

**STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU**

Case No. 607-2014

IN RE INFORMATION REQUEST BY  
RICHARD J. MARTIN

**FINAL AGENCY DECISION**

I. INTRODUCTION

Richard Martin, attorney at law, and his client, Bruce Hoiland, have requested that the Employment Relations Division (ERD) disclose the entirety of the Montana Contractor's Compensation Fund's (MCCF) Stay at Work/Return to Work (SAW/RTW) assistance policy which MCCF filed with ERD pursuant to Admin. R. Mont. 24.29.1807(1). MCCF objects to disclosure of the policy to Martin and Hoiland arguing that the information in the policy is proprietary information and should not be disclosed. Martin appeared on behalf of Hoiland and himself. Kelly Wills, attorney at law, appeared on behalf of MCCF. Patricia Bik, agency legal counsel, appeared on behalf of ERD.

The parties waived hearing in this matter and elected to proceed informally upon written briefs. The parties timely filed their briefs and responsive briefs. A complete copy of MCCF's SAW/RTW assistance policy was provided with the administrative file. Hoiland and Martin filed a copy of its request for disclosure of the MCCF policy (Appendix A), copies of e-mails between Jason Swant, ERD employee and Martin's law office requesting ERD to disclose MCCF's assistance policy (Appendix B), and a copy of the documentation that MCCF provided to Hoiland in his workers' compensation case (Appendix C). MCCF filed the affidavit of Marvin Jordan, Executive Director of MCCF. ERD provided a copy of the ERD model SAW/RTW assistance policy which is provided to all insurers by ERD (Attachment 1), copies of two other insurers' SAW/RTW assistance policies (Attachments 2 and 3), and a copy of State Compensation Insurer's Fund's manual which is provided to insurers on developing and maintaining a successful return to work program (Attachment 4).

Based on the arguments adduced by the parties in briefing, the hearing officer finds for the reasons stated below that ERD must disclose MCCF's SAW/RTW assistance policy to Martin and Hoiland.

## II. FINDINGS OF FACT

1. MCCF is a worker's compensation insurer under Plan One of the Montana Worker's Compensation Act.

2. Hoiland is an injured worker seeking to avail himself of the benefits offered under the Stay -at-Work/Return -to-Work Assistance Act (Mont. Code Ann. 39-71-1003 et seq.). Martin serves as legal counsel for Hoiland in his worker's compensation claim.

3. On Hoiland's behalf, Martin requested that MCCF disclose the entirety of its SAW/RTW assistance policy to Hoiland. Stay -at-Work/Return -to-Work Assistance Act (Mont. Code Ann. 39-71-1003 et seq.). In response, MCCF provided only a summary of its SAW/RTW assistance policy to Martin.

4. Martin also asked ERD to provide a copy of MCCF's SAW/RTW assistance policy to him. MCCF interposed an objection, claiming a "privacy interest." That objection has generated the instant information request.

5. MCCF has not yet determined whether to accept Hoiland's claim.

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

Martin and his client, Hoiland, an injured worker availing himself of MCCF's SAW/RTW assistance policy in conformity with the Stay -at-Work/Return -to-Work Assistance Act (Mont. Code Ann. 39-71-1003 et seq.), have requested disclosure of the entirety of the objector's Stay at Work/Return to Work SAW/RTW assistance policy which the objector filed with ERD. Because MCCF is a nonhuman entity, the constitutional balancing test afforded to individuals by Article II, Section 9 provides it no right to privacy. *Great Falls Tribune v. PSC*, 2003 MT 359, ¶38, 319 Mont. 30, 82 P.3d 876. Clearly understanding this proposition, MCCF asserts that its SAW/RTW is proprietary information that is entitled to protection as outlined in the *Great Falls Tribune* case. *Id.* at ¶39 (noting that "nothing in Article II, Section 9

---

<sup>1</sup> Statements of fact in this discussion are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

requires disclosure of trade secrets and other confidential proprietary information where the data is protected from disclosure elsewhere in the federal or state constitutions or by statute”). The analysis in this case begins and ends with an assessment of whether there can be any proprietary right in a document that by statute is defined to be one that “*explains to the worker* the process of evaluation, planning, implementation, and provision of services by the insurer.” Mont. Code Ann. 39-71-1011(4) (emphasis added). The hearing officer believes the answer is “no” and for that reason, as discussed below, MCCF cannot demonstrate that it has overcome the constitutional presumption that a document filed with a public agency is available to the public.<sup>2</sup>

Under the Stay -at-Work/Return -to-Work Assistance Act, a worker’s compensation insurer under Plan One of the Montana Worker’s Compensation Act is required to submit a copy of its SAW/RTW assistance policy to the Department of Labor and Industry. Admin. R. Mont. 24.29.1807(1). The Stay -at-Work/Return -to-Work Assistance Act defines an insurer’s stay -at-work/return -to-work assistance policy as a “written policy that explains to the worker the process of evaluation, planning, implementation, and provision of services by the insurer.” Mont. Code Ann. 39-71-1011(4). The services described in the policy are intended to facilitate a worker’s return to work as soon as possible following an injury or occupational disease. *Id.*

Documents filed by corporate entities with public agencies are presumptively available for public access under the Montana Constitution. *Great Falls Tribune*, ¶60. The extent of that constitutional presumption is that “all documents of every kind in the hands of public officials are amenable to inspection, regardless of legislation, special exceptions made to accommodate the exercise of the constitutional police power, and other competing constitutional interests, such as due process.” *Id. at* ¶54, citing Justice Nelson’s concurring opinion in *Associated Press, Inc. v. Montana Dep’t of Revenue*, 2000 MT 160, ¶85, 300 Mont. 233, 4 P.3d 5. In addition, every citizen has a right to inspect and copy public writings of the state. Mont. Code Ann. §2-6-102 (1). Public writings include public records of private writings. Mont. Code Ann. §2-6-101(2)(b).

---

<sup>2</sup>The objector has suggested that if the hearing officer were to find that the policy should be disclosed to the requesters in this proceeding that he should nonetheless prohibit the requestor from disseminating the policy. Since the hearing officer finds that the policy at issue is a public document, there is no legal basis upon which the hearing officer can limit the requestor’s dissemination of the policy. Determining that the policy is a public document obviates any need to limit its dissemination to non-parties.

A nonhuman entity claiming that a document it has filed with an agency should not be disclosed must establish prima facie proof that the information is a discernable property right entitled to protection. *Great Falls Tribune*, ¶160. In order to meet this burden, the entity requesting protection must support a claim of confidentiality by filing a supporting affidavit making a prima facie showing that the materials constitute a property right which is protected under constitutional due process requirements. The showing must be more than conclusory; it must be specific enough for the agency, objecting parties and reviewing authorities to clearly understand the nature of the claims of confidentiality. *Great Falls Tribune*, ¶156.

Disclosure of a trade secret (and, again, by analogy, disclosure of proprietary information) to others who have no obligation to protect the confidentiality of the information extinguishes any property right to that secret. *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1002, (1984); *Tubos de Acero de Mex., SA v. American Int'l Inv. Corp.*, 292 F.3d 471, 483 (5<sup>th</sup> Cir. 2002). *See also*, Mont. Code Ann. 30-14-402 which defines a “trade secret” as information that “derives independent economic value from not being generally known to ***and not being readily ascertainable by proper means by other persons*** who can obtain economic value from its disclosure or use.” (Emphasis added). In discussing reasonable efforts to maintain trade secrets (and, again, by analogy, proprietary information), the court in *Great Falls Tribune* recognized:

What is reasonable under the circumstances should be entirely different in the context of a utility filing contracts with an agency, such as the PSC, as compared to an exchange of information between private parties. In other words, one might expect a more encompassing definition of a trade secret in litigation between private parties than would be recognized when a utility files a document with the PSC. Certainly, the fact that the contracts, although private, were negotiated for the benefit of the public, must be taken into consideration.

*Great Falls Tribune*, ¶161. Extrapolating from the language in this quotation, it appears that where a nonhuman entity files a document with a regulating agency which document is developed for the benefit of the public, a narrower definition of what is a trade secret or proprietary is utilized. It also appears that a higher standard of reasonableness is imposed by which to measure the steps taken to protect the trade secret or proprietary information. That rationale applies here where the policy MCCF filed with the agency was promulgated for the sole purpose of advising injured workers of services available to them and the requirements of the policy are clearly

imposed by the state for the benefit of injured workers covered under the Worker's Compensation Act.

There are at least two reasons why the document at issue here cannot be considered proprietary information protected from disclosure. First, as a matter of law, it cannot be so. The objector has cited no case law to support its proposition that any proprietary right can be found in a document that by statute is created solely to provide an injured worker with information regarding what services will be provided to that worker for SAW/RTW. There is no indication that the injured worker for whom the policy is written and to whom it is addressed is under any obligation to not disclose the terms of that policy. He can disclose it to anyone whom he wishes to. Presumably, it is also provided to employers. And there is no evidence to show that employers are restricted in any way from disseminating the information to whomever the employer wants. Under the above case law, the hearing officer cannot comprehend that in any circumstance such a policy could ever be deemed proprietary.

Second, the objector has failed to take any steps either to ensure that the document when filed with ERD would remain proprietary or to even suggest to ERD at the time of filing that the document was proprietary. In fact, MCCF took no steps until the advent of this proceeding to assert any proprietary interest in the policy. Trying to do so now long after filing the policy with ERD is not sufficient under the rationale of *Great Falls Tribune* to demonstrate that MCCF took reasonable steps to maintain any proprietary interest it suggests it has. Knowing that the policy was being filed with a state agency and that the document was promulgated for the purpose of advising injured workers of services available to hasten their return to work, reasonableness under the circumstances would at a minimum require MCCF to tell ERD about its concerns when it filed the policy with ERD or taken some affirmative act to protect the policy from disclosure. MCCF did nothing of the sort and its failure to do so prevents it from overcoming the presumption favoring disclosure of public documents filed with state agencies.

Likewise, MCCF has failed to show with particularity that the information in the policy is or should be considered proprietary. While the affidavit asserts as much, it does not point to any specific language or services that should or could be construed as being proprietary. A comparison between other insurer's SAW/RTW policies which have been provided to ERD (Attachments 2 and 3 to ERD's response) and MCCF's policy show nothing remarkable in the MCCF policy that might be considered proprietary or in the nature of a trade secret. In short, MCCF has failed to demonstrate in anything other than conclusory terms that the information in its

SAW/RTW policy is proprietary or protected in any manner such that the constitutional presumption for disclosure has been overcome.

#### IV. CONCLUSIONS OF LAW

1. Public writings filed with public agencies are presumptively available for public access under the Montana Constitution.

3. MCCF's SAW/RTW assistance policy cannot be proprietary because by statute it is a document that is provided to an injured worker who is not restrained in any way from disseminating it.

4. In any event, MCCF has failed to overcome the constitutional presumption that public writings filed with a public agency are available to the public. MCCF took no reasonable steps to protect its SAW/RTW assistance policy from being disclosed when it filed the policy with ERD. In addition, its affidavit fails to show in anything more than conclusory terms how its SAW/RTW assistance policy is proprietary.

5. Martin and Hoiland are entitled to receive a copy of MCCF's SAW/RTW assistance policy.

#### V. ORDER

Based upon the foregoing, on March 14, 2014 ERD shall disclose to Martin MCCF's SAW/RTW assistance policy. Disclosure will occur on that date unless a party (1) obtains a stay from an appropriate higher authority before March 14, 2014 or (2) obtains a stay from this tribunal before that date.

DATED this 27th day of February, 2014.

DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT  
GREGORY L. HANCHETT  
Hearing Officer

NOTICE: You may be entitled to judicial review of this final agency decision in accordance with Mont. Code Ann. § 2-4-702 by filing a petition for judicial review in an appropriate district court within 30 days of service of the decision.