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August 15, 2013

OPINION NO. 2013-06

CITIZENS; PUBLICATION; DELINQUENCY:

The City may if it chooses publish names of municipal utilities customers who are delinquent in their payments. There is a strong governmental purpose in collecting delinquent payments, and any counter-vailing privacy interest does not outweigh the government's purpose. The City may not, however, disclose the customers' account numbers, which are protected by express statutory provision.

Kevin R. Briggs, Esq.  
Ely City Attorney  
501 Mill Street  
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Dear Mr. Briggs:

This letter is in response to your inquiry regarding the public nature of municipal utility customers' personal information.

QUESTION

Whether a delinquent municipal utility customer's personal information is per se a public record or should a balancing test be applied to protect his/her personal information?

ANALYSIS

You indicate in your letter that the Ely City Council is considering the publication of the names, addresses, and account numbers of persons who are delinquent, or "in

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arrears,” in their municipal utility payments. You ask if “this list is per se public or whether a balancing test should be applied to protect the privacy interests of our citizens?” Your opinion request notes that persons who are delinquent in payment of their property taxes have their names published in the local newspaper annually. You inquire whether publication of delinquent public utility customers could be similarly treated.

As an initial matter, publication of tax delinquencies is mandated by NRS 361.565(1) which provides: “Except as otherwise provided in subsection 3, if the tax remains delinquent 30 days after the first Monday in April of each year, the tax receiver of the county shall cause notice of the delinquency to be published.” NRS 361.565(1). There is no such corollary provision with regard to delinquent public utility customers. Therefore, the fact that delinquent taxpayers’ names are published in the local newspaper offers no applicable precedent for publishing the personal information of delinquent municipal public utility customers.

The next sources of statutory authority to review in reference to your question are NRS Chapter 239, Public Records and NRS Chapter 239B, Disclosure of Personal Information to Governmental Agencies. NRS 239.010(1) provides that all records of a governmental entity that are not confidential are open to “any person” for inspection and copying. It goes further to state that an “abstract” may be prepared from the public records and may be used to the advantage of the governmental entity.

1. Except as otherwise provided in subsection 3, all public books and public records of a governmental entity, the contents of which are not otherwise declared by law to be confidential, must be open at all times during office hours to inspection by any person, and may be fully copied or an abstract or memorandum may be prepared from those public books and public records. Any such copies, abstracts or memoranda may be used to supply the general public with copies, abstracts or memoranda of the records or may be used in any other way to the advantage of the governmental entity or of the general public. . . .

NRS 239.010(1).

Thus, NRS 239.010 makes disclosure of all public records a matter of legislative mandate upon request. Without more, all the records of a municipal utility, including personal customer information, would be public records unless declared by law to be confidential. However, decisions by the Nevada Supreme Court have

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imposed limits on NRS 239.010 by requiring application of a balancing test. Recently, in *Reno Newspapers Inc. v. Gibbons*, 127 Nev. \_\_\_\_, 266 P.3d 623 (Adv. Op. 79, December 15, 2011), the Court in line with its previous holdings stated:<sup>1</sup>

We also reiterated that when the requested record is not explicitly made confidential by a statute, the balancing test set forth in *Bradshaw* must be employed, explaining that “[i]n *Bradshaw* this court, at least by implication, recognized that any limitation on the general disclosure requirements of NRS 239.010 must be based upon a balancing or ‘weighing’ of the interests of non-disclosure against the general policy in favor of open government.”

*Id.* 127 Nev. at \_\_\_\_, 266 P.3d at 627.

Certain personal information is made confidential by statute. NRS 239B.030(2) makes confidential personal information submitted to a governmental agency on or after January 1, 2007. NRS 239B.030(7) defines “personal information” by cross-reference to NRS 603A.040.

NRS 603A.040 defines “personal information” as follows:

“Personal information” means a natural person’s first name or first initial and last name in combination with any one or more of the following data elements, when the name and data elements are not encrypted:

1. Social security number.
2. Driver’s license number or identification card number.
3. Account number, credit card number or debit card number, in combination with any required security code, access code or password that would permit access to the person’s financial account.

The term does not include the last four digits of a social security number, the last four digits of a driver’s license number or the last four digits of an identification card

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<sup>1</sup> See, *Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990); *DR Partners v. Bd. of County Comm’rs*, 116 Nev. 616, 6 P.3d 465 (2000); and *Reno Newspapers v. Sheriff*, 126 Nev. \_\_\_\_, 234 P.3d 922 (Adv. Op. 23, July 1, 2010). These decisions are relevant even though they involve claims made by parties requesting public records as compared to your question about a voluntary governmental publication of records.

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number or publicly available information that is lawfully made available to the general public.

NRS 603A.040.

Therefore, disclosure of delinquent municipal customer's name and account number is prohibited by law.

There is no express statutory protection for information other than an account number. Therefore, the remainder of the City's records regarding its customers' delinquency must be considered under the framework supplied in *Donrey* and succeeding decisions. "[O]pen records are the rule, and any nondisclosure of records is the exception." *Reno Newspapers, Inc. v. Gibbons*, 266 P.3d at 627 (internal quotation and citations omitted).

In the absence of a statutory provision that explicitly declares a record to be confidential, any limitations on disclosure must be based upon a broad balancing of the interests involved, and the state entity bears the burden to prove that its interest in nondisclosure clearly outweighs the public's interest in access.

*Id.* (citations omitted).

The government's interest in the circumstances here supports openness; after all, it is the government's interest in collecting delinquent payments that motivates it to publish delinquent customer's names. This is a widely recognized governmental purpose. As one court has stated, "[i]t is an appropriate exercise of the police power to require the publication of a list of persons who have not complied with their legal obligations under appropriate circumstances." *Jackel v. Green*, 2013 WL 2394855 at \*5 (Ky. App. 2013) (unpublished).

Also in the circumstances, there is no compelling, competing privacy interest of delinquent customers. See *e.g.*, *Attorney General v. Collector of Lynn*, 385 N.E.2d 505 (Mass. 1979):

Public disclosure of the lists of tax delinquents does involve some invasion of personal privacy. Publication of one's name on such a list would certainly result in personal embarrassment. . . . However, we cannot say that disclosure publicized intimate details of a highly personal nature. . . . While [a tax delinquent] may have some

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expectation of privacy in real estate tax records, he does not have the same expectation of privacy concerning his legal obligation as he has in his private financial affairs.

*Id.* at 508-09. See also *Sully Equipment Rentals, Inc. v. Does 1 through 100*, 554 F. Supp. 141, 144 (C.D. Cal. 1982) (Pension trustees' publication of name on delinquency list was lawful because delinquent party was legally obligated to make contributions to fund and was in fact delinquent).<sup>2</sup>

Therefore, balancing performed under the Nevada Supreme Court's public records precedents supports the City's desire to publish names of municipal utilities customers who are delinquent in their payments.


#### CONCLUSION

The City may if it chooses publish names of municipal utilities customers who are delinquent in their payments. There is a strong governmental purpose in collecting delinquent payments, and any countervailing privacy interest does not outweigh the government's purpose. The City may not, however, disclose the customers' account numbers, which are protected by express statutory provision.

Sincerely,

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<sup>2</sup> Regarding privacy interest, see generally Annotation, *Public disclosure of person's indebtedness as invasion of privacy*, 33 A.L.R.3d 154 (1970). Also note that publication for improper purposes may support a tort cause of action, *Humphers v. First Interstate Bank of Oregon*, 696 P.2d 527, 532 (Or. 1985) (“[d]eliberately harassing debt collection methods may be tortious [even] without publicity or invasion of privacy”), as may publication of false information. *Ag-Chem Equipment Co, Inc. v. Hahn, Inc.*, 480 F.2d 482, 491 (8<sup>th</sup> Cir. 1973) (“Minnesota law recognizes that a false statement of an overdue account, as alleged here, may be defamatory per se. . . .”)