SENATE JUDICIARY
EXHIBIT NO. 4
DATE 1/9/13
BILL NO. SB37

SB37

March 21, 2000

Mr. Joe Kolman
Billings Gazette
P.O. Box 926
Bozeman, MT 59771

Re: Request for Records

Dear Mr. Kolman:

This letter responds to your request for electronic copies of several databases maintained by the Department of Justice, including the Sexual and Violent Offender Registry, the registry of persons holding concealed weapon permits, and the criminal history records database. As I explained to you on the telephone, the Department is able to provide some, but not all, of the requested information. This letter does not address your request for motor vehicle records, to which the Department has already responded in writing.

The Department has provided or will provide the name, city of residence, and permit expiration or revocation date of individuals who have received concealed weapon permits. The Department also will provide from the Sexual and Violent Offender Registry the names and addresses of registered offenders, and the offenses for which each is required to register. The Department is unable to provide an electronic copy of its Criminal History Records system. This explanation follows.

Before releasing any information, the Department is required to conduct a balancing test to weigh the competing interests of the public's right to know (Mont. Const. art. II, § 9) and the individual's right to privacy (Mont. Const. art. II, § 10). Becky v. Butte-Silver Bow Sch. Dist. No. 1, 274 Mont. 131, 136, 906 P.2d 193, 196 (1995).

In evaluating the individual privacy rights that are implicated by your request, we have considered decisions of the Montana and United States Supreme Courts, Opinions of the Attorney General, and other relevant authorities. As you may know, the Montana Supreme Court has in recent years clarified the protective nature of the Montana

Constitution's right to privacy, concluding that "informational privacy is a core value furthered by state constitutional guarantees of privacy" (State v. Nelson, 283 Mont. 231, 941 P.2d 441 (1997)), and emphasizing that "Montana's Constitution affords citizens broader protection of their right to privacy than does the federal constitution" (State v. Gryczan, 283 Mont. 433, 942 P.2d 112 (1997)).

In light of the strong individual right to privacy enjoyed by Montana citizens, we examined federal case law applying the privacy exemption to the federal Freedom of Information Act. The seminal

case is United States Department of Defense v. FLRA, 510 U.S. 487 (1994). Conducting a balancing test similar to that applied under state law, the United States Supreme Court ruled that a labor union is not entitled to the home address of federal employees, since disclosure would constitute a clearly unwarranted invasion of the employees' personal privacy.

The Court noted FOIA's "core purpose" of informing the public understanding of the operations or activities of the government, which is best served by official information that "sheds light on an agency's performance of its statutory duties." 510 U.S. at 496. "That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." Id. The Court observed that "[a]n individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." Id. at 500.

Other court decisions have applied the Department of Defense case to rule against disclosure of personal information. See, for example, Scottsdale Unified Sch. Dist. No. 48 v. KPNX Broadcasting Co., 955 P.2d 534 (1998) (media not entitled to disclosure of public school teachers' birth dates); City of San Jose v. Superior Court of Santa Clara County, 88 Cal. Rptr. 2d 552 (Cal. Ct. App. 1999) (media not entitled to names and addresses of complainants of airport noise); Oregon Nat'l Desert Ass'n v. Bibles, 83 F.3d 1168 (9th Cir. 1996), rev'd, 519 U.S. 355 (1997) (Supreme Court reversed Ninth Circuit ruling that required Bureau of Land Management to turn over to plaintiff its mailing list of individuals and entities receiving information about management of BLM lands).

Previous Attorney General's Opinions have relied on federal interpretations of FOIA in determining whether records are subject to disclosure. 45 Op. Att'y Gen. No. 17 (1993); 43 Op. Att'y Gen. No. 6 at 15 (1989). You mentioned the 1990 Attorney General's

Opinion concerning the distribution of mailing lists by state agencies. 43 Op. Att'y Gen. No. 73 (1990). That opinion recognizes, however, that the agency must determine there is no privacy interest at stake before releasing information. Id. at 283.

Like the federal Freedom of Information Act, the purpose of Montana's public records laws is to let people know what their government is up to. We are concerned that the release of personally identifying information violates the individual privacy rights of the persons who appear in these databases. The exception, of course, is the Sexual and Violent Offender Registry; names and addresses of registered offenders are made public by law. Mont. Code Ann. § 46-23-508(1).

With respect to criminal history records there are two important points to consider. First, even with recent legislative changes making criminal history records more publicly accessible, the database still contains confidential criminal justice information, including records of deferred impositions of sentence in which the charge was later dismissed. See Mont. Code Ann. § 46-18-204. Second, criminal history records are maintained and stored using the identification of the offender. Each

record contains significant personal information about an offender, including birth date, social security number, home address, driver license number, and any driving restrictions. While the Department will provide a specific criminal history record upon request, a fee is imposed for each record because each must be examined manually to make sure only public criminal justice information is released. The fee for obtaining a person's criminal history record is $5, which hasn't been raised in more than a decade. Authorization for the imposition of fees is contained in the Criminal Justice Information Act, Mont. Code Ann. § 44-5-301(2). When a record is requested, the Department provides only that identifying information already possessed by the requestor. In other words, if a person asks for the criminal record of Jane Doe, date of birth 2/11/65, the record returned will show Jane Doe's name and birth date, but not her social security number.

You mention that you have been able to obtain at the local level some records we are refusing to provide, such as copies of applications for concealed weapon permits. I advise the Department of Justice, and can only speak to the records of which our agency is custodian. I can assure you, however, that we have given careful consideration to your request. We understand our obligations to the public and are withholding only that information we believe is legally protected by individual privacy rights.

Historical practice has driven many agencies' previous responses to requests for information, and it was the receipt of your comprehensive request that prompted us to examine fully the developments in the law–many of which are quite recent–applicable to disclosure of information held by the Department. That may explain why some information disclosed in the past is no longer available.

I hope this answers your questions.

Sincerely,

ELIZABETH S. BAKER

Chief Deputy Attorney General

esb/dm
c: Art Pembroke
Mike Batista