

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

Case No. 924-2014:

IN RE INFORMATION REQUEST BY
THE BITTERROOT STAR

* * * * *

Final Agency Decision Re Information Request

* * * * *

I. INTRODUCTION

The Bitterroot Star (hereafter “the Star”), requested disclosure of some documents in the investigative files of the Montana Department of Labor and Industry’s Human Rights Bureau (hereafter “HRB”). The documents that the Star sought were in Danielle Senn v. Ravalli County Commission, HRB No. 0131016497, and consisted of Senn’s complaint and any attachments to it, the County’s response, any reply by Senn, as well as any conciliation agreement reached between the parties prior to issuance of a Final Investigative Report. Ravalli County (“the County”) objected to the disclosure.

On November 25, 2013, the Hearings Bureau received from HRB a transmittal of record, with Attachment A (the Star’s original request), Attachment B (the County’s objection to the disclosure requested), Attachment C (the Star’s further request for Hearings Bureau review) and Attachment D (copies of documents from the investigative file, including the requested documents). The Hearings Bureau issued its “Notice of Hearing and Telephone Conference” on November 27, 2013, assigning the contested case proceedings to this Hearing Officer.

Hearing Officer Terry Spear conferred by telephone with the parties, who agreed this matter could be submitted on briefs. This matter was later transferred to Hearing Officer David Scrimm, due to workload issues in the Office.

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 September 18, 2013, Danielle Senn, a former employee of Ravalli County, filed a complaint with Department of Labor and Industry’s Human Rights Bureau (HRB) alleging that Ravalli County discriminated against her in employment and retaliated against her for complaining of the discrimination. Her complaint

named two county employees alleged to be involved in the illegal acts. Document 2, Attachment D to the “Transmittal of Record” from HRB.

2. On October 11 (by fax) and 15 (by mail), the County filed a response to the complaint, by a letter, dated October 11, 2013, addressed to the HRB Data Manager, Kim Cobos. Document 10, Attachment D to the “Transmittal of Record” from HRB.

3. On November 4, 2013, The Bitterroot Star made a request to HRB for a copy of the complaint Senn had filed against the County. On November 14, 2013, the Star expanded its request to include the complaint, any attachments to the complaint, or “other documentation associated with the complaint that you can release.” Attachment A to the “Transmittal of Record” from HRB.

4. In its briefs to the Hearings Bureau, the Star has repeatedly stated that it is willing to examine the documents produced with “names of other employees or third parties redacted.” Redacting the names of the two employees identified in the complaint might be an idle act, given the information the Star already has, and the information about those employees’ jobs contained in the allegations involved. In addition, the Star has repeatedly named one of the two employees in its filings, which are not sealed. Therefore, the Hearing Officer will apply the appropriate legal analysis to any expectations of privacy the two employees named in the complaint may have, and determine whether their names should be redacted or retained. If their subjective privacy expectations are recognized by society as reasonable and clearly outweigh the public right to know, there is no reason for the department to disclose those names, even if the Star already knows who they are.

5. There is another document, a list of witnesses, filed by Senn with her reply (see Finding 6, below), which consists entirely of the names and phone numbers of witnesses, which the Hearing Officer listed in the Scheduling Order “Document List” of the documents within Attachment D to the “Transmittal of Record” from HRB. The Hearing Officer did not designate that document as a document at issue for possible disclosure, and no objection to that omission has been made. That document is not within the scope of the Star’s request.

6. On November 15, 2013, Senn filed a reply to the County’s response, by a filing captioned, “Rebuttal to Response.” Document 7, Attachment D to the “Transmittal of Record” from HRB.

7. Of the documents transmitted to the Hearings Bureau, only the complaint, the response and the reply are within the scope of the request made by the Star.

III. DISCUSSION¹

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 follows a specific procedure which leads to referral of the request to the Hearings Bureau. Admin R. Mont. 24.8.210 states the 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 has ruled that such a procedure meets the requirements of due process and 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 the parties, and of any third parties whose activities, names and/or identities are disclosed or discernible in the documents requested, outweigh the public interest in obtaining the documents, filed with HRB, a public agency.

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 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 produced investigative documents, which included the requested documents and some other incidental documents from the files, the Hearing Officer considered the characteristics of information contained 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

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.

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 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, Mont. Con. Article II, Section 9, mandates disclosure, except where the demands of individual privacy clearly exceed the merits of public disclosure. In the Matter of T.L.S., ¶31, 2006 MT 262, 334 Mont. 146, 144 P.3d 818 (citing *Bozeman Daily Chron.* at 227, 859 P.2d at 441); *Worden v. Montana Bd. of Prob. & Par.*, ¶¶31-32, 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. Several categories of people may have privacy rights at issue in this

case: the charging party, Senn; the individual who allegedly engaged in the prohibited work place activities; and the individual who allegedly disclosed her name as the person complaining about the work place activities.

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. Senn's Privacy Rights

Senn did not object to disclosure of the requested documents therefore her privacy rights are not at issue in this proceeding.

2. The County's Objections

The County objected solely on behalf of individuals whose privacy rights it asserted were at stake here, not on its own behalf. It asserted that the HRB file documents contained allegations brought to the County as "personnel issues" and "addressed as such" by the County, and that therefore the employees alleged to have engaged in discriminatory or retaliatory acts had privacy rights that outweighed the public's right to know. The County attempted to argue against disclosure on behalf of Senn, but it had no standing to do.

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.*

In subsequent cases, the Court held that elected officials' and teachers' expectations of privacy are unreasonable when allegations of misconduct directly related to the exercise of their public duties are asserted and because they hold

positions of great public trust. *Svaldi v. Anaconda-Deer Lodge County*, 2005 MT 17, ¶ 31, 325 Mont. 365, 106 P.3d 548 (teacher found to be in position of great public trust due to her care and instruction of children); *Jefferson County*, 2003 MT 304, 318 Mont. 173, 79 P.3d 805 (Court did not use term “great public trust” but held that Commissioner’s decision to violate the law questioned her judgment and ability to work with peers and to properly supervise employees); *Whitlock*, 255 Mont. 517, 844 P.2d 74 (mayor in position of great public trust as elected official accused of sexual harassment and discrimination).

In no case has the Court found that the expectation of privacy held by a public employee, regardless of station, is unreasonable solely because they are state or local government employees. It has only found the expectation of privacy 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. *Yellowstone County v. Billings Gazette*, 2006 MT 218, 333 Mont. 390, 143 P.3d 135.

The need to satisfy both prerequisites, a position of public trust and alleged or actual wrongdoing, is made most clear in *Missoulian* where six university presidents’ expectations of privacy in statements made about them during their performance appraisals were found to be reasonable. 207 Mont. 513, 675 P.2d 962. In that case, there were no allegations of wrongdoing against the presidents and the Court found their expectations of privacy reasonable.

The Court’s jurisprudence also seems to indicate that the determination actually only requires the combination of a position of public trust and alleged or actual misconduct.

Because of the County’s objections, the Hearing Officer will consider whether either of the two county employees named in the complaint as engaging in the illegal acts had a subjective or actual expectation of privacy, and, if so, whether society must be (is) willing to recognize that expectation as reasonable.

The County correctly cites Montana precedent holding that personnel records are decidedly the kind of documents about which an employee does have a subjective or actual expectation of privacy. *Montana Human Rights Div.* at 442, 649 P.2d at 1287-88. However, there are no personnel records within the documents at issue in this case. Senn’s complaint is not a document submitted to the County at any time as a “personnel issue.” The information in that complaint consists of her allegations about illegal acts by the County – activities by Dusty McKern, the Ravalli County Road Department’s Administrator/Operations Manager in alleged violation of County policy, and failure or refusal of the County to act to stop those activities when Senn reported it; failure of Robert Jenni, Ravalli County’s Human Resources Director, to

protect Senn's identity from the supervisory employee as the source of internal complaints about the supervisory employee; and discharge in retaliation for her opposition to the illegal activities. Senn filed her complaint containing these allegations with an agency of state government, seeking relief – both recovery from the county and correction of the County's future conduct to prevent similar wrongs in the future. Similarly, the letter of the County that constitutes its response, and Senn's reply filing, address the same issues.

The degree of public interest in many of these cases is obviously very great, because of the nature of the accusations and the importance of the job duties of the involved public employees. Other Montana cases have involved a DUI arrest of a county commissioner, *Jefferson County v. Montana Standard*, 2003 MT 384, 318 Mont. 173, 79 P.3d 805, a school teacher's abuse of students, *Svaldi v. Anaconda Deer Lodge*, 2005 MT 17, 325 Mont. 365, 106 P.3d 548, a sex discrimination case involving county public defender's office, *Yellowstone County*, supra, and a police department clerk accused of misusing city funds, *Billings Gazette v. City of Billings*, 2011 MT 293, 362 Mont. 522, 267 P.3d 11.

A recent iteration of this doctrine is the 2011 *Billings Gazette* ruling. There, the Court determined that because the clerk was being investigated for allegations that she misappropriated public funds, "which is the very aspect of her job that renders it a 'position of trust,' the public documents generated as a result of the investigation should be subject to public disclosure." ¶ 23. The Court relied on its 2006 *Yellowstone County* case recognizing "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." *Yellowstone County*, supra at ¶ 21.

Although there was disagreement on the Court about whether in all cases involving a public employee's breach of trust, records must be disclosed, the majority and the Chief Justice's concurring opinion make it clear that all of the precedent described above is alive and well. Indeed, in the recent decision of the Court in *Billings Gazette v. City of Billings*, 2013 MT 334, 372 Mont. 409, 313 P.3d 129, the foregoing precedent was cited and affirmed, even though the majority determined that the rule did not apply to non-supervisory city employees who did not occupy positions of public trust.

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.

While the Court has not established a bright-line rule, McKern's position as a senior manager for Ravalli County with significant authority and public responsibilities makes him far more similar to elected officials who the courts have clearly identified as holding positions of public trust, than to a non-supervisory employee who is not. As such he is in a position of public trust. Senn's complaint alleges that he created a hostile work environment and retaliated against her for complaining about his conduct to Robert Jenni, the county's Human Resources Director. Accordingly, under the Court's standard announced in *Havre Daily News*, McKern does not have an expectation of privacy that society would recognize as reasonable.

Because of the County's objections, the Hearing Officer will also consider whether Jenni, named in the documents as revealing Senn's identity as one of the persons complaining about some of the alleged prohibited activities had a subjective or actual expectation of privacy, and, if so, whether society is willing to recognize that expectation as reasonable.

Jenni, like McKern, holds a senior management position with Ravalli County. Under the analysis discussed above, Jenni holds a position of public trust. Senn alleges that he wrongfully disclosed her name to McKern, which brought about McKern's retaliatory conduct and that Jenni took part in the retaliation against her for filing her grievances about McKern's conduct. Jenni holds a position of public trust and Senn has alleged that he discriminated against her. Accordingly, Jenni does not have an expectation of privacy that society would recognize as reasonable.

Because neither McKern, nor Jenni have a privacy interest that clearly exceeds the public's right to know, their names, the allegations made against them and any responsive comments made by the county will be disclosed to the Star.²

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 the County. They will have 20 days to

² During his in camera review the hearing officer did not see any other persons named in the documents besides Senn, McKern and Jenni.

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 20th day, the documents will be released to the Bitterroot Star, 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. Neither McKern not Jenni have an expectation of privacy with respect to the documents at issue in this matter that society would find reasonable.
3. The Bitterroot Star is entitled to receive copies of the documents requested.

VI. ORDER

All copies of the Disclosed Documents provided to the parties are to remain sealed until July 2, 2014. Unless otherwise directed by court order, on July 3, 2014, the Office of Administrative Hearings will release a copy of the Disclosed Documents to the Bitterroot Star.

DATED: June 12, 2014

DEPARTMENT OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

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