VOLUME NO. 38 OPINION NO. 1

AGRICULTURE - Public disclosure of pesticide applicator and dealer records;
CONSTITUTIONS, RIGHT TO KNOW - Public disclosure of pesticide applicator and dealer records;
DEPARTMENT OF AGRICULTURE - Public disclosure of pesticide applicator and dealer records;
PESTICIDES - Applicator and dealer records, public disclosure of;
PRIVACY - Confidentiality of pesticide applicator and dealer records;
CONSTITUTION OF MONTANA - Article II, section 9, Article II, section 10;
REVISED CODES OF MONTANA, 1947 - Sections 27-215, 27-234, 27-239.

HELD: Pesticide applicator and dealer records held by the Department of Agriculture are subject to public disclosure upon a finding by the Department that the public's right to know outweighs the individual applicator's or dealer's right to privacy. Non-disclosure of such records is appropriate only where the Department has determined that a matter of privacy is involved, has weighed the demands of that privacy and the merits of publicly disclosing the records, and has found that the demand of individual privacy clearly outweighs the demand of public disclosure.

4 January 1978

Gordon McOmber, Director
Montana Department of Agriculture
Sixth and Roberts
Helena, Montana 59601

Dear Mr. McOmber:

You have requested my opinion on the following question:

> Are pesticide applicator and dealer records of the Montana Department of Agriculture subject to public disclosure?

The Montana Pesticides Act, sections 27-213 through 27-245, R.C.M. 1947, was enacted in 1971 to protect man and his essential needs from potentially dangerous pesticides. The Act provides for the control of the distribution, sale, application, disposal and transportation of pesticides.

The Montana Department of Agriculture is charged with the administration of the Pesticides Act. § 27-215, R.C.M. 1947. The Department is empowered to adopt necessary rules and regulations, including rules which prescribe methods of:

> Licensing commercial applicators and operators, dealers, establishing methods of record keeping for applicators, operators, and dealers, and providing for the review of the records by the department of agriculture's authorized agent and the submission of the records to the department of agriculture upon written request ***.

§ 27-234(2)(d), R.C.M. 1947.

Administrative regulations adopted by the Department include detailed provisions for record keeping by pesticide applicators, M.A.R. 4.10.160, and by pesticide dealers, M.A.R. 4.10.330. Both applicators and dealers must open their records to inspection by Department employees and submit them in whole or in part upon the written request of the Department. M.A.R. 4.10.160(3) and 4.10.330(3), respectively. Public disclosure of individual applicator records is limited by M.A.R. 4.10.160(5), which provides:

> Individual applicator records shall not be public records except in those cases established and set forth by a district court. Provided that the department may summarize records for publication for groups of or classifications of applicators.

The regulations do not limit the public disclosure of pesticide dealer records.

In your letter you indicate the pesticide applicator and dealer records are used for investigative and enforcement as well as informational and operational purposes. You also state that the Department's current policy is to maintain the confidentiality of applicator and dealer records held by the Department. Public review of those records occurs only when the records are disclosed during administrative or judicial proceedings or, in some instances, when the Department's proceedings against an applicator are completed.

The propriety of this disclosure policy turns on constitutional principles which govern public disclosure in general and on the language of the Pesticides Act.

Montanans are guaranteed the right to know by Article II, section 9, Constitution of Montana 1977, which states:

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

By its terms this provision mandates the consideration of two distinct and often competing interests when a state agency is asked to disclose information in its possession; the public's interest in open government and the individual's interest in privacy.

The public's right to know is not absolute. It may give way where an individual's privacy is threatened by public disclosure of information held by a government agency. The Montana Constitutional Convention Bill of Rights proposal on the Right to Know, No. VIII, p. 23, states in part:

> The right of individual privacy is to be fully respected in any statutory embellishment of the |Right to Know| provision as well as the court decisions that will interpret it. To the extent that a violation of individual privacy outweighs the public right to know, the right to know does not apply.

The right of privacy is guaranteed by Article II, section 10, Constitution of Montana 1972, which states:

> 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.

The Montana Supreme Court has not construed the above right to know or privacy provisions to either allow or prohibit any particular disclosure policy. The court has stated that constitutional provisons bearing on the same subject matter are to receive appropriate attention and to be construed together. Board of Regents v. Judge, 168 Mont. 433, 444, 543 P.2d 1323 (1975).

Public disclosure and individual privacy were discussed in 37 Op. Att'y Gen. No. 107. That opinion specifically concerns practices and policies of the Board of Real Estate,

but it applies in general to other agencies as well. The opinion states that to properly balance the interests of public disclosure and individual privacy, the agency must determine: (1) whether a matter of individual privacy is involved; (2) the demands of that privacy and the merits of publicly disclosing the information at issue; and (3) whether the demand of individual privacy clearly outweighs the demand of public disclosure.

There are no set guidelines for the determination of whether a matter of individual privacy is involved. Information which reveals facts concerning personal aspects of an individual's life necessarily involve individual privacy. Information concerning commercial matters may or may not constitute private information, depending in part on the nature of that information.

The Montana Supreme Court has not defined the scope of our constitutional right of privacy, but it has indicated in criminal case decisions that an individual has a protected right of privacy when he "justifiably relies" on an expectation of privacy. State v. Brackman, ___ Mont. ___, 33 St. Rptr. 1103, 1110, 582 P.2d 1216 (1978); State v. Charvat, ___ Mont. ___, 35 St. Rptr. 41, 44, 573 P.2d 660 (1978). Similar reasoning has prevailed in federal courts which have construed Fourth Amendment privacy "emanations." Katz v. United States, 389 U.S. 347 (1967); compare, United States v. Miller, 425 U.S. 435 (1976).

The second part of the test requires that the degree of infringement on an individual's privacy and the extent of the interest in favor of disclosure be determined. As the degree of infringement increases, so does the extent of the interest in public disclosure that is necessary to overcome the privacy interest. The recording of personal information such as one's attitudes, beliefs, or medical history, for example, would substantially infringe on one's privacy and therefore such information would be subject to disclosure if at all, only upon a strong showing of public interest in its disclosure.

The final step is to balance the merits of public disclosure and the demands of individual privacy. The Department must recognize that as a general rule its records are open to the public. Nevertheless, a legislative statement of policy declaring the superiority of the right of privacy in certain information would require the Department, if not a court, to refuse public disclosure of that information.

Section 27-239, R.C.M. 1947, provides that the Department cannot disclose a person's operations of selling, production, or use of pesticides in information the Department publishes. On its face, this provision does not apply to the kind of disclosure at issue here. M.A.R. 4.10.160(5), which prohibits the disclosure of applicator records, does apply.

That regulation forecloses consideration of the public's interest in access to pesticide applicator records, an interest embodied in the right to know provision. Additionally, nothing in the Pesticides Act authorizes the Department to preclude public access to its applicator records and, unless the legislature expressly states that such confidentiality is to be maintained, it is doubtful that the Department can reasonably interpret its mandate to require confidentiality.

The Montana Supreme Court has held that a regulation which is inconsistent with the statute it implements is void as an unreasonable exercise of delegated power. Vita Rich Dairy, Inc. v. Department of Business Regulation, 170 Mont. 341, 349, 553 P.2d 980 (1976); State ex rel. Swart v. Casne, ___ Mont. ___, 34 St. Rptr. 394, 399, 564 P.2d 983 (1977).

Pesticide applicator and dealer records involve essentially commercial information concerning materials which can have a profound effect on man and his environment. While public access to such information is within the Department's discretion, the Department must apply the balancing test previously discussed rather than precluding access automatically.

The Department also must require that all requests for applicator and dealer records be in writing and be specific. Any grants or denials of access by the Department must be in writing and specifically state the reasons therefor.

THEREFORE, IT IS MY OPINION:

> Pesticide applicator and dealer records held by the Department of Agriculture are subject to public disclosure upon a finding by the Department that the public's right to know outweighs the individual applicator's or dealer's right to privacy. Non-disclosure of such records is appropriate only where the Department has determined that a matter of privacy is involved, has weighed the demands of that privacy and the merits of publicly disclosing the records, and has found that the demand of individual privacy clearly outweighs the demand of public disclosure.

Very truly yours,

MIKE GREELY
Attorney General