VOLUME NO. 43 OPINION NO. 25

HOUSING, BOARD OF - Certain records subject to public disclosure;
PRIVACY - Certain records held by Board of Housing subject to public disclosure;
RIGHT TO KNOW - Certain records held by Board of Housing subject to public disclosure;
MONTANA CODE ANNOTATED - Sections 2-15-1814, 15-30-303, 90-6-101 to 90-6-127;
MONTANA CONSTITUTION - Article II, sections 9, 10;
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 64 (1988), 39 Op. Att'y Gen. No. 17 (1981), 38 Op. Att'y Gen. No. 109 (1980), 38 Op. Att'y Gen. No. 1 (1979), 37 Op. Att'y Gen. No. 107 (1978).

HELD: The "Buyer's Affidavit and Certification" submitted to the Board of Housing pursuant to the Mortgage Credit Certificate Program is subject to public disclosure.

July 20, 1989

David L. Jackson
Montana Board of Housing
203 North Ewing
Helena MT 59601-1300

Dear Mr. Jackson:

You have requested my opinion on behalf of the Montana Board of Housing on the following question:

> Does a mortgagor's right of privacy prohibit public disclosure of documents contained in the mortgagor's loan file which is maintained by the Montana Board of Housing?

Your question arises because of the Mortgage Credit Certificate (MCC) program, which is administered by the Board of Housing (Board). The MCC program is available to qualifying individuals who obtain a mortgage loan (conventional, FHA, VA, or other) to purchase a home. Persons who qualify under the program are entitled to credit a portion of their mortgage loan against their federal income taxes.

Application for membership in the MCC program requires the mortgagor (borrower) to complete a "Buyer's Affidavit and Certification" form. The form requires personal financial information concerning the house being purchased and the borrower's annual household income. This information is pertinent to the MCC program because the requirements for membership include limits on annual income and purchase price of the house. Another requirement is that the borrower occupy the house as his primary residence. Persons who complete and sign the Buyer's Affidavit and Certification form acknowledge that any material misstatements made by them will subject them to federal criminal prosecution as well as revocation of their MCC certificate.

Certain federal agencies have reason to believe that some MCC members have not been complying with the requirements of the program, and have requested copies of the members' Buyer's Affidavit and Certification forms in order to verify compliance or noncompliance.

Your question is whether the Buyer's Affidavit and Certification forms constitute public information or whether the members' individual right of privacy precludes disclosure of the documents.

Initially it should be noted that the Montana Board of Housing is a state agency, with powers, functions and duties established by statute. §§ 2-15-1814, 90-6-101 to 127, MCA. There are no express statutory provisions that make any information obtained by the Board confidential or otherwise immune from public access. Therefore, the status of the documents in question must be analyzed under Montana's right to know and privacy provisions, Article II, sections 9 and 10 of the Montana Constitution.

Each Montanan's "right to know" is guaranteed by Article II, section 9 of the Montana Constitution, which states:

> 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.

The right of individual privacy referred to in this section is guaranteed by Article II, section 10 of the Montana Constitution, which states:

> 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.

Opinions of the Montana Supreme Court and the Montana Attorney General have spoken of the need to reconcile these two rights. The Constitution requires that a potential conflict between the public's right to know and an individual's right of privacy be resolved by applying a balancing test. 42 Op. Att'y Gen. No. 64 (1988). The following balancing test for dealing with these questions has been developed:

> (1) [D]etermining whether a matter of individual privacy is involved,
>
> (2) determining the demands of that privacy and the merits of publicly disclosing the information at issue, and
>
> (3) deciding whether the demand of individual privacy clearly outweighs the demand of public disclosure. [Emphasis in original.]

42 Op. Att'y Gen. No. 64 (1988). See also Missoulian v. Board of Regents, 207 Mont. 513, 522, 527, 675 P.2d 962, 967, 970 (1983). It is the duty of each agency, when asked to disclose information, to apply these steps and make an independent determination within the guidelines of the law, subject to judicial review. 38 Op. Att'y Gen. No. 109 at 375, 376 (1980). It is useful, however, to examine legal precedent in determining and weighing the merits of privacy or disclosure.

The Montana Supreme Court has spoken several times of a person's subjective expectation of privacy and whether society considers that expectation reasonable. Belth v. Bennett, 44 St. Rptr. 1133, 740 P.2d 638, 642 (1987); Missoulian v. Board of Regents, 675 P.2d at 967-68; Montana Human Rights Division v. City of Billings, 199 Mont. 434, 649 P.2d 1283, 1287 (1982). While there are no set guidelines for the determination of whether a matter of individual privacy is involved, Opinions of the Attorney General have held that information which reveals facts concerning personal aspects of the individual's life necessarily involve individual privacy. 42 Op. Att'y Gen. No. 64 (1988), 38 Op. Att'y Gen. No. 1 at 1, 4 (1979). Information concerning commercial matters may or may not constitute private information, depending in part on the nature of the information. 38 Op. Att'y Gen. No. 1 at 1 (1978).

The right of privacy is not easily defined with precision. 37 Op. Att'y Gen. No. 107 at 460 (1978). The Supreme Court of Washington has utilized the privacy standard of the Restatement (Second) of Torts § 652D at 383 (1977) in analyzing the individual right of privacy. Hearst Corporation v. Hoppe, 580 P.2d 246 (Wash. 1978). The Restatement limits the disclosure of any private matter that "would be highly offensive to a reasonable person and ... is not of legitimate concern to the public." Examples cited are "[s]exual relations ... family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget." Restatement at 383; Hearst at 253. Cf. 37 Op. Att'y Gen. No. 107 at 460 (1978) (privacy protects facts about an individual's attitudes, beliefs, behavior and other personal aspects of that individual's life). An individual's personal income has long been recognized as a matter of personal privacy. See 26 U.S.C. § 6103 (income tax returns are confidential); § 15-30-303, MCA (state income tax information is confidential); Application of Nicholas, 458 N.Y.S.2d 858, 859 (N.Y. Supp. 1983) (New York has declared information pertaining to personal income a matter of personal privacy).

The Buyer's Affidavit and Certification contains the purchase price of the residence and the borrower's annual household income. In addressing the first step of the test, it is my opinion that in this context the purchase price of the house presents minimal privacy demands. See 39 Op. Att'y Gen. No. 17 at 62 (1981). On the other hand, I conclude that a statement of the borrower's annual household income is a matter of individual privacy. When the borrower submits the financial information to the Board, he has an expectation that the information will be used by the administering agency for purposes of the MCC program, but that it will not be disclosed to the general public.

The next step of the test is to determine the comparative demands of individual privacy and the merits of public disclosure. Although information pertaining to personal income is a matter of individual privacy, that privacy interest is necessarily diminished when the individual submits the information to the Board of Housing for the MCC program. The Board of Housing requires the financial information in order to determine eligibility to participate in the program. Once an MCC certificate is issued, the information serves to document the decision of the Board, and since the borrower is required to comply with the requirements of the program on a continuous basis, the information also serves as a basis for confirming compliance. Thus, upon submission to the Board, the information is integrated into a governmental function that directly benefits the borrower, and his objective expectation of privacy is thereby reduced.

In comparison, the public has a substantial interest in verifying continued compliance of MCC participants, since the program involves the public treasury. Public disclosure is an added safeguard to assure that the Board

administers the MCC program properly and that participants comply with the program's requirements.

In addressing the third step of the three-part test, the general rule is that government records must be open to the public, with the burden placed upon the custodian of the records to affirmatively show that the demands of individual privacy clearly outweigh the merits of public disclosure. 37 Op. Att'y Gen. No. 107 at 4 (1978). I conclude that the demands of individual privacy do not outweigh the merits of public disclosure of the Buyer's Affidavit and Certification.

THEREFORE, IT IS MY OPINION:

> The "Buyer's Affidavit and Certification" submitted to the Board of Housing pursuant to the Mortgage Credit Certificate Program is subject to public disclosure.

Sincerely,

MARC RACICOT
Attorney General