

VOLUME NO. 43

OPINION NO. 6

HIGHWAYS, DEPARTMENT OF - Availability to trade union organization of payroll record information submitted to Department in order to verify payment of wages in conformance with federal law;

PRIVACY - Availability to trade union organization of payroll record information submitted to Department of Highways in order to verify payment of wages in conformance with federal law;

RIGHT TO KNOW - Availability to trade union organization of payroll record information submitted to Department of Highways in order to verify payment of wages in conformance with federal law;

STATE GOVERNMENT - Availability to trade union organization of payroll record information submitted to Department of Highways in order to verify payment of wages in conformance with federal law;

MONTANA CONSTITUTION - Article II, sections 9, 10;

OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 64 (1988), 38 Op. Att'y Gen. No. 109 (1980), 38 Op. Att'y Gen. No. 1 (1979);

UNITED STATES CODE - 40 U.S.C. § 276(a).

HELD: Payroll record information, including the names, addresses, and wages of private employees working on a publicly-funded project, that is reported to the Department of Highways is subject to public disclosure. The social security numbers of those employees are not subject to public disclosure.

February 27, 1989

Jesse Munro, Interim Director  
Department of Highways  
2701 Prospect Avenue  
Helena MT 59620

Dear Mr. Munro:

Your predecessor requested my opinion on the following question:

Is a trade union organization entitled to payroll record information, including the names and social security numbers of employees, submitted to the Department of Highways for the purpose of verifying the payment of wages in conformance with the Davis-Bacon Act?

The Department of Highways receives federal funds for the construction of highways. As a condition of receiving that aid, the Department must ensure that the firms with which it contracts pay the prevailing rate of wages established by the United States Department of Labor and incorporated into the construction contract. Pursuant to 40 U.S.C. § 276a(b), and as used in this opinion, the term "wages" or "prevailing wages" includes fringe benefits.

Because the Department of Highways must monitor the wages paid by the contractor, the contractor is required to submit to the Department a weekly payroll record. The record includes the name, address, social security number, work classification, hours worked per week, rate of pay, deductions, and gross and net pay of each employee on the payroll.

The Montana Heavy and Highway Construction Sub-Committee, a trade union organization, has requested copies of some of these records, including the names, addresses, and social security numbers of employees. The trade union organization states it is requesting the records in order to verify compliance with the Davis-Bacon Act, 40 U.S.C. § 276a. The Department of Highways has resisted releasing the names, addresses, and social security numbers of the employees.

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 allowed a governmental agency to assert the privacy interests of others where potential economic injury to the agency could result from lawsuits for improper disclosure. Belth v. Bennett, 44 St. Rptr. 1133, 1136, 740 P.2d 638, 641 (1987); Montana Human Rights Division v. City of Billings, 199 Mont. 434, 443, 649 P.2d 1283, 1288 (1982). Such potential economic injury exists in this case, and it is therefore my opinion that the Department of Highways may assert the privacy interests of the employees whose payroll records are involved.

The Montana Supreme Court has spoken several times of a party's subjective expectation of privacy and whether society considers that expectation reasonable. Belth v. Bennett, 740 P.2d at 642; Missoulian v. Board of Regents, 675 P.2d at 967-68; Montana Human Rights Division v. City of Billings, 649 P.2d at 1287. 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). 38 Op. Att'y Gen. No. 109 at 375 (1980) concluded that a state employee's title, dates and duration of employment, and salary are public information. The findings in that opinion concerning public employee information are not necessarily dispositive of an issue concerning private employees working on a publicly-funded project. Nonetheless, I find the discussion of the nature of names and wages helpful, and I conclude that the names, addresses, and wages of employees are not intimate details of a highly personal nature. Thus, with respect to the names, addresses, and wages of the employees, I find that while they involve a privacy interest, it is a minimal one. In comparison, the public has a substantial interest in verifying that employees receiving federal funds are complying with labor laws. In my opinion, the slight demand for individual privacy concerning names, addresses, and wages does not outweigh the merits of public disclosure.

The social security numbers of the employees are a different matter. Montana's constitutional right of privacy is explicit. The protection it offers is more substantial than that offered by the federal constitution. Missouliau v. Board of Regents, 675 P.2d at 967; Montana Human Rights Division v. City of Billings, 649 P.2d at 1286. However, even the federal authorities have recognized the strong privacy interest that employees have in their social security numbers. I.B.E.W. Local Union No. 5 v. U.S. Dept. of H.U.D., 852 F.2d 87, 89 (3d Cir. 1988). Against this strong privacy interest, I find no public interest that would be furthered by release of the social security numbers. I therefore conclude that the demand of individual privacy clearly outweighs the demand of disclosure of the employees' social security numbers.

Federal case law is consistent with my conclusion. See I.B.E.W. Local Union No. 5 v. U.S. Dept. of H.U.D., *supra* (names and addresses of employees of nonunion contractor performing work on federally funded project should be disclosed under Freedom of Information Act privacy exemption, but their social security numbers should not be disclosed); United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry, Local 598 v. Dept. of Army Corps of Engineers, 841 F.2d 1459 (9th Cir. 1988) (Army's refusal to disclose its payroll records to union had no reasonable basis in federal law).

THEREFORE, IT IS MY OPINION:

Payroll record information, including the names, addresses, and wages of private employees working on a publicly-funded project, that is reported to the Department of Highways is subject to public disclosure. The social security numbers of those employees are not subject to public disclosure.

Sincerely,

MARC RACICOT  
Attorney General