

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

Case No. 1763-2012

IN RE INFORMATION REQUEST BY
JULIA CIERO

FINAL AGENCY DECISION

I. INTRODUCTION

Julie Ciero, the requester in this matter, seeks specific information filed by Pizza Hut, her former employer, with the Human Rights Bureau (HRB) in Ciero's Human Rights Complaint. Specifically, she seeks (1) the response to the complaint that Pizza Hut filed with the HRB, (2) an Excel spreadsheet with the names of employees and their date of hire and/or date of termination, (3) the written notice of termination of employment for an employee dated September 12, 2011, (4) a handwritten note by a witness containing that witness' observations of the conduct of Ciero and another witness and (5) a DVD that shows the interior of the Pizza Hut building. Pizza Hut objects to the disclosure of these items. The hearing officer has engaged in an in camera inspection of the information sought in order to be able to rule on whether or not the information should be disclosed.

The parties waived hearing in this matter and elected to proceed informally upon written briefs. The parties timely filed written briefs, the last one which was received on June 14, 2012. Based on arguments of the parties as set forth in their respective briefs, the hearing officer finds that the Excel spreadsheet containing the names of the employees, the termination notice dated September 12, 2011 and the respondent's response to the complaint contain information in which a privacy interest outweighs the public's right to know and, therefore, are not subject to disclosure. The DVD of the kitchen and the witness statement are subject to disclosure.

II. FINDINGS OF FACT

1. Ciero filed a charge of discrimination with the Human Rights Bureau alleging that Pizza Hut, her former employer and the respondent in this case, discriminated against her by permitting her to be subjected to a sexually hostile work environment. The investigation into her complaint resulted in a no reasonable cause finding and Ciero was given a right to sue in district court.

2. Ciero seeks five discrete pieces of information. The first is Pizza Hut's February 22, 2012 response to Ciero's HRB complaint. Most of the responses contain specific information related to other employee's complaint's about sexual harassment at the Pizza Hut where Ciero worked . The second piece of information is an Excel Spreadsheet that shows the names of Respondent's employees, their date of hire, and their date of termination. The third piece of information she seeks is the termination statement issued by the employer for one of Ciero's co-workers. The fourth piece of information she seeks is a witness statement containing a witness' observations fo the conduct of Ciero and another employee on a certain date. Finally, she seeks the DVD of the June 12, 2011 surveillance video of the Pizza Hut kitchen.

3. With respect to the witness statement regarding the conduct of Ciero and another employee, there is no indication that the witness who gave the statement regarding Ciero provided that information as a result of any promise by the employer that the information would not be disclosed. The statement itself reflects nothing more than what the witness observed. There is no information in the observation that would impinge on any privacy right of the witness. The privacy rights of the third person described in the statement and any privacy right of the witness can be adequately protected by redacting the names of the third person and the witness.

III. DISCUSSION¹

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

¹Statements 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.

to be conducted. *City of Billings Police Dep't v. Owen*, 2006 MT 16, ¶30, 331 Mont. 10, ¶30, 127 P.3d 1044, ¶30.

It is important at the outset to note that Ciero's argument that she has an interest in reviewing the documents "because it is related to my claim [that she has indicated she intends to make in a district court law suit] so I am entitled to prepare my case . . ." misapprehends her standing in the matter before this tribunal. Ciero has no greater standing in this matter than would any member of the public who had brought it to obtain information. The fact that she feels she may need it in order to prepare a lawsuit against her former employer does nothing to strengthen her position. Cf, *Evans v. Mahoney*, 2010 U.S. Dist. LEXIS 141172, 25-26 (D. Mont. Dec. 22, 2010). The process due Ciero in this proceeding gives her a right to seek information but only to the extent the public would have a right to the information. The process is not designed to confer entitlements to information in the same way that a civil suit in a district court would (such as through the discovery process).² Therefore, her arguments that she needs the information to pursue her district court case does nothing to enhance her rights to the information sought in this proceeding.

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.

²In all likelihood, the information Ciero seeks in this information request will be discoverable in a district court proceeding if Ciero brings suit. In that forum, due process would almost certainly require the respondent to disclose most if not all of the information sought here. As mentioned, above, however, the matter before this tribunal is entirely different.

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.” *Missoulain 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).

A tribunal must make two levels of inquiry in these types of matters in order to ascertain whether disclosure of information sought is appropriate. First, a tribunal must determine whether there is a privacy right at stake in the material sought. Second, if such a privacy right exists, the tribunal must weigh whether the privacy right clearly exceeds the merits of public disclosure of the investigative file.

Analysis of the privacy level of the inquiry entails utilization of a two part test. 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, ¶ 46, 333 Mont. 331, 341, 142 P.3d 864, 871; *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. The reasonableness of an individual’s expectation of privacy may be aided by an inquiry 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.

1. Existence and Nature of the Asserted Privacy Rights

Each of the pieces of information that Cicero seeks will be analyzed to determine what, if any, privacy interest is at stake. Turning first to the Excel spreadsheet that contains employee name information and their date of hire and termination, it is difficult for the hearing officer to imagine information in which privacy interest could be much greater. Third party non-witness employees have a well recognized right to privacy in the information contained in that sheet. See, e.g., *Montan Human Rights*, supra. Likewise, the termination notice from September 21, 2011 contains obviously sensitive material regarding the terminated employee. That

employee is not in a position of public trust -- the employee worked for a private employer -- and the document contains potentially damaging assertions about that employee's conduct in a private employment setting. That employee's expectation of privacy in the document is reasonable and one that society does, as the case law demonstrates, recognize. *Montana Human rights, supra*. See also, *Missoulain v. Board of Regents*, 207 Mont. 513, 675 P.2d 962 (1984).

Finally, while the hearing officer does not believe that the objector's privacy interests are in anyway implicated in its response to the HRB investigation, the information about the named individuals contained therein is information in which the courts of Montana have recognized a privacy right and which those courts have protected from disclosure. The information contains the identities of present and former employees and their complaints of harassment. Such information falls within a well recognized right of privacy. See, e.g., *Bozeman Daily Chronicle, supra*.

The privacy rights regarding the other two pieces of information are not presently recognized as reasonable under the Montana Constitution and the objector has failed to convince the hearing officer that any such right does exist or should be found to exist. As to the witness statement regarding the conduct between Ciero and a third person that the witness observed, the witness has no reasonable expectation of privacy. *Worden v. Montana Bd. of Pardons & Parole*, 1998 MT 168 ¶29, 289 Mont. 459, 463, ¶29, 962 P.2d 1157, 1163, ¶29. Moreover, any concerns about privacy in that document can be eliminated by simply redacting the name of the witness and name of the third person involved. *Id.* See also, *Montana Human Rights Division*, 199 Mont. at 449, 649 P.2d at 1291 (noting that privacy interests may be adequately protected "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.")

With respect to the corporate concern about the DVD, the only proffered basis for objecting to its disclosure is a claimed proprietary interest on the part of the corporation. The privacy rights implicated by the balancing analysis under Article 2, Sections 9 and 10 apply only to individuals, not corporations and do not apply to protect even trade secrets. *Great Falls Tribune Co. v. Montana PSC*, 2003 MT 359, 319 Mont. 38, 82 P.3d 876. It is unlikely that any trade secret is implicated here since it is almost a certainty that many members of the public, from fire marshals and health inspectors right down to friends of employees, have seen the kitchen. Moreover, the corporation's proprietary concerns if in fact they do exist can be protected by ordering that the requester not disseminate the DVD and not use it in any fashion except in connection with any potential law suit she may file. Because

no privacy right has been demonstrated with respect to either the witness' statement (redacted to conceal the name of the observer and the third party) or the DVD (subject to the above limitations on dissemination and use), those documents should be disclosed.

2. Balancing Individual Privacy Against the Merits of Public Disclosure

With respect to those three pieces of information in which a reasonable expectation of privacy has been found, the second level of inquiry must also be undertaken in balancing the right of privacy against the public's right to know. 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.

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

With respect to the first three pieces of information, the balancing process leads the hearing officer to conclude that the privacy rights at issue here clearly outweigh the public's right to know. No conceivable public interest can be served by disclosing the names, hire dates and termination dates of other employees working for the respondent, particularly where there is no indication that those employees have any connection to the issues in Ciero's Human Rights complaint. On the other hand, those employees have a well recognized expectation that the personal information of their names, hire dates and termination dates will be protected from public disclosure. Likewise, the requester has not articulated any pressing public interest in a notice of termination of a private (as opposed to a public) employee who holds no position of public trust where that notice contains very sensitive

information about the termination. In contrast, that employee, who has not had the benefit of any sort of hearing in which the allegations surrounding his termination from employment have been tested, has a well recognized right of privacy with regard to those allegations (which at this point are simply that: allegations). Finally, the requester has pointed to no case law and has not even argued for any type of public interest in the information in the employer's response. In contrast, the privacy rights of the individuals named in the response as well as their privacy rights with respect to the allegations regarding the work place are well recognized by Montana case law. On balance, those privacy rights clearly outweigh the uncertain right to know of the public in this case.

IV. CONCLUSIONS OF LAW

1. The department has jurisdiction in this matter. Admin. R. Mont. 24.8.210.
2. The privacy rights of the individuals contained in the Excel spreadsheet of former employees, the termination notice of September 12, 2011 and the respondent's response to the Human Rights Bureau's inquiry are recognized rights under the law.
3. There is no clearly defined public interest in the information sought in the Excel spreadsheet of former employees, the September 12, 2011, termination notice and the respondent's response to the Human Rights Bureau's inquiry.
4. The privacy interests at stake in the information contained in the Excel spreadsheet of former employees, the termination notice of September 12, 2011 and the respondent's response to the Human Rights Bureau's inquiry clearly outweigh the public's interest in obtaining that information.
5. The privacy interest in the information contained in the witness' statement can be adequately protected by redacting the names of the witness and the third party. That information, properly redacted, should be disclosed.
6. There is no recognizable privacy right with respect to the DVD. To alleviate potential concerns about dissemination of trade secrets, the requester is specifically prohibited by this order from disseminating the DVD or using it for any purpose other than as it relates to any suit the requester may subsequently file against Pizza Hut. In conjunction with this, the requester is specifically admonished that if the requester does not adhere to this tribunal's restriction regarding dissemination and use of the DVD, the objector may be able to bring a cause of

action against the requester in an appropriate tribunal for any damages arising out of improper dissemination or use of the DVD.

7. The requester is entitled to obtain a copy of the DVD and a redacted copy of the witness statement. The Excel spreadsheet of former employees, the termination notice of September 12, 2011 and the respondent's response to the Human Rights Bureau's inquiry cannot be disclosed through this proceeding.

V. ORDER

Based upon the foregoing, no later than August 13, 2012, the Hearings Bureau will disclose the redacted witness statement and the DVD to the requester. Disclosure will occur on that date unless a party (1) obtains a stay from an appropriate higher authority before August 13, 2012 or (2) obtains a stay from this tribunal before that date.

DATED this 27th day of July, 2012.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
Hearing Officer