VOLUME NO. 38 OPINION NO. 109

CONSTITUTIONS - Right to know, form of requests;
CONSTITUTIONS - Right to know, state employee's title, dates and duration of employment, and salary;
EMPLOYEES, PUBLIC - Title, dates and duration of employment, and salary as public information;
OPEN RECORDS - Form of requests;
OPEN RECORDS - State employee's title, dates and duration of employment, and salary;
PUBLIC INFORMATION - Form of requests;
PUBLIC INFORMATION - State employee's title, dates and duration of employment, and salary;
SALARIES - State employee's salary as public information;
1972 MONTANA CONSTITUTION - Article II, sections 9 and 10;
OPINIONS OF THE ATTORNEY GENERAL - 37 Op. Att'y Gen. No. 107 (1978), 37 Op. Att'y Gen. No. 112 (1978), 38 Op. Att'y Gen. No. 1 (1979).

HELD: 1. A state employee's title, dates and duration of employment, and salary are public information.

2. A state agency may require that requests for disclosure of a state employee's title, dates and duration of employment, and salary be in writing. However, the agency may not require that justification for the requests be given.

16 October 1980

David M. Lewis, Director
Department of Administration
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Dear Mr. Lewis:

You have asked for my opinion on the following questions:

1. Is a state employee's title, dates and duration of employment and a verification of salary range public information?

2. If they are public information, may agencies require that requests for this information be made in writing or must this information be released on demand?

The "right to know" of every Montanan 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 provision 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.

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. In 37 Op. Att'y Gen. No. 107 at 2 (1978), I set forth the steps involved in a proper application of this balancing test:

> (1) determining 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.

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. See 37 Op. Att'y Gen. No. 107 at 2, 6 (1978); 37 Op. Att'y Gen. No. 112 (1978); 38 Op. Att'y Gen. No. 1 (1979). Such a determination requires a knowledge concerning the information and the people involved that often only the custodian has. It is useful, however, to examine legal precedent in determining and weighing the merits of privacy or disclosure. Therefore, I have researched the questions presented, and offer the following opinion.

With respect to a state employee's title, I find that no matter of individual privacy is even arguably involved.

Individual privacy is involved only "when the information at issue reveals facts about an individual's attitudes, beliefs, behavior, and any other personal aspect of that individual's life." 37 Op. Att'y Gen. No. 107, supra, at 3 (1978). A state employee's job title reveals no personal aspect of that individual's life. It is related purely to his or her public role as a public employee. Because no demand of individual privacy is present, no balancing is required, and the public's right to know the job title of a state employee is clearly guaranteed.

The determination of whether a matter of individual privacy is involved with respect to an employee's dates of employment and salary is only slightly more difficult. I reach the same conclusion--no privacy right is infringed by the disclosure of a state employee's dates of employment and salary. My research has revealed a number of cases from other jurisdictions that support this conclusion, and none that contradict it.

For example, in Penokie v. Michigan Technological University, 93 Mich. App. 650, 287 N.W.2d 304 (1980), the Michigan Court of Appeals held that the names and salaries or wages of each of the persons employed by a state university from 1970 on were public. The court said:

> The names and salaries of the employees of defendant university are not "intimate details" of a "highly personal" nature. Disclosure of this information would not thwart the apparent purpose of the exemption to protect against the highly offensive public scrutiny of totally private personal details. The precise expenditure of public funds is simply not a private fact.

287 N.W.2d at 309. Accord, People ex rel. Recktenwald v. Janura, 59 Ill. App. 3d 143, 376 N.E.2d 22, 25 (1978); Hastings & Sons Publishing Co. v. City Treasurer, ___ Mass. ___, 375 N.E.2d 299, 303 (1978); Mans v. Lebanon School Board, 112 N.H. 160, 290 A.2d 866, 868 (1972); Gannett Co. v. County of Monroe, 45 N.Y.2d 954, 383 N.E.2d 1151, 411 N.Y.S.2d 557 (1978), aff'g 59 App. Div. 2d 309, 399 N.Y.S.2d 534, 536 (1977) (holding that names, job titles, and salary levels of county employees who had been terminated were not information of a personal nature).

In Penokie, supra, the Michigan court went on to say that even if the information being sought did infringe on the

privacy of the employees, it would have to be disclosed because "[t]he minor invasion occasioned by disclosure of information which a university employee might hitherto have considered private is outweighed by the public's right to know precisely how its tax dollars are spent." 287 N.W.2d at 310 (footnote omitted).

The balancing test was also applied by the Utah Supreme Court in a case in which the plaintiff sought the names and gross salaries of employees of a state college, Redding v. Brady, ___ Utah 2d ___, 606 P.2d 1193 (1980). The court stated:

> Inasmuch as the very existence of public institutions depends upon finances provided by the public, it does not strike us as being discordant to reason that the public would want to know and ought to know, how their money is spent. In regard to the defendant's expressed fears that the exposure of such information will have an adverse effect upon its ability to operate the College, it seems to us that there is even a greater potential for evil in permitting public funds to be expended secretly. In this connection it is also to be realized that by accepting employment at the college its employees are not merely private citizens, but become public servants in whose conduct and in whose salary the public has a legitimate interest.
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> * * *
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> In harmony with what has been said herein, it is our conclusion that the rights of freedom of speech and of the press, and of the public to have and to publish the information as to the salaries paid to employees of the college, outweighs considerations as to the right of privacy of the employees, or of the institution to carry on its operations in secret.

606 P.2d at 1196-97.

Even if the information you have asked about did infringe on an individual's privacy, Montana's balancing test likewise would require it to be disclosed.

> When applying the final step of balancing the merits of public disclosure and the demands of individual privacy, the general rule must be that

> government records are open to the public, with the burden placed upon the custodian of the records to affirmatively show the demands of individual privacy clearly outweigh the merits of public disclosure.

37 Op. Att'y Gen. No. 107, at 4 (1978). In this case, the slight demand of individual privacy does not outweigh the great merit of allowing the public to know who its employees are, what their jobs are, and how much they are being paid. Disclosing such information increases public confidence in its government, and consequently increases government's ability to serve the public.

You have also asked for my opinion as to whether agencies may require that requests for this information be made in writing. In 37 Op. Att'y Gen. No. 107 at 3 (1978), I said:

> This initial decision by the [custodian to disclose or withhold information] is subject to judicial review at the insistence of an aggrieved party. ... Art. III, Section 9 of the 1972 Montana Constitution could be asserted in a declaratory judgment action. In order to provide an accurate basis for possible litigation the [custodian] must require all requests for information be in writing and be specific. In turn, any grants or denials of access given by the [custodian] must be in writing and specifically state the reasons therefor.

That opinion involved a situation in which the demand of individual privacy was substantial and the custodian was required to make determinations concerning disclosure on a case-by-case basis. In situations such as that, I adhere to my opinion that requests and responses must be in writing.

In the situation you have presented, however, the demand of individual privacy, if any, is slight, and it is possible to establish a policy covering all cases, rather than make case-by-case determinations. In that circumstance, it is not necessary that requests and responses be in writing. On the other hand, the Constitution does not prohibit a requirement that requests be in writing. An agency, after considering such factors as its own efficiency and the likelihood of individual complaints about disclosure, may, in its discretion, require that requests be in writing.

An agency may not, however, require that justification for the request be given. Our Constitution, guaranteeing the public's right to know, is alone sufficient justification. The constitutional provision is "concerned with the necessity of an open government and the public's ability to observe how its government operates regardless of each person's subjective motivation." 37 Op. Att'y Gen. No. 107 at 4 (1978) (emphasis added). The New Hampshire Supreme Court, in Mans v. Lebanon School Board, supra, held similarly, saying:

> One consideration not relevant to our inquiry is the plaintiff's lack of a sufficient personal reason for seeking the information.... Plaintiff's rights...do not depend upon his demonstrating a need for the information.

290 A.2d at 867.

THEREFORE, IT IS MY OPINION:

1. A state employee's title, dates and duration of employment, and salary are public information.

2. A state agency may require that requests for disclosure of a state employee's title, dates and duration of employment, and salary be in writing. However, the agency may not require that justification for the requests be given.

Very truly yours,

MIKE GREELY
Attorney General