

VOLUME NO. 35**Opinion No. 59**

ASSESSMENTS — Banks, supplemental; BANKS AND BANKING — Assessments, examination, confidentiality of; CONSTITUTIONAL LAW — Right to know, public disclosure, bank examinations confidential; OFFICES AND OFFICERS — State officers, director of department of revenue, policy; DEPARTMENT OF REVENUE — Taxation, banks examinations, confidentiality of; TAXATION — Banks, examinations confidential. Article II, section 9, Constitution of Montana; sections 5-705, 5-901, 5-1012, 84-708.1 and 84-1507, R.C.M. 1947.

HELD: The Constitution of Montana, Article II, section 9, does not require the department of revenue to release information to the public regarding supplemental bank assessments that were issued against Montana banks as a result of an examination of such banks pursuant to section 84-708.1 (13), R.C.M. 1947.

January 10, 1974

Mr. Keith Colbo, Director
Department of Revenue
Sam W. Mitchell Building
Helena, Montana 59601

You have requested my opinion on the following question:

Does the Montana Constitution, Article II, section 9, require the department of revenue to release information to the public regarding supplemental assessments that were issued against Montana banks as a result of an examination of such banks pursuant to section 84-708.1 (13), Revised Codes of Montana, 1947?

Article II, section 9, Constitution of Montana, provides:

No person shall be deprived of the right to examine documents...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.** (Emphasis supplied)

Article II, section 9, Constitution of Montana, is a new constitutional provision which was not contained in the Constitution of Montana of 1889. By its terms, the state shall not deprive any person of the right to examine state documents "except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure."

The purpose of this provision was to constitutionally guarantee public access to government documents and operations. However, the Constitutional Convention Bill of Rights proposal on the right to know specifically proclaimed:

The Committee intends by this provision that the right to know **not** be absolute. **The right of individual privacy is to be fully respected in any statutory embellishment of the provision as well as in the court decisions that will interpret it.** To the extent that a violation of individual privacy outweighs the public right to know, the right to know does not apply. Montana Constitutional Convention, **Bill of Rights Proposal**, No. VIII, p. 23 (Emphasis supplied)

Section 84-708.1, R.C.M. 1947, sets out the powers and duties of the department of revenue. Subsection (13) provides that the department of revenue has the power and duty "[t]o examine into all cases where evasion or violation of the laws for taxation or property, proceeds, occupation or business is alleged, complained of or discovered,

An investigation or examination of bank records pursuant to section 84-708.1 (13), *supra*, is a criminal investigation into the possibility of tax fraud. The fact that criminal charges may never be forthcoming does not change its character or the rights, duties and obligations of the parties involved.

The right of inspection does not extend to all public records or documents. Public policy and due process demand that investigative reports of possible criminal activity remain confidential to protect the innocent as well as the guilty, and to encourage cooperation with state agencies for full disclosure which, in turn, should help to promote confidence and credibility in state government.

Bank records and examinations thereof are generally afforded protection against public inspection and disclosure. Sections 5-705, 5-1012 and 84-1507, R.C.M. 1947. The investigation of the several banks involved was not only a criminal investigation, but it was also an investigation to determine that values of moneyed capital and other assets and liabilities were "correctly carried on the[ir] books." In other words, it was an examination to investigate their "system of accounting," which is the exact same type of investigation that may be conducted by the superintendent of banks pursuant to section 5-901, R.C.M. 1947. Furthermore, it is mandated by section 5-1012, supra, that "[a]ny knowledge or information" pertaining to a section 5-901 investigation "shall be deemed confidential" under penalty of a felony.

In the absence of a specific confidentiality statute, the director of the department of revenue is the appropriate government official to determine whether or not public disclosure is in the best interest of the state by weighing the demand for individual privacy against the merits of public disclosure. This is his prerogative, subject only to review by the courts. *Mathews v. Pyle*, 75 Ariz. 76, 251 P.2d 893, 896 (1952).

Public disclosure at this time of the names of the banks investigated pursuant to section 84-708.1 (13), supra, would serve only to scandalize the investigation and to stigmatize by innuendo those banks which may be innocent of any criminal wrongdoing.

THEREFORE, IT IS MY OPINION:

The Constitution of Montana, Article II, section 9, does not require the department of revenue to release any information to the public regarding supplemental assessments that were issued against Montana banks as a result of an examination of those banks pursuant to section 84-708.1 (13), R.C.M. 1947.

Very truly yours,

ROBERT L. WOODAHL
Attorney General