

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

Case No. 1267-2014

IN RE INFORMATION REQUEST BY
THE HAVRE DAILY NEWS

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Final Agency Decision Re Information Request

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Dr. Randy Bachmeier filed a human rights complaint with Human Rights Bureau (“HRB”) of the Montana Department of Labor and Industry (“DLI”). His complaint alleged illegal employment discrimination and retaliation, all related to his employment with Montana State University-Northern. MSU-Northern and its then Provost, Rosalyn Templeton were the named respondents. HRB divided the complaint into two sets of charges, those against MSU-Northern as one set and those against Dr. Templeton as the other set, after giving notice to the respondents, began its investigation into the charges. Its investigator ultimately issued a “Final Investigative Report” (“FIR”) addressing both complaints.

The Havre Daily News, a daily newspaper of general circulation in Hill County, sought disclosure of the Human Rights Bureau’s FIR addressing both complaints. MSU-Northern objected on the grounds that the conclusions in that report were not final and binding facts and conclusions of law and that the privacy interests “of those involved” outweighed the public’s right know. The Human Rights Bureau transmitted the record to DLI’s Hearings Bureau for contested case proceedings on the Daily News’ information request. This order is the agency’s final decision on that contested case proceeding, as captioned above, with the Hearings Bureau’s name having been changed, effective May 27, 2014, to the “Office of Administrative Hearings” (“OAH”).

After an initial telephone scheduling conference, Hearing Officer Terry Spear issued a scheduling order in this proceeding on February 14, 2014. As that order reflects, the Daily News, MSU-Northern and Dr. Templeton participated, through counsel, in the telephone scheduling conference and subsequently their attorneys filed and served appearances. The attorney for Dr. Bachmeier thereafter also filed and served an appearance. Counsel participating in this contested case proceeding

agreed to submit the matter on briefs, and thereafter the parties, through counsel, submitted their briefs, with the last brief filed and served on May 2, 2014.

In the meantime, Dr. Bachmeier's two complaints themselves had been certified by HRB to the Hearings Bureau for contested case proceedings. The Hearings Bureau issued its "Notice of Hearing" on February 11, 2014, identifying the presiding Hearing Officer as Terry Spear. Counsel for Dr. Bachmeier, MSU-Northern and Dr. Templeton all made appearances in that contested case proceeding, which is set for a contested case hearing in Havre, Montana, on June 17-19, 2014.

Counsel currently representing the participants in this information request contested case proceeding are – for Dr. Bachmeier, Kelton D. Olney, Luxan & Murfitt, PLLP; Colette Davies, Davies Law PLLC; John Heenan, Bishop & Heenan Law Firm – for MSU-Northern, Jessica M. Brubaker and Vivian V. Hammill, Office of Commissioner of Higher Education – for respondent Dr. Templeton, Elizabeth L. Griffing, Axilon Law Group PLLC – for requestor Daily News, Peter Michael Meloy, Meloy Law Firm.¹

Based on the arguments and authorities applicable, review of the parties' filings, and an in camera review of the FIR, the Hearing Officer issues this final agency decision.

II. FINDINGS OF FACT

1. On May 30, 2013, Charging Party² Dr. Randy Bachmeier (hereinafter "Bachmeier") filed charges of employment discrimination because of sex and retaliation for opposing and resisting that discrimination, with the Montana Department of Labor and Industry's Human Rights Bureau (hereinafter "HRB"). HRB designated his complaint as two cases, to be investigated together, being HRB No. 0131012684, Bachmeier's charges of discrimination and retaliation against his employer, Montana State University-Northern ("MSU-Northern"), and HRB

¹ The Daily News recently made a second information request, this time to OAH, regarding all of the briefing on a motion for partial summary judgment filed and served by MSU-Northern. That request has been resolved, and the documents will be produced in accord with this order (see, p. 10-11). The administrative rules governing information requests to the Human Rights Bureau do not apply to such requests submitted to the Office of Administrative Hearings. The same parties and attorneys are involved in that second information request, with the same Hearing Officer, except that Dr. Templeton is not participating in that second information request.

² In the administrative process provided under the Human Rights Act and its companion Governmental Code of Fair Practices Act, a complaining party, called a "plaintiff" in most civil litigation and sometimes called a "complainant" or "petitioner" or "grievant" in other administrative processes, is called a "charging party."

No. 0131016285, Bachmeier's charges of employment discrimination and retaliation against then-Provost Dr. Rosalyn Templeton ("Templeton").

2. On January 10, 2014, HRB's investigator concluded his investigation into both complaints, issuing a single Final Investigative Report ("FIR") finding reasonable basis to believe that Bachmeier's charges that both MSU-Northern and Templeton discriminated against him by subjecting him to a hostile work environment because of inappropriate touching by Templeton and that MSU-Northern retaliated against him because of his complaints about the hostile work environment. The two complaints were then certified to the Hearings Bureau, for combined contested case proceedings. Bachmeier's complaints were Hearings Bureau Case Nos. 1323-2014 (against MSU-Northern, HRB No. 0131012684) and 1324-2014 (against Templeton, HRB No. 0131016285). Case No. 1324-2014 was later dismissed upon MSU-Northern's unopposed motion.

3. On January 24, 2014, the Daily News made its request to HRB for a copy of the Final Investigative Report ("FIR") on the two complaints. MSU-Northern objected to release of a copy of the FIR, and has subsequently expanded its original objection (made on behalf of Bachmeier's privacy and Templeton's privacy) to include privacy interests of non-party witnesses who provided information during the investigation and whose conduct was evaluated critically (according to MSU-Northern) in the FIR. This order is the agency final decision regarding that request.

4. In its briefs to the Hearings Bureau regarding this matter, the Daily News has stated that it is willing to examine the FIR with "the names of third-party witnesses redacted." Redacting the names of all the non-parties identified in the FIR will probably be an idle act, given the information the Daily News already has, and the reality that the information provided by the third-party witnesses and the discussions in the FIR regarding their knowledge and involvement in the situations at issue will probably identify who they are even if their names and positions are redacted.

5. It is difficult to find that any public employee, private employee or any other category of persons, whether somehow holding a position of public trust or great public trust or not, could subjectively or actually expect protection of his or her privacy regarding her or his conduct, when investigation by an independent government agency into a complaint of illegal discrimination or retaliation results in finding that, in whole or in part, due to the conduct of, in this case, one or more of those public employees of MSU-Northern involved in the events at issue, there is merit to the charges. No public employee, from the lowliest laborer to the highest elected official, could subjectively or actually believe that in the event that an independent government agency found that his or her conduct caused or contributed

to what appears may have been illegal discrimination or retaliation against Bachmeier, that she or he would be entitled to confidentiality regarding that conduct, as described in that report. Perhaps a private individual could subjectively or actually expect protection of her or his privacy by non-disclosure of his or her conduct, when a like investigation into a similar complaint found a merit to charges that her or his conduct caused or contributed to illegal discrimination or retaliation against the charging party, since that private individual was not being paid with public dollars for the work he or she was doing at the time of the alleged conduct as to which the FIR found probable merit.

6. Because any such finding by HRB is preliminary, every public employee and private person would know that the FIR merit finding would not be the last word about her or his conduct. The case might later settle, with a provision in the settlement agreement that no liability whatsoever was admitted, so that the public would have access to the information that no actual finding of wrongdoing was finally made. But even though the FIR is always preliminary, unless the case is immediately settled before it left HRB (which this case did not) that FIR determines the forum in which further proceedings will take place.

7. If the FIR finds reasonable cause to believe that the charges are supported by a “preponderance of the evidence,”³ a contested case process to determine the actual merit of the allegations of illegal discrimination or retaliation. Under these circumstances, with the finding of merit opening the door for the charging party to proceed to a public contested case hearing, this Hearing Officer finds that society will be extremely reluctant ever to recognize subjective or actual expectations of privacy as reasonable, regarding “evidence” of conduct found to indicate that the charges of discrimination or retaliation have probable merit. Certainly, any public employee who has subjective or actual expectations of a privacy interest in such conduct would regularly be disappointed in those expectations because society simply should very rarely, if ever recognize such expectations as reasonable. In those rare instances when society might find expectations of privacy in conduct relevant to a probable merit finding to be reasonable, it should be ever rarer to find such expectations clearly to outweigh the public’s interest in knowing what the conduct was.

8. The public’s right to know, in these cases, is always the right to know what happened to cause the public employer to be expending public money defending against the discrimination claim. It is the right to know why HRB, at this beginning phase of the process, expending more public money discharging its duty to

³ This legal phrase appears in Mont. Code Ann. §49-2-504(1) as the standard HRB investigator’s must use in deciding whether to issue a “reasonable cause” finding or a “no reasonable cause finding” on a charge in a complaint of discrimination or retaliation.

investigate, determined that there was reasonable cause to believe that the allegations of discrimination or retaliation were supported by a preponderance of the “evidence.”⁴

9. With that merit determination, these particular cases have now progressed to the contested case hearing phase, and the public’s right to know also includes finding out the allegations and defenses that now are costing further taxpayer dollars with the public employer’s continued defense against the charges and with the Office of Administrative Hearing’s involvement in presiding over formal discovery, hearing preparation and motions practice by the parties, followed by holding actual contested case hearing and issuing the final agency decision about the case. In furtherance of that developing right to know, given that the Daily News has already made a further information request and in anticipation of the attendance of a reporter at the hearing, some additional disclosures hereafter can already be scheduled.

10. There is one further issue involved here. Sometimes a person (public employee or not) who was involved in the events relevant to the complaint was not someone whose conduct caused or contributed to the illegal conduct found, but nonetheless is someone whose personal information is entangled in the facts related to proof of the allegedly illegal discrimination or retaliation. For an example, in a Human Rights discrimination complaint against a government employee, where the information request went to the entire investigative file, not just the FIR, the file contained evidence of alleged “prior acts” by the employee, presented to HRB by the charging party, including an incident involving an underage student (not a public employee at all) allegedly victimized by the employee years before when the employee was in different (but still public) employment. The Hearing Officer went to great lengths to protect the identify of the former underage student. Why?

- (1) The underage student’s conduct and identity in the alleged incident was entirely irrelevant to the charges of illegal discrimination under investigation;
- (2) The alleged incident regarding the former underage student, now an adult, arguably had some relevance to the charges, but specifics of the alleged incident might allow identification of the former underage student;

⁴ “Evidence” in the context of Mont. Code. Ann. §49-2-504(1) refers to written submissions or oral statements, typically not under oath, not actually “testimony,” not at all “evidence” in any formal, legal sense. The tendency of the HRB investigators to write their FIRs as if they had heard “testimony” and weighed “evidence,” in even a quasi-judicial sense, is perhaps one of the reasons why public employers often object the most strenuously of all respondents against public disclosure of FIRs – FIRs look and read a lot like formal due process hearing decisions, even though they are not.

- (3) Disclosing the allegations and the former underage student's identity would unquestionably have violated that person's actual expectations of privacy, which society would consider reasonable and which (with the case closed) outweighed the public's right to know about more than the limited specifics of the incident released⁵

Thus, in deciding how much of the current FIR to reveal to the public at this time, protection of the particulars regarding MSU-Northern employees who were interviewed (and what they said), or even some employees not interviewed who were identified as involved in some of the transactions relevant to the merit finding, is appropriate, at least until some of the further public disclosures that will follow as the case progresses.

11. The privacy interests of Templeton and the other public employees identified and discussed in the first four complete pages and the first complete paragraph of the fifth page of the FIR do not clearly outweigh the public's right to know the information in that portion of the FIR and that portion of the FIR should be immediately released to the Daily News. It is so ordered.

12. The further disclosures discussed and scheduled in the following order are also proper under that same standard, should the further conditions attached herein to those further disclosures be met, where applicable. In addition to those disclosures, the protective order portion of this decision applies to documents currently in or hereafter placed in the OAH files in this case (and not disclosed by order of the Hearing Officer) until the conclusion of the contested case hearing, and to the telephonic final prehearing conference scheduled for June 10, 2014.

III. DISCUSSION⁶

When a third party seeks disclosure of documents in an HRB investigative file, and, upon notification of the parties, one or more of them object to all or part of the requested disclosure, then HRB refers the request to OAH (formerly the Hearings Bureau), and Admin R. Mont. 24.8.210 sets out the applicable procedure and vests the Hearing Officer with the authority and responsibility to determine whether applicable privacy interests are, in fact, involved and if so, whether those privacy interests clearly outweigh the public's right to know the information. The Montana Supreme Court found that this procedure meets the requirements of due process and

⁵ In the interests of maintaining maximum protection of the identity of the formerly underage student, the Hearing Officer has not cited the decision involved.

⁶ 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.

provides the only realistic forum for conducting many such reviews. *City of Billings P.D. 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 Templeton, or of any other MSU-Northern employees whose activities, names and/or identities are disclosed or discernible in the FIR requested, clearly outweigh the public interest in learning the contents of the FIR.

Allegations of misconduct alone do not extinguish privacy rights, particularly when the allegations are pursued by internal personnel procedures, up to and including discipline, of the public employees toward whom the allegations are directed. See, e.g. *Billings Gazette*, ¶47.

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 v. City of Bozeman* (1993), 260 Mont. 218, 228-229, 869 P.2d 435, 439 (citing *Allstate Insurance Company v. City of Billings*, (1989), 239 Mont. 321, 326, 780 P.2d 186, 189).

After his in camera review of the FIR, the Hearing Officer considered the characteristics of the information therein, the context of the underlying dispute and the relationship between the information in the requested documents and the duties of the public officials involved. See *Havre Daily News, LLC v. City of Havre*, ¶23, 2006 MT 215, 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 the demand of individual privacy clearly exceeds the merits of public disclosure.

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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 individuals’ rights to privacy and have adopted a method for that balancing, set forth in Admin. R. Mont. 24.8.210. The inquiry involves: (a) analyzing the asserted privacy interests and (b) weighing whether the individual privacy demands clearly exceed the merits of public disclosure of the particular documents at issue from the investigative file. In the process, it is clear that Mont. Con. Article II, Section 9, mandates disclosure, except where the demands of individual privacy clearly exceed the merits of public disclosure. *Matter of T.L.S.*, ¶131, 2006 MT 262, 334 Mont. 146, 144 P.3d 818 (citing *Bozeman D. Chron.* at 227, 859 P.2d at 441; *Worden v. Montana Board of Probation & Pardons*, ¶¶131-32, 1998 MT 168, 289 Mont. 459, 962 P.2d 1157.

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, and second, society must be willing to recognize that expectation as reasonable. *Havre Daily News*, ¶23; *Jefferson Co. v. Mont. 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; *MT Human Rights Div. v. City of Billings* (1982), 199 Mont. 434, 649 P.2d 1283. Two categories of people may have privacy rights at issue in this case: Templeton, the individual who allegedly engaged in the inappropriate touching at issue; and various other employees of MSU-Northern, who allegedly failed to protect Bachmeier from the inappropriate touching and allegedly took adverse employment action against him regarding his application for the Provost position. The only named respondent remaining is MSU-Northern itself. Bachmeier has waived his privacy rights in the FIR only, so for the moment, his rights are not at issue regarding this initial disclosure. Through counsel, he has indicated that he does not object to disclosure of the information sought by the Daily News’ follow-up request for disclosure of the filings regarding MSU-Northern’s motion for partial

summary judgment, and with that withdrawal, his rights are not at issue regarding the disclosure of those materials to be made on June 9, 2014. He may still choose to assert privacy rights with regard to later disclosures.

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, ¶123. The Hearing Officer will consider all of these categories of potential privacy demands, as applicable.

1. MSU-Northern's Objections to Disclosures of Information About Templeton

Northern's objections to disclosure of information in the FIR about Templeton are not supported either with regard to Bachmeier's allegations about what she said and did in encounters with him, or with regard to his allegations about her conduct and MSU-Northern's conduct in reaction to Bachmeier's notices about and reactions to Templeton's encounters with him. Likewise, MSU-Northern's objections to disclosure of information in the FIR about Templeton's responses to Bachmeier's charges are not supported.

Templeton's objections to disclosure of information in the FIR about her are not supported with regard to Bachmeier's allegations about what she said and did in encounters with him, with regard to his allegations about her conduct and MSU-Northern's conduct in reaction to Bachmeier's notices about and reactions to Templeton's encounters with him, nor with regard to disclosure of information in the FIR about her responses to Bachmeier's charges. Although it is unclear, she also appears to have objected to the Hearing Officer both reviewing the FIR and being the presiding Hearing Officer over the underlying contested case on Bachmeier's discrimination cases. In civil cases, juries are not permitted to learn inadmissible facts, and presenting some inadmissible facts (such as insurance coverage over tort claims) to the jury can trigger a mistrial. Hearing Officers are quasi-judicial administrative officers, and, like judges, are credited with the ability to distinguish between inadmissible facts (which are not available in fact finding) and admissible facts. To the extent that Templeton's objections were to trusting the same administrative officer, acting in a quasi-judicial capacity, to rule upon disclosure of

the FIR in this case and continue to preside over the underlying contested case (from which Templeton has been dismissed), those objections are overruled.

Bachmeier and Templeton provided some information to HRB about what other public employees at MSU-Northern allegedly said or did or failed to do regarding the touching and/or the reports of the touching. The privacy interests of those other public employees in keeping that information out of the public record, even if those other public employees have subjective or actual expectations of such privacy that society might somehow consider reasonable, do not clearly outweigh the public's present right to find out what the parties alleged about the conduct of those other public employees. Thus, the entire initial portion of the FIR reporting those matters is properly placed in the public record by this order.

The FIR is the outcome of the HRB investigator's independent investigation into Bachmeier's charges. It is not the functional equivalent of any kind of an internal investigation by a public employer of its own employees, with or without discipline considered and/or imposed. Thus, it is not appropriate to cite privacy decisions regarding personnel records or other internal investigations of public employee conduct by their employers as precedent for keeping HRB investigations out of the public's hands.

Nonetheless, disclosure of the balance of the FIR at this time is unwarranted because of the short time before the hearing and the work the parties and the Hearing Officer must do in the interim. In lieu of diverting the resources of the parties and OAH into a rushed effort to make further disclosures of the FIR available to the Daily News before hearing, the Hearing Officer is now deferring ruling upon such further disclosures and is now sealing the remainder of the FIR from public disclosure, until an appropriate future date not later than the date the decision on the merits on Bachmeier's complaints issues. It is so ordered.

The general parameters for future disclosures in this case are set forth in the findings and in this discussion.

Northern has also raised a number of objections about evidence regarding reports of Templeton's conduct in prior employment. Much of that evidence currently resides in documents addressing various motions before the Hearing Officer. Information regarding one of those motions, MSU-Northern's motion for partial summary judgment, was requested by the Daily News last week. MSU-Northern initially objected to disclosure of Bachmeier's filings in opposition to the motion, largely because of that evidence of reports of Templeton's conduct in prior employment. That opposition has been withdrawn, in yesterday's telephone conference. The Daily News agreed to wait until Monday, June 9, 2014, to receive,

at one time, electronic copies of all of the documents filed regarding that motion (the last of which will be filed on Monday) from OAH by e-mail, except documents filed under seal pursuant to a stipulated protective order issued yesterday. It is so ordered.

On Tuesday, June 10, 2014, the Hearing Officer will convene a final telephonic prehearing conference with counsel for the parties in the underlying Bachmeier discrimination and retaliation contested case proceeding. Before that telephone conference, the Hearing Officer will provide to counsel therein a draft final prehearing order, using the final prehearing submissions of the parties. During the telephone conference, the parties will discuss the draft order, and the motions herein (upon which the Hearing Officer will rule, if not before the telephone conference then during it). After the telephone conference, the Hearing Officer will revise and issue the "Final Prehearing Order." A copy will be sent to counsel for the Daily News and directly to the Daily News, by e-mail. Any sealed portion of that order (and it is unlikely that any portion of it will be sealed) will be redacted from the copies sent to counsel for the Daily News and directly to the Daily News. It is so ordered.

The hearing itself will be open to the public. Upon timely notice to the Hearing Officer that evidence involving a potential privacy interest that needs a ruling before offer of that evidence, the Hearing Officer will seal the hearing and require the public to leave while that evidence is presented under provisional seal, and will issue rulings removing or retaining the sealing at or before the time when the decision is issued. Upon timely notice, the same procedure will be utilized for exhibits containing evidence involving a potential privacy interest. If provisional sealing occurs during hearing, before the public is required to leave, the Hearing Officer will receive brief objections.

Except for the documents and information being disclosed to the Daily News as detailed in this order, the remainder of the OAH's file on the contested case hearing of Bachmeier's complaints is sealed (this is the "protective order") and none of the parties or counsel or OAH employees with access to that file shall disclose any of its contents to any member of the public at any time except for any documents put into the public record at hearing or otherwise released from this protective order by the Hearing Officer or some other tribunal exercising jurisdiction over the question.

DATED: June 3, 2014.

DEPARTMENT OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

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

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