HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. 58-16

ORDER Re: AGENCY'S UNOPPOSED MOTION TO REDACT

ALONZO MAREZ, Appellant,

v.

DEPARTMENT OF AVIATION, AIRPORT INFRASTUCTURE MANAGEMENT,
and the City and County of Denver, a municipal corporation, Agency.

On May 18, 2017, the Agency filed an unopposed motion to redact Appellant's name and identifying information from the decision issued in this appeal. The only basis for the motion is that Appellant has requested it.

Our Career Service Rules (CSRs) are silent on the matter of confidentiality.[1] We therefore take guidance from Colorado law, and also refer to federal administrative law practice under the Merit Service Protection Board. [C.R.S. § 24-4-101 *et al*; *see also* In re Lacombe, CSB 56-14 (7/16/15); In re Marez, CSA 58-16 (1/27/17); In re Jenkins, CSA 55-14 (2/5/15)].

Colorado law and practice includes rules by the state courts and directives under state law. Colorado Rules of Civil Procedure, Rule 121, sets forth the following test:

Section 1-5 LIMITATION OF ACCESS TO COURT FILES

1. Nature of Order. Upon motion by any party named in any civil action, the court may limit access to court files. The order of limitation shall specify the nature of limitation, the duration of the limitation, and the reason for limitation.

2. When Order Granted. An order limiting access shall not be granted except upon a finding that the harm to the privacy of a person in interest outweighs the public interest.

3. Application for Order. A motion for limitation of access may be granted, *ex parte*, upon motion filed with the complaint, accompanied by supporting affidavit or at a hearing concerning the motion.

4. Review by Order. Upon notice to all parties of record, and after hearing, an order limiting access may be reviewed by the court at any time on its own motion or upon the motion of any person.

In the Federal sector, the Federal District of Colorado applies the following local rule to restricting access to its case files.

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[1] The only reference to privacy interests in the Career Service Rules provides that hearings are presumed open to the public unless, upon motion, the hearing officer balances the parties' interests more favorably than those of the public. CSR 19-54.

PUBLIC ACCESS TO DOCUMENTS AND PROCEEDINGS

(a) Policy. Unless restricted by statute, rule of civil procedure, or court order, the public shall have access to all documents filed with the court and all court proceedings.

(b) Levels of Restriction. There are three levels of restriction. Level 1 limits access to the parties and the court. Level 2 limits access to the filing party and the court. Level 3 limits access to the court.

(c) Motion to Restrict. A motion to restrict public access shall be open to public inspection and shall:

(1) identify the document or the proceeding for which restriction is sought;

(2) address the interest to be protected and why such interest outweighs the presumption of public access (stipulations between the parties or stipulated protective orders with regard to discovery, alone, are insufficient to justify restriction);

(3) identify a clearly defined and serious injury that would result if access is not restricted;

(4) explain why no alternative to restriction is practicable or why only restriction will adequately protect the interest in question (e.g., redaction, summarization, restricted access to exhibits or portions of exhibits); and

(5) identify the level of restriction sought.

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The starting point under this rule requires unrestricted access to all court filings and documents unless an exception applies. The exception must "identify a clearly defined and serious injury that would result if access is not restricted." The exception must also explain why it would be impractical to do something other than restrict the information to be protected, such as redaction, summarization or restricted access, or why restriction is the only adequate remedy. Finally, even if the restriction meets these criteria it, the private interests in protecting the disclosure must outweigh the presumption of public access.

Under the MSPB, named non-parties are provided greater protection than appellants; however, appellants' identities may be "sanitized" when disclosure would endanger the appellant, or when disclosure would reveal intimate personal details. Analysis proceeds under a two-step analysis, (1) whether there is a strong possibility that the use of a third party's name would constitute an invasion of privacy and (2) balancing the individual privacy concerns with the public interest in disclosure of the third party's identity. [MSPB Judges Handbook, Chapter 12 § 8].

Melding these well-thought considerations leads me to conclude that requests to protect appellants' identities from disclosure should be subject to a balancing of private and public interests. That balancing test begins with an appellant providing an identifiable and significant injury that would result from disclosure.

In the present case Appellant did not identify any interest or injury to be protected, much less a significant one. Moreover, if the Hearing Office granted redaction simply upon request, it is not difficult to conclude many or most appellants, might want their identification hidden from public view.

Certainly there is a policy decision that could be made to protect appellants' identities upon request or even as a matter of course, such as the Equal Employment Opportunity Commission, where randomly generated names replace real names. (October 5, 2015), https://www.eeoc.gov/eeoc/newsroom/release/10-5-15.cfm (last viewed May 23, 2017)]. That kind of policy decision resides with the Career Service Board following open discussion and an opportunity for interested parties to be heard, and should not issue by fiat from the Hearing Office.

Finally, the issuance of a decision four months ago made the matter final. To allow continuing motions after a final decision issues would open the door to all manner of post-decision motions, in violation of the rule of finality.

For reasons stated above, the motion is **denied**.

DONE May 23, 2017.

Bruce A. Plotkin
Career Service Hearing Officer

I certify that on May 23, 2017, I emailed a correct copy of this Decision to the following:

Sean Olson, Esq., sean@olsonlawfirmllc.com
John Sauer, ACA, john.sauer@denvergov.org
City Attorney's Office, dlefiling.litigation@denvergov.org