

June 19, 2002

Mr. Kurt Alme  
Director Department of Revenue  
Sam W. Mitchell Building  
P.O. Box 5805  
Helena, MT 59604-5805

Dear Mr. Alme:

You have requested my opinion on the following question, which I have rephrased as follows:

May the Department of Revenue use social security numbers as the identifying number on warrants for distraint in order to collect unpaid taxes.

It has been determined that a letter of advice, rather than a formal Attorney General's Opinion, provides the appropriate response to your request.

As you pointed out in your opinion request, the Department of Revenue is responsible for the administration of taxes in Montana. You also noted that it is a necessary function of the Department, in its administration of taxes, to collect reports and tax returns from individuals and corporations. The collection of reports and tax returns includes the collection of confidential information such as social security numbers and federal employer identification numbers. The Department is authorized, as will be discussed in further detail later in this letter, by both state and federal law to collect such personal identifiers.

Among the Department's duties in administering the tax system is the collection of unpaid taxes. The Department is authorized by statute to use warrants for distraint to collect unpaid taxes. Mont. Code Ann. § 15-30-311. A warrant for distraint "is an order, under the official seal of the department [of Revenue] or of the department of transportation, directed to a sheriff of a county of Montana or to an agent authorized by law to collect a tax. The order commands the recipient to levy upon and sell the real and personal property of a delinquent taxpayer." Mont. Code Ann. § 15-1-701(1).

Mr. Kurt Alme  
June 19, 2002  
Page 2

After the Department issues a warrant for distraint, it files it with the clerk of district court in accordance with Mont. Code Ann. 15-1-704. The clerk then files the warrant in the judgment docket “with the name of the taxpayer listed as the judgment debtor.” Warrants for distraint, like other court pleadings and documents, are open for public inspection.

While the Department is clearly authorized to collect social security numbers in its administration of taxes, your inquiry is whether using social security numbers on warrants for distraint, which are public documents, violates any constitutionally-protected privacy interest a taxpayer may have. You noted that while numerical identifiers--such as social security numbers and federal employer identification numbers--are often granted certain privacy protections, they are the most reliable information available to the Department for confirming a taxpayer’s identity. Thus, the Department uses social security numbers as the numerical identifiers when it files warrants for distraint in order to collect unpaid taxes. It is this practice, and the privacy concerns associated with it, that give rise to your opinion request.

### **RELEVANT FEDERAL LAW**

Several federal statutes impact your question. The Tax Reform Act of 1976 expressly authorizes the use of social security numbers by states in the administration of taxes. Specifically, it provides:

It is the policy of the United States that any State (or political subdivision thereof) may, in the administration of any tax, general public assistance, driver’s license, or motor vehicle registration law within its jurisdiction, utilize the social security account numbers issued by the Commissioner of Social Security for the purpose of establishing the identification of individuals affected by such law, and may require any individual who is or appears to be so affected to furnish to such State (or political subdivision thereof) or any agency thereof having administrative responsibility for the law involved, the social security account number (or numbers, if he has more than one such number) issued to him by the Commissioner of Social Security.

42 U.S.C. § 405(c)(2)(C)(i).

Mr. Kurt Alme  
June 19, 2002  
Page 3

The Social Security Administration provides a general framework for when social security numbers obtained for the administration of taxes may be disclosed. It requires the following analysis:

The FOIA [Freedom of Information Act] principle which most often applies to SSA disclosure questions is whether the disclosure would result in a “clearly unwarranted invasion of personal privacy.” To decide whether a disclosure would be a clearly unwarranted invasion of personal privacy we consider – (a) The sensitivity of the information (e.g., whether individuals would suffer harm or embarrassment as a result of the disclosure); (b) The public interest in the disclosure; (c) The rights and expectations of individuals to have their personal information kept confidential; (d) The public’s interest in maintaining general standards of confidentiality of personal information; and (e) The existence of safeguards against unauthorized redisclosure or use.

20 C.F.R. § 401.140.

Federal employer identification numbers, although generally subject to less scrutiny than social security numbers, are federally protected under 26 U.S.C. § 6103. Finally, federal law specifically prohibits persons or agencies authorized to have access to return information, which includes a taxpayer’s identity, from disclosing that information. See 26 U.S.C. 6103(a) and 6103(b)(2). A taxpayer’s identity includes either the use of a social security number or a federal employer identification number. 26 U.S.C. § 6109.

### **RELEVANT MONTANA LAW**

Like the federal government, Montana has statutes governing the collection and disclosure of social security numbers and federal employer identification numbers. Montana requires that each taxpayer provide his social security number or federal employer identification number on all tax returns or reports filed with the Department of Revenue. Mont. Code Ann. § 15-30-142. Montana law also limits the disclosure of confidential information that the state acquires in its administration of taxes. Montana Code Annotated § 15-30-303 requires that any report or return filed for individual income

taxes be kept confidential. (Similar protections are afforded to corporations under Mont. Code Ann. § 15-31-511.) Specifically, section 303(1) provides:

Except as provided in subsections (7) and (8) or in accordance with a proper judicial order or as otherwise provided by law, it is unlawful to divulge or make known in any manner:

(a) the amount of income or any particulars set forth or disclosed in any individual report or individual return required under this chapter or any other information secured in the administration of this chapter; or

(b) any federal return or federal return information disclosed on any return or report required by rule of the department or under this chapter.

Section 15-30-303(2) limits disclosure of return information, even under court order, to actions where the Department is a party or the reports are directly at issue. Additionally, when access to, or disclosure of, confidential records in the possession of a governmental agency is at issue, Montana's constitutional provisions regarding an individual's right to privacy must be considered.

In determining whether a recognizable privacy interest exists, the Montana Supreme Court has looked to: 1) whether the individual involved has a subjective or actual expectation of privacy; and 2) whether society is willing to recognize that expectation as reasonable. See Great Falls Tribune Co. v. Day, 1998 MT 133, ¶ 20, 289 Mont. 155, 959 P.2d 508 (1998) (citation omitted). The Court has recognized that the right to privacy is not absolute. See State v. Pastos, 269 Mont. 43, 47, 887 P.2d 199, 202 (1994). Where a case involves an alleged governmental intrusion into an individual's privacy, in addition to the two factors listed above, the Court has looked at the nature of the government's alleged intrusion in determining whether a protected privacy interest has been violated. State v. Boyer, 2002 MT 33, ¶ 20, 308 Mont. 276, 42 P.3d 771.

### ANALYSIS

Review of relevant federal and Montana law reveals that social security numbers are generally granted a certain level of confidentiality. Montana statute specifically states that information collected on individual income tax returns and reports is confidential and attaches a criminal penalty to the wrongful disclosure of such information. See Mont.

Code Ann. § 15-30-303(1) and (5). The Montana Supreme Court has not directly commented on whether social security numbers are protected by Montana's constitutional right to privacy. However, an opinion by then-Attorney General Greely concluded that an individual had a recognizable privacy interest in his social security number. 43 Op. Att'y Gen. 12 (1985).

This conclusion is supported by the decisions of other jurisdictions. The Ninth Circuit Court of Appeals has stated that "the indiscriminate public disclosure of SSNs, especially when accompanied by names and addresses, may implicate the constitutional right to informational privacy." Crawford v. United States Trustee, 194 F.3d 954, 958 (1999).

However, the Ninth Circuit has also noted that the right to informational privacy "is not absolute; rather, it is a conditional right which may be infringed upon a showing of a proper government interest." Crawford 194 F.3d at 959. In determining whether the government may properly disclose information, the Ninth Circuit, like the Montana Supreme Court, has engaged in "the delicate task" of weighing the competing interests. Id. The Court has found the following factors to be relevant:

. . . the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.

Id.

Ultimately, the government has the burden of showing that its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to advance that interest. Id. In Crawford, the Ninth Circuit concluded that a bankruptcy petition preparer did not have a constitutionally-protected privacy interest in his social security number even though once the social security number was revealed on the bankruptcy petition it was a matter of public record. Crawford 194 F.3d at 960. The preparer argued that disclosure of his social security number made him vulnerable to crimes such as identity theft. Id. at 959-960. The Court concluded that the Bankruptcy Code's legitimate interest in public access outweighed a preparer's individual privacy interest in keeping his social security number confidential. Id. at 960.

Mr. Kurt Alme  
June 19, 2002  
Page 6

Relying on Crawford for guidance, it is my opinion that the Department of Revenue's practice of using social security numbers as the identifying numbers on warrants for distraint is permissible. Although an individual has a reasonable expectation of privacy in his social security number and faces some potential harm if the number is disclosed, the governmental interest in requiring its citizens to pay their taxes outweighs the potential privacy interests at stake. A legitimate state interest exists in the Department of Revenue being able effectively to collect unpaid taxes. Mont. Code Ann. § 15-30-311 specifies that when taxes imposed by the Department are not paid when due, the Department may issue a warrant for distraint in order to collect the amount owing.

The best identifying number to ensure that the taxpayer named on the warrant for distraint is actually the delinquent taxpayer is the social security number. Use of the social security number advances two legitimate governmental interests. First, it provides conclusive confirmation of the identity of the delinquent taxpayer; and, second, it protects an innocent taxpayer, who has paid his taxes, from adverse economic impacts because a delinquent taxpayer of the same or similar name has not. Using only the taxpayer's name to confirm identity enhances a risk that the warrant for distraint will be filed against the wrong individual. Using social security numbers as the identifying numbers on warrants for distraint facilitates the fundamental public-policy interest of ensuring that all citizens pay their taxes.

This letter should not be construed as a formal Opinion of the Attorney General.

Sincerely,

CIVIL SERVICES BUREAU

ALI N. SHEPPARD  
Assistant Attorney General

ans/jym