VOLUME NO. 39 OPINION NO. 17

CONSTITUTIONS - Right to know: property record cards used in tax appraisals;
OPEN RECORDS - Property record cards used in tax appeals;
PROPERTY, REAL - Tax appraisal property records: right to know;

PUBLIC INFORMATION - Property record cards used in tax appraisals;
TAXATION AND REVENUE - Appraisal property record cards;
MONTANA CODE ANNOTATED - Sections 2-6-101, 2-6-102, 2-6-104.
MONTANA CONSTITUTION - Article II, section 9;
OPINIONS OF THE ATTORNEY GENERAL - 37 Op. Att'y Gen. No. 107 at 460 (1978); 37 Op. Att'y Gen. No. 112 at 482 (1978); 38 Op. Att'y Gen. No. 1 (1979); 38 Op. Att'y Gen. No. 109 (1980).

HELD: The Department of Revenue may not withhold property record cards from public inspection.

3 June 1981

Ellen Feaver, Director
Department of Revenue
Sam W. Mitchell Building
Helena, Montana 59601

Dear Ms. Feaver:

You have asked for my opinion on the following question:

> May the Department of Revenue withhold "property record cards" from public inspection?

"Property record cards" are cards on which tax appraisers for the State of Montana record their observations and opinions with respect to each piece of real property that is appraised. Included may be information concerning the nature and condition of improvements to the property, the type of construction and interior finishing, numbers of bedrooms and bathrooms, the type of heating and plumbing, and other information relevant to a determination of the market value of the property. These include construction costs, selling price, and information concerning depreciation, obsolescence, and trends in the real estate market of the locale.

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 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 460, 462 (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 460, 462 and 466 (1978); 37 Op. Att'y Gen. No. 112 at 482 (1978); 38 Op. Att'y Gen. No. 1 (1979). The determination requires knowledge that often only the custodian has concerning the information and the people involved. 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. See 38 Op. Att'y Gen. No. 109 at 2-3 (1980).

Whether a matter of individual privacy is involved in the case of property record cards is debatable. The right of privacy is not easily defined with precision. 37 Op. Att'y Gen. No. 107 at 460, 462 (1978). In Hearst Corp. v. Hoppe, 90 Wash. 2d 123, 580 P.2d 246, 253 (1978), a case that also concerned access to raw data on which final assessment figures were based, the Washington Supreme Court adopted the privacy standard of the Restatement (Second) of Torts § 652D. at 383 (1977), which 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." Cf. 37 Op. Att'y Gen. No. 107 at 460, 463 (1978) (privacy protects facts about an individual's attitudes, beliefs, behavior, and any other personal aspect of that individual's life); Attorney General v. Collector of Lynn, ___ Mass. ___, 385 N.E.2d 505, 508 n.5 (1979) (privacy extends only to fundamental personal matters such as marriage and procreation). The Hearst Corp. court applied this privacy standard and concluded:

> In this case, we reach only the first step in the balancing process--determining whether the release of the materials sought would be highly offensive to a reasonable person. The appellant has not demonstrated that these records fall within this category. There is nothing in the materials which the trial judge ordered disclosed that reveals intimate details of anyone's private life in the Restatement sense. Thus, the portions of the folios ordered disclosed fail to violate any right of privacy.

580 P.2d at 254, accord Van Buren v. Miller, 22 Wash. App. 836, 592 P.2d 671, 675-76 (1979).

A number of courts from other jurisdictions have also rejected the argument that a right of privacy is involved in the disclosure of information used to assess property. See Attorney General v. Board of Assessors, ___ Mass. ___, 378 N.E.2d 45, 46 (1978); Menge v. City of Manchester, 113 N.H. 533, 311 A.2d 116, 119 (1973); DeLia v. Kiernan, 119 N.J. Super. 581, 293 A.2d 197, 199, cert. denied, 62 N.J. 74, 299 A.2d 72 (1972); Sanchez v. Papontas, 32 App. Div. 2d 948, 303 N.Y.S.2d 711, 712-13 (1969); Sears Roebuck & Co. v. Hoyt, 202 Misc. 43, 107 N.Y.S.2d 756, 759-60 (1951). In accord with the weight of authority, I find as a matter of law that no demand of individual privacy is present, no balancing is required, and the public's right to know on what basis assessments are made is guaranteed.

Even if privacy were involved, it would not be sufficient to outweigh the merits of public disclosure. The availability of the property record cards would

undoubtedly increase public confidence in the lawfulness of tax appraisals, and allow government to serve outside of the shadow of public mistrust that is often cast by unnecessary secrecy. See DeLia v. Kiernan, supra, 293 A.2d at 198-99; cf. 38 Op. Att'y Gen No. 109 (1980) (state employee's title, dates and duration of employment, and salary).

In reaching my conclusion, I have examined carefully the memorandum prepared by your legal staff setting forth arguments in favor of nondisclosure. First, it is argued that the property record cards do not constitute "public writings" within the meaning of section 2-6-101, MCA. That issue is irrelevant to the question of disclosure. The Montana constitutional right to know does not refer to "public writings," but rather "documents...of all public bodies or agencies of state government and its subdivisions." The Constitutional Convention committee that considered this provision deliberately refrained from using the term "public documents" in order to avoid tying the right to know to the statutory definition of "public writings." VII Montana Constitutional Convention Transcript of Proceedings 5148; cf. Menge v. City of Manchester, supra, 311 A.2d at 118 ("[D]efinitions [of public records] for other purposes predating the 'right to know' law are not helpful"). Furthermore, section 2-6-102, MCA, concerning "public writings," is not controlling with respect to questions of public access. The main purpose of that statute is to allow citizens to obtain certified copies of certain documents to use in court. Section 2-6-104, MCA, is the controlling statute. It addresses public access in general and is not limited to "public writings." Section 2-6-104, MCA, states:

> Except as provided in 40-8-126 [concerning adoption records], and 27-18-11 [concerning attachment records], the public records and other matters in the office of any officer are at all times during office hours open to the inspection of any person.

(Emphasis added.) Long before the adoption of the 1972 Montana Constitutional right to know, the Montana Supreme Court held that this statute "extends beyond the matter of 'public records' and eliminates the necessity of a precise definition of what constitute public

records." State ex rel. Holloran v. McGrath, 104 Mont. 490, 498, 67 P.2d 838, 841 (1937). One commentator has classified Montana's statute as among the most liberal public access laws in the country. See Comment, Public Inspection of State and Municipal Executive Documents: "Everybody, Practically Everything, Anytime, Except....", 45 Fordham L. Rev. 1105, 1119-20 (1977). Raw valuation and assessment data should be open to inspection under the broad terms of section 2-6-104, MCA. See Gold v. McDermott, 32 Conn. Super. 583, 347 A.2d 643, 646 (1975); Menge v. City of Manchester, supra, 311 A.2d at 118.

Second, your staff has cited two cases from other jurisdictions in which public access to property record cards has been denied. Dunn v. Board of Assessors, 361 Mass. 692, 282 N.E.2d 385 (1972); Kottschade v. Lundberg, 280 Minn. 501, 160 N.W.2d 135 (1968). Both cases rely on particular statutory definitions of public records, and are therefore irrelevant to Montana's determination of access. Furthermore, due to statutory changes in Massachusetts, Dunn is no longer the law there. In Attorney General v. Board of Assessors, supra, 378 N.E.2d 45 (1978), the Supreme Judicial Court of Massachusetts held that property record cards must be made available to the public in that state.

Third, your legal memorandum sets forth a number of policy reasons for keeping the property record cards confidential. These policy considerations have been rejected by courts in other states as insufficient to overcome the public's interest in disclosure. Courts have found unpersuasive arguments that the cards must be kept confidential in order to promote the public cooperation necessary for the Department to perform its functions, (see Gold v. McDermott, supra, 347 A.2d at 647; Van Buren v. Miller, supra, 592 P.2d at 674) or that access to assessment roll books is sufficient to satisfy the public's right to know (see Gold v. McDermott, supra, 347 A.2d at 647; Hearst Corp. v. Hoppe, supra, 580 P.2d at 251). Courts have explicity rejected the argument that assurances of confidentiality can prevent public disclosure. In Hearst Corp. v. Hoppe, supra, the Washington Supreme Court said:

> One established principle...is that an agency's promise of confidentiality or privacy is not adequate to establish the

> nondisclosability of information; promises cannot override the requirements of the disclosure law. [Citations omitted.]

580 P.2d at 254; accord Van Buren v. Miller, supra, 592 P.2d at 675; Sears Roebuck & Co. v. Hoyt, supra, 107 N.Y.S.2d at 759.

Fourth, your memorandum states, "This is not the same case as where the public wants to know how its tax dollars are spent, but rather segments of the public are attempting to inspect information the State has gathered about private citizens." This statement implies that the decision to provide access depends on the reasons that particular individuals have for requesting access. That approach has been rejected by some courts, and I do not consider it a viable approach in Montana. In 37 Op. Att'y Gen. No. 107, at 460, 464 (1978), I discussed a better approach, exemplified by Robles v. Environmental Protection Agency, 484 F.2d 843 (4th Cir. 1973):

> The Robles court...set down a rule of all or nothing disclosure. The Robles court reasoned that disclosure...never was intended to depend upon the interest or lack of interest of the party seeking disclosure. Therefore, the Robles approach disregards the purpose or motive of the requesting party. This...approach, illustrated in Robles, is the better of the two for Montana. Neither our Constitution nor our Open Meeting Law suggest that an individual must display a certain reason in order to inspect government operations and records. Both of these provisions in our law are 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.

Accord 38 Op. Att'y Gen. No. 109 (1980). This approach was also accepted in Montana before the constitutional right to know was established. See State ex rel. Holloran v. McGrath, supra, 104 Mont. at 495-96, 67 P.2d at 840. In determining whether information should be available to the public, the subjective motives of those seeking access must be disregarded.

Finally, in response to arguments made by some members of the public concerning the public's interest in disclosure, your memorandum states that access to the information on the property record cards is not necessary to prepare tax appeals. However, courts have ruled that a taxpayer challenging his or her assessment as discriminatory is entitled to inspect the government's property record cards. See Tagliabue v. North Bergen Township, 9 N.J. 32, 86 A.2d 773 (1952); DeLia v. Kiernan, supra, 293 A.2d 198; Sears Roebuck & Co. v. Hoyt, supra, 107 N.Y.S.2d 756. Department of Revenue v. State Tax Appeal Board, ___ Mont. ___, 613 P.2d 691 (1980), does not contradict those rulings.

THEREFORE, IT IS MY OPINION:

> The Department of Revenue may not withhold property record cards from public inspection.

Very truly yours,

MIKE GREELY
Attorney General