

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU

Case No. 1245-2012

IN RE INFORMATION REQUEST BY  
HARLOWTON TIMES-CLARION

Final Agency Decision Re Information Request

I. INTRODUCTION

On December 12, 2011, Shirley Wegner, editor of the Harlowton Times-Clarion, requested “the entire file, including the Wheatland County Investigation file and complete response to the Human Rights Complaint filed by Everett Misner Nov. 22, 2010 . . . “ The Times-Clarion’s request included releases from Sheila Crow and Jamie Sanguins. Pursuant to Admin R. Mont 24.8.210, the HRB sent notice of the request to Everett Misner and to Linda Hickman, Wheatland County attorney, asking whether they objected to the release of the requested information. Misner’s attorney responded that the terms of the settlement agreement bound his client “to not reveal contents of the files or any other information in this matter.” Wheatland County responded that pursuant to this hearing officer’s previous order in the earlier information request it did not have standing to object. That position is inaccurate. While Wheatland County had no standing to object to the release of the settlement agreement it would have standing to object to the release of the documents now sought by the Times-Clarion.

The HRB notified the Times-Clarion on January 3, 2012, that it would not be releasing the requested information due to the objections. On January 6, 2012, the Times-Clarion through its attorney, Mike Meloy, requested review of the HRB’s decision and the matter was transferred to the Hearings Bureau on January 10, 2012.

On January 12, 2012, the Hearings Bureau issued a notice of hearing and telephone conference in this matter. Counsel for all parties to this proceeding appeared at the January 17, 2012, conference. The parties agreed to informal disposition under Mont. Code Ann. § 2-4-603 and that the hearing officer could make his decision in this matter by reviewing the briefs submitted in the earlier Time-Clarion information request, Case No. 483-2012.

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

## II. FINDINGS OF FACT

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

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

## III. DISCUSSION<sup>1</sup>

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 Misner, the County and third parties whose names or identities are disclosed in the complaint or settlement agreement outweigh the merits of the public's right to obtain documents contained in the files of a public agency – the HRB.

The proper procedure to protect an individual's legitimate right to privacy and to balance the public's right to know "is to conduct an in camera inspection of the documents at issue in order to determine what material could properly be released, taking into account and balancing the competing interests of those involved, and conditioning the release of information upon limits contained within a protective order." *Bozeman Daily Chronicle*, at 260 Mont. 228-229, 859 P.2d 435, 439 (citing

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<sup>1</sup> 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.

Allstate Ins. Co. v. City of Billings, (1989), 239 Mont. 321, 326, 780 P.2d 186, 189).

After his in camera review of the requested documents, the hearing officer considered the characteristics of information contained therein, the context of the underlying dispute and the relationship of that information to the duties of the public officials involved. See Havre Daily News, LLC v. City of Havre, 2006 MT 215, ¶ 23, 333 Mont. 331, 341, 142 P.3d 864, 871.

The Montana Supreme Court has held that “[b]oth the public right to know, from which the right to examine public documents flows, and the right of privacy, which justifies confidentiality of certain documents, are firmly established in the Montana Constitution.” Citizens to Recall Mayor James Whitlock v. Whitlock (1992), 255 Mont. 517, 521, 844 P.2d 74, 78.

Article II, Section 9, of the Montana Constitution provides:

No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

Article II, Section 10, of the Montana Constitution provides:

The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

The right to know is not absolute. “The right to know provision was designed to prevent the elevation of a state czar or oligarchy; it was not designed for . . . the tyranny of a proletariat.” Missoulia v. Board of Regents (1984), 207 Mont. 513, 530, 675 P.2d 962, 971 quoting Mtn. States T. and T. v. Dept. Pub. Serv. Reg. (1981), 194 Mont. 277, 289, 634 P.2d 181, 189. The Human Rights Commission and the department have recognized the need to balance the competing interests of the public’s right to know and the individual’s right to privacy and have adopted a method for that balancing, Admin. R. Mont. 24.8.210.

The two levels to the inquiry are: (a) analyzing the asserted privacy interests and (b) weighing whether the individual privacy demands clearly exceed the merits of public disclosure of the investigative file.

## A. Existence and Nature of the Asserted Privacy Rights

There is a two-part test to determine whether individuals have privacy interests protected by the Montana Constitution. First, the individual must have a subjective or actual expectation of privacy. Second, society must be willing to recognize that expectation as reasonable. *Havre Daily News*, ¶ 23; *Jefferson County v. Montana Standard* (2003) 318 Mont. 173 ¶15, 79 P. 3d 805; *Lincoln County Com'n v. Nixon* (1998), 292 Mont. 42, ¶16, 968 P.2d 1141; *Bozeman Daily Chronicle*, 260 Mont. 218, 859 P.2d 435; *Montana Human Rights Division v. City of Billings* (1982), 199 Mont. 434, 649 P.2d 1283. Several categories of people may have privacy rights at issue in this case: the alleged victim, Misner; the individuals who allegedly created the hostile work environment; and parties whose names or identities are disclosed in the documents. The reasonableness of an individual's expectation of privacy may be aided by an inquiry into the:

(1) attributes of the individual, including whether the individual is a victim, witness, or accused and whether the individual holds a position of public trust (internal citations omitted); (2) the particular characteristics of the discrete piece of information and (3) the relationship of that information to the public duties of the individual.

*Havre Daily News*, ¶ 23. The hearing officer will consider all of these categories of potential privacy demands.

### I. Misner's Privacy Rights

Misner's only objection to the release of the settlement agreement is based on his agreement to not do so pursuant to its terms. His contractual obligations are simply insufficient to prevent disclosure of documents in the public record.

Misner also argued that the privacy interests of others who were named in the complaint have privacy interests that should be protected. Misner asserts their rights under Admin. R. Mont 24.8.210(c).

Many of the documents regarding Misner in the HRB file are the type that the Montana Supreme Court has found to be constitutionally protected. *Montana Human Rights Division*, 199 Mont. 434, 649 P.2d 1283 (personnel files, performance evaluations, application materials and medical records); *Missouliau*, 207 Mont. 513, 530, 675 P.2d 962 (performance evaluations); *Whitlock*

(performance evaluations). Accordingly, Misner's expectation of privacy in those documents is reasonable.

## 2. Privacy interests of third parties.

Montana Human Rights Division provides guidance on how to protect the privacy interests of witnesses "by restricting the release of information which suggests the identity of employees whose files may be used in investigating the alleged discriminatory practices by respondents." 199 Mont. at 449, 649 P.2d at 1291.

Resolving the conflict between the public's right to know and the individual's right to privacy requires the department "to balance the competing constitutional interests in the context of the facts of each case, to determine whether the demands of individual privacy clearly exceed the merits of public disclosure. Under this standard, the right to know may outweigh the right of individual privacy, depending on the facts." Missoulain, 207 Mont. 513, 529, 675 P.2d 962, 970 (original emphasis); Havre Daily News, ¶ 23.

It is important to remember that Article II, Section 9 favors disclosure, limiting disclosure only when the demand of individual privacy clearly exceeds the merits of disclosure. "It is the party asserting individual privacy rights which carries the burden of establishing that those privacy rights clearly exceed the merits of public disclosure." In the Matter of T.L.S. 2006 MT 262, ¶31, 334 Mont. 146, 155, 144 P.3d 818, 825 (citing Bozeman Daily Chronicle, 260 Mont. at 227, 859 P.2d at 441; Worden, ¶¶31-32).

Third parties have a reasonable expectation of privacy in their private information. However, the public's right to know in this case is strong. The underlying matter is related to charges of discrimination, harassment and retaliation associated with Misner's political beliefs involving the upper echelons of county government and a settlement of those claims. Those persons who waived their rights to privacy with regard to the contents of the HRB file will not have their names or other information about them redacted. However, since the Clarion has agreed to the redaction of the information related to other third parties, their information will not be released.

It is the hearing officer's intent to provide the Times-Clarion with as much information as possible. Witness identities, other than Crow and Sanguins, provided to the investigator will be redacted. Misner's personnel records will not be released or will be redacted to protect his privacy interests. 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. 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 Misner and the HRB. They will have 20 days to review the documents proposed for release and to file a petition for judicial review. The 20-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 20<sup>th</sup> day, the documents will be released to the Times-Clarion, who can then exercise its right to seek judicial review.

#### V. CONCLUSIONS OF LAW

1. The department has jurisdiction. Admin. R. Mont. 24.8.210.
2. Misner's expectation of privacy with respect to his personnel records is one that society would find reasonable.
3. Except for Crow and Sanguins, witnesses involved in the investigation of Misner's complaint have an expectation of privacy in their identity that society would find reasonable. The witnesses have an expectation of privacy in their identity and their statements that clearly exceeds the merits of public disclosure.
4. The Harlowton Times-Clarion is entitled to receive copies of the documents that do not involve a privacy interest or have been redacted to protect such interests. The Times-Clarion is not entitled to receive copies of Misner's personnel records.

#### VI. ORDER

Based upon the foregoing, the Human Rights Bureau is directed to maintain the "Sealed Documents" provided by the hearing officer with this decision and shall not disclose their contents, unless directed by court order. The Human Rights Bureau shall not open the envelope containing the "Disclosed Documents" (attached to HRB's copy of the decision) to the public record until July 3, 2012. All copies of the Disclosed

Documents provided to the parties are to remain sealed until July 3, 2012. Unless otherwise directed by court order, on July 5, 2012, the Hearings Bureau will release a copy of the Disclosed Documents to the Times-Clarion.

DATED this 12th day of June 2012.

DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU

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