STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

Case No. 1245-2012

IN RE INFORMATION REQUESTS BY
THE BILLINGS GAZETTE, Case No. 1259-2012
THE TERRY TRIBUNE Case No. 1269-2012
AND THE FALLON COUNTY TIMES Case No. 1287-2012

Final Agency Decision Re Information Requests

I. INTRODUCTION

On June 8, 2011, Nicole Brown submitted to the Montana Department of Labor and Industry an 8-page letter from her attorney, to which was affixed her sworn verification,[1] detailing her allegations of illegal discrimination because of her sex by Fallon County and by Donald Rieger, who at all times mentioned in the letter was a Fallon County Commissioner and the Chair of the Commission. At all times mentioned in the letter, Brown had been an employee of Fallon County, first as a Clerk of the Fallon County Justice Court (as well as of the Baker City Court), and then as a Fallon County Justice of the Peace (serving at the same time also as the Baker City Judge). The letter was submitted to the department's Human Rights Bureau (HRB).

HRB drafted two separate complaints, identical in substance, one captioned Brown versus Fallon County (HRB No. 0111015089), and the other captioned Brown versus Rieger (HRB No. 011101590), and created two separate files for the jointly conducted investigation into the two complaints. HRB received back the two complaints it had drafted for Brown, with Brown's notarized signature on each, on August 15, 2011. HRB commenced its joint investigation with letters, dated August 17, 2011, to the two respondents providing notice of the complaints and a time limit for each to file a written answer to the complaint directed to that respondent. Both investigative files were subsequently closed because of resolution of the charges before completion of the investigation.

The Billings Gazette (the Gazette), The Terry Tribune (the Tribune) and The Fallon County Times (the Times) each requested complete copies of the complaints, all investigatory notes and any settlement/conciliation agreements in the custody of

[1] The verification was dated June 1, 2011, which would have created a technical problem had the letter been accepted as a complaint upon which an investigation was commenced.

the Human Rights Bureau (HRB) related to Brown's complaints. All those documents were situated in the two HRB investigative files. All three parties to the underlying case, Brown, Fallon County and Rieger, objected to the requests.

HRB notified the three media entities (together referenced hereafter as "the newspapers") that it would not be releasing the requested information due to the objections. The newspapers requested review. Following the applicable statutes and department rules, HRB referred the matter to the department's Hearings Bureau for contested case proceedings on the three information requests. The attorneys for all participants (the newspapers and the three parties to the underlying complaint) agreed to submit the issue on briefs, with Hearing Officer in camera review of the investigative files. The participants filed their briefs addressing the propriety of releasing all or part of the information.

Unfortunately, in the press of other work, the Hearing Officer regrets that he has been delayed in deciding this matter for a prolonged period of time, due to the press of other work which took priority over the in camera review of both HRB files. Based on the arguments of the parties in their briefs and that finally completed in camera review of both HRB files, the Hearing Officer now issues this final agency decision regarding all three information requests applied to both HRB files.

II. FINDINGS OF FACT

1. On August 15, 2011, Nicole Brown filed two complaints with the Department of Labor and Industry's Human Rights Bureau (HRB) alleging that while she was an employee of Fallon County, initially as a clerk of the Fallon County Justice Court and the Baker City Court, and thereafter (commencing in approximately October 2008[2]) while she was the Fallon County Justice of the Peace and the Baker City Judge, that Fallon County and Fallon County Commissioner and Commission Chair Donald Rieger discriminated and retaliated against her in employment, in government services and in discrimination by the state, because of sex.

2. Before HRB completed its investigation and issued a final investigative report, the parties agreed to a resolution of the complaints and Brown withdrew them both.

3. Given settlement of the underlying charges, the parties thereto have no privacy interests in the contents of the complaints which clearly outweigh the public's

[2] The only timely charges in the complaints were those regarding acts of discrimination alleged to have occurred within 180 days of the complaints' filings, which would be on or after February 16, 2011, long after Brown became the Fallon County J.P. and Baker City Judge.

right to know the contents of complaints made against a public body and an executive officer of that public body, occupying a position of great public trust. The status of the complainant (charging party) makes no difference.

4. The settlement document captioned "Settlement Agreement and Release of All Claims," embodies all the pertinent terms of the resolution of the complaints. With the closure of the file, there are no privacy interests of the parties that clearly outweigh the public's right to know how the complaints regarding the treatment of the judicial officer by the public body and one of its executive officers were settled between those parties.

5. The investigative notes of the HRB investigator were informal, were not ultimately reduced to a Final Investigative Report and were not supported by any signed statements from witnesses (either those the investigator interviewed or others). In addition, understanding the informal notes is impossible without explanation from the author. Under these circumstances, whether or not any "work product" privilege would attach to the investigative notes, there is no public right to know the contents of informal notes of an investigator which are subject to varying interpretations and uncertain application. Applying that right to such informal notes would not result in the public learning any clear information about the investigation, could result in misinformation being disseminated and would not vindicate the purposes of the constitutional right. There were no final and formal written investigative findings, which customarily would include specific clear statements of pertinent information the investigator learned from investigative interviews as well as from the rest of the investigation. There are no signed witness statements. There simply is no basis upon which to apply the constitutional right of the public to know what its government is doing to unclear and ambiguous informal investigative notes, never intended by their author to be a public record of what the investigation found.

6. For subsequent cases, no "chilling effect" upon future investigations can result from confirmation that existing Montana law requires disclosure of the complaints and the settlement document herein despite the mutual agreement between these parties that those documents be kept confidential. Neither of the parties against whom the allegations were made and who settled those allegations against them could reasonably have believed, under the existing law, that settlement of their particular case would be and remain confidential. The charging party sought relief against those public entities through a forum provided by state law, with a public hearing as one of the steps to gaining relief. Any charging party so situated must reasonably expect, under existing law, this precise outcome under these precise circumstances.

III. DISCUSSION[3]

When a third party seeks disclosure of documents in an HRB investigative file, Admin R. Mont. 24.8.210 vests the Hearing Officer with 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 Department v. Owen, ¶30, 2006 MT 16, 331 Mont. 10, 127 P.3d 1044.

This public information request case involves a determination of whether the privacy rights of Brown, Rieger and the County clearly outweigh the merits of the public's right to obtain documents contained in the files of HRB, a public agency.

The proper procedure to protect an individual's potentially 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 v. City of Bozeman Police Department (1993), 260 Mont. 218, 228-29, 859 P.2d 435, 439 (citing Allstate Ins. 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 the 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, 142 P.3d 864.

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

[3] 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.

> 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.

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. (1) The individual must have a subjective or actual expectation of privacy; and (2) Society must be willing to recognize that expectation as reasonable. Havre Daily News, ¶ 23; Jefferson Cnty. v. Mont. Stand. (2003) 318 Mont. 173 ¶15, 79 P. 3d 805; Lincoln County Com'n. v. Nixon (1998), 292 Mont. 42, ¶16, 968 P.2d 1141. 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.

Several categories of people might have had privacy rights at issue in this case, however, as the analysis progressed after in camera review of the documents, the Hearing Officer concluded that since only the parties are identified in the complaints and settlement, the only documents being released, only the privacy interests of the

parties are at issue. Thus, the Hearing Officer will limit his inquiry to this single category of potential privacy rights – parties – encompassing the charging party (alleged victim of sexual discrimination) and the accused perpetrators of the sexual discrimination (the alleged creator of the hostile environment and the entity for which he worked).

1. Brown's Privacy Rights

After signing and returning the two human rights complaints prepared on her behalf by HRB, Brown may have had a subjective expectation of privacy in the contents of the complaints, but she could not have had a reasonable expectation of privacy. Her complaints were formal accusations of wrongdoing against the County and one of its Commissioners, and requests for investigation and adjudication of those accusations. No person could reasonably expect that the particulars of formal charges against a County Commissioner (and the Chair of the Commission) for intentional sex discrimination over an extended period of time, and against the County government itself for failing to act to end the discrimination, could be kept from the public.

With regard to the particulars of the settlement, no person settling such claims as those in Brown's complaints with a public employee in a position of great public trust and with a county government could reasonably expect that her privacy rights would clearly outweigh the public's right to know the terms and conditions of a settlement. See, e.g., Pengra v. State, 2000 MT 291, 302 Mont. 276, 14 P.3d 499 (privacy rights of the victim of criminal conduct of an individual recently paroled by the state did not clearly outweigh the public's right to know what costs the public had incurred in the settlement agreement between the county and the victim and her family).

2. Rieger's Privacy Interests

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).

Article II, Section 9 favors disclosure, limiting disclosure only when the demands of individual privacy clearly exceed 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 v. Montana Bd. of P. & P., ¶¶31-32, 1998 MT 168, 289 Mont. 459, 962 P.2d 1157). It is beyond cavil that a County Commissioner holds a position of great public trust, and therefore the public has a very strong right to view the complaint asserting inappropriate treatment of another public employee by this particular commissioner. Rieger failed to carry the burden of establishing that the demands of his individual privacy clearly exceeded the merits of that disclosure.

3. The County's Privacy Interests

The only individual privacy rights involved here are those of the other parties, which do not clearly exceed the merits of public disclosure. There are no third party interests involved in the disclosure of the complaints and the substance of the settlement agreement. Therefore, the County has no privacy interests of any person that it has an obligation or even a right to protect, and disclosure is proper.[4]

B. Access to the Investigator's Informal Notes

As already noted, the public's right to know was "not designed for . . . the tyranny of a proletariat." Mtn. States T. and T. at 289, 634 P.2d at 189, quoted in Missoulian at 530, 675 P.2d at 971. It was also not designed to help the press to sell newspapers. Montana Constitutional Convention Trans., Vol. 5, p. 1673

[4] There are no non-parties whose names, identities or information are disclosed in the complaint or confidential settlement agreement.

(Rep. Wade Dahood). The investigator's unclear and ambiguous informal investigative notes, meant as a resource for further investigation and to aid in preparing a final investigative report, might implicate the privacy of a number of non-parties if placed in the public record, something the investigator clearly never intended. Releasing the notes in a case that settled before the investigation progressed to any conclusions does not vindicate the public's right to know, and the investigative notes should not be released.

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 when the information is available to news media who are parties to the public information case and now properly have the information in hand. Therefore, no access to the disclosed documents, under this final decision, will be provided to the three parties herein who have requested disclosure for 15 days after the issuance of this decision. Brown, Rieger and the County, who all already have access to the documents to be disclosed, have those 15 days to file a petition for judicial review, allowing them a chance to seek a stay before the documents are placed in the public record. After the 15th day, HRB must release the disclosed documents to the three newspapers. Obviously, all parties to this proceeding can seek timely judicial review either before or after release of the disclosed documents.

V. CONCLUSIONS OF LAW

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

2. The subjective privacy expectations of Brown and Rieger with respect to the contents of the complaints and the settlement agreement are not ones that society would find reasonable. The County has no privacy rights it is entitled to assert at all with regard to the contents of the complaints and the settlement agreement.

3. The investigator's notes are not documents within the scope of the public's right to know, and any potential privacy interests therein need not be weighed. The agreement between the parties to keep the notes confidential remains in effect.

4. The newspapers are entitled to receive copies of the two complaints and of the "Confidential Settlement Agreement" after the end of the 15th day after issuance of this order (no extra days for mailing are added, and the order has been either faxed or emailed to counsel for all parties on the date of its issuance).

VI. ORDER

Unless otherwise directed by court order, the Human Rights Bureau is hereby directed to provide to counsel for all three newspapers, on the 16th calendar day after the issuance of this order, true and complete copies of the two separate and identical complaints, one captioned Brown versus Fallon County (HRB No. 0111015089), and the other captioned Brown versus Rieger (HRB No. 011101590), date stamped as received by HRB on August 15, 2011, and true and complete copies of the "Confidential Settlement Agreement" addressing both complaints and maintained previously as "sealed" in the investigative files.

DATED this 8th day of January, 2013.

DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

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

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

This is a final agency decision. Any party aggrieved hereby can seek review, pursuant to 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 fifteen days during which disclosure in accord with this decision is delayed does not extend the time for seeking judicial review.