MEMORANDUM

State of Alaska

Department of Law

TO: The Honorable Wilson Condon
Commissioner
Department of Revenue

DATE: March 4, 1996

FILE: 663-95-0496

TEL.NO.: 465-4118

SUBJECT: Confidentiality of Gaming Records

FROM: Vincent L. Usera
Assistant Attorney General
Commercial Section - Juneau

We have been asked whether documents and information submitted to the charitable gaming division (division) of the Department of Revenue are confidential. The short answer is that virtually all of the information maintained by the division is open to the public. To the extent that previous advice is in conflict with this memorandum, it is withdrawn.[1] Our analysis follows.

BACKGROUND

History of Charitable Gaming Administration

The legislature in 1960 enacted legislation approving the conduct of certain games of chance and contests of skill for purposes of charitable fundraising. The bill became law over the Governor's veto on March 7, 1960. Ch. 27 SLA 1960. Initially, responsibility for the administration of charitable gaming for purposes of charitable fundraising in Alaska was lodged with the Department of Revenue. Sec. 3, ch. 27 SLA 1960. Gaming remained under the Department of Revenue until July 1, 1989 when Governor Cowper, by executive order, transferred oversight of charitable gaming to the Department of Commerce and Economic Development. In Governor Cowper's view, gaming fit more logically within the ambit of duties carried out by the division of occupational licensing, where gaming was placed. Exec. Order No.

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[1] A 1993 opinion advised that gaming records were not subject to the open records dictates of AS 09.25.110. (1993 Inf. Op. Att'y Gen.) (Aug. 31; Amendola). The advice contained in the 1993 opinion was premised on three conclusions: that the information is required to be held confidential under AS 09.25.100; that the right of privacy guaranteed by Art. I, § 22 of the Alaska Constitution bars its disclosure; and, the federal prohibition on disclosure of social security numbers bars disclosure.

74 (Jan. 9. 1989). From 1960 until 1993, the records of charitable gaming activities were continuously open to public scrutiny.

In 1993, however, Governor Hickel moved the administration of charitable gaming back to the Department of Revenue, finding that this action would "increase the efficiency of the administration of the charitable gaming program." Exec. Order 82 (Jan. 11, 1993). During the years the administration of gaming was lodged with the Department of Commerce and Economic Development, oversight of charitable gaming enjoyed only program status within the division of occupational licensing. On moving the administration of charitable gaming back to the Department of Revenue, however, these functions were delegated to a full-fledged division.

History of Gaming Statutes

The gaming laws had remained virtually unchanged from their enactment in 1960 until the entire chapter covering this activity was overhauled in 1988 in the Alaska Gaming Reform Act. Ch. 99 SLA 1988. These revisions became effective September 2, 1988. The 1960 enactment authorized bingo, certain raffles and lotteries, and a few ice classics, dog mushers' contests, fish derbies, and contests of skill. The gaming statutes were only sporadically amended in the succeeding years. The 1988 Gaming Reform Act for the first time authorized the play of pull-tab games and also initiated the tax now found at AS 05.15.184. Although the gaming statutes have been substantively amended since, the only change subsequent to the 1988 Act that impinges on the issues being explored in this memorandum is the move of the responsibility for charitable gaming back to the Department of Revenue in 1993.

Discussion

Policy Favoring Disclosure

We begin with the premise that there is a strong public policy in Alaska favoring disclosure of public records. In 1962, the legislature enacted AS 09.25.110 which provides in pertinent part that "[u]nless specifically provided otherwise the books, records, papers, files, accounts, writings and transactions of all agencies and departments are public records and are open to inspection by the public . . . ." Sec. 3.22, ch. 101 SLA 1962.[2] In 1990, this section was amended to provide specifics for the administration of recouping for public agencies the costs of

[2] An illuminating discourse on the history of the concept of open records in Alaska is contained in *City of Kenai v. Kenai Peninsula Newspapers, Inc.*, 642 P.2d 1316, 1319-1323 (Alaska 1982). That discourse shows that the common law rule entitled every interested person with the right to inspect public records and that Alaska has consistently followed the common law rule. Statutory recognition of the common law rule goes back as far as 1900.

providing copies of documents on public request. Secs. 2, 3, ch. 200 SLA 1990. In that 1990 enactment, the legislature amended AS 09.25.120 which contains exceptions to the open records rule of AS 09.25.110. At that same time, the legislature enacted findings and intent to accompany the legislation. Subsection 1 of § 1, ch. 200 SLA 1990 states that "public access to government information is a fundamental right that operates to check and balance the actions of elected and appointed officials and to maintain citizen control of government." The strong interest of the public in the records of their government being open to their view is expressed most forcefully in the section of the Administrative Procedure Act (AS 44.62) dealing with the policy of the state to conduct its governmental business in full view of the public. In particular, AS 44.62.312 pronounces the State's policy thus:

> It is the policy of this state that
> (1) the governmental units mentioned in AS 44.62.310 [inclusive of virtually all public bodies] exist to aid in the conduct of the people's business;
> (2) it is the intent of the law that actions of those units be taken openly and that their deliberations be conducted openly;
> (3) the people of this state do not yield their sovereignty to the agencies which serve them;
> (4) the people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know;
> (5) *the people's right to remain informed shall be protected so that they may retain control over the instruments they have created.*

AS 44.62.310(a) (emphasis added). These same policies are quoted in C*ity of Kenai v. Kenai Peninsula Newspapers, Inc.*, 642 P.2d 1316, 1324 (Alaska 1982) bolstering the Court's finding that "[T]he legislature has expressed a bias in favor of public disclosure." *Id.* at 1323. *See also, id.* at 1324 ("[AS 09.25].110 and .120 articulate a broad policy of open records."). As noted above, AS 09.25.110 provides that all records are open to inspection unless a specific provision to the contrary exists. Alaska Statute 09.25.120 lists the exceptions to full disclosure of public records.[3] None of these exceptions is applicable to activities conducted under AS 05.15, the

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[3] Sec. 09.25.120 provides:

> (a) Every person has a right to inspect a public record in the state, including public records in recorders' offices, except
> (1) records of vital statistics and adoption proceedings which shall be treated in the manner required by AS 18.50;
> (2) records pertaining to juveniles unless disclosure is authorized by law;

(continued...)

statutes governing charitable gaming. The Alaska Supreme Court has held, "In the absence of an express exception to the disclosure laws, a balance must be struck between the public interest in disclosure on the one hand, and the privacy and reputational interests of the affected individuals together with the government's interest in confidentiality on the other." *Municipality of Anchorage v. Anchorage Daily News*, 794 P.2d 584, 590 (Alaska 1990) citing *City of Kenai, supra*. The process of applying this balancing test is described in both cases, quoting from *MacEwan v. Holm*, 359 P.2d 413, 421-22 (Ore. 1961).[4] Although the division anticipates a that a high volume of requests could be expected from operators, we do not believe it would rise to the level that would justify restricting public access to the records.

(...continued)

(3) medical and related public health records;
(4) records required to be kept confidential by a federal law or regulation or by state law;
(5) to the extent the records are required to be kept confidential under 20 U.S.C. 1232g and the regulations adopted under 20 U.S.C. 1232g in order to secure or retain federal assistance;
(6) records or information compiled for law enforcement purposes, but only to the extent that the production of the law enforcement records or information
(A) could reasonably be expected to interfere with enforcement proceedings;
(B) would deprive a person of a right to a fair trial or an impartial adjudication;
(C) could reasonably be expected to constitute an unwarranted invasion of the personal privacy of a suspect, defendant, victim, or witness;
(D) could reasonably be expected to disclose the identity of a confidential source;
(E) would disclose confidential techniques and procedures for law enforcement investigations or prosecutions;
(F) would disclose guidelines for law enforcement investigations or prosecutions if the disclosure could reasonably be expected to risk circumvention of the law; or
(G) could reasonably be expected to endanger the life or physical safety of an individual.

[4] In *MacEwan*, the court described the balancing test to be applied: "In balancing the interests . . . , the scale must reflect the fundamental right of a citizen to have access to the public records as contrasted with the incidental right of the agency to be free from unreasonable interference. The citizen's predominant interest may be expressed in the burden of proof which is applicable in this class of cases; the burden is cast upon the agency to explain why the records sought should not be furnished."

In the case of gaming records, there is a strong interest in keeping watch over an industry that throughout the world historically has been the target of infiltration by criminal elements. As a cash business with large amounts of money changing hands, the occasions are rife for manipulation of the system. The public that patronizes gaming operations is entitled to protections built into the administration of gaming by the State. While disclosure of records is not of itself an affirmative protection, the openness of records serves as some deterrent to those who would manipulate gaming to their own ends.

The public has an additional interest in the openness of charitable gaming records. In recent years there has been substantial discussion of the subject of charitable gaming in general and certain specific issues as well. As was expressed by Senate President Drue Pearce, "By granting public access to permittee records, Alaskans can begin an informed debate on the future of this activity [referring to charitable gaming in general]. Alaskans are entitled to know the magnitude of the "net proceeds" income generated by charitable gaming permittees and the names of those who benefit." Excerpt of letter from Drue Pearce, President, Alaska State Senate, to Bruce M. Botelho, Alaska Attorney General, Jan. 24, 1996 (copy on file with Dep't of Law).

In sum, the policy favoring disclosure of public records supports the conclusion that the records maintained by the charitable gaming division are open to public scrutiny. Any conclusion to the contrary would require compelling evidence of legislative intent to shroud these records in confidentiality. As explained below, we find no such evidence and conclude that these records are open to public inspection.

Applicability of AS 09.25.100

Alaska Statute 09.25.100 imposes on the Department of Revenue the duty to keep taxpayer records confidential.[5] Although certain organizations do pay a tax on certain games,[6] we conclude that this statute does not apply to gaming records because it applies only to taxpayer information and charitable gaming is not principally a tax program. The legislative history of AS 09.25.100, enacted as § 3.21, ch. 101 SLA 1962 and later codified by § 1, ch. 1 SLA 1963, indicates it is to apply to tax information. *See* Comment to § 3.23 in HCSSB 105 (available through Legislative Affairs Library), renumbered prior to enactment as § 3.21, ch. 101 SLA 1962 ("The disposition of *tax information* is a subject that should be placed in the revised title concerned with the Department of Revenue.") (emphasis added).

The 1993 memorandum on this subject apparently viewed the payment of any tax by any person or entity within charitable gaming as a compulsory trigger of the proscription from disclosure in AS 09.25.100 for all records. We believe that to be a flawed analysis. The tax imposed by AS 05.15.184 is paid *only* by permittees and is collected by pull-tab distributors. In some instances, we understand, operators make the actual payment of tax for a permittee and later deduct that payment from monies owed the permittee; but,

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[5] AS 09.25.100 provides:

> Information in the possession of the Department of Revenue which discloses the particulars of the business or affairs of a taxpayer or other person is not a matter of public record, except for purposes of investigation and law enforcement. The information shall be kept confidential except when its production is required in an official investigation or court proceeding. These restrictions do not prohibit the publication of statistics presented in a manner that prevents the identification of particular reports and items, or prohibit the publication of tax lists showing the names of taxpayers who are delinquent and relevant information that may assist in the collection of delinquent taxes.

[6] AS 05.15.184 imposes on pull-tab games a tax of 3% to be collected by pull-tab distributors and paid to the department.

only permittees -- i.e., qualified organizations -- pay a tax.[7] The records submitted to the division by operators, distributors, or vendors are not shielded from public scrutiny by operation of AS 09.25.100 simply because none of those entities pays a tax on the activity.

We believe the better view is that advanced in an opinion issued by this department in 1984 on the same subject. 1984 Inf. Op. Att'y Gen. (July 9; 366-510-84) (copy attached). The analysis contained in that opinion reasoned that the confidentiality provision of AS 09.25.100 applies only to those records maintained by the Department of Revenue that contain "the particulars of the business or affairs of a taxpayer or other persons." The information contained in the reports provided to the division by those holding charitable gaming permits "relates to the *licensed activity* [of charitable gaming], not to the business or affairs of a taxpayer." 1984 Inf. Op. Att'y Gen. p.2 (July 9; 366-510-84) (emphasis added). What AS 09.25.100 seeks to protect is that information provided to the Department of Revenue by which a taxpayer's tax obligation to the state can be determined or verified; information which, of necessity, provides a viewer with considerable insight into the business and, perhaps, personal affairs of the taxpayer. This sort of information, if made public, would, indeed, invade the privacy of the taxpayer and provide others with details by which competition could be furthered, or a taxpayer embarrassed. It is these pernicious effects of opening up a taxpayer's records that the statute seeks to avoid. Alaska Statute 09.25.100 is in concert with and a direct effect of the privacy provision of the Alaska Constitution.[8]

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[7] Only qualified organizations and municipalities may secure a permit to conduct charitable gaming under AS 05.15. A "qualified organization" is defined as a bona fide civic or service organization or a bona fide religious, charitable, fraternal, veterans, labor, political, or educational organization, police or fire department and company, dog mushers' association, outboard motor association, or fishing derby or nonprofit trade association in the state, that operates without profits to its members and that has been in existence continually for a period of three years immediately before applying for a license; the organization may be a firm, corporation, company, association, or partnership. AS 05.15.690(36).

While not bearing directly on the issue, we note that federal tax law provides that the tax returns of organizations exempt from taxation under federal law *must* be made available to the public. 34 U.S.C. § 6104.

Municipalities are required by state law to make their records open to the same extent as state government. Under AS 09.25.110, all records of public agencies are open to public inspection unless specifically provided otherwise in statute. "Public agency" is defined to include municipalities. AS 09.25.220(2).

[8] ALASKA CONST. Art. I, § 22.

By contrast, the records which are maintained by the charitable gaming division are not records of the "business" of the taxpayer. The records at issue here are those which relate to the permitted activity in which the organization engages. The "business" of a civic organization, for example, is the betterment of the society in which its members live; the conduct of charitable gaming is simply an auxiliary to that "business" for the limited purpose of raising funds to further the primary interest. Likewise, the "business" of a municipality is government; charitable gaming is simply an ancillary means to help defray the costs incurred in that "business."

Historically, gaming records had always been open to public scrutiny. From 1960 until 1993, the records of charitable gaming activities were open to public scrutiny. Prior to July 1, 1993 the oversight of charitable gaming was lodged with the Department of Commerce and Economic Development. While under the aegis of that department, all records were open to public scrutiny because no reading of AS 09.25.100 could make it applicable to records in that department. The applicability of AS 09.25.100 apparently was never discussed in connection with moving the administration of charitable gaming to the Department of Revenue. We do not believe it was the legislative intent to have AS 09.25.100 apply to gaming records merely because the responsibility for the administration of gaming was moved back to the Department of Revenue.

Right to Privacy

The right to privacy under Art. I, § 22 of the Alaska Constitution has also been cited as authority for maintaining the confidentiality of gaming records. We disagree. While Alaska's privacy protection is broader in scope than that afforded under the U.S. Constitution, it is not absolute. *Messerli v. State*, 626 P.2d 81, 86 Alaska 1981) (Right to privacy is not absolute). However, where government seeks to abridge the right to privacy, it must demonstrate that to do so furthers a legitimate and compelling governmental interest. *Id.* at 86; *accord*, *Gray v. State*, 525 P.2d 524, 528 (Alaska 1974). The Alaska Supreme Court spoke of privacy interests of individuals being subordinate to the public interest in having the applications of persons seeking high government positions open to public scrutiny. *City of Kenai v. Kenai Peninsula Newspapers, Inc.*, 642 P.2d 1316, 1324 (Alaska 1982). We believe courts would conclude that the public interest is served in having the records of those conducting gaming likewise open to public scrutiny and that this interest in openness outweighs whatever privacy expectations those persons may have. As noted above, gambling is often the target of any number of undesirable elements and practices. The more openly games are conducted and the more gaming records are open to public scrutiny, the less likely would be the occurrence of wrongdoing. The corollary is also true: the more secrecy there is surrounding gambling and the records of those conducting gaming, the more likely wrongdoing would remain undetected.

Disclosure of Social Security Numbers

The 1993 opinion on this subject concluded that federal law prohibits disclosure of social security numbers and, therefore, any record maintained by the division containing a social security number must be kept confidential. This is not entirely correct. If social security numbers are voluntarily provided by persons completing reports to the division, disclosure of those documents is not prohibited so long as the documents are normally subject to public review. *See* Letter from Robert A. McConnell, Ass't Att'y Gen. U.S. Department of Justice to Sen. Ted Stevens, Alaska, dated October 28, 1983 (copy maintained by Dep't of Law). Thus, federal law simply does not categorically prohibit disclosure.

That being said, however, if those completing reports are *required* to provide social security numbers, they may not be disclosed unless the state has complied with the requirements of 5 U.S.C. § 552a. Under that statute, notice must be given by the state that providing a social security number is either voluntary or mandatory. If the latter, the authority for the requirement must be disclosed, as well as to what use or uses that information may be put. We are not certain whether these requirements have been met in all cases and, therefore, suggest that, until the division is certain that it has complied with the federal mandate, before making records public, social security numbers be expunged.

The conclusions we reach in this memorandum represent a change in the manner in which charitable gaming records will be handled in the future. We suggest, therefore, that before disclosure of any records occurs, those whose records are maintained by the division receive adequate notice of this change and an opportunity to object.

We hope this resolves any questions or concerns in this area. If there is anything further you require in this regard, please don't hesitate to contact us.

VLU/rjb