, which will be in the public record in eleven days unless another tribunal rules otherwise, contains true and complete copies of the Documents which are being disclosed, except for the redactions ordered herein. There is one distinction that should be noted. Documents 16 and 17 are photographs. The three-ring binder destined for the public record contains scanned color duplicates of the photographs rather than photocopies.

3. Extended Time for Objections and Briefs by Phillips, and Long’s Waiver of Objections.

On Sunday, May 13, 2012, Long sent an email to the Hearings Bureau, with no indication it was copied to Brown and Forsythe, stating that she was “waiving all objections on grounds that HIPPA [sic] protects me from disclosures anyway and the Judge’s lawyer is filing to [sic] many civil litigation motions to keep up with.”

On May 22, 2012, the Hearings Bureau (Sandra Page) contacted Brown, Long and Forsythe by email, indicating that the Hearing Officer wanted another telephone conference “this week” (May 22, 2012, was a Tuesday), and setting forth the times that the Hearing Officer would be available on that Wednesday, Thursday and Friday. Brown and Forsythe responded to Page’s email that same day with their respective availabilities. Long also sent an email that same day, but not as a response to the telephone conference request, instead resending her May 13 email, this time with copies to Brown and Forsythe, “making sure” that the Hearing Officer got the May 13, 2012, email. Long also stated that “Mr. Brown is welcome to everything in the existing file.”

On May 23, 2012, Sandra Page sent an email to Brown, Long and Forsythe advising that she had set the telephone conference with the Hearing Officer for Friday (May 25, 2012) at 10:00 a.m. Within minutes, Long responded that she was “in meetings every morning this week and will be unable to attend this conference. Please reschedule. Thanks.”

On May 23, 2012, there followed an additional volley of emails. Page sent Brown, Long and Forsythe an email detailing the days and times the Hearing Officer would be available the week of May 28 through June 1, 2012. Forsythe apparently let Page know his availability, because she followed the lists of available times for the

Hearing Officer with, "Thanks Andy for letting me know when you're available next week." Long responded to Page's email asking for possible teleconference times, at 12:04 p.m., May 23, 2012, by an email stating: "Thanks, Sandra. The morning of the 30th would work well."

Brown originally indicated he could participate in a telephone conference on Monday, Tuesday and Thursday, but not on Wednesday, May 30. Then he apparently found out that Long had limited availability, and emailed Page, Long and Forsythe at 1:23 p.m. on May 23, 2012, that "If Wednesday's the only day that works for Britt Long, I can make that one work too." Page then responded to Brown, Long and Forsythe, at 4:00 p.m. on May 23, 2012: "Thanks Matt. I've set the conference for Wednesday, May 30, 2012, at 10:00 a.m. Hearing Officer Spear will initiate the conference by telephone conference call." In the week following that email, none of the participants responded that they were unavailable for that telephone conference call.

On May 30, 2012, the Hearing Officer convened a recorded telephone conference regarding the above matter, as scheduled by email by the Hearings Bureau Staff. Brown and Forsythe participated. Long was not available.

Thereafter that same day, the Hearing Officer issued his "Order Scheduling Further Filings." The order was sent by U.S. Mail, postage prepaid, as well as by email, to Brown, Long and Forsythe, as set forth in the "Certificate of Mailing" which was part of that document. The email providing attached copies of the order was also sent to Brown, Long and Forsythe on May 30, 2012.

During the May 30, 2012, telephone conference, Forsythe confirmed that he had received the updated spreadsheet prepared by HRB and filed and served by email on April 23, 2012. He advised that he had neglected to calendar it, and still wanted to file further objections. He indicated that he had already gone through the spreadsheet and had 10 documents which his clients objected to being disclosed (in addition to the 15 documents to which his clients previously objected).

The Hearing Officer had asked for and convened this telephone conference to ascertain the status of any briefing that might be desired by the parties, since they had originally indicated they did want to file some briefs, but had failed to do so within the time for such briefing, pursuant to the April 17, 2012 Order. In addition, the waiver emailed to the Hearings Bureau by Long stated, in pertinent part, that she was waiving all her objections, but asserted that HIPAA would still protect her from "disclosures anyway" (May 13, 2012 email to spage@mt.gov). Her subsequent email stated that the A.P. was "welcome to everything in the existing file" (May 22, 2012 email to spage@mt.gov). The Hearing Officer had hoped during the May 30, 2012, telephone conference he could confirm the scope of Long's waiver.

For these reasons, in his May 30, 2012, order, the Hearing Officer ordered that Phillips, through counsel, must, by June 8, 2012, file and serve any additional objections and any supporting brief. The Hearing Officer also ordered that by that same date, Long could file a clarification of her waiver, specifically designating any of the documents identified in the original or updated spreadsheets from HRB, which she believed that HIPAA and/or its Montana counterpart prevented the department from releasing. The May 30, 2012, order went on to state that if Long did not file any clarification, that would be her express waiver and consent to the release of all documents in the HRB file identified in the original and the updated spreadsheets filed in this proceeding by HRB, leaving only respondents' objections for ruling.

The Hearing Officer also indicated that by June 15, 2012, he would issue an order directing HRB to provide documents as to which there are no objections under consideration, whether or not he was able to rule upon the respondents' objections to 25 documents.

On June 7, 2012, in accord with the schedule set by the May 30, 2012, order, counsel for Phillip³ s timely filed and served "Respondent's Objections to Production of Certain Documents," with accompanying copies of the documents to which Phillips at least objected to being disclosed, at least without redactions. The documents to which Phillips at least objected were Nos. 27 (pages 3, 5, 7 and 11), 69, 70, 76, 77, 79 (page 2), 84, 94, 98 (pages 1 and 3-4), 101, 102 (pages 1, 3-7, 10, 12 and 14-16), 103 (page 1), 104 (pages 1 and 2), 105 (pages 4 and 6), 106 (pages 4, 7-8, 10-16, 17 and 18), 107, 160 (pages 5, 11, 12 and 14), 175 (pages 1 and 2), 176 (page 1), 183 (all), 186 and 190 (pages 5, 6, 7, 8, 11 and 15-19).

The June 8, 2012, deadline passed and Long did not file a clarification of her waiver, and did not file any specific designations of any documents identified in the original or updated spreadsheets from HRB which she believed that HIPAA and/or its Montana counterpart prevented the department from releasing.

On June 11, 2012, Long sent an email to Sandra Page, asserting that she "received an order this week [June 11, 2012, was a Monday, so it is unclear exactly when Long was stating she had received the paper and/or electronic copies of the May 30, 2012, order] which apparently followed a scheduling conference I never indicated I could attend, but which was held anyway." Although Long's email called this "unfortunate but somewhat moot," the Hearing Officer decided not to order release of documents to which no objections were any longer interposed, until he addressed Long's statement that she "never indicated" she could attend a telephone

³ Counsel for both respondents before HRB participated in this case, formally on behalf of Phillips only.

conference set for May 30, 2012 and thereafter ruled upon disclosure of any and all documents.

With regard to Long's assertion that she had never indicated that she could attend a telephone conference on May 30, 2012, Long's 12:04 p.m., May 23, 2012, email stated, in its entirety, "Thanks, Sandra. The morning of the 30th would work well." Long, like the other participants in this case, agreed she could participate in a telephone conference on May 30, 2012, before that conference was set. Long, like the other participants in this case, was sent notice of that telephone conference seven days before it was convened. Long had previously notified the Hearings Bureau after receiving notice of a telephone conference that she could not attend, after which the Hearings Bureau reset the conference. For the May 30, 2012, telephone conference, after agreeing that date would work for her and after being given notice of it, Long did not contact the Hearings Bureau to request a postponement and did not advise the Hearings Bureau that she now would be unable to attend. She simply was not available when the Hearing Officer convened the conference.

By her acts and omissions, Long confirmed her waiver of any objections, based on HIPAA or any state or federal law, to disclosure of information in documents in the Human Rights Bureau investigative files regarding her complaints against O.C.A. and/or Phillips, as those files existed on April 3, 2012.

4. Legal Framework for Rulings in this Order and Sealing of the Substance of it

When a third party seeks disclosure of documents in an HRB investigative file, and at least one of the participants in the investigation objects to the disclosure, Admin R. Mont. 24.8.210 vests department hearing officers with the authority and responsibility to determine whether privacy interests are, in fact, at issue and if so, 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*, ¶30, 2006 MT 16, 331 Mont. 10, 127 P.3d 1044.

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. In addition, the applicable administrative rules recognize the providing information to the Human Rights Bureau that may implicate third person privacy rights have standing to assert the privacy rights of those individuals. Admin. R. Mont. 24.8.210(10)(c)(I).

The initial question is whether there is a privacy interest at stake in disclosure of the information. The individual must have a subjective or actual expectation of privacy. In addition, the expectation must be reasonable in the eyes of society. *Havre Daily News, LLC v. City of Havre*, ¶46, 2006 MT 215, 333 Mont. 331, 142 P.3d 864; *Bozeman Daily Chronicle v. City of Bozeman Police Dept.* (1993), ¶21-23, 260 Mont. 218, 225, 859 P.2d 435, 439; *Mont. H.R.D. v. City of Billings* (1982), 199 Mont. 434, 649 P.2d 1283.⁴ To ascertain the reasonableness of an individual’s expectation of privacy, it is appropriate to inquire into, among other things, (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) and (2) the particular characteristics of the discrete piece of information. *Havre Daily News*, ¶23.

For information about which a reasonable expectation of privacy has been found, a balancing of that reasonable expectation of privacy against the public’s right to know is necessary, “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* at 529, 675 P.2d at 970 (original emphasis); *Havre Daily News*, ¶21.

⁴ *Havre Daily News* and *Bozeman Daily Chronicle* both expressly apply this privacy evaluation and the ultimate balancing test, to cases involving confidential criminal justice information.

In balancing those interests “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. Article II, Section 9 mandates disclosure, except in cases where the demand of individual privacy clearly exceeds the merits of public disclosure. In the Matter of T.L.S., ¶31, 2006 MT 262, 334 Mont. 146, 144 P.3d 818 (citing Bozeman Daily Chronicle at 227, 859 P.2d at 441; Worden v. Montana Bd. of P. & P., ¶¶31-32, 1998 MT 168, 289 Mont. 459, 962 P.2d 1157. Thus, the “step by step learning process” contemplates delineations over time, under the concrete facts of specific cases, of the kinds of circumstances in which there are or are not privacy concerns that justify withholding from the public various kinds of information.

The Hearing Officer has reviewed the entire contents of the investigative files, as they existed on the date of A.P.’s updated information request, to determine where there are reasonable expectations of privacy (or other kinds of confidentiality rights) and where such reasonable expectations are found, to apply the balancing test and to decide whether to disclose, with or without redaction, or to withhold, the documents that are relevant to the merits of Long's claims and Phillips' and O.C.A.'s defenses. Generally, when a person (whether a party or a non-party) has reasonable expectations of privacy in information related to the merits of the underlying claims, the balancing test must be applied before deciding whether to disclose that information. In this case, when there is a reasonable expectation of privacy in particular information unrelated to the merits of the underlying discrimination and retaliation claims, particularly when the person with the reasonable expectation is not a party, the privacy interests of that person do clearly outweigh the merits of public disclosure of the information.

Phillips objected to disclosure of communications Long had with him regarding cases before the court, arguing that at least the information identifying the parties and cases should be protected. While he also argued in some places that the actual content of the exchanges should be protected, any such argument must be rejected. Communications between Long and Phillips about the work they were doing, including particularly their disagreements about that work, are integral to Long’s underlying claims and to Phillips’ defenses against those claims. The public’s right to know about those disagreements is not clearly outweighed by any privacy right of Phillips and/or Long. Nor does any applicable judicial work product privilege clearly outweigh the public’s right to know about the interactions between Long and Phillips, so long as the identities of the parties and participants in the cases involved are protected.

Phillips' argument that the entirety of such communication is privileged is supported with citations to the constitutional interests involved and a quote that "a constitutionally protected privacy interest exists when a person has a subjective or actual expectation of privacy that society is willing to recognize as reasonable." *Yellowstone County v. Billings Gazette*, ¶20, 2006 MT 218, 333 Mont. 390, 143 P.2d 135. This quotation is an accurate statement of the test to determine whether there exists a constitutional privacy right, but does not include the balancing test required to determine whether protection of an established privacy interest clearly outweighs the merits of public disclosure. The reader can look immediately ahead of the language quoted by Phillips, at the top of the selfsame page (396) in 333 Mont. 390, for the recitation of the entire balancing test encompassed in the "final steps of the right to know test." *Id.* at ¶19. With redaction of the names of the cases and parties (and sometimes counsel, too), the "judicial work product" is sufficiently protected so that the merits of public disclosure can be honored for the rest of the communications between Long and Phillips about cases, which reveals virtually nothing about the workings of judicial process but certainly provided HRB with considerable information about the deteriorating work situation between the two persons.

Phillips also objected to what he characterized as "scurrilous charges" by Long about persons who were not parties to the underlying Human Rights complaints. Phillips argued that such allegations should be redacted because Long could be sued if she made the statements outside a judicial, or in this case quasi-judicial proceeding, and it would be unfair to publish her charges in a way that might protect her from such suits. The only authority for this argument was *Skinner v. Pistoria* (1981), 194 Mont. 257, 633 P.2d 672, a case in which the Montana Supreme Court held that Mont. Code Ann. §27-1-804(2) did confer an absolute privilege upon publications (statements) made in any "official proceeding authorized by law," which included statements related to the topics addressed during a regular meeting of a city commission. Whether or not Long's statements to HRB are protected by this statutory privilege, the balancing test regarding their disclosure to the public remains unchanged. An important part of that balancing test involves whether the information at issue relates to the merits of Long's claims against Phillips and O.C.A. No part of that balancing test involves whether Long's statements are protected by the statutory privilege involved in *Skinner*, a question that this Hearing Officer has no power to address in any event.

Long made accusations about public employees other than Phillips who worked in the district court offices in Lewistown or other court offices in Montana. She argued that her accusations against these other public employees in the court offices were relevant because the other employees either were influenced against

corroborating Long's accounts of events out of fear of reprisals, were rewarded with more favorable treatment for not resisting Phillips' allegedly inappropriate behavior, or were somehow part of a conspiracy to protect Phillips. She eventually sued those other employees in civil litigation. Her first amended complaint in that civil lawsuit was provided to HRB and is a document being disclosed herein, since it is a public document already. Her accusations against those other public employees, as presented to HRB in multiple other documents, are too remote from her discrimination and retaliation claims against Phillips and O.C.A., although Long worked hard to bridge that gap and find a connection between all her accusations and her existing claims. Thus, in many instances, Long's accusations against public employees other than Phillips are not related to the merits of her claims against Phillips, are not within the scope of what A.P. requested, and will not be disclosed.

In her submissions to HRB, Long also made accusatory statements about the competence and integrity of her former supervisor in a state agency where she was previously employed, as well as questioning the integrity and work-ethics of other attorneys and long-term state employees. Long suggested in her filings that her dealings with Phillips could only be fully grasped in light of her alleged earlier experiences with others in unrelated prior public employment. This argument might theoretically have merit with regard to her damages, but the HRB investigation was focused upon liability. Damages information might later have been pertinent to HRB conciliation efforts, but had no bearing on the merit determination central to the investigation itself. These accusations of wrongdoing by public employees in other offices at other times were entirely unrelated to the merits of the case under investigation. Thus, these accusations are outside the scope of A.P.'s request for information regarding Long's claims against Phillips and O.C.A., as of April 3, 2012, and also will not be disclosed.

Long also submitted to HRB accusations about the propriety of the professional conduct of persons involved in both the HRB investigation of her charges and the Office of Court Administrator's internal investigation into her report of Phillips' inappropriate conduct. Essentially all of these persons about whom Long made accusatory statements, within and also beyond matters directly relevant to her charges against Phillips under Montana anti-discrimination law, were public employees at the applicable times, arguably working in positions of public trust. Long argued strenuously to HRB that these persons, as well as the public employees other than Phillips who worked in the district court offices in Lewistown or other court offices in Montana, were part of a conspiracy to protect Phillips and attack Long. That argument was not part of her discrimination and retaliation claims pending as of April 3, 2012, the last date to which the A.P.'s updated information request applied. Not a single one of these other public employees was a target of the

claims under investigation at that time. This substantially diminishes the merits of the public's right to know about Long's accusations against these public servants.

Long included these persons as defendants in her civil suit, the amended complaint from which (as already noted) was provided to HRB and will be disclosed as a public record in this proceeding.

Long also moved to add these persons as additional respondents in her case before HRB. HRB had taken no action on that motion by April 3, 2012). That motion to amend will likewise be placed in the public record by this order, but at least until Long's accusations against these other public employees became part of the investigation, by the granting of the motion to amend (if it ever was granted), her accusations against these other public employees are too remote from her specific claims of sexual harassment and retaliation in her original complaint to relate to the merits of those specific claims. As argument, her claims that these other public employees reached incorrect conclusions or placed too little weight upon her assertions have been retained in the disclosures, to inform the public about the arguments she made to HRB in support of her claims pending as of April 3, 2012.

The cases in which the courts have found that the merits of public disclosure were not clearly outweighed by the privacy interests at stake generally involved the privacy interests of the targets of the various investigations that generated the disputed information. *Yellowstone County v. Billings Gazette* at ¶21:

We have previously determined that society is not willing to recognize as reasonable the privacy interest of individuals who hold positions of public trust when the information sought bears on that individual's ability to perform public duties. See *Great Falls Tribune v. Sheriff* (1989), 238 Mont. 103, 107, 775 P.2d 1267, 1269 (the public's right to know outweighed the privacy interests of three disciplined police officers in the public release of their names because police officers hold positions of "great public trust"); *Bozeman Daily Chronicle*, 260 Mont. at 227, 859 P.2d at 440-41 (investigative documents associated with allegations of sexual intercourse without consent by an off-duty police officer were proper matters for public scrutiny because "such alleged misconduct went directly to the police officer's breach of his position of public trust . . ."); and *Svaldi v. Anaconda-Deer Lodge County*, 2005 MT 17, P 31, 325 Mont. 365, P 31, 106 P.3d 548, P 31 (a public school teacher entrusted with the care and instruction of children held a position of public trust and therefore the public had a right to view records from an investigation into the teacher's abuse of students).

Having claims pending against Phillips and O.C.A. does not increase the merit of the public's interest in the disclosure of a long litany of allegations made against various other public employees who worked in various parts of government and whose only common denominator here was that they gave information or reached conclusions about information that, in either instance, was not favorable to Long's claims. Long wove them together as if their conduct in their various jobs, and/or their giving of information or reaching decisions not favorable to her, established on its face that they conspired with Phillips and O.C.A. The merit in public disclosure of allegations and accusations against these non-party public employees is not given more substance because Long attacked them in her pursuit of claims against Phillips and O.C.A. Indeed, revealing to the public accusations not directly related to Long's pending claims against Phillips and O.C.A., which Long seems to have made against virtually every non-party who either provided information inconsistent with her pending claims or decided that Long's pending claims were not well-founded, would have a chilling effect upon the cooperation of witnesses and impede the entire process.⁵ Thus, in many instances, those accusations have been redacted, being left only where they serve to illuminate the claims at issue on April 3, 2012.

The accusations against non-parties appear in multiple Documents submitted to HRB. Sometimes different submissions to HRB by Long contain multiple copies of the same allegations and accusations, sometimes in the same underlying emails and other writings, rearranged in multiple filed Documents. This circularity of submissions makes it very difficult to sort out where all of the allegations of particular inappropriate conduct by non-parties appear, and since there is no indication that the non-parties were given notice of the A.P.'s request for documents, and Phillips' objections are the only objections now at issue, public access to the accusations against non-parties must largely be decided on its own merits, according to the Documents produced by HRB.

Phillips also objected to charges against him that are either "based solely on hearsay" or "not relevant to [Long's underlying discrimination and retaliation claims] but which would, outside the context of this quasi judicial [sic] proceeding, potentially constitute defamatory and therefore actionable statements." As already noted, whether any accusations are or are not protected against defamation claims outside of the investigation is really irrelevant here.

Unlike the non-parties subjected to accusations, Phillips was a party in the investigated charges, had notice of the charges against him and responded to those

⁵ Such a "chilling effect" impedes an investigation by reducing the availability of information, whether it be favorable to either side. Reduced access to pertinent information can defeat the public policy of deterring illegal discrimination or retaliation, because without accurate information, deciding whether such illegal acts have occurred becomes difficult or impossible.

charges during the investigation. He was, at the time of his alleged discrimination and retaliation, an elected public official in a position of great public trust. Charges and accusations against Phillips, regardless of his objections, should not be withheld from the public, unless he establishes a reasonable privacy interest that clearly outweighs the substantial merit in public access to such information, in the context of the claims pending against him at the time.

As already noted, Phillips has sometimes objected to and other times not objected to the same portions of the same documents, as they reappear in different Documents produced to HRB. The Hearing Officer has done his best to make consistent rulings regarding such accusations.

Once this order issues and the information is disclosed pursuant to its provisions, subsequent judicial review of it may not be able to remedy any harm that results from disclosure of information that a court might determine on review should not have been revealed. Perhaps no irremediable harm would result, but this entire problem can be resolved by delaying release of the substance of the order, and the information at issue, for a few days to permit the parties to seek a stay order on the disclosures pending review.

Section 5, the substance of this order, except for the last subsection on page 20, is sealed, for eleven (11) calendar days after the date of issuance, from the public and the A.P., to allow the parties an opportunity to seek judicial review and a stay order. UNLESS BEFORE CLOSE OF BUSINESS ON SEPTEMBER 4, 2012 A COURT ORDER STAYING DISCLOSURE OF THE SUBSTANCE OF THIS ORDER IS FILED UPON THE HEARINGS BUREAU, THE SUBSTANCE OF THIS ORDER AND THE DOCUMENTS (WITH ANY REDACTIONS REQUIRED), TO BE RELEASED PURSUANT TO IT WILL THEREAFTER BE AVAILABLE TO THE PUBLIC GENERALLY AND THE A.P. SPECIFICALLY.

5. Order Identifying Documents Available to the Public, Redacting and Withholding Certain Information, and Identifying Documents That Are Withheld.

Documents Disclosed Without Redactions

The Documents listed herein (and in the printout) as disclosed in full (without redactions) include several categories of documents. Documents for which there are no objections to disclosure, and no privacy issues identified regarding information about non-parties are being disclosed without redactions. In addition, some of Phillips' objections to disclosure were not based upon reasonable subjective privacy rights. Others of Phillips' objections were based upon reasonable subjective privacy rights, but society was not willing to recognize as reasonable the privacy interests asserted, because the individuals held positions of public trust or great public trust

and the information sought related to those individuals' ability to perform those public duties. Still others of Phillips' objections were based upon reasonable subjective privacy rights which society was willing to recognize as reasonable, but those rights did not clearly outweigh the merits of public disclosure. Similarly, some of the Documents included information about non-parties which related to the merits of the claims pending against Phillips or O.C.A. as of April 3, 2012, and any privacy rights apparent on the face of the documents (whether Phillips objected or not to disclosure) either would not be considered reasonable by society or did not clearly outweigh the merits of public disclosure. For some Documents, the information regarding parties or non-parties appeared to be office contact or other information that was a matter of public record, or other information in which there really was no privacy interest.

Documents disclosed without redactions are as follows: 3-6, 8, 12-17, 19-26, 28-68, 71-77, 79-83, 86-93, 95-97, 99-100, 107, 110-117, 119-127, 129-131, 133-140, 143-144, 146-147, 149-150, 154-157, 159, 161-174, 177-178, 180-182, 184-185 and 187-189.

Documents Disclosed with Redactions

There are Documents that contain personal identification information about parties or non-parties. There are Documents with information about non-parties as to which the involved person or persons had subjective privacy rights and the information was unrelated to the merits of Long's claims pending as of April 3, 2012. There are Documents with information about individuals as to which the involved person or persons had subjective privacy rights that society would recognize as reasonable and those privacy interests clearly outweighed the merits of public disclosure. For each of these Documents, the least restrictive method of protecting the privacy interests at stake was redaction to protect the privacy interests involved and then disclosure of the redacted Document.

Documents disclosed with redactions are as follows: 18, 27, 69-70, 84, 94, 98, 101-106, 118, 145, 148, 151, 160 and 175-176.

Documents Not Disclosed, with Content Summarized

Document 108. Document 108 is a photocopy of a personal check. No party objected to its production. In addition to the information in the spreadsheet, the only additional information the public could possibly need to know about it is that it was dated February 10, 2009, and is in the amount of \$501.00. Personal identification information and bank information, including account and routing numbers, etc. are not appropriately placed in the public record. Therefore, the information in the spreadsheet and this order are sufficient to satisfy any public right

to know. Why the public should need to know that Kathleen Mastin wrote a check to Britt Long for that amount on that date is a mystery to the Hearing Officer, but neither party had an objection to it. Document 108 will not be disclosed.

Document 179. Document 179 is a check from the State of Montana to Britt Long, for zero dollars and zero cents, dated October 19, 2011. Disclosing the copy of the actual check will provide no useful additional information, and it will not be disclosed, to avoid any mischief that might be done by any person with access to the check routing information, etc., contained therein. Document 179 will not be disclosed.

Document 183. During the investigation into her discrimination and retaliation complaints, Long submitted to the Human Rights Bureau a 1-page handwritten statement, signed by the author and initialed by another person, dated 9/22/2011, and a 1-page typed and unsigned statement, with the typed name of the same person who authored the handwritten statement at the bottom (apparently indicating that she had also authored the typed statement) and the date (9/22/2011), with a contact number for the author in the typed statement itself. Long submitted both documents together as Long's "Exhibit 24" to her "Rebuttal to Phillips' Defense" (Document 160). Phillips labeled it "Exhibit 183" and objected to both pages of Document 183 as "irrelevant" and "private."

The handwritten statement states that the author was sitting outside Judge Phillips courtroom when the judge walked by and said to "us" [with no identification of who in addition to the author constituted the "us"] "I'll do everything I can to help you." The typed and unsigned statement reports that Phillips had inappropriate contact many years before, when he was a teacher at a "reform school," with a 16-year old female student. The implication from the statements is that at some more recent time, this former student's child appeared before Phillips, in a criminal case. Before the appearance, it is asserted that Phillips offered to do what he could for the former student. From the HRB in camera production, it appears, although it is not entirely clear, that Phillips did not take any substantive action on the criminal case.

The apparent author of the typed statement included within it a request to keep the statement and her identity in confidence. To provide either or both statements to the A.P. and the public, even with the name of the author redacted, could give details that would aid in identification of the author of the handwritten statement who also is the apparent author of the typed statement. Therefore, the statements will not be disclosed, and the identity of the author/apparent author is sealed from the public and remains confidential. Had this case proceeded to a contested case hearing, the declarant might have been subpoenaed to testify, and

could have requested (among other relief) preservation of her personal privacy by concealment of her identity from the public. Whether or not any such request could or would have been granted at such a later state in proceedings, her request for confidentiality of her identity in the typed statement would be granted scant dignity if the entire documents were made public at this point, even with her name and contact information redacted.

Phillips objected to disclosure of Document 183 (both statements), but the basic information disclosed here may have some relevance to the claims made by Long as of April 3, 2012, despite its remoteness in time. Therefore, the merits of public disclosure, with the present degree of specificity, of the allegations about Phillips' prior conduct are not clearly outweighed by his privacy rights, given his status, at the time of his alleged illegal discrimination and retaliation, as an elected official in a position of great public trust as a state district court judge.

The disparities between Phillips and the apparent author of Document 183, in their ages and statuses, militate in favor of preserving her privacy. Any greater specificity than has been provided herein could imperil that privacy. Document 183 will not be disclosed.

Other Documents Not Disclosed

There are documents that simply are not within A.P.'s request because they lack information about the substance of the discrimination and retaliation charges. The EEOC Charging Detail Inquiry sheets (Documents 2 and 11) are two examples of this kind of Document, and both largely consist of personal contact information for the parties, with and other administrative process information. Other Documents not being disclosed are duplicates – Document 7 is a duplicate of Document 3 (which is being disclosed), Document 109 is a duplicate of Document 12 (which is being disclosed), and Document 158 is a photocopy of Document 12. Documents 2, 7, 11, 109 and 158 will not be disclosed.

Rule 7(a) of the Judicial Standards Commission provides, in pertinent part, that "All papers filed herewith and all proceedings before the Commission shall be confidential" None of the pertinent exceptions, drawn from Title 3, Chapter 1, Part 11, have been satisfied, on the current record. As already noted, perhaps a party to a J.S.C. proceeding can waive his or her confidentiality, and even designate his or her particular submission as "non-confidential." Since there are no such exceptions in the Rule itself, no Documents authored by or filed with the Judicial Standards Commission will be disclosed. Documents 128, 141, 142 and 190 will not be disclosed.

There are no objections interposed to Documents 152 and 153 (affidavits of two non-party public employees about whom Long made numerous accusations in her HRB filings), but it seems clear from other Documents that these affidavits were submitted to the Judicial Standards Commission. No one has presented any explanation about why these affidavits should nonetheless be put in the public record here. The authors of the affidavits have been identified in numerous places in documents that are being disclosed, so it is simply too late to protect their identities as the authors, but the content of their affidavits cannot be disclosed. Documents 152 and 153 will not be disclosed.

During the investigation into her discrimination and retaliation complaints, Long submitted to the Human Rights Bureau three 3-page letters she had written, in draft form (unsigned). One such letter, undated, was addressed to the current Tenth District Court Reporter at the time. HRB designed this letter as Document 132. Phillips did not object to Document 132. The other two draft letters were dated 9/20/11, and Long submitted them as “Exhibit 27” to her “Rebuttal to Phillips’ Defense” (Document 160), with one being (except for the date added to it) the same draft letter to the Court Reporter and the other being a very similar to Phillips “Administrative Assistant.” HRB designated these two dated letters together as Document 186, and erroneously labeled them as “2 versions of letter from Long to Mari dated 9/20/11 6 pgs”. Phillips labeled the combined draft letters “Exhibit 186” and objected to both letters as invading the privacy of the two non-party public employees. The two draft letters (one appearing twice) are aggressively accusatory regarding the two affidavits filed with the J.S.C., each of which was signed by one of the two addressees of the draft letters. There is simply no way to redact the letters sufficiently to protect information about the contents of the affidavits that were filed with the J.S.C. Documents 132 and 186 will not be disclosed.

Numbers for Which There Are No Documents

There are no Documents for numbers 1, 9, 10, 78 and 85.

6. Current Service of Copies of Documents to be Disclosed, and Availability of Documents to be Disclosed in Eleven Days.

With this order, the parties to the HRB proceeding who are also parties here, Long and Phillips, are receiving a full set of photocopies of the Documents designated herein for full disclosure, and of the Documents to be disclosed with redactions (in their redacted conditions). **UNTIL THE EXPIRATION OF THE ELEVEN-DAY PERIOD, ALL OF THESE DOCUMENTS REMAINED SEALED, AND DOCUMENTS SERVED UPON THE PARTIES MAY NOT BE COPIED, MAY NOT BE DISCLOSED TO ANYONE OTHER THAN COUNSEL AND THE PARTY, AND INFORMATION OBTAINED FROM THESE DOCUMENTS MAY**

NOT BE DISCLOSED TO ANYONE OTHER THAN COUNSEL AND THE PARTY.

After expiration of the eleven-day period, absent an order to the contrary, this full order will be provided to Brown and placed in the public record, and the Documents designated for full disclosure and the Documents designated for disclosure with redactions will be available to the public. A.P.'s participant, Brown, or any other designee of A.P., or any member of the public, generally, may arrange to view these Documents at the Hearings Bureau while the appeal time is running. Copies of Documents may be requested and will be provided, at a charge of \$.35 per page. After the appeal time has run, should no appeal be pending, the Documents available to the public, and the full HRB in camera production (still sealed) will be returned by the Hearings Bureau to HRB. Should an appeal be filed, the Documents will be retained by the Hearings Bureau unless and until the reviewing tribunal requests or directs that it be provided with the Documents.

**NOTICE OF RIGHT TO SEEK JUDICIAL REVIEW
AND TIME LIMIT FOR SEEKING SUCH REVIEW**

This is a final agency decision. Any person or entity aggrieved hereby is entitled to review of this final agency decision in accord with Title 2, Chapter 4, Part 7, Mont. Code Ann., by filing a petition for judicial review in an appropriate district court within 30 days of the date of mailing of the hearing officer's decision. Mont. Code Ann. § 2-4-702; Admin. R. Mont. 24.8.210(4). The eleven days during which a portion of this decision is sealed does not extend the time for seeking judicial review.

DATED this 17th day of September, 2012.

DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

By: /s/ TERRY SPEAR
Terry Spear, Hearing Officer