

**Public Employees' Retirement Board
June 12, 2014**

**Topic: Release of Information Requested During Discovery in
AMRPE v. State**

Staff Recommendations:

1. Release of PERS Retiree Information
2. Release of PERS members eligible to purchase 1 for 5 Service
3. No release of PERS members who have purchased 1 for 5 Service
4. Release addresses with a Disclaimer

Board Motion:

Uphold Staff Recommendation

Other.

Moved by

Seconded by

Vote

ISSUES: Plaintiffs in the *AMRPE v. State* lawsuit have filed their first set of discovery requests to defendants. MPERA is assisting the Attorney General's office with responding to the requests. Our responses are due no later than Friday, June 13th. Most of the discovery has been completed. However, several requests for production require Board action either because the requested information is considered confidential or because addresses are requested:

INTERROGATORY NO. 11: Please identify each member of PERS who retired after July 1, 2001.

INTERROGATORY NO. 13: Please identify all PERS members that are eligible as of the date these requests were served to purchase "1 for 5" service credit pursuant to Mont. Code Ann. §19-3-513.

INTERROGATORY NO. 14: Please identify all PERS members that purchased "1 for 5" service credit pursuant to Mont. Code Ann. § 19-3-513 after June 30, 1997.

“Identify” for purposes of these discovery requests means the person's name, current or last known address, current or last known telephone number, job title and dates of employment by that person's current or last known employer.”

DISCUSSION:

Confidential Information: According to Section III.A. of the MPERA Policy General 01 Confidential Information – Protection and Release “information about a member’s buybacks, eligibility for buybacks, or additional contributions” and “a member’s purchased service credit” are confidential. See subsections #7 and #15, respectively. Therefore, the information requested in Interrogatory No. 13 and particularly No.14 may be considered confidential.

However, Attorney General Bullock issued an Opinion to Teachers’ Retirement System in September 2011 determining that the public’s right to know “clearly exceeds” any rights to privacy a state retiree may have or expect to have. 54 Op. Att’y Gen. No. 03 concludes as follows:

“In the San Diego County case, the court provided the following explanation of the balance between the retirees’ privacy interests and the public’s right to know:

The names of [public] pension recipients combined with their pension amounts is not information of a personal nature. The information does not solely relate to private assets or personal decisions. Rather, the pension amounts reflect specific governmental decisions regarding retirees’ continuing compensation for public service. Therefore, the pension amounts are more comparable to public salaries than to private assets. Retirees’ publicly funded pensions--like their previous salaries--are of interest to the public, and only through disclosure can the public expect to prevent abuse. *San Diego County* at 490 (citations omitted).

* * *

“Ultimately, I find the rationale of the court in the San Diego County case to be persuasive. TRS members’ retirement benefits were earned while they were public employees and are subject to the same public disclosures as discussed above. Likewise, their retirement benefits are paid largely by public funds and, necessarily, subject to the public’s same interest in understanding how pension funds are calculated and how the government is spending taxpayer funds.”

The questions before the Board are (1) whether a member’s eligibility to purchase 1 for 5 service is confidential; and (2) whether a member’s purchase of 1 for 5 service is confidential. A member’s eligibility for 1 for 5 service is based on the member’s years of covered employment. As such, this information does not appear to be confidential and should be released. However, 1 for 5 service is not purchased with public funds. It is purchased by the member using the member’s personal financial resources. For that reason, it does not appear that the Attorney General Opinion requires release of information regarding who has purchased 1 for 5 service.

Prior to reaching a decision to release or not release the 1 for 5 service purchase information, the Board must also consider that if a court determines the information to be public, the Board may be liable for attorney fees related to that determination. Likewise, in the event the Board releases this information and a member objects, a Court could determine the information to be confidential. At that point, the Board could once again be liable for attorney fees, amongst other damages.

Addresses: Within the Discovery document the term “identify” includes providing addresses. State statute (2-6-109(1), MCA) prevents the Board from “distributing for use as a mailing list any list of persons”. It also prohibits others from using a list prepared by the Board as a mailing list:

2-6-109. Prohibition on distribution or sale of mailing lists --

exceptions -- penalty. (1) Except as provided in subsections (3) through (9), in order to protect the privacy of those who deal with state and local government:

(a) an agency may not distribute or sell for use as a mailing list any list of persons without first securing the permission of those on the list; and

(b) a list of persons prepared by the agency may not be used as a mailing list except by the agency or another agency without first securing the permission of those on the list.

(2) As used in this section, "agency" means any board, bureau, commission, department, division, authority, or officer of the state or a local government.

(10) A person violating the provisions of subsection (1)(b) is guilty of a misdemeanor.

In 43 Op. Att'y Gen No. 73 Attorney General Marc Racicot recognized that a previous Attorney General opinion (38 Op. Atty' Gen 59) balanced the above statute against the public's right to know and determined that § 2-6-109 prohibits agencies from distributing a list of persons **only** if the intended use of the list is for unsolicited mass mailings, house calls or distributions, or telephone calls; and that agencies are not required to learn why the list is sought, but need only provide a clear written disclaimer regarding the proscriptions and penalty set out in the statute.

For this reason, the Board should release the identifying information requested with respect to retirees and those eligible to purchase 1 for 5 service, including addresses, and include a clear written disclaimer on the documents containing the addresses.

MONTANA PUBLIC EMPLOYEE RETIREMENT ADMINISTRATION (MPERA)

TITLE: Confidential Information – Protection and Release

POLICY NO: MPERA Gen 01 EFFECTIVE DATE: June 1992

I. POLICY AND OBJECTIVE

- A. It is the policy of MPERA to protect the privacy rights of the Montana Public Employees' Retirement Board-administered retirement systems, deferred compensation plan members and benefit recipients.
- B. The objectives of this policy are to:
 - 1. identify information considered confidential;
 - 2. establish the process for releasing confidential information to third parties;
 - 3. establish the process for confirming the identity of members and participants requesting personal information regarding their accounts and benefits;
 - 4. establish requirements for protecting physical documents containing confidential information. See Computer Use policy for requirements protecting electronic documents.

II. APPLICABILITY

This policy applies to:

- A. requests received as a regular part of daily operations by MPERA to release confidential information pertaining to any Board-administered retirement system or deferred compensation member, benefit recipient or other individual with Board-administered retirement system or deferred compensation plan related privacy rights.
- B. all documentation containing confidential information.

III. DEFINITIONS

- A. Confidential information is defined as information retained by MPERA that is constitutionally, statutorily or judicially protected from disclosure to the public. Confidential information includes:
1. any information describing a member's disability or the nature of a disability;
 2. any medical information or medical records;
 3. the amount of an individual's retirement benefit or account balance;
 4. the amount of a participant's deferrals to the deferred compensation plan;
 5. information about a member's contributions or account balance;
 6. information about the investment options selected by a participant in the defined contribution retirement plan or the deferred compensation plan;
 7. information about a member's buybacks, eligibility for buybacks, or additional contributions;
 8. the identity or relationship of designated beneficiaries;
 9. confirmation that a member is considering retirement, or has requested retirement benefit estimates or a refund;
 10. the retirement option the member chose;
 11. information regarding a PERS member's retirement plan election;
 12. information regarding other retirement system elections made by the member, unless participation in the retirement system feature is mandated by statute;
 13. personal information including:
 - a. social security numbers;

- b. birth dates;
 - c. bank routing numbers and bank account numbers.
14. if a draft family law order exists, the alternate payee, the alternate payee's attorney, and the member's attorney may be told that the member has requested retirement estimates, has applied for retirement or for a refund, or is receiving a retirement or disability benefit.
 15. A member's purchased service credit.
- B. Public information is defined as information that will be released to the public upon request. Public information includes the:
1. name of a member, retiree or other benefit recipient;
 2. name of a member's employing agency or a retiree's former employer;
 3. fact that a person is a member of a retirement system administered by MPERA;
 4. a member's earned service credit;
 5. retirement system of which a person is a member, retiree or benefit recipient;
 6. fact that a person is a retiree;
 7. fact that a person is either receiving or has been approved to receive a benefit.

IV. RELEASE OF CONFIDENTIAL INFORMATION TO THIRD PARTIES

- A. Confidential information will be released to third parties when one of the following exists:
1. a valid legal order;
 2. a written release signed by the member or benefit recipient;
 3. a valid request to conduct a third party mailing of acceptable materials on behalf of an IRC section 501(c)(4) tax-exempt retiree organization formed for board-administered retirement system participants.

- B. The Executive Director may release confidential information to the member's employer or former employer in order that the employer may effectively administer its employee benefit program, and comply with the requirements of the applicable payroll and retirement systems.
- C. The Executive Director may release confidential information to governmental agencies with statutory authority to access specific information. The requesting agency must submit the request in writing, citing proper legal authority to obtain the specified information.
- D. Confidential information released by the Executive Director pursuant to paragraphs A., B., or C. above will contain a statement identifying the information as confidential and requiring the receiving entity to restrict access to the information to the minimum necessary to conduct official business.
- E. Confidential information may be made public in a manner that protects the individual privacy of the member or retiree. For example, the information may be included in a summary form or as part of a report.

V. RELEASE OF CONFIDENTIAL INFORMATION TO PUBLISHING FIRMS ON BEHALF OF IRC 501(c)(4) COMPANIES.

- A. "Acceptable materials" are defined in Administrative Rule of Montana 2.43.1407.
- B. Addresses will be released directly to the contracted publishing firm solely for mailing purposes. The following documentation shall be submitted prior to distribution or information:
 - 1. Release of Confidential Information Request from the IRC 501(c)(4) company.
 - 2. Release of Confidential Information Contract with the publishing company. The Release of Confidential Information Contract shall be approved by an MPERA attorney.
- C. The confidential information shall be destroyed by the publishing company after it is used for its stated purpose and MPERA shall be notified in writing after its destruction.

- D. A Destruction of Confidential Information Confirmation form shall be included with the contract.
- E. A Release of Information Log shall be maintained to monitor compliance with this policy.
- F. A template for the above documents can be found at OPERATIONS Workgroups\AdminSvcs\ThirdPartyMailings.

VI. RELEASE OF PERSONAL INFORMATION TO MEMBERS, PARTICIPANTS AND BENEFICIARIES

- A. General Information. Telephone requests from retirement system members or benefit recipients for general information regarding a retirement system or the deferred compensation plan will be handled in a manner most efficient to both the member or benefit recipient and MPERA. Information provided may be subject to written verification.
- B. Specific Information. Specific information particular to a member or benefit recipient will be released to the member or benefit recipient only upon proof of identification.
 - 1. Telephone request. If the inquiry is made by telephone, proof of identification requires either a member identification number (once established) or verification of a and b below, and at least one of the items in c through h.
 - a. full social security number
 - b. date of birth
 - c. name of designated beneficiary
 - d. relationship of beneficiary to member
 - e. beneficiary's date of birth
 - f. address
 - g. employer
 - h. spelling of maiden name
 - 2. E-mail request.

- a. If the inquiry is by state e-mail (currently Outlook) from the member's or the benefit recipient's e-mail address, proof of identification requires one of the following:
 - i. the requestor's date of birth;
 - ii. the requestor's member identification number (once established).
 - b. Inquiries by e-mail other than state e-mail require the same proof of identification as in section VI(B)(1) above.
 - c. The requested information will be e-mailed to the member's e-mail address of record.
3. Written request (other than e-mail). If the inquiry is in writing, other than state e-mail, the member must sign the inquiry.
- a. MPERA staff will consider the member's signature to be sufficient proof of identification.
 - b. The requested information will be mailed to the member at the member's last address of record, or to the address requested in writing by the member.

VII. PROTECTION OF CONFIDENTIAL INFORMATION

A. Office areas:

1. Any file pertaining to a member or beneficiary that is being used in any area shall be returned to the vault at closing time with the exception of areas that have been provided locking, fire-proof cabinets.
2. Documents or reports containing confidential information shall not be left where they are visible to visitors or maintenance and custodial workers during or after work hours.
3. Individuals shall be responsible for taking their shredding to the shredding bin daily. Shredding that is being held for possible future reference must be kept secured.

4. At closing time, designated staff shall do a sweep of all printers, copiers, and fax machines and clear them of any documents containing confidential information. The documents shall be taken to a secure location.

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B. Reception Area:

1. Monitors that are visible to the public must be equipped with privacy screens.
2. Documents with confidential information shall not be left where they may be visible to the public or maintenance and custodial workers during or after work hours.
3. Mail slots must not contain documents with confidential information after closing time.

C. The microfiche room and vault must be secured after hours.

VIII. TRAINING

Supervisors are required to provide education incorporating our confidential information policy with staff. The policy shall be reviewed on an annual basis, and if any part of the policy changes. Staff is required to sign the attached acknowledgement form and return to their supervisor.

IX. CROSS REFERENCES

The following laws, rules or policies may contain provisions that apply to this policy. The list should not be considered exhaustive – others may also apply.

Montana Constitution Article II, Sections 8, 9 and 10.
Public Records, Title 2, Chapter 6 (section 2-6-109, MCA)
Board Powers, section 19-2-403, MCA
ARM 2.43.1405 Requests for Release of Information by Members
ARM 2.43.1406– 2.43.1408 Mailing for Non-Profit Groups
Public Information (replaced Request for Information (G3-92.2))
Board's Statement of Governance Principles
Board's Confidential Information Policy – BOARD Gen 02
Board's Public Information Policy – BOARD Gen 01
MPERA Computer Use Policy

IX. HISTORY

G692.2 Confidential Member Information
Originally Approved June 1992
Amended April 1, 2004
Amended September 12, 2005
Amended August 13, 2007
Amended July 27, 2009
Amended March 31, 2010
Amended February 28, 2012
Amended August 22, 2012
Amended July 26, 2013
Amended January 22, 2014

X. APPROVAL

Approved: _____
Roxanne M. Minnehan, Executive Director
Montana Public Employee Retirement Administration

Date: _____

**MONTANA PUBLIC EMPLOYEE RETIREMENT
ADMINISTRATION**

100 North Park Avenue, Suite 200 ~ PO BOX 200131
Helena, MT 59620-0131
(406) 444-3154 or (877) 275-7372

(i) MPERA Confidentiality and Release of Information

1) Acknowledgement Form

By signing this form I acknowledge that I have read the policy entitled "Confidentiality and Release of Information" issued on August 22, 2012, and understand and agree that I am bound by the requirements in that policy. I have had the opportunity to review that policy with my supervisor and ask any questions I might have. If I have any questions in the future regarding the disclosure of particular information, I agree I will discuss those questions with my supervisor prior to disclosing that information.

PRINT NAME: _____

SIGNATURE: _____

DATED: _____

Return to supervisor.

MONTANA PUBLIC EMPLOYEES' RETIREMENT BOARD

TITLE: Public Information

POLICY NO: BOARD Gen 01

EFFECTIVE DATE: 01/14/2010

I. POLICY AND OBJECTIVES

It is the policy of the Public Employees' Retirement Board (the Board) to provide any and all available public information to all parties of interest, and to the general public as appropriate.

The objective of this policy is to establish guidelines for the release by the Board and the Montana Public Employee Retirement Administration (MPERA) of accurate and timely information of concern to the public. The guidelines balance the public's right to know with an individual's right to privacy. The guidelines also ensure that accurate information will be provided with the least impact on staff resources as possible.

Board members will not disseminate confidential, incomplete or misleading information. The Board member should refer requests for confidential or sensitive information to the Executive Director.

II. DEFINITIONS

- A. Public information is defined as information that is not designated as confidential by state or federal law.
- B. Public information that will be released to the public upon request:
 - 1. The name of a member, retiree or other benefit recipient;
 - 2. The name of a member's employing agency or a retiree's former employer;
 - 3. The fact that a person is a member of a retirement system administered by the Board;
 - 4. The retirement system of which a person is a member, retiree or benefit recipient;

5. The fact that a person is a retiree and is either receiving or has been approved to receive a benefit; and
6. The fact that a person is either receiving or has been approved to receive a benefit.

III. PROCEDURES

A. General

1. Requests for Information. Board members are occasionally asked to respond to requests for information from the general public, retirement system members or employers, other government entities and legislators. Information should be disseminated in a timely and professional manner. However, if the information is confidential, the Board member's knowledge is incomplete, or the request is outside the scope of the Board member's expertise, duties or responsibilities, the request will be referred to the Executive Director.
 - a. Neither the Board nor the MPERA is required to release information that is not readily available. For example, neither the Board nor the MPERA is required to comply with requests to use existing data to create new reports, documents or lists that are not created as a part of the Board or the MPERA's ordinary business.
 - b. If the Executive Director denies a request under 1. or 1.a., the requestor may appeal the decision to the Board.
 - c. In the event the Board or the Executive Director determines to comply with requests to create new reports, documents or lists, all associated costs of the MPERA staff time exceeding three hours will be borne by the requesting party. An estimate of the cost, based on **\$25 an hour starting on the second hour**, will be provided to the requesting party before the costs are incurred. No production will be initiated until the requesting party has prepaid the estimated costs.
 - d. If the estimate under 1.c. exceeds the actual cost, a refund of the overpayment will be made when the information is delivered to the requesting party. If the

estimate is less than the actual cost, the requesting party will pay the difference upon delivery of the requested information.

2. **Disclose Contact with the Public.** Board members who are contacted by the public regarding issues or matters over which the Board has jurisdiction will disclose the contact to the other members of the Board at the time the matter is discussed and acted upon by the Board or by a committee of the Board if the Board member is a member of that committee.
 3. **Board Spokesperson.** Board members may represent themselves as a Board spokesperson only when so designated by the Board President or the Executive Director.
- B. **Board's Annual Report and Website.** The Board will make every effort to include in its annual report and on its website as much information of interest to retirement system members and employers as possible, without incurring undue expense or undue burden to MPERA employees.
- C. **Attorneys.** When a Board member is contacted by a person or the person's attorney for information concerning an issue that may be adversarial or the likely subject of a contested case matter, the Board member will direct the person or the person's attorney to the Executive Director or the Board's legal counsel.
- D. **Media.** When the media contacts a Board member, issues requiring research or legal assistance, and questions of policy should be forwarded to the Executive Director. Contacts with the media should be reported to the Board President and Executive Director.
- E. **Lobbying**
1. **Board Lobbying.** Board members may attend committee hearings or floor sessions as desired and do not need to register as lobbyists. A Board member who is requested to provide information during a legislative session should notify the Board President and the Executive Director of the request to determine who will be responsible for assembling and releasing the information.
 2. **Personal Lobbying.** A Board member involved in personal lobbying or who attends hearings for reasons unrelated to

Board business and who identifies him or herself as a Board member or who is commonly recognized by legislators as a Board member should state that they are not representing the Board of the MPERA.

- F. Requests Related to Employees/Individuals. Information requested by other state agencies, state employees or the general public concerning issues relating to an employee/individual (i.e. information relating to payroll, benefit payments, recruitment and selection, performance appraisal, disciplinary action, grievances, reduction in work force, disabled person's employment preference and veterans' employment preference) should be treated as confidential information which may require authorization from the employee/individual a constitutionally-valid legal order or specific statutory authority to release the information. Any questions regarding these requests should be referred to the Executive Director.
- G. Reference Check Information. A Board member contacted by an employer for information regarding references will refer the requestor to the Executive Director.
- H. MPERA Policies. MPERA policies regarding the release of information contain procedures and specific guidelines for responding to requests for information. This policy does not change those procedures, but is meant to cover areas that do not have more specific procedures.

IV. CROSS-REFERENCE GUIDE

The following laws, rules or policies may contain provisions that might modify a decision relating to public information. The list should not be considered exhaustive – other policies may apply.

Montana Constitution Article II, Sections 8, 9 and 10
Title 2, Chapter 3, Parts 1-3, MCA Public Participation in Government Operations
Title 2, Chapter 4, Parts 1-3, MCA Administrative Procedures Act
Title 2, Chapter 6, MCA Public Records
MOM 3-0165 Recruitment & Selection
MOM 3-0110 Employee Record Keeping
ARM 2.21.3728 Confidentiality of Applications and Selection Materials
Section 19-2-403, MCA
ARM 2.43.1405 Request for Release of Information by Members
Board Gen 02 Confidentiality
MPERA Gen Confidential Member and Retiree Information

V. HISTORY

G3-92.2 Request for Information

Originally approved March 1992

Amended March 25, 2004

G6-92.2 Confidential Member Information

Originally approved June 1992

Amended March 25, 2004

Board Gen 01 Public Information

Reviewed and amended January 14, 2010

MONTANA PUBLIC EMPLOYEES' RETIREMENT BOARD

TITLE: Confidential Information

POLICY NO: BOARD Gen 02

EFFECTIVE DATE: 11/12/2004

I. POLICY AND OBJECTIVE

It is the policy of the Public Employees' Retirement Board (the Board) to protect the privacy rights of Board-administered retirement system and deferred compensation plan members and benefit recipients.

The objective of this policy is to establish the criteria for releasing confidential information.

II. APPLICABILITY

This policy applies only to appeals of staff determinations denying the release of confidential information and to requests for the release of confidential information made directly to the Board as part of a contested case process. The Board must direct any other request for confidential information to the Montana Public Employee Retirement Administration (MPERA) staff.

III. DEFINITION

Confidential information is defined as information retained by the Board or by the MPERA that is constitutionally, statutorily or judicially protected from disclosure to the public.

IV. CRITERIA FOR RELEASING CONFIDENTIAL INFORMATION

- A. The Board may not distribute or sell for use as a mailing list any list of Board-administered retirement system participants except as provided by the statutes and rules that permit the Board to conduct a mailing on behalf of a retiree organization formed for Board-administered retirement system participants with tax-exempt status under section 501(c)(4) of the Internal Revenue Code (IRC).

- B. The Board will release confidential information to the public only when one of the following exists:
1. a valid legal order;
 2. a written release from the member or benefit recipient; or
 3. a valid request to conduct a third party mailing pursuant to section A.

V. CROSS REFERENCES

The following laws, rules or policies may contain provisions that apply to this policy. The list should not be considered exhaustive – others may also apply.

Montana Constitution Article II, Sections 8, 9 and 10.
Public Records, Title 2, Chapter 6 (Section 2-6-109, MCA)
Section 19-2-403, MCA
ARM 2.43.1405 Requests for Release of Information by Members
ARM 2.43.1406 – 2.43.1408 Mailing for Non-Profit Groups
Board Gen 01 Public Information
Board's Statement of Governance Principles

VI. HISTORY

G692.2 Confidential Member Information
Originally Approved June 1992
Amended April 1, 2004
Amended November 12, 2004
Board Gen 02 Confidential Information
Reviewed January 14, 2010

PRIVACY - Even if state retirees have constitutionally protected rights to privacy, when balanced against the public's right to know, those rights to privacy do not clearly exceed the merits of public disclosure;

RIGHT TO KNOW - Information such as public employees' names, addresses, salaries, job titles, merit pay, vacation and sick leave, dates of employment, and hours worked is crucial to fostering the public's trust in government;

RIGHT TO KNOW - State retirees' privacy interests in their names and benefit amounts does not "clearly exceed" the public's right to know;

MONTANA CODE ANNOTATED - Sections 2-6-101, (1);

MONTANA CONSTITUTION OF 1972 - Article II, sections 9, 10;

OPINIONS OF THE ATTORNEY GENERAL - 44 Op. Att'y Gen. No. 32 (1992), 43 Op. Att'y Gen. No. 6 (1989), 41 Op. Att'y Gen. No. 35 (1985), 38 Op. Att'y Gen. No. 109 (1980).

HELD: Retirees of the Teachers' Retirement System of the State of Montana do not have individual rights of privacy in the amounts of their retirement benefits that clearly exceed the public's right to know.

September 16, 2011

Ms. Denise Pizzini
Chief Legal Counsel
Teachers' Retirement System
1500 East Sixth Avenue
P.O. Box 200139
Helena, MT 59620-0139

Dear Ms. Pizzini:

[P1] You have requested my opinion on the following question:

Whether a retiree of the Teachers' Retirement System of the State of Montana has an individual right of privacy in the amount of his or her retirement benefit that clearly exceeds the public's right to know.

[P2] According to your letter, in August, 2010, the State Administration and Veterans' Affairs Legislative Interim Committee (SAVA Committee) requested information from the Legislative Audit Division on the 100 highest annual retirement benefit amounts paid by the Montana Teachers' Retirement System (TRS) and the Montana Public Employees' Retirement System. The Legislative Audit Division provided the requested information to the SAVA Committee as a ranked listing of the 100 highest annual benefit amounts paid by each retirement system. The information provided by the Legislative Audit Division did not include any information by which individual retirees could be identified.

[P3] On August 24, 2010, the executive director of TRS received a written request via email from a media outlet, which stated in part:

Last week I was at a SAVA meeting and members reviewed a list of the top 100 annual retirement benefits to retirees. I am looking into the story a little deeper. I would like the names, job titles, government agency for the top 10 TRS retirees.

[P4] According to your letter, TRS does not gather job title information on its members and therefore could not provide that information. Otherwise, if granted, the request would match individual retirees' benefit amounts with their names and agencies.

[P5] TRS then sent written notices to the retirees at issue, inquiring whether they would be willing to waive any privacy interests they may have in the requested information and authorize TRS to disclose the information pursuant to the media request. Each TRS retiree was informed that his information would be provided pursuant to the request only if he returned a signed and notarized authorization form. TRS further indicated that a retiree's failure to respond would be construed as the individual having declined to waive his or her privacy rights and therefore declining to authorize TRS to disclose the information.

[P6] Of the ten retirees whose information was at issue, only one returned the signed and notarized authorization. That individual's information was therefore disclosed pursuant to the request. Another retiree provided a written statement to TRS specifically asserting a privacy interest. Another called TRS asserting a privacy interest. The other seven retirees provided no response. Accordingly, TRS construed their silence as declining to waive their privacy interests and authorize TRS to disclose the information.

[P7] Resolution of this question requires the balancing of two rights enshrined in Montana's constitution: the right of individual privacy and the right of the public to know and understand the workings of its government.

[P8] Article II, section 9 of the Montana Constitution grants the public's right to know:

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.

[P9] Describing the Framers' intent in adopting this section, the Court has noted, "the theme was that except as it may be limited by the right of the individual to personal privacy, there is to be in Montana a broad-based, pervasive and absolute right of citizens to know what is going on in their government and a right to participate in government untrammelled by the government itself." Bryan v. Yellowstone County Elem. Sch. Dist. No. 2, 2002 MT 264, ¶ 39, 312 Mont. 257, 60 P.3d 381.

[P10] Various statutes, such as Mont. Code Ann. § 2-6-101, specifically provide public access to government documents. Montana Code Annotated § 2-6-101(1) states, "Every citizen has a right to inspect and take a copy of any public writings of this state. . . ." The Montana Supreme Court has held that the public right to know includes the media and that the constitutional right of inspection may not be hindered based upon the gatekeeper or, in other words, the governmental record keeper's interpretation of the need or basis underlying the request. See Jefferson County v. Montana Std., 2003 MT 304, ¶ 13, 318 Mont. 173, 79 P.3d 805 and Associated Press v. Montana Department of Revenue, 2000 MT 160, ¶ 85, 300 Mont. 233, 4 P.3d 5.

[P11] Montana's right to privacy is found at article II, section 10 of the Montana Constitution, and provides, "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 right extends to informational privacy, that is, the right of individuals to control the disclosure and circulation of personal information. Montana Shooting Sports Ass'n v. State, 2010 MT 8, ¶ 14, 355 Mont. 49, 224 P.3d 1240, (citing) St. James Community Hosp. v. District Court, 2003 MT 261, ¶ 8, 317 Mont. 419, 77 P.3d 534; Gryczan v. State, 283 Mont. 433, 449, 942 P.2d 112, 122 (1997).

[P12] It is "well established" that Montana's constitutional right to know is not absolute. Yellowstone County v. Billings Gazette, 2006 MT 218, ¶ 19, 333 Mont. 390, 143 P.3d 135 (citations omitted). The Court has recognized that the public's constitutional right to know must be weighed against any individual privacy rights that may be present.

[P13] In order to balance these interests, the Court has established a three step-process:

First, we consider whether the provision applies to the particular political subdivision against whom enforcement is sought. Second, we determine whether the documents in question are “documents of public bodies” subject to public inspection. Finally, if the first two requirements are satisfied, we decide whether a privacy interest is present, and if so, whether the demand of individual privacy clearly exceeds the merits of public disclosure.

Becky v. Butte-Silver Bow Sch. Dist. No. 1, 274 Mont. 131, 136, 906 P.2d 193, 196 (1995).

[P14] Here it is uncontested that article II, section 9 of the Montana Constitution applies to TRS. It is further conceded that the information requested constitutes “documents of public bodies” subject to public inspection.

[P15] The question presented instead turns on whether a privacy interest is present and, if so, “whether the demand of individual privacy clearly exceeds the merits of public disclosure.” Becky, 274 Mont. at 136, 906 P.2d at 196. If the demand for individual privacy clearly exceeds the public’s right to know public disclosure is not required. Yellowstone Co., ¶ 19, citing Bryan v. Yellowstone Co. Elem. Sch. Dist. No. 2, 2002 MT 264, ¶ 33, 312 Mont. 257, 60 P.3d 381.

[P16] The Montana Supreme Court has established a two-part test to determine whether an individual has a protected privacy interest under article II, section 10 of the Montana Constitution. Jefferson County, ¶ 15 (citation omitted). A person has a constitutionally protected privacy interest when he or she has a subjective or actual expectation of privacy that society is willing to recognize as reasonable. Lincoln County Comm’n v. Nixon, 1998 MT 298, ¶ 16, 292 Mont. 42, 968 P.2d 1141 (citation omitted). Under this test, if it is determined that a constitutional right to privacy exists, it must then be balanced against the constitutional right to know. Montana Health Care Ass’n v. Montana Bd. of Directors, 256 Mont. 146, 150, 845 P.2d 113, 116 (1993). As stated above, only if the demand for individual privacy clearly exceeds the public’s right to know is public disclosure not required. Yellowstone Co., ¶ 19 (citation omitted).

[P17] Good reason exists to conclude TRS retirees had some expectation of privacy in their retirement benefits. At least nine of the ten retirees either explicitly or implicitly asserted a privacy interest in the information sought. This suggests that they had at least a subjective expectation of privacy concerning their retirement benefits. Further, TRS’s own policies may have created an actual expectation of privacy on the part of the retirees. As your letter points out, generally TRS does not publish or otherwise make publicly

available the financial information and benefits of its members. Moreover, TRS's "Member's Retirement Plan Handbook" provides:

RELEASE OF INFORMATION

Most retirement and benefit information is confidential and may only be released to the member, benefit recipient, or an authorized person.

The TRS receives many requests for information from banks, accountants, attorneys, spouses, and other interested parties. Even though most requests are made on behalf of the member or benefit recipient, state law prohibits the release of any confidential information unless the member consents in writing, or we are otherwise required to release the information. Information may be released directly to the member, benefit recipient, or to another person designated by the member in writing.

[P18] However, our analysis does not end there. While TRS members may have had an expectation of privacy, that expectation is only constitutionally protected if society recognizes it as reasonable. Lincoln County, ¶ 16. Whether society would recognize TRS members' expectation of privacy in their publicly funded retirement benefits is a more difficult question.

[P19] However, it is not necessary to reach that issue today, because I conclude that even if TRS members had constitutionally protected rights to privacy, when balanced against the public's right to know, those rights to privacy do not "clearly exceed the merits of public disclosure." Yellowstone Co., ¶ 19.

[P20] It is well established through previous opinions of this office that public employees' names, addresses, salary, job titles, merit pay, vacation and sick leave, dates of employment, and hours worked may be subject to public disclosure. See 38 Op. Att'y Gen. No. 109 (1980), 41 Op. Att'y Gen. No. 35 (1985), 43 Op. Att'y Gen. No. 6 (1989), 44 Op. Att'y Gen. No. 32 (1992). Such information helps the public to understand how the state is using its tax dollars and what budget priorities the state has set for those dollars. Accordingly, such information is crucial to fostering the public's trust in government.

[P21] The present situation, involving retirees' names and retirement benefits, admittedly is somewhat different. However, it is not so different as to tip the scales to conclude that the retirees' rights to privacy now "clearly exceed[]" the public's right to know. This is particularly true in light of the fact that the Montana Supreme Court has

indicated under article II, section 9 of the Montana Constitution, the public's right to know is essentially presumed. See Bryan, ¶ 39.

[P22] In considering this question, other jurisdictions have determined that public employees lack a reasonable expectation of privacy in their retirement benefits, a largely publicly financed benefit, that would trump the public's right to know. San Diego County Employees Retirement Ass'n v. The Superior Court of San Diego County, 127 Cal. Rptr. 3d 479, 489-90 (Cal App. 2011). See also Detroit Free Press v. City of Southfield 713 N.W.2d 28, 35 (Mich App. 2005); Pulitzer Publishing v. Missouri State Employees Retirement Sys., 927 S.W.2d 477 (Mo. App. 1996); Seattle Fire Fighters Union v. Hollister, 737 P.2d 1302 (Wash. App. 1987); Mergenthaler v. Commonwealth State Employees' Retirement Bd., 372 A.2d 944 (Pa. Cmmw. 1977).

[P23] In the San Diego County case, the court provided the following explanation of the balance between the retirees' privacy interests and the public's right to know:

The names of [public] pension recipients combined with their pension amounts is not information of a personal nature. The information does not solely relate to private assets or personal decisions. Rather, the pension amounts reflect specific governmental decisions regarding retirees' continuing compensation for public service. Therefore, the pension amounts are more comparable to public salaries than to private assets. Retirees' publicly funded pensions--like their previous salaries--are of interest to the public, and only through disclosure can the public expect to prevent abuse.

San Diego County at 490 (citations omitted).

[P24] A party asserting a privacy interest in the question before me relied upon Rowland v. Commonwealth of Pennsylvania, 885 A.2d 621 (Pa. Commw. Ct. 2005) to support his position that retirees hold a constitutionally protected privacy interest in the amount of retirement benefit received that trumps the public's constitutional right to know. That case, however, is distinguishable from the question presented in this Opinion. The challenge in Rowland was to release of address, date of birth and last employer. The retirement entity had already released the names of retirees, their dates of retirement, years of credited service and monthly annuities as public documents and that release was not challenged. The Rowland case therefore does not support the contention that retirees have a constitutionally protected privacy interest in the amount of retirement benefits paid which is the question I answer here.

Ms. Denise Pizzini
September 16, 2011
Page 7

[P25] Ultimately, I find the rationale of the court in the San Diego County case to be persuasive. TRS members' retirement benefits were earned while they were public employees and are subject to the same public disclosures as discussed above. Likewise, their retirement benefits are paid largely by public funds and, necessarily, subject to the public's same interest in understanding how pension funds are calculated and how the government is spending taxpayer funds.

THEREFORE IT IS MY OPINION:

Retirees of the Teachers' Retirement System of the State of Montana do not have individual rights of privacy in the amounts of their retirement benefits that clearly exceed the public's right to know.

Sincerely,

STEVE BULLOCK
Attorney General

sb/zz/jym

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VOLUME NO. 43

OPINION NO. 73

CORPORATIONS - Prohibition on distribution of state agency list of corporations as mailing list;
PRIVACY - Use of state agency list of corporations as mailing list;
RIGHT TO KNOW - Use of state agency list of corporations as mailing list;
SECRETARY OF STATE - Prohibition on distribution of list of corporations as mailing list;
MONTANA CODE ANNOTATED - Section 2-6-109;
MONTANA CONSTITUTION - Article II, sections 9, 10;
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 119 (1988), 38 Op. Att'y Gen. No. 59 (1979).

HELD: The prohibition of section 2-6-109, MCA, against the distribution of mailing lists by state agencies applies to mailing lists of both individual persons and corporations. 38 Op. Att'y Gen. No. 59 at 207 (1979) is overruled insofar as it conflicts with the holding of this opinion.

October 31, 1990

The Honorable Mike Cooney
Secretary of State
Room 225, State Capitol
Helena MT 59620

Dear Mr. Cooney:

You have requested my opinion concerning the following question:

Should 38 Op. Att'y Gen. No. 59 (1979) concerning distribution of state agency mailing lists be overruled in light of subsequent case law?

Your question is prompted by an individual's request that he be provided with a list of all nonprofit corporations in good standing on file in the Secretary of State's office. Furthermore, that individual has indicated that he intends to use the requested information as a mailing list, as that phrase has been defined by the Attorney General. See 38 Op. Att'y Gen. No. 59 at 210-11

October 31, 1990

(1979). The question raised by the request is whether the Secretary of State can lawfully release the list for use as a mailing list in light of the restrictions set forth in section 2-6-109, MCA, which provides:

(1) Except as provided in subsections (3), (4), (5), and (6), in order to protect the privacy of those who deal with state and local government:

(a) no agency may distribute or sell for use as a mailing list any list of persons without first securing the permission of those on the list; and

(b) no list of persons prepared by the agency may be used as a mailing list except by the agency or another agency without first securing the permission of those on the list.

(2) As used in this section, "agency" means any board, bureau, commission, department, division, authority, or officer of the state or a local government.

(3) Except as provided in 30-9-403, this section does not prevent an individual from compiling a mailing list by examination of original documents or applications which are otherwise open to public inspection.

(4) This section does not apply to the lists of registered electors and the new voter lists provided for in 13-2-115 and 13-38-103, to lists of the names of employees governed by Title 39, chapter 31, or to lists of persons holding driver's licenses provided for under 61-5-126.

(5) This section shall not prevent an agency from providing a list to persons providing prelicensing or continuing educational courses subject to Title 20, chapter 30, or specifically exempted therefrom as provided in 20-30-102.

(6) This section does not apply to the right of access either by Montana law enforcement agencies or, by purchase or otherwise, of public records dealing with motor vehicle registration.

(7) A person violating the provisions of subsection (1)(b) is guilty of a misdemeanor.

The issue raised by your request was previously addressed in 38 Op. Att'y Gen. No. 59 at 207 (1979): Noting that section 2-6-109, MCA, must be construed in a manner consistent with the Montana Constitution, Article II, sections 9 and 10 (the right to know and

October 31, 1990

right of privacy provisions, respectively), the Attorney General held that:

1. Under the provisions of chapter 606, 1979 Montana Laws [section 2-6-109, MCA], agencies are prohibited from distributing a list of persons only if the intended use of such list is for unsolicited mass mailings, house calls or distributions, or telephone calls.
2. The prohibition pertains only to lists of natural persons, not businesses, corporations, governmental agencies or other associations.
3. Agencies are not required to affirmatively ascertain the intended use for which the list is sought; a clear written disclaimer from the agency as to the proscriptions and penalty of chapter 606 is sufficient.

38 Op. Att'y Gen. No. 59 at 207-08. The second holding quoted above was based on the Attorney General's opinion that the right of privacy mentioned in section 2-6-109, MCA, could be consistently construed with the right of privacy provisions of the Montana Constitution if it applied only "to individual human beings," and not to "corporations, associations, governmental bodies and businesses[.]" 38 Op. Att'y Gen. No. 59 at 211 (1979). Since that opinion was issued, the Montana Supreme Court has twice held that the right of privacy exception to the right to know provision of the Montana Constitution (Mont. Const. Art. II, § 9) applies to corporations as well as individuals. Mountain States Telephone and Telegraph v. Department of Public Service Regulation, 38 St. Rptr. 1479, 1486, 634 P.2d 181, 188 (1981); Belth v. Bennett, 227 Mont. 341, 345, 740 P.2d 638, 640-41 (1987). As you have observed, the holdings in these two cases cast doubt on the validity of the second holding in 38 Op. Att'y Gen. No. 59 at 207 (1979).

In Belth, the State Insurance Commissioner withheld from the editor of a monthly insurance publication information on file in the Commissioner's office concerning financial statements of insurance companies. The Commissioner's decision to withhold was based on section 33-1-412(5), MCA:

The commissioner may withhold from public inspection any examination or investigation report for so long as he deems such withholding to be necessary for the protection of the person examined against unwarranted injury or to be in the public interest.

Finding that the statute protected a privacy interest coextensive with the privacy exception within the right to know provision of the Montana Constitution, Art. II, § 9, the Court held that the exception applied to corporations as well as natural persons. Belth, 227 Mont. at 345, 740 P.2d at 640-41, citing Mountain

States, 38 St. Rptr. at 1486, 634 P.2d at 188. The Court also held that the Commissioner had standing to raise the constitutional issue on behalf of the insurance companies since a breach of the privacy rights of those companies could lead to a lawsuit against the Commissioner. Belth, 227 Mont. at 345, 740 P.2d at 641, citing Montana Human Rights Division v. City of Billings, 199 Mont. 434, 443, 649 P.2d 1283, 1288 (1982). In Mountain States the Court held that the demands of individual privacy of a corporation as well as of a person might clearly exceed the merits of public disclosure and thus come within the privacy exception of the "right to know." Consequently a corporate utility could seek to preserve confidentiality of certain trade secrets required to be disclosed to the Public Service Commission when the utility applied for a rate increase. 634 P.2d at 188-89. It is my opinion that the holdings in these cases are fully applicable to the issue raised here. I therefore hold that the prohibition against public distribution of state agency mailing lists set forth in 38 Op. Att'y Gen. No. 59 at 207 (1979) applies with equal force to lists of both individual persons and corporations.

There are, however, two important caveats which attend my holding. First, the Montana Supreme Court has made it clear that it will construe statutes protecting privacy interests in a manner that does not violate the mandate of the right to know provision of the Montana Constitution. Belth, 227 Mont. at 346, 740 P.2d at 641; Allstate Insurance Co. v. City of Billings, 46 St. Rptr. 1716, 1719-20, 780 P.2d 186, 188-89 (1989). Compliance with the right to know provision requires that a decision to withhold mailing lists pursuant to the statute must be based on a determination that "the demand of individual privacy clearly exceeds the merits of public disclosure." Belth, 227 Mont. at 346, 740 P.2d at 641. In short, the custodian of the information sought must determine whether there is a constitutionally protected privacy interest at stake, and if so, whether that right clearly exceeds the public's right to know. Belth, 227 Mont. at 346-48, 740 P.2d at 641-43; see also Missouliau v. Board of Regents, 207 Mont. at 513, 675 P.2d at 962 (1984); 42 Op. Att'y Gen. No. 119 at 454, 461-62 (1988). If the Secretary of State determines that there is no privacy interest at stake, or that a protected privacy interest does not clearly exceed the public's right to know, the prohibition of the statute does not apply, and the mailing lists at issue may be publicly disseminated. Second, it must be noted that the statute specifically allows an individual to compile "a mailing list by examination of original documents or applications which are otherwise open to public inspection." § 2-6-109(3), MCA. Because you have indicated that the original documents involved here are open to public inspection, a requestor may be permitted in any case to compile his or her own mailing list by examining those original documents.

October 31, 1990

THEREFORE, IT IS MY OPINION:

The prohibition of section 2-6-109, MCA, against the distribution of mailing lists by state agencies applies to mailing lists of both individual persons and corporations. 38 Op. Att'y Gen. No. 59 at 207 (1979) is overruled insofar as it conflicts with the holding of this opinion.

Very truly yours,



MARC RACICOT
Attorney General

MR/PJ/mr