

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

Case No. 1363-2014

IN RE INFORMATION REQUEST BY
RICHARD MONTZ

Final Agency Decision Partially Granting Information Request

I. INTRODUCTION

On February 5, 2014, Richard Montz requested the documents in the Human Rights Bureau's (HRB) file regarding Candi Morrison v. Tamarack Property Management, Inc., HRB Case No. 0131016300. Some of the requested documents contained information that had been found to be protected by Montana's Constitutional Right to Privacy. Accordingly, HRB notified parties to the complaint to determine whether they objected to Montz' information request. Counsel for Morrison objected and the matter was transferred to the Hearings Bureau on February 13, 2014 for further proceedings.

While trying to contact Montz to set up a scheduling conference for the proceedings Montz was verbally abusive to Hearings Bureau staff and sent several threatening emails as well. Accordingly, the matter was set on a briefing schedule allowing the parties to make legal arguments in support of their positions.

The parties are not required to submit written legal arguments in support of disclosure or non-disclosure of the documents identified in summary form in the table below, however, if they wish to do so, opening briefs must be filed on or before March 14, 2014. Response briefs shall be filed no later than March 28, 2014.

Montz declined to file any brief. The hearing officer then reviewed the legal arguments made by Morrison's counsel, conducted an in camera review of the documents and reviewed the relevant law governing the public's right to know and an individual's right to privacy.

Based on that review, the hearing officer finds that Morrison's right to privacy outweighs Montz' right to obtain some or some parts of the documents in question.

II. FINDINGS OF FACT

1. On June 5, 2013, Candi Morrison filed a claim with the Department of Labor and Industry Human Rights Bureau alleging that Tamarack Property Management, Inc. discriminated against her based on her disability. Montz was an employee of TPM, but not a named party to the complaint.

2. On June 26, 2013, Morrison withdrew her complaint.

III. DISCUSSION¹

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 Candi Morrison or witnesses involved in the investigation of Morrison's human rights complaint clearly 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 *Allstate Ins. Co. v. City of Billings*, (1989), 239 Mont. 321, 326, 780 P.2d 186, 189).

After his in camera review of the entire HRB investigative file, the hearing officer considered the characteristics of information contained therein, the context of the underlying dispute, and the people whose privacy interests are at stake. See *Havre Daily News, LLC v. City of Havre*, ¶46, 2006 MT 215, 333 Mont. 331,

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.

142 P.3d 864; *Bozeman Daily Chronicle v. City of Bozeman Police Dept.* (1993), ¶21-23, 260 Mont. 218, 225, 859 P.2d 435, 439; *Mont. H.R.D. v. City of Billings* (1982), 199 Mont. 434, 649 P.2d 1283.

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.” *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 seven remaining documents from 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, Morrison; and individuals who authored, or whose names appear in, documents acquired during the HRB 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.

1. Morrison's Privacy Rights

Morrison asserts that her right to privacy should prevent any disclosure of the seven documents at issue in this matter. Those documents include copies of letters sent to Tamarack Property Management and three documents specifically related to Morrison's medical care.

The reasonableness of Morrison's expectation of privacy hinges on whether she waived her right to privacy by filing her human rights complaint against TPM; the effect of her status as an alleged victim of disability discrimination; and the type of document at issue. Morrison does not hold a position of public trust so no analysis of that issue is necessary. Morrison's withdrawal of her complaint may also be considered.

In the underlying complaint, Morrison alleged she was a victim of disability discrimination. In an effort to remedy her situation she filed a complaint with the HRB pursuant to the Human Rights Act. A limited investigation into the complaint and allegations ensued. Charging parties, in such situations, often must reveal not only their identity to the HRB, but specific details of the nature of the alleged

discrimination, including medical information or other facts and statements they would otherwise only reveal to their most trusted confidant.

The Montana Supreme Court has not faced the issue of whether the filing of a discrimination claim waives the claimant's right to privacy. The California Supreme Court in looking at the issue in the context of a discovery dispute held that "we cannot agree that the mere initiation of a disability harassment lawsuit . . . functions to waive all her privacy interests." *Vinson v. Superior Ct.*, (1987) 43 Cal. 3d 833, 841, 740 P. 2d 404, 410. The California Court further held that "[p]laintiff is not compelled as a condition of entering the courtroom, to discard entirely her mantle of privacy." *Id.* "At the same time, plaintiff cannot be allowed to make her very serious allegations without affording defendants an opportunity to put their truth to the test." *Id.* "While the filing of a lawsuit may implicitly bring about a partial waiver of one's constitutional right to privacy, the scope of such 'waiver' must be narrowly construed, so that plaintiffs will not be unduly deterred from instituting lawsuits by the fear of exposure of their private associational affiliations and activities." *Britt v. Superior Ct.* (1978) 20 Cal. 3d 844, 574 P. 2d 766.

Morrison may have waived her right to privacy with respect to the right to TPM's ability to determine the exact nature of her claim, but it is reasonable for her to expect that public disclosure of the private details of her complaint to non-parties would not occur prior to a hearing in her case.

2. Morrison as an alleged victim of disability discrimination may have a reasonable expectation of privacy in the information contained in the HRB investigative file.

The Court further held that while the expectation may be reasonable, "often this interest can be served by simply redacting his or her address or telephone number." *Id.* Morrison's complaint alleges that TPM denied her request for accommodation of her disabilities. While Morrison subsequently withdrew her complaint, the nature of her allegations suggest she was a victim of disability discrimination. As such, Morrison's expectation of privacy with regard to private details of her complaint and other investigative documents is reasonable.

3. The types of documents included in the HRB investigative file aid in the determination of the reasonableness of Morrison's expectation of privacy.

The seven documents in the investigative file are of the very type that the Montana Supreme Court found to be constitutionally protected, because society

recognizes the expectations of privacy as reasonable. *State v. Nelson*, 283 Mont. 231, 242; 941 P.2d 441, 448 (1997) (holding that “if the right of informational privacy is to have any meaning it must, at a minimum, encompass the sanctity of one's medical records”). Morrison’s subjective expectation of privacy in those documents in the investigative file is one that society would find reasonable.

Among the seven documents are letters for state or local government social support agencies asking TPM to assist Morrison with her medical needs. As public employees they have no privacy interest in documents issued in the course of their employment.

Morrison had a reasonable expectation of privacy in the medical records and other documents discussing her medical condition that were submitted with her complaint.

B. 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., ¶31, 2006 MT 262, 334 Mont. 146, 144 P.3d 818 (citing Boz. Daily Chronicle at 227, 859 P.2d at 441); Worden, ¶¶31-32).

Morrison has shown that she has a reasonable expectation of privacy in her private information.

The hearing officer also recognizes some information that should not be disclosed because the right to privacy clearly exceeds the merits of such a disclosure. Because the Montana Supreme Court has not addressed all the issues faced here, a review of the intent of the drafters of the right to know provision is instructive. Chairman Wade Dahood of the Bill of Rights Committee, in explaining the provision at the 1972 Constitutional Convention, stated that the right to know was not unfettered and that it reached its limits when the press invaded an individual’s dignity. Tr. of the Montana Constitutional Convention Vol. 5 p. 1673-1674.

It is difficult to see how the public’s right to know about the working of its government can be advanced in a case where the charging party withdrew her complaint three weeks after filing it; and where the HRB conducted no investigation. The workings of our government are not really at issue. Neither is the public served when a complainant withdraws her complaint but still has her private medical information disclosed and potentially published in any and all forms of media. Such an effect would have a chilling effect on other people who are subject to discrimination but who decide that the disclosure of their most private information is too great a cost.

Morrison’s medical records (Ex. E, F and G) will not be released.² Exhibits A-D will be redacted to remove any personal medical information. Other parties whose names appear in the documents and were acting in their capacity as aids or support for Morrison as government employees will be identified.

In the few instances where disclosure of the information contained in a witness statement or other document exceeds “the purposes and merits of the asserted public right to know” and would unnecessarily violate an individual’s dignity, that information will be redacted. Information in any document pertaining to home addresses, telephone numbers and social security numbers will be redacted.

² The Hearing officer believes Montz already has documents E, F and G, and likely A-D as well.

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. Therefore, the only parties who will have immediate access to the disclosed documents, under this final decision, will be the HRB and Morrison. They will have 20 days to review the documents proposed for release and to file a petition for judicial review. That 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 Montz, and he can then exercise his right to seek judicial review should he deem it appropriate to do so.

V. CONCLUSIONS OF LAW

1. The department has jurisdiction. Admin. R. Mont. 24.8.210.
2. Morrison's expectation of privacy in medical information provided during an informal investigation that was not completed by the HRB is one that society would find reasonable.
3. Morrison's privacy rights in the withheld documents and the redactions made in other documents clearly exceed the merits of disclosure.

VI. ORDER

Based upon the foregoing, the Human Rights Bureau is directed to maintain a sealed copy (attached to HRB's copy of the decision) of the disclosed documents contained in the investigative file compiled in response to Morrison's complaint of illegal discrimination filed against the Tamarack Property Management, Inc. The Human Rights Bureau shall not open the disclosed documents to the public record until May 26, 2014.³ Copies of the disclosed documents are also provided, as non-public records, to Morrison with her copy of this decision. All copies of the disclosed documents provided to the parties are to remain sealed until May 26, 2014. Unless otherwise directed by court order, on May 27, 2014, the Hearings Bureau will release a copy of the redacted documents to Montz. The Human Rights Bureau shall not release any other information from the file, unless otherwise ordered.

³ The 20-day time period for review ends on May 26, 2014, Memorial day. Accordingly, the disclosed documents will be made available to Montz and the public on May 27, 2014, the next business day.

DATED this 6th day of May, 2014.

DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

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

* * * * *

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

This is a final agency decision. Any person or entity aggrieved hereby is entitled to review of this final agency decision in accord with 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).