VOLUME NO. 39 OPINION NO. 32

CODE OF ETHICS - Duty of Secretary of State, advisory opinions;
CODE OF ETHICS - Eligibility to request advisory opinions from Secretary of State;
ELECTED OFFICIALS - Manner of exercising official discretion;
EMPLOYEES, PUBLIC - Code of Ethics;
SECRETARY OF STATE - Code of Ethics, duty to issue advisory opinions;
SECRETARY OF STATE - Exercise of official discretion;
MONTANA CODE ANNOTATED - Section 2-2-132;
MONTANA CONSTITUTION - Article XIII, section 4.

HELD: 1. The Secretary of State is required to issue advisory opinions, permit public access to voluntary disclosure statements, and adopt rules concerning the conduct of his affairs pursuant to the provisions of the Montana Code of Ethics.

2. The Secretary of State is required to issue advisory opinions concerning the ethical conduct of either the requesting party or a third party.

3. The method of conducting the Secretary's duties under the Code of Ethics is within the discretion of the Secretary of State.

10 September 1981

Honorable Jim Waltermire
Secretary of State
State Capitol
Helena, Montana 59620

Dear Mr. Waltermire:

You have requested my opinion concerning the duties of the Secretary of State with regard to the Montana Code of Ethics. The request consists of eight questions, including 36 sub-issues, regarding your authority under the provisi ns of section 2-2-132, MCA. Your questions are answered by reference to the provisions of that statute. However, only two of your questions require statutory interpretation. The answers to the other questions are left entirely to the discretion of the Secretary of State.

The Legislature, pursuant to the constitutional mandate of Article XIII, section 4, Montana Constitution, has enacted a code of ethics for public officers and employees. The purpose of the code is to "prohibit conflict between public duty and private interest." § 2-2-101, MCA. Section 2-2-132, MCA, states:

> The Secretary of State <u>may</u>:
>
> (1) issue advisory opinions with such deletions as are necessary to protect the identity of the requesting party or the party about whom the opinion is written;

(2) keep and permit reasonable public access to voluntary disclosure statements;

(3) make rules for the conduct of his affairs under this part. [Emphasis added.]

The threshold question here revolves around the use of the term "may" in the statute. As a general rule the language of a statute is to be construed in the ordinary sense of the words used unless it appears otherwise from the context of the statute itself. In re Woodburns Estate, 128 Mont. 145, 273 P.2d 391 (1954). Also as a general rule the use of the term "may," as opposed to the term "shall," indicates a permissive, rather than a mandatory, grant of authority. Hansen v. City of Havre, 112 Mont. 207, 217, 114 P.2d 1053 (1942). However, where the public interest or individual rights are involved, the term "may" becomes imperative when bestowing power on a public officer. In Bascom v. Carpenter, 126 Mont. 129, 136, 246 P.2d 223 (1952), the Montana Supreme Court, quoting a decision from Oregon, stated:

> It is well settled that, even where the word "may" is used, and the rights of the public or of a third party are affected, the language is mandatory, and must be strictly obeyed....It is a general principle in statutory construction that, where the word "may" is used in conferring power upon an officer, court, or tribunal, and the public or a third person has an interest in an exercise of the power, then the exercise of the power becomes imperative. [Citations omitted.]

Often legislative intent determines whether "may" is a discretionery or a mandatory term. In cases where no right or benefit to the public is implied the word "may" is enabling and permissive. Whenever the rights of the public are involved the word is interpreted to mean "shall." Durland v. Prickett, 98 Mont. 399, 39 P.2d 652 (1935).

The use of the term "may" in section 2-2-132, MCA, falls under the rule cited in Durland and Bascom. Clearly the public has an interest in the exercise of the powers granted to the Secretary of State pursuant to the Montana Code of Ethics. Indeed, the purpose of the Code

is to protect the public interest. Thus, in my opinion, the use of the term "may" in the statute is imperative. The Secretary of State must issue advisory opinions, permit public access to voluntary disclosure statements, and adopt rules concerning the conduct of his affairs under those provisions.

Your questions regarding the availability of opinions to third parties can also be answered by reference to section 2-2-132(1), MCA. The pertinent language allows opinions to be issued:

> [W]ith such deletions as are necessary to protect the identity of the requesting party or the party about whom the opinion is written. [Emphasis added.]

The statute presumes that advisory opinions will be issued concerning conduct of either the requesting party or conduct of a third party. Any other interpretation would render meaningless the phrase "or the party about whom the opinion is written." It has long been settled that each component of a statute must be construed in such a way that each has some meaning, vitality and effect. Burritt v. City of Butte, 161 Mont. 530, 534, 508 P.2d 563 (1973). The Legislature does not engage in useless acts. Kish v. Montana State Prison, 161 Mont. 297, 505 P.2d 891 (1973). Thus, in my opinion, third parties are entitled to receive advisory opinions.

While the Secretary of State is required to perform the duties under the statute, no explicit direction is provided as to how those duties are to be performed. When powers are conferred upon a public officer, that officer has the implicit power necessary to the efficient exercise of those powers expressly granted. Guillot v. State Highway Commission, 102 Mont. 149, 56 P.2d 1072 (1936); MSU v. Ransier, 176 Mont. 149, 152, 536 P.2d 187 (1975). The method of exercising an implicit power is within the discretion of the public official given the authority. As long as the provisions of the enabling legislation are not contradicted, the exercise of the authority is entirely within the discretion of the public official given the power. See, e.g., Wenzel v. Murray, ___ Mont. ___, 585 P.2d 633 (1978).

The courts are very reluctant to get involved in the procedure or method of exercising official discretion

unless there has been a manifest abuse. See, e.g., Burgess v. Softich, 160 Mont. 70, 535 P.2d 178 (1975). Thus the general rule has evolved that writs or other judicial remedies are not available to compel a public official to exercise his discretion in a specified manner. Spear v. State Highway Patrol Retirement Board, 149 Mont. 7, 442 P.2d 348 (1967).

Absent specific statutory guidelines, elected officials should be given wide latitude in the methods they choose to exercise their authority. As the balance of your questions revolve around the exercise of your discretion as an elected official they do not provide an appropriate basis for an Attorney General's Opinion. This is not to say, however, that I necessarily agree with your prior analysis. These questions are subject to your interpretation within the guidelines of this opinion.

THEREFORE, IT IS MY OPINION:

1. The Secretary of State is required to issue advisory opinions, permit public access to voluntary disclosure statements, and adopt rules concerning the conduct of his affairs pursuant to the provisions of the Montana Code of Ethics.

2. The Secretary of State is required to issue advisory opinions concerning the ethical conduct of either the requesting party or a third party.

3. The method of conducting the Secretary's duties under the Code of Ethics is within the discretion of the Secretary of State.

Very truly yours,

MIKE GREELY
Attorney General