

VOLUME 37

OPINION NO. 107

BOARD OF REAL ESTATE - Public disclosure of records; CONSTITUTIONS, RIGHT TO KNOW - Public disclosure of Board of Real Estate records; LICENSES, OCCUPATIONAL AND PROFESSIONAL - Public disclosure of Board of Real Estate records; REAL ESTATE AGENTS, DEALERS AND SALESMEN - Public disclosure of Board of Real Estate records; CONSTITUTION OF MONTANA - Article II, section 9; REVISED CODES OF MONTANA, 1947 - Sections 66-1945 and 82-3402.

- HELD: 1. The Board of Real Estate, when requested, must disclose the status of any real estate licensee, whether any disciplinary action has been taken against that individual, and, if so, the reason for the disciplinary action. Public access to information relating to complaints or to allegations is left to the discretion of the board, within the guidelines of this opinion.
2. All minutes of the Board of Real Estate, except those minutes of a meeting closed by the presiding officer pursuant to section 82-3402, R.C.M. 1947, must be open to public inspection.
3. Public access to the other files on individual licensees is left to the discretion of the Board of Real Estate within the guidelines of this opinion.

27 January 1978

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Dear Mr. Cummins:

You have requested my opinion concerning public accessibility to the following records of the Board of Real Estate: (1) files concerning complaints against real estate licensees, (2) minutes of the Board of Real Estate, and (3) other files concerning individual real estate licensees.

Article II, section 9, Constitution of Montana 1972 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.

This constitutional provision provides public access to government documents and operations. However, this right to know is not absolute. When the demands of individual privacy clearly exceed the merits of public disclosure, government documents and operations are not subject to public disclosure. The Constitutional Convention Bill of Rights proposal on the right to know 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 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 added.)

The right of individual privacy is recognized by Art. II, section 10, Constitution of Montana 1972, as follows:

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 1972 Montana Constitution applies a balancing test between the public's right to know and the demands of individual privacy when concerned with public accessibility issues.

This test is found in our Open Meeting Law, section 82-3402, R.C.M. 1947, which requires all meetings of public and governmental bodies to be open to the public. As section 82-3402 states in part:

... Provided, however, the presiding officer of any meeting may close the meeting during the time

the discussion relates to a matter of individual privacy, and then, if, and only if, the presiding officer determines that the demands of individual privacy clearly exceed the merits of public disclosure.

A proper application of this balancing test involves the following steps: (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.

The Board of Real Estate has the duty to apply this test and make the ultimate decision. Art. II, section 9, Constitution of Montana 1972, makes no reference to the responsibility for making this decision. Nevertheless, section 66-1927(4), R.C.M. 1947, provides that the records of the Board are open to public inspection under rules prescribed by the Board. Section 82-3402, R.C.M. 1947, places the discretion to close a meeting in the hands of the presiding officer. If he determines that a meeting relates to a matter of individual privacy, which clearly exceeds the merits of public disclosure, he may close the meeting and deny public inspection of those particular minutes under section 82-3403, R.C.M. 1947.

This initial decision by the board is subject to judicial review at the insistence of an aggrieved party. Section 82-3406, R.C.M. 1947, provides judicial review under the Open Meeting Law and Art. II, 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 board must require all requests for information be in writing and be specific. In turn, any grants or denials of access given by the Board must be in writing and specifically state the reasons therefor.

The right of privacy is a developing one and not precisely defined. The term "right of privacy" is commonly used to refer to a sphere of personal autonomy which is protected from governmental interference. The United States Supreme Court has recognized certain zones of privacy, which are constitutionally protected: Loving v. Virginia, 388 U.S. 1 (1967) (marriage); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation); Griswold v. Connecticut, 381 U.S. 479 (1965); Einstadt v. Baird, 405 U.S. 438 (1972) (contraception);

Pierce v. Society of Sisters, 260 U.S. 510 (1925) (child rearing); Stanley v. Georgia, 394 U.S. 557 (1969) (the home). The Montana Supreme Court has not defined the term "demand of individual privacy" found in Art. II, section 9, Constitution of Montana 1972. However, this constitutional provision is concerned with privacy in a narrower sense, which is termed "disclosural privacy." "Disclosural privacy" refers to an individual's ability to choose for himself the time and circumstances under which, and the extent to which, his attitudes, beliefs, behavior and opinions are to be shared with or withheld from others. O. Ruebhausen and O. Brim, Jr., Privacy and Behavioral Research, 65 Col. L. Rev. 1184, 1189 (1965). The board must recognize a demand of individual privacy, regardless of degree, when the information at issue reveals facts about an individual's attitudes, beliefs, behavior, and any other personal aspect of that individual's life.

Once a demand of individual privacy has been recognized, the degree of infringement on that demand must be determined. The degree of infringement will vary according to the type of information sought, e.g., the name of an individual as compared to his medical history. The extent of the state interest necessary to justify public disclosure will vary with the degree of individual privacy involved.

In the merits of public disclosure, two interests are involved. These interests are the government's need for information and the public's interest in access to government records.

All individuals share an interest in effective government. Confidentiality helps encourage full and honest disclosure of information essential to effective government. The board may have a reasonable concern that licensees and complainants may be hesitant to come forward with needed information should all records of the board be open for public inspection.

On the other hand, the public has a valid interest in knowing what government is doing. The government cannot carry on its activities in secret and, at the same time, remain accountable to the public. In the case of the Board of Real Estate, the board's function is to license and regulate the members of the real estate profession to insure qualified assistance to the public seeking help from real estate licensees. For this reason, dissemination of information compiled by the board plays an important role in

carrying out the board's function. This is reflected in the legislature's mandate that the board publish an annual directory of licenses, including a list of all licenses suspended or revoked, and any other information of interest to real estate licensees and the public. Section 66-1945, R.C.M. 1947.

Recognizing the public's interest in an open government, recent federal decisions concerning the Freedom of Information Act, 5 U.S.C. § 1002 (1946) (hereafter cited as FOIA) are relevant. These decisions indicate that two different definitions of "public interest" have been applied when considering the balancing test between privacy and the public's right to know. The first definition is found in Getman v. NLRB, 450 F.2d 670 (D.C. 1971), stay denied 404 U.S. 1204 (1971). Two law professors requested from the NLRB names and addresses of employees eligible to vote in certain union elections for the purpose of studying union election campaigns. The Getman court, considered the purpose or motive of the requesting party in defining public interest, stating that the privacy exemption under the FOIA required a balancing of the employees' right of privacy and the public interest purpose of the professors' study. A second approach is exemplified by Robles v. Environmental Protection Agency, 484 F.2d 843 (4th Cir. 1973). The Robles court specifically rejected the Getman approach and set down a rule of all or nothing disclosure. The Robles court reasoned that disclosure under the FOIA 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 second 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.

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. Unless the Legislature has enacted a policy which declares

the right of privacy superior, public disclosure is compelling. Art. II, section 9, must be read together with Art. II, section 10, Constitution of Montana 1972, and both given effect. The latter clearly addresses all types of invasions of privacy, while the former addresses only that type of invasion which concerns us here, invasion of privacy through disclosure. Art. II, section 9 governs the questions of public disclosure of government records. The board must begin with the general rule that all of its records, minutes, and files are open to the public. The burden is upon the board to show that the demands of individual privacy clearly outweigh the merits of public disclosure.

The specific questions in your request concern three types of records: (1) complaint files, (2) minutes of the board's meetings, and (3) other files concerning individual licensees.

(1) Public disclosure of complaints against licensees has not been addressed by the Montana Supreme Court, but the Minnesota Supreme Court did face this issue in Minneapolis Star and Tribune Co. v. State, 163 N.W.2d 46 (Minn. 1968). In that case, a newspaper brought an action to inspect records of the State Board of Medical Examiners relating to disciplinary actions taken against certain doctors. The Minnesota court held that the newspaper was entitled as a member of the public to ascertain the status of any doctor within the jurisdiction of the board, whether any disciplinary action had been taken against a particular doctor, and, if so, the reason for such disciplinary action. However, the court went on to say that the newspaper did not have a right to inspect records which contained charges, investigations, reports and discussions between members of the board or their employees, and complaints, or allegations which were uncorroborated and unsupported. The latter could unjustly injure the character and reputation of innocent persons both in and out of the medical profession. The court held that the board had the discretion to withhold its source of information where, in its judgment, a disclosure would violate a privileged or confidential communication from patients and informants.

A solution, similar to the one reached in the Minnesota case, is compatible with the Montana law previously discussed. Section 66-1945, R.C.M. 1947, requires the Board to make public an annual directory of licenses, indicating which licenses have been suspended or revoked, and including

any other information of interest to the public. The protection afforded the public or other licensees by disclosing disciplinary action taken by the board against any individual licensee and the reason for such disciplinary action clearly outweighs any demand of individual privacy asserted by the guilty party.

The board should have the discretion to deny public access to those records containing complaints in the investigatory stages, allegations which are uncorroborated and unsupported, and the source of a complaint or information compiled during the investigation. The ability to exercise discretion in these areas enables the board to operate efficiently by insuring full and honest disclosure of needed information and avoid injury to the character or reputation of innocent persons both in and out of the real estate profession.

(2) Public disclosure of the board's minutes is governed by the Open Meeting Law, specifically section 82-3403(1), R.C.M. 1947, which states:

Appropriate minutes of all meetings required by 82-3402 to be open shall be kept and shall be available for inspection by the public. (Emphasis added.)

All minutes of the board must be open for public inspection unless they relate to a meeting closed by the presiding officer pursuant to section 82-3402, R.C.M. 1947. His decision to close a meeting must be made with the balancing test previously discussed in mind and with the appropriate written explanation.

(3) Public access to the other files on individual licensees is left to the board's discretion. The balancing test previously discussed should be applied with relation to each type of information sought. The board may wish to inform licensees that the information required by the board will be made public, making certain information optional with the understanding that any confidentiality is being waived by the licensee. The board should give reasonable notice to persons involved if they decide public disclosure is necessary and outweighs the right of individual privacy in a given case.

In light of Art. II, section 9 of the 1972 Montana Constitution, the board should make every reasonable effort to meet

a request for public disclosure. The board can achieve this by screening records and deleting personal references when the demands of individual privacy require such deletion.

As a final note, a voluntary and intelligent waiver of the right of privacy on the part of any individual would negate the concern for Art. II, sections 9 and 10. Furthermore, section 82-3402, R.C.M. 1947, states in part:

... The right of individual privacy may be waived by the individual about whom the discussion pertains, and, in that event, the meeting shall be open. (Emphasis added.)

Therefore, public inspection of all of the board's records is mandatory when the right of individual privacy has been waived.

THEREFORE, IT IS MY OPINION:

1. The Board of Real Estate, when requested, must disclose the status of any real estate licensee, whether any disciplinary action has been taken against that individual, and, if so, the reason for the disciplinary action. Public access to information relating to complaints or to allegations is left to the discretion of the board, within the guidelines of this opinion.
2. All minutes of the Board of Real Estate, except those minutes of a meeting closed by the presiding officer pursuant to section 82-3402, R.C.M. 1947, must be open to public inspection.
3. Public access to the other files on individual licensees is left to the discretion of the Board of Real Estate within the guidelines of this opinion.

Very truly yours,

MIKE GREELY
Attorney General