

VOLUME NO. 37

OPINION NO. 112

COUNTY ATTORNEYS - Disclosure of investigation reports; CORONERS - Disclosure of investigation reports; POLICE - Disclosure of investigation reports; SHERIFF - Disclosure of investigation reports; CONSTITUTION - Right to know; CONSTITUTION - Right of privacy; CONSTITUTION OF MONTANA - Article II, section 9; CONSTITUTION OF MONTANA - Article II, section 10; REVISED CODES OF MONTANA, 1947 - Sections 32-1213(6), 32-2142.1, 32-2142.3(c), 69-5104, 95-802; 37 OP. ATT'Y GEN. NO. 107 (1978).

HELD: County Attorneys, law enforcement personnel, and coroners must release reports of accident investigations, autopsies and related tests to persons specifically listed in statutes. Public access to the results of investigations not covered by statute is left to the discretion of the public official following the guidelines set forth in this opinion and 37 OP. ATT'Y GEN. NO. 107 (1978).

3 February 1978

J. Fred Bourdeau, Esq.
Cascade County Attorney
Cascade County Courthouse
Great Falls, Montana 59401

Dear Mr. Bourdeau:

You have requested my opinion on the following question:

To whom must county attorneys, law enforcement personnel and coroners release reports of investigations, autopsies, and related tests?

Section 32-1213(b), R.C.M. 1947, which is part of the uniform Accident Reporting Act, provides:

All accident reports and supplemental information filed as required by this act, shall be confidential and not open to general public inspection ...except however, that the report and supplemental information filed by law enforcement personnel, as required by this act, may be examined by any person named in such report or reports, or by any driver, passenger or pedestrian involved in the accident, or by his representative

designated in writing, or if such person shall be deceased, by his executor or administrator, or by the attorney representing such executor or administrator.

Reports of automobile accidents are to be disclosed to anyone involved in the accident or their representatives, as long as the representative is properly designated. This would include attorneys and insurance company personnel.

Other reports covered by statutes elsewhere may be subject to disclosure under this section if they are prepared as part of the investigation itself and therefore are "supplemental information" within the statute. This would include tests to determine alcohol content in the blood under section 32-2142.1, R.C.M. 1947, as well as autopsy reports.

Section 32-2142.1(a), R.C.M. 1947, states:

Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have been given consent...to a chemical test of his blood, breath, or urine for the purpose of determining the alcoholic content of his blood if arrested by a peace officer for driving or in actual physical control of a motor vehicle while under the influence of intoxicating liquor.

Paragraph section 32-2142.3(c), R.C.M. 1947, states:

Upon the request of the person tested, full information concerning the test taken at the direction of the peace officer shall be made available to him or his attorney.

Under this statute, the results of blood-alcohol tests can be disclosed only to the person tested unless it falls within the disclosure of accident reports as discussed above.

As with accident reports and blood-alcohol tests, autopsy information is also controlled by statute. Section 69-5104, R.C.M. 1947, states that an autopsy report:

upon completion...shall be sent to the physician attending the person at the time of death..., upon request to the hospital or skilled nursing facility where the person died..., to the next of

kin of the decedent or the representative of the decedent's estate...., and to such other person lawfully requesting the report. (Emphasis added.)

Lawfully, as used in this context, means that which is specifically authorized by law. Dominick v. Christensen, 87 Wash.2d 25, 548 P.2d 541, 542 (1976). Those public officials having a right to such information pursuant to another statute or investigative power which covers the disclosure of autopsy reports would be "lawfully" requesting the report. For example, under section 95-802, R.C.M 1947, the County Attorney is to receive a copy of the autopsy report. Those people enumerated in the Accident Reporting Act would also be "lawfully" requesting the report in those circumstances where the autopsy report formed part of the accident report.

These statutes clearly cover the disclosure of information by county law enforcement personnel and coroners. However, the 1972 Montana Constitution specifically included provisions which must be considered. Article II, section 10, entitled "Right of Privacy" 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.

Article II, section 9, entitled "Right to Know" provides:

No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies or state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

There are two fundamental rights necessarily in conflict. On the one hand, the right of privacy which can be infringed only upon a showing of a compelling state interest, and on the other a right of public disclosure which may be defeated only if the individual's right of privacy is paramount.

The United States Supreme Court has established the general rule that the individual's "fundamental rights" under the United States Constitution may not be abridged by government except in circumstances where a governmental interest neces-

sarily overcomes the right. *Roe v. Wade*, 410 U.S. 113, 155 (1973). The 1972 Montana Constitution has established the right of privacy as a "fundamental right" and followed the United States Supreme Court in requiring that such a right can be overcome only by a compelling state interest. Likewise, the Montana Constitution has given "fundamental right" status to the Right to Know.

Each of these conflicting provisions can be overcome in the proper circumstances. However, the courts have not devised a clear definition of a "compelling state interest." Because of the conflicting rights involved, it is apparent that each circumstance must be addressed individually. The statutes I have discussed above appear to have been an attempt by the Legislature to strike a balance between public disclosure and privacy. Problems arise with regard to criminal investigations which may very well involve matters not covered by the statutes. The public officials involved have no guidance as to the circumstances under which the results of an information gathered in the course of such investigations is disclosable. Although 37 OP. ATT'Y GEN. NO. 107 is directed to the Board of Real Estate it sets forth general guidelines which are applicable to criminal investigation records. A copy of that opinion is enclosed for your reference.

The public official who is the custodian of those records must apply the balancing test set forth in that opinion. His decision could be reversible by declaratory judgment action or other appropriate remedy.

The reasons for disclosure of criminal investigation information are analagous to the disclosure of disciplinary action taken against licensees by the Board of Real Estate in 37 OP. ATT'Y GEN. NO. 107.

In weighing the right to know and the right of privacy the balancing test in a criminal investigation will vary according to the stage of the investigation. Rights of privacy of witnesses, informants, or accused parties weigh heavily in the early and unsubstantiated stages. On the other hand the right to know becomes paramount when a criminal matter has culminated in the filing of an information or complaint as a matter of public record. The area in between must necessarily be left to the discretion of the custodian of the information.

THEREFORE, IT IS MY OPINION:

County Attorneys, law enforcement personnel, and coroners must release reports of accident investigations, autopsies and related tests to persons specifically listed in statutes. Public access to the results of investigations not covered by statute is left to the discretion of the public official following the guidelines set forth in this opinion and 37 OP. ATT'Y GEN. NO. 107 (1978).

Very truly yours,

MIKE GREELY
Attorney General