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IDAHO PERSONNEL COMMISSION  
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**IDAHO PERSONNEL COMMISSION**

**STATE OF IDAHO**

	)	
	)	
JOHN MCALLISTER, PAT DEBRAN,	)	
CAROL BRASSEY, JERRY LEHAN,	)	
DAVE WAGNON, DWIGHT JOHNSON,	)	
TOM VALASEK, TOM JOHNSON,	)	
MICHAEL JOHNSON, and NANCY	)	
UPCHURCH,	)	IPC NO. 95-04
	)	
Petitioners,	)	<b>DECLARATORY RULING</b>
	)	
	)	
vs.	)	
	)	
VIRGINIA STACEY and	)	
DEPARTMENT OF LABOR,	)	
	)	
Respondents.	)	
_____	)	

THIS MATTER CAME ON FOR HEARING ON THE PETITION FOR DECLARATORY RULINGS on March 13, 1998. Petitioners John McAllister, *et al.*, (Petitioners) appeared pro-se; Respondent Virginia Stacey (Stacey) was represented by William L. Mauk, Esq.; Respondent Department of Labor (Department) was represented by Michael S. Gilmore, Deputy Attorney General. By order of the Commission, the matter was submitted for decision on the briefs.

**I.**

**BACKGROUND AND PRIOR PROCEEDINGS**

**A. Facts.**

On December 4, 1997, Petitioners filed a Petition for Declaratory Rulings with the Commission. The petition arose out of a related case, *Stacey v. Dep't of Labor*, IPC No. 95-04 (*Stacey*). Petitioners are all current employees of the Department. Stacey is a former Department employee who has an appeal pending with the Commission challenging her lay-off on March 17, 1995. Stacey made a number of discovery requests to the Department in furtherance of her claims, including a request for copies of all performance appraisals prepared or approved by the Department since January 3, 1995 for all of the Petitioners.

The Department objected to the provision of these performance appraisals for the reasons that they were not relevant and were exempt from disclosure under Idaho Code § 9-340 (36) (now § 9-340 (3) (a)). Stacey filed a motion to compel disclosure of the performance appraisals, and the hearing officer in *Stacey* issued an order compelling the Department to provide the requested evaluations. The Department requested that the hearing officer reconsider the order regarding the appraisals. That request was denied, prompting the Petition at issue here.

Petitioners seek four declaratory rulings:

1. An interim order staying the hearing officer's order until this matter can be heard on the merits;
2. That Petitioners' performance evaluations are personal and confidential records which are not discoverable in *Stacey v. Dep't of Labor* without Petitioners' consent;
3. That the Commission order the Department not to release Petitioners' performance evaluations without the written consent of each of the Petitioners;
4. That these declaratory rulings are applicable in all future Personnel Commission appeals unless and until modified by the Commission.

On December 8, 1997, the Commission issued an interim order granting an interim stay of the hearing officer's orders.

Although denominated a Respondent in this matter, the Department has filed a pleading with the Commission indicating that it concurs in the petition and the relief requested. Thus, in this matter, Petitioners and the Department are aligned in opposition to Stacey.

**B. Appeal to Personnel Commission.**

A petition for declaratory ruling is a request that the Commission rule on the applicability of a statute, rule or order administered by the Commission. The process originates with the petition directed to the Commission itself. Requests for declaratory ruling are questions of legal applicability addressed directly to the Commission and are retained by the Commission for decision.

**II.**

**ISSUE**

*Is the performance evaluation of an employee, who is not party to an administrative proceeding before the Commission, discoverable in a proceeding before the Commission?*

**III.**

**ANALYSIS**

**A. Relevant Statutory and Administrative Provisions.**

1. Idaho Code § 67-5232 provides in part:

Any person may petition an agency for a declaratory ruling as to the applicability of any statutory provision or of any rule administered by the agency.

2. Evidentiary matters at an administrative hearing are governed by Idaho Code § 67-

5251 and IDAPA 4.11.01.600. The statute provides in relevant part:

(1) The presiding officer may exclude evidence that is irrelevant, unduly repetitious, or excludable on constitutional or statutory

grounds or on the basis of any evidentiary privilege provided by statute or recognized in the courts of this state. All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs.

Idaho Code § 67-5251. Similar language appears in IDAPA 4.11.01.600:

Evidence should be taken by the agency to assist the parties' development of the record, not excluded to frustrate that development. The presiding officer at hearing is not bound by the Idaho Rules of Evidence. No informality in any proceeding or in the manner of taking testimony invalidates any order. The presiding officer, with or without objection, may exclude evidence that is irrelevant, unduly repetitious, *inadmissible on constitutional or statutory grounds*, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho. All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs. The agency's experience, technical competence and specialized knowledge may be used in evaluation of evidence.

(Emphasis added).

3. Idaho Code § 9-340 (3) (a) exempts performance evaluations, along with other private personal information, from public disclosure.

**B. Application of Statutory and Administrative Provisions.**

1. *Idaho Code § 67-5232.*

The purpose of a declaratory ruling, as explained by the comments which accompanied the Administrative Procedure Act through the legislative process, is to provide “a procedure to allow persons to have the applicability of statutes and rules determined without being forced to risk the sanctions for violating the provisions of a statute or rule that might or might not be applicable.” In particular, Petitioners ask this Commission to determine whether the performance evaluations of individuals who are not party to a proceeding before the Commission are discoverable by the parties to the proceeding. The Commission has the authority to determine what statutory and administrative evidentiary provisions will apply to proceedings before it.

In this matter, one of the parties to a proceeding before the Commission has been ordered by the hearing officer to produce the performance evaluations of Petitioners. Petitioners believe that they would be harmed by the production of these documents. Because they are not parties to the underlying dispute, they cannot bring their concerns to the hearing officer. Petitioners are not in the usual posture of a party seeking a declaratory ruling, *i.e.*, they will not be subject to legal sanctions for the possible violation of a statute or rule. They believe, however, that their privacy rights will be compromised by the disclosure of their performance evaluations, and that this potential harm could be avoided by a ruling on whether statutory protection of private information extends to proceedings before the Commission. This places Petitioners in a situation analogous to that of the typical petitioner for declaratory ruling.

2. *Idaho Code § 67-5251, IDAPA 4.11.01.600.*

As set out in Idaho Code § 67-5251 and IDAPA 4.11.01.600, strict rules of evidence do not apply in administrative hearings. These provisions recognize that administrative proceedings are less formal than judicial proceedings. Rules of evidence which were developed in the courts as mechanisms to control juries may not be appropriate in the administrative arena. The evidentiary provisions for administrative proceedings are intended to allow the consideration of all relevant information, excluding only evidence which is privileged or protected by statute or constitutional provisions.

In this request for declaratory ruling, the question becomes whether the performance evaluations should be considered, if relevant, or whether they should be excluded, even if relevant, because they are protected by statute. Assuming, for purposes of argument, that the performance evaluations of non-parties are relevant to Ms. Stacey's case, we believe that they are protected by statute, and should not be admitted without the consent of the affected employees.

3. *Idaho Code § 9-340 (3) (a).*

Idaho's public records law, Idaho Code § 9-337 *et seq.*, begins with a presumption that all public records are open at all reasonable times to inspection and copying. Idaho Code § 9-338. The statute then lists specific exceptions to presumptively open records, including that found at Idaho Code § 9-340 (3) (a):

Except as provided in this subsection, all personnel records of a current or former public official *other than* the public official's public service or employment history, classification, pay grade and step, longevity, gross salary and salary history, status, workplace and employing agency [are exempt from disclosure]. *All other personnel information relating to a public employee or applicant including, but not limited to, information regarding sex, race, marital status, birth date, home address and telephone number, applications, testing and scoring materials, grievances, correspondence and performance evaluations, shall not be disclosed to the public without the employee's or applicant's written consent.* A public official or authorized representative may inspect and copy his personnel records, except for material used to screen and test for employment.

(Emphasis added).

In enacting this section, the legislature recognized that while there is personnel information to which the public should have access, there is much that is personal and private and should not be disclosed. Performance evaluations are specifically enumerated as being private. This Commission has always jealously guarded the privacy rights of state employees, taking all reasonable steps to ensure that personal information about state employees stays private. It would be inconsistent for the Commission to honor employees' privacy in word while dishonoring that privacy in deed by allowing the unauthorized disclosure of performance evaluations in its administrative proceedings. The Commission cannot ensure that other entities or individuals respect the privacy rights of state employees, but it can ensure that such matters are respected within its bailiwick.

#### IV.

#### CONCLUSION

Petitioners ask this Commission for a declaratory ruling on the issue of whether the performance evaluation of an employee, who is not party to an administrative proceeding before the Commission, is discoverable in that proceeding. We believe that the question posed by Petitioners is appropriate for resolution by declaratory ruling, and that the issuance of such a declaratory ruling is within the Commission's authority. We believe that employees' performance evaluations are protected from disclosure by statute, and that while the Commission cannot ensure that other entities or individuals respect the privacy rights of state employees, it can ensure that such matters are respected within its jurisdiction.

For the foregoing reasons, we issue the following declaratory ruling: This Commission will not accept as evidence in any proceeding before it or its agents any performance evaluation unless the person evaluated has provided specific written consent for the disclosure. This declaratory ruling is applicable in this case and in all future cases which may come before the Commission unless and until this Commission should rule otherwise.

## V.

### **STATEMENT OF APPEAL RIGHTS**

The issuance of this declaratory ruling is a final agency action. Pursuant to Idaho Code §§ 67-5270 and 67-5272, any party aggrieved by this declaratory ruling may appeal to district court by filing a petition in the District Court in the county in which:

1. A hearing was held;
2. The declaratory ruling was issued;
3. The party appealing resides or operates its principal place of business in Idaho;
4. The real property or personal property that was the subject of the declaratory ruling is located.

An appeal must be filed within twenty-eight (28) days of the service date of this declaratory ruling.

DATED this 10th day of April, 1998.

BY ORDER OF THE  
IDAHO PERSONNEL COMMISSION

/s/ \_\_\_\_\_  
Sherry Dyer, Chair

/s/ \_\_\_\_\_  
Peter Boyd

/s/ \_\_\_\_\_  
Ken Wieneke

/s/ \_\_\_\_\_  
Don Miller

/s/ \_\_\_\_\_  
Dale Tankersley

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the Declaratory Ruling in *McAllister, et al. v. Stacey, et al.*, IPC No. 95-04, was delivered to the following parties by the method stated below on the 10th day of April, 1998.

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/s/ \_\_\_\_\_  
Val E. Rodriguez