STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

Case No. 887-2012

IN RE INFORMATION REQUEST BY
BREANNE CUTLER

FINAL AGENCY DECISION RE INFORMATION REQUEST

I. INTRODUCTION

On November 8, 2011, Geoffrey Angel, on behalf of Breanne Cutler (Cutler), requested "a copy of the investigative file prepared by respondent MSU"from the Department of Labor & Industry Human Rights Bureau (HRB). The requested documents were supplied by MSU during the investigation of a human rights complaint filed by Cutler against MSU and involved the conduct of one of her former professors, Shuichi Komiyama. Pursuant to Admin R. Mont 24.8.210, the HRB sent notice of the request to MSU asking whether it objected to the release of the requested information. MSU objected to release of information involving their students' and their faculty's rights to privacy as declared in Article II, Section 10 of the Montana Constitution and on the basis that the documents were education records under the Family Educational Rights and Privacy Act (FERPA).

At some undocumented point, the HRB notified Cutler that it would not release the documents due to the objections. At some later but undocumented point, Angel requested a review of HRB's decision and the matter was transferred to the Hearings Bureau on November 9, 2011.

On November 10, 2011, the Hearings Bureau issued a notice of hearing and telephone conference in this matter. On November 22, 2011, the hearing officer held a telephonic conference at which counsel for all parties to this proceeding appeared. At the conference, the hearing officer informed the parties that based on his initial review of the requested documents that he may need to provide notice to the persons who were identified therein and they would, in turn, notify the hearing officer as to whether they objected to the release of the documents that contained their information. The additional objections could require additional briefing and potential delays. During the hearing officer's preliminary review of the requested

documents, it became clear to him that a number of them could be released without further review. Accordingly, the hearing officer assembled a list of the 401 documents with some identifying information and requested that MSU identify any documents to which it had no objection. The hearing officer held a conference with the parties on December 19, 2011, to explain what he was requesting the University to do, and on December 20, 2011 issued an order setting the schedule for the parties to review the list the hearing officer created and requiring Komiyama to file any objection he may have to the release of the documents no later than December 30, 2011. On December 30, 2011, the Hearings Bureau received Komiyama's objection to the release of the documents. This matter was fully briefed on December 23, 2011.

It later became clear that the university could and would object to release on behalf of its students and that contacting them individually would not serve their interests. 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. Upon further review of the documents, the hearing officer learned that they had been originally provided to HRB on a thumb drive, which was not included with the documents provided by HRB. After obtaining the thumb drive, it also became clear there were documents on the drive that had not been supplied by HRB when it initially provided the documents to the hearing officer. Those documents consisted of 54 additional pages of documents many of which were duplicates of documents that had been included among the 401 listed in the table the hearing officer supplied the parties.

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

II. FINDINGS OF FACT

1. On August 11, 2011, Breanne Cutler filed a charge of discrimination with the Human Rights Bureau alleging that Montana State University violated the human rights act and the governmental code of fair practices.

2. Prior to Cutler filing her charge of discrimination with HRB, Montana State University conducted an internal investigation into her alleged complaint pursuant to MSU policies. As a result of that investigation, a report was issued, which included several hundred pages of supporting documents. After Cutler filed her HRB complaint, MSU sent a redacted copy of the investigative report and supporting documents to HRB.

3. Cutler was a student at Montana State University, Shuichi Komiyama was a professor at Montana State University. The witnesses identified in the documents sought for disclosure are or were Montana State University students and faculty, as well as students, faculty and administrators of other educational institutions.

III. DISCUSSION[1]

A. The Family Educational Rights and Privacy Act.

MSU argues that the documents at issue are "education records" which may not be disclosed under the provisions of the Family Educational Rights and Privacy Act (FERPA). The hearing officer cannot find any authority for the proposition that FERPA applies to records that are in the hands of the Human Rights Bureau. FERPA prohibits the release of education records by educational institutions and has no authority over documents held by a state agency. See 20 USCS § 1232g. Even if FERPA applied, there is a sound argument that the investigatory documents are not "education records" and thereby not subject to the act. Moreover, as further explained later in this decision, redaction of personally identifiable information removes the documents from being records subject to FERPA disclosure requirements. See Bd. of Trs. v. Cut Bank Pioneer Press, 2007 MT 115, P28, 160 P.3d 482. Finally, the balancing test described below includes and perhaps subsumes any analysis that would be conducted under FERPA

B. Due Process Considerations.

The petitioner argues that due process requires disclosure of these documents and cites the case of Cooper v. Salazar in support of her argument. 190 F. 3d 809 (7th Cir. 1999). The petitioner's reliance on Cooper is misplaced. Cooper sought the contents of the Illinois Human Rights Bureau investigative file before the matter was reviewed by the Department's chief legal counsel. Id. Cooper also challenged the changes in process instituted by the 1996 Illinois Legislature that replaced the Illinois Human Rights Commission with the Department's chief legal counsel as the reviewing entity. The Illinois procedure struck down in Cooper is significantly different than the process developed under the Montana Human Rights Act, and the MHRA procedure is much more like the pre-1996 Illinois procedure which was not found violative of due process. In Montana the public can, except when the privacy rights of individuals outweigh disclosure, access the contents of an investigative file

[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.

after the investigation is complete. Unlike the Illinois process, the public can obtain the investigative file even before any de novo proceeding is conducted by a District Court or the Hearings Bureau in which full discovery, confrontation of witnesses and motion practice is allowed. It is also important to note that when Cooper was remanded to the Illinois District Court, it provided Cooper with access to the investigative files, including notes about witness statements, but excluding certain sensitive materials, much like the instant process. Cooper v. Salazar, 2001 U.S. Dist. Lexis 17952. It is important to note that this is a public information case, not a contested human rights case as Cutler has mistakenly captioned this matter on several occasions. This case is In Re The Information Request by Breanne Cutler. The investigation from which Cutler seeks the documents at issue recently resulted in a cause finding by the investigator and as of February 22, 2011, Breanne Cutler's case will be heard by an administrative law judge where Cutler will have a meaningful opportunity to confront witnesses and discover information in the hands of the respondents in that matter.

In opposing Cutler's due process argument MSU cites the case of Evans v. Mahoney which is directly on point. Evans v. Mahoney, 2010 U.S. Dist. LEXIS 141172, 25-26 (D. Mont. Dec. 22, 2010). At issue in that case was a prisoner's claim that the HRB investigation was violative of his due process rights because the HRB investigator chose not to interview a witness Evans identified. Id. at 25. In denying Evans' claim, the court held that "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. Id. "Mr. Evans, therefore, must establish that the Montana Human Rights Act somehow created a 'legitimate claim of entitlement' to having his witnesses interviewed during the investigation of his complaint. Id. (internal citations omitted). Cutler cannot show that she has an entitlement to obtaining the documents in this case that contain the identities of or private information regarding third parties.

C. Constitutional provisions.

When a third party seeks disclosure of documents in an 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 Shuichi Komiyama and witnesses involved in MSU's investigation of Cutler's complaint clearly outweigh the merits of the public's right to obtain documents now 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, ___ Mont. ___, ___P.3d ___.

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, ___.

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.

1. 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: Komiyama and the students and faculty who either witnessed or are identified in the requested documents, some of whom provided statements and other information during the course of MSU's investigation. The privacy interests at issue involve both a particular witness' identity, and their statements made during the investigation. 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. Komiyama's privacy interests

Komiyama has asserted his right to privacy and objected to the release of documents in the investigative file. In a line of cases beginning with Great Falls Tribune v. Cascade County Sheriff (1989), the Montana Supreme Court held that certain public official's expectations of privacy may not be reasonable because they hold "positions of great public trust." 238 Mont. 103, 107; 775 P.2d 1267, 1269. While not articulating a bright-line rule for what constitutes a position of great public trust, the Court in Great Falls Tribune held that the officer in that case was in such a position because "the public health, safety and welfare are closely tied to an honest police force." Id. It further held that "if [the officer] engaged in conduct resulting in discipline in the line of duty the public had a right to know." Id.

The Court has held that when the nature of a person's job makes him "subject to public scrutiny in the performance of his duties, the public has the right to be informed of the actions and conduct." Whitlock, 255 Mont. at 522, 844 P.2d at 77. The Supreme Court in Bozeman Daily Chronicle found that "allegations of sexual misconduct went directly to the official's ability to properly carry out his duties and, therefore, should not be withheld from public scrutiny." 260 Mont. at 226, 859 P.2d at 440. The allegations against Komiyama include inappropriate sexual conduct and quid pro quo discrimination. Those allegations clearly call into question his ability to carry out his duties as a professor who is in contact with impressionable young men and women, many of whom have not reached the age of majority.

Teachers in the public schools, "entrusted with the care and instruction of children" are in positions of public trust. Svaldi v. Anaconda-Deer Lodge County, 2005 MT 17, P31 (Mont. 2005). That position combined with "allegations of misconduct, assault against her students, went directly to her ability to properly carry out her duties." Id. The expectation of privacy is only unreasonable when two elements are present: a position of public trust; and allegations of or actual misconduct that calls into question a person's ability to perform his or her public duties. Y ellowstone County v. Billings Gazette, 2006 MT 218, ¶ 21, 333 Mont. 390, ¶ 21, ___P.3d ___ .

The need to satisfy both prerequisites, a position of public trust and alleged or actual wrongdoing, is made most clear in Missoulian, op. cit. where six university presidents' expectations of privacy in statements made about them during their

performance appraisals were found to be reasonable. In that case, there were no allegations of wrongdoing against the presidents and the Court found their expectations of privacy reasonable.

The hearing officer finds that Komiyama was in a position of public trust and has been accused of wrongdoing. Accordingly, under this analysis, society would find his expectation of privacy unreasonable. While persons in positions of great public trust have no expectation of privacy with regard to information directly related to the wrongdoing, other private information may remain private. Jefferson County, ¶15; Whitlock, 255 Mont. 517, 521, 844 P.2d 74. Id. Komiyama's address, telephone number, e-mail address will not be released.

b. Privacy Interests of Witnesses involved in MSU's investigation

Witnesses interviewed by MSU in its internal investigation of Cutler's complaint have privacy interests in both their identities and in the information they provided about themselves and about others. Numerous witnesses provided statements to MSU during its investigation of Cutler's complaints. Those statements include their observations of the conduct of Cutler and Komiyama and others; information about incidents involving themselves or others and Cutler and Komiyama. MSU on behalf of all the witnesses asserts that none of these statements or the identity of those witnesses should be publicly disclosed.

i) Witnesses identities

In Worden v. Montana Bd. of Pardons & Parole (1998) the Court stated:

> While we agree that encouraging the flow of information to the Board of Pardons is an important policy, we do not agree that anyone who provides information to the Board necessarily has a privacy interest that outweighs the Inmates' right to know. . . . A victim may have a privacy interest in a letter submitted to the Board of Pardons, but often this interest can be served by simply redacting his or her address or phone number. Likewise, when members of the community submit letters to the Board of Pardons expressing concern about an Inmate's possible parole, names and addresses can be removed. We conclude that each document in an Inmate's file must be examined to determine whether all or part of it is subject to the privacy exception of the right to know.

1998 MT 168 ¶29, 289 Mont. 459, 463, ¶29, 962 P.2d 1157, 1163, ¶29.

Montana Human Rights Division also 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.

ii) Private information disclosed in witness statements may be protected from disclosure.

The Supreme Court has also held that an accuser and witnesses to an alleged sexual assault who were interviewed during the investigation of the alleged assault have a subjective privacy interest in their identities and in information given during an investigation which society is willing to recognize as reasonable in an investigation focused on the accused. Bozeman Daily Chronicle, 260 Mont. at 228, 859 P.2d at 441.

The identity of and statements made by witnesses interviewed by MSU during its internal investigation are the core issue in this information case. The results of that investigation and supporting documentation were subsequently turned over to HRB during its investigation of Cutler's human rights complaint. Whether those witnesses have a reasonable expectation of privacy in their identities and in the information they provided are not issues the Montana Supreme Court has directly addressed. The Court has, however, stated that "[p]rivacy has been defined as the ability to control access to information about oneself." Fried, Privacy (1968), 77 Yale L.J. 475, 482, 483 cited in State v. Hyem (1981), 193 Mont. 51, 62, 630 P.2d 202, 209. Thus, put another way the issue here is whether witnesses who provide private information in an informal investigation lose control over information about themselves. A number of cases suggest that witnesses have a reasonable expectation of privacy in private information included in their statements given to investigators.

In Goyen v. City of Troy (1996), a witness whose testimony in a closed public meeting acknowledged that "she and officer Goyen had engaged in sexual activity in or near a city patrol car while the officer was on duty and in uniform" was found to have a reasonable expectation of privacy in her specific testimony that society is willing to recognize. 276 Mont. 213, 222, 915 P.2d 824, 830.

The Montana Supreme Court found that the public had the right to know information about third parties contained in a party's deposition because: 1) the information went directly to the claim of the charging party; 2) the third parties had not asserted a privacy interest in the deposition testimony; and 3) the deponent was a person in a position of public trust and the information sought went directly to his

knowledge of the third parties' job histories and official duties. Yellowstone County, ¶¶26 -27. Only one of those elements is present here - the witnesses either asserted their privacy rights when they provided information during MSU's investigation or they were told that MSU would consider the information they provided confidential.

In Montana Human Rights Division, the Court struck down the division's rule preventing the release of information resulting from a complaint or an investigation thereof prior to hearing, clearly indicating that once the matter went to a contested case hearing or trial, the information was to be released to the public unless perhaps a protective order was issued. 199 Mont. at 447-448, 649 P.2d at 1290 (emphasis added). While this rule was struck down by the Court, it did so because the rule provided inadequate protection for privacy interests, and not because it found protecting the information before hearing was constitutionally or otherwise flawed.

The holdings in Montana Human Rights Division and Bozeman Daily Chronicle are consistent with the idea that during an informal investigative process victims and witnesses have a reasonable expectation of privacy in private information provided during the investigation, but that once a dispute moves into the formal adjudicative process of hearings and trials testimony of alleged victims and witnesses is taken under oath and their identities are protected only if they are at great risk of harm.

iii. Release of private information about witnesses may have a chilling effect on future human rights investigations.

MSU argues that identification of witnesses or public disclosure of their statements or private information will dissuade future victims of discrimination seeking relief under the Montana Human Rights Act and dissuade witnesses from providing statements in future investigations. The hearing officer finds that in this particular context, a human rights investigation involving MSU and its faculty, such disclosures could have a chilling effect.

In Montana Human Rights Division, the Court held that in order for the Commission to fulfill its duties under Article II, Section 4, its power had to be "broad enough to allow a thorough scrutiny of the circumstances surrounding complaints of discrimination." 199 Mont. at 445, 649 P.2d at 1289. In so holding, the Court found a compelling state interest sufficient to invade an individual's right to privacy. Similarly here, if witness identities and personal information are not protected from disclosure, the ability of the HRB to fully investigate other claims of discrimination may be seriously undermined. Indeed, if witnesses' identities were not protected

during the investigative stage, it is possible that they would not have come forward to provide evidence in Cutler's Human Right's complaint and reasonable cause to believe discrimination had occurred may not have been found.

In discussing the potential public disclosure of employment records to the Human Rights Division, the Court held that although "respondents gave their employees no assurances of confidentiality, we believe that employees would reasonably expect such communication normally would be kept confidential." 199 Mont. at 442, 649 P.2d at 1287-1288. Here, the witnesses have a greater expectation of privacy because they all either requested or were given promises that their identity and the information they provided about themselves would be kept confidential. In such an instance where witnesses reveal otherwise private information about themselves or other non-parties gathered during an informal investigation, it is reasonable to expect such communication would be kept confidential.

In Dorr v. Bd. of Psychologists, the First Judicial District Court applied the same reasoning to letters submitted to the Board of Psychologists in support of a psychologist against whom a complaint had been brought. No. BDV-99-359, ¶9-10 (1st Judicial Dist. Ct., Mont., November 9, 1999). The district court found that the letter contained "personal and sensitive details which the patient may not have expressed if she did not believe the letter would remain confidential." Dorr, ¶11. The Board of Psychologists in Dorr argued:

> . . . that public policy supports their contention that society is willing to accept that persons writing letters to the Board would expect them to remain confidential. The Board occupies a position of public trust in which it regulates state psychiatrists. The Board seeks to encourage persons with concerns about the professional behavior of psychiatrists to report those concerns to the Board. The Board contends that violations might go unreported if the complainant could not be assured of strict confidentiality. This is certainly an expectation of privacy that society is willing to recognize." Dorr, ¶11-12.

It is a reasonable conclusion that other parties could be dissuaded from bringing complaints seeking redress of discriminatory actions against them if their identities or private information was disclosed. Moreover, even if complaints were filed, witnesses could be reluctant to come forward willingly if private information about themselves would be disclosed prior to a hearing or trial in the matter. The ability of others to bring claims for discrimination could be substantially reduced and

investigation of claims could be considerably hampered, if not entirely derailed, if private information about witnesses suddenly appeared in the news. Persons whose conduct was blameless according to the allegations presented would be unlikely to cooperate with the process if they are actually subjected to or at reasonable risk of public disclosure of their personal and private information.

The hearing officer finds that the students who were witnesses involved in the investigation of Cutler's complaint have an expectation of privacy in their private information that society is willing to recognize as reasonable. Faculty members who were witnesses in the investigation do not have a privacy interest that society would find reasonable. Faculty members have an obligation to come forward when the administration is investigating allegations of sex discrimination and the disclosure of their identities is less likely to have a chilling effect on witnesses coming forward or faculty members bringing discrimination claims.

2. Balancing Individual Privacy Against the Merits of Public Disclosure

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

In balancing those interests "[I]t is apparent that 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. "Montana Human Rights Division and Mountain States indicate that it is appropriate and necessary to balance the competing rights in the context of the purposes, functions and needs of the governmental entity involved and the purposes and merits of the asserted public right to know." Missoulian, 207 Mont. at 530-531, 675 P.2d at 971.

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, ___ Mont. ___, ___ P.3d ___

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

MSU has shown that Cutler and the witnesses have a reasonable expectation of privacy in their identities and in statements made during MSU's investigation of Cutler's complaint. However, the public's right to know in this case is strong. The underlying matter is related to charges of sex discrimination at one of Montana's two universities and involves a member of its faculty and at least one of its former students. Under those circumstances, the witnesses' expectations of privacy must give way to the public's right to know about the nature of the allegations.

It is the hearing officer's intent to provide Cutler with as much information as possible. Students' identities and personal information provided to the investigator about their personal conduct or that of others with privacy interests will be redacted. The names of faculty members will not be redacted. The witnesses in this matter are or were students and faculty in a relatively small part of the university and providing background details would likely lead to the discovery of the identities of the students and their private information. Because of that, information that could lead to the discovery of that information has also been redacted. Those few documents which contain the names and private information of multiple individuals and information that might lead to the identity of those individuals will not be disclosed. Information in any document pertaining to home addresses, email addresses, telephone numbers and social security numbers will also be redacted.

IV. DELAYING PUBLIC DISCLOSURE

Mont. Code Ann. § 2-4-702(2)(a) empowers an aggrieved party to file a petition for judicial review of this final agency decision within 30 days after service of this decision. Cutler and MSU expressed concern during these proceedings about disclosure of the documents before they had the opportunity to ask for a stay to seek judicial review. Once information is in the public record, it is essentially impossible to take it back out, especially if the information is provided to the news media. Therefore, the only parties who will have immediate access to the disclosed documents, under this final decision, will be MSU and the HRB[2]. They will have 20 days to review the documents proposed for release and to file a petition for judicial review. Komiyama will be provided the documents upon written request. The 20-

[2] For the benefit of the parties an index listing all the Documents in the HRB file and their disposition is included with this decision. In the event that the spreadsheet and the documents conflict with regard to whether they were released or redacted, the documents are the final determination.

day period will allow the parties asserting privacy rights an opportunity to seek a stay before the documents are placed in the public record. After the 20th day, the documents will be released to Cutler, who can then exercise her right to seek judicial review.

V. CONCLUSIONS OF LAW

1. The department has jurisdiction. Admin. R. Mont. 24.8.210.

2. Komiyama, as a person in a position of public trust, does not have a reasonable expectation of privacy.

3. Witnesses involved in MSU's investigation of Cutler's complaint have an expectation of privacy in their identity that society would find reasonable.

4. Witnesses identified in Documents 0001 to 0455 have an expectation of privacy in their statements that society would find reasonable.

5. The witnesses have an expectation of privacy in their identity that clearly exceeds the merits of public disclosure.

6. The witnesses have an expectation of privacy in their statements that clearly exceeds the merits of public disclosure.

7. Cutler, as a member of the public, has the right to know the content of the documents MSU provided to the HRB to the extent that such disclosure is not outweighed by the individual rights to privacy of the witnesses in MSU's investigation.

VI. ORDER

Based upon the foregoing, the Human Rights Bureau is directed to seal all documents provided by MSU together with the thumb drive that MSU sent to HRB and which contains the documents discussed in this decision. The Human Rights Bureau shall not open the disclosed documents (attached to HRB's copy of the decision) to the public record until March 19, 2012. All copies of the disclosed Documents provided to the parties are to remain sealed until March 19, 2012. Unless otherwise directed by court order, on March 19, 2012, the Hearings Bureau will release a copy of the redacted Documents to Cutler. The Human Rights Bureau shall not release any other information from the file, unless otherwise ordered.

DATED this 28th day of February, 2012.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ DAVID A. SCRIMM
DAVID A. SCRIMM
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.

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