VOLUME NO. 42 OPINION NO. 119

CRIMINAL INFORMATION DISSEMINATION - Rules for dissemination of public and confidential criminal justice information; initial arrest records; initial offense reports; original documents; traffic records and reports;
POLICE - Rules for dissemination of public and confidential criminal justice information; initial arrest records; initial offense reports; original documents; traffic records and reports;
PRIVACY - Balancing test with right to know required in dissemination of certain criminal justice information;
RIGHT TO KNOW - Balancing test with right of privacy required in dissemination of certain criminal justice information;
SHERIFFS - Rules for dissemination of public and confidential criminal justice information; initial arrest records; initial offense reports; original documents; traffic records and reports;
TRAFFIC - Rules for dissemination of traffic accident reports and traffic operating records;
MONTANA CODE ANNOTATED - Sections 26-2-101, 26-2-102, 41-5-601 to 41-5-604, 44-5-102, 44-5-103(3), (4), (6), (12), 44-5-111, 44-5-301 to 44-5-303, 46-15-322, 61-6-107, 61-7-114(2);
MONTANA CONSTITUTION - Article II, sections 9, 10;
OPINIONS OF THE ATTORNEY GENERAL - 40 Op. Att'y Gen. No. 35 (1984), 37 Op. Att'y Gen. No. 112 (1978), 37 Op. Att'y Gen. No. 107 (1978).

HELD: 1. Under section 44-5-301, MCA, the "original documents" available to the public are thos

documents originated by a criminal justice agency which fall within the definition of public criminal justice information as defined in section 44-5-103(12), MCA, including initial offense reports, initial arrest records, bail records, and daily jail occupancy rosters.

2. Under section 44-5-103(12), MCA, an initial offense report is the first record of a criminal justice agency which indicates that a criminal offense may have been committed, including the initial facts associated with that offense; an "initial arrest record" is the first record made by a criminal justice agency indicating the fact of a particular person's arrest, including the initial facts associated with that arrest. If an initial offense report or initial arrest record contains information defined as confidential by the Act, that information may have to be deleted prior to public dissemination.

3. The interests of the public's right to know and an individual's right of privacy must be balanced on a case-by-case basis by the custodian of the criminal justice information sought in determining whether criminal investigative information contained in an initial offense report or an initial arrest record should be publicly disseminated.

4. Recordings of phone calls reporting offenses and dispatch recordings should be considered public criminal justice information if they fall within the definition given in section 44-5-103(12), MCA, except that if those recordings contain information defined as confidential by the Act, deletion of that information may be required prior to public dissemination.

5. A person not otherwise statutorily authorized is authorized by law to obtain confidential criminal justice information pursuant to section 44-5-303, MCA, when that person has obtained a district court order or subpoena requiring such disclosure.

6. Persons other than one charged with an offense are not entitled to receive confidential criminal investigative reports without either specific statutory authority or a district

court order or subpoena requiring dissemination.

7. Under section 44-5-301(1)(b), MCA, if a person's conviction record (1) reflects only misdemeanors or deferred prosecutions, and (2) that conviction record reflects no convictions of any kind for a period of five years from the last conviction, excluding convictions for traffic, regulatory, or fish and game offenses, then no record or index information of any kind, including traffic offense records, may be publicly disseminated. However, the Act specifically provides that records of traffic offenses maintained by the Department of Justice are not considered criminal history record information, and those records are publicly available by operation of section 61-6-107, MCA.

31 October 1988

James L. Tillotson
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Dear Mr. Tillotson:

You have requested my opinion concerning the dissemination provisions of the Montana Criminal Justice Information Act of 1979 (hereinafter the Act). I have phrased your questions as follows:

1. What are the "original documents" which are available to the public under section 44-5-301, MCA?

2. What are "initial offense reports" and "initial arrest records," which are public criminal justice information under section 44-5-103(12), MCA, and how can a criminal justice agency provide them to the public when they include criminal investigative information which is deemed confidential by the Act?

3. Are recordings of phone calls reporting offenses and other dispatch recordings confidential or public criminal justice information?

4. Under what circumstances is a person "authorized by law" to receive confidential criminal justice information pursuant to section 44-5-303, MCA, when that person is not otherwise statutorily authorized to receive the information?

5. Are persons named in police investigative reports of criminal offenses, including traffic offenses, entitled to receive those reports, or are such persons required to obtain a district court order?

6. Does section 44-5-301(1)(b), MCA, prohibit dissemination of records of traffic offenses when the conviction record reflects only misdemeanors or deferred prosecutions and when there are no convictions except for traffic, regulatory, or fish and game offenses for a period of five years from the date of the last conviction?

I. ORIGINAL DOCUMENTS.

With reference to your first question, I have previously held that the "original documents" available to the public under section 44-5-301, MCA, are those documents falling within the ambit of "public criminal justice information," as defined in section 44-5-103(12), MCA. 40 Op. Att'y Gen. No. 35 at 146 (1984). Such documents, if originated by the criminal justice agency, include initial offense reports, initial arrest records, bail records, and daily jail rosters. § 44-5-103(12)(e)(i) to (iv), MCA. "Original documents" do not include record or index compilations, 40 Op. Att'y Gen. No. 35 at 146 (1984), which may be publicly disseminated only in accordance with section 44-5-301(1)(a), (b), MCA.

II. INITIAL OFFENSE REPORTS AND INITIAL ARREST RECORDS--DEFINITION.

Regarding your second question, the Act does not define the phrases "initial offense report" and "initial arrest record," nor has the Montana Supreme Court construed their meaning. Furthermore, it is my understanding that the various criminal justice agencies in Montana do not use standardized forms employing those phrases. Therefore, ordinary principles of statutory construction must be applied to determine the proper interpretation

of section 44-5-103(12), MCA. The fundamental rule of statutory construction is that the intention of the Legislature controls, and that requires initial reference to the plain language of the statute. Missoula County v. American Asphalt, Inc., 42 St. Rptr. 920, 922, 701 P.2d 990, 992 (1985); W.D. Construction, Inc. v. Gallatin County Board of Commissioners, 42 St. Rptr. 1638, 1641, 707 P.2d 1111, 1113 (1985).

The phrase "initial offense report," given its plain meaning, would be the first report recorded by a criminal justice agency which indicates that a criminal offense may have been committed, including a description of the initial facts surrounding the reported offense.[1/] Similarly, an "initial arrest record" would be the first record made by a criminal justice agency indicating the fact of a particular person's arrest, including the initial facts associated with that arrest. It should be observed that the "initial offense report" and the "initial arrest record" may be contained in the same document or recording.

III. INITIAL OFFENSE REPORTS AND INITIAL ARREST RECORDS--RIGHT TO KNOW VERSUS RIGHT OF PRIVACY.

Your query regarding "initial offense reports" and "initial arrest records" included a question concerning the propriety of providing such documents to the public, as the Act requires (see § 44-5-301, MCA), when they contain information specifically defined as confidential by the Act and are therefore unavailable for public dissemination. § 44-5-303, MCA.

Obviously, if information deemed confidential appears within an "initial offense report" or "initial arrest record," a question arises as to precisely what may be publicly disseminated. In resolving this apparent inconsistency in the Act, I am mindful that in construing statutory language "an attempt must be made to produce a harmonious whole from each and every part of a statute." Wynia v. City of Great Falls, 183 Mont. 458, 465, 600 P.2d 802, 806-07 (1979). In addition, I

1/ Examples of the kinds of facts typically found in an initial offense report are mentioned in the American Bar Association Standards for Fair Trial and Free Press (1978), Standard 8-2.1, which sets forth a list of the types of information that can be publicly disseminated. The American Bar Association Standard is discussed further in this opinion.

recognize at the outset that the Act represents a legislative attempt to balance two competing fundamental rights under the Montana Constitution: the public's right to know and the individual's right of privacy. Mont. Const. Art. II, §§ 9, 10. I am also aware of my duty to "uphold the constitutionality of legislative enactments if such can be accomplished by reasonable construction." Belth v. Bennett, 44 St. Rptr. 1133, 1136, 740 P.2d 638, 641 (1987).

A. Constitutional and Legislative History.

Article II, section 9 of the Montana Constitution provides that:

> 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.

Article II, section 10 provides that:

> 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.

It is clear that the framers of the Montana Constitution contemplated the inevitable tension between these two important rights. See VII Mont. Const. Conv. 2483-98 (1972). The plain and explicit language of Article II, section 9 makes it equally clear that the framers contemplated that occasions may arise in modern technological society where the public's right to know must be subservient to the "demand of individual privacy." See V Mont. Const. Conv. 1680-81 (1972), II Mont. Const. Conv. 632 (1972). Regarding the privacy exception to the right to know section of the 1972 Constitution, the Bill of Rights Committee Comments state:

> The committee intends by this provision that the right to know not be absolute. The right of individual privacy is to be fully respected in any statutory embellishment of the provision as well as 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.

II Mont. Const. Conv. 632 (1972).

The Legislature considered these competing constitutional rights, as well as the comments and suggestions of Montana press representatives, in drafting and enacting the Criminal Justice Information Act of 1979. See Minutes of Senate Judiciary Committee, February 7, 1979; Minutes of House Judiciary Committee, March 13, 1979.

When the Act was passed following extensive amendment in committee it contained the following statement of purpose:

> The purpose of this chapter is to require the photographing and fingerprinting of persons under certain circumstances, to ensure the accuracy and completeness of criminal history information, and to establish effective protection of individual privacy in confidential and nonconfidential criminal justice information collection, storage, and dissemination. [Emphasis provided.]

§ 44-5-102, MCA. The purpose of the Act to protect individual privacy is manifested by the division of all criminal justice information into two categories, "public criminal justice information," which is specifically enumerated and publicly disseminable, and "confidential criminal justice information," which in addition to being enumerated, is also defined as "any other criminal justice information not clearly defined as public criminal justice information." §§ 44-5-103(3), (12), MCA. Confidential criminal justice information is not publicly disseminable. § 44-5-303, MCA.

Confidential criminal justice information includes "criminal investigative information," defined as follows:

> [I]nformation associated with an individual, group, organization, or event compiled by a criminal justice agency in the course of conducting an investigation of a crime or crimes. It includes information about a crime or crimes derived from reports of informants or investigators or from any type of surveillance.

§ 44-5-103(6), MCA.

The crux of the issue you have presented is that "initial offense reports" and "initial arrest records" frequently contain information that falls squarely within the definition of criminal investigative information, raising a question concerning the legality of publicly disseminating that information.

B. Balancing the Right of Privacy and the Right to Know.

The custodian of the criminal justice information sought must ultimately decide on a case-by-case basis whether that information will be publicly disseminated. See 37 Op. Att'y Gen. No. 112 at 495 (1978). However, recent Montana Supreme Court decisions concerning the conflict between the public's right to know and an individual's right of privacy suggest a useful analytical framework for making that decision.

The Montana Supreme Court has used a three-part analysis in resolving conflicts between these competing rights:

1. Whether there is a right of individual privacy protected by the Montana Constitution;

2. Whether that right clearly exceeds the public's right to know under the Montana Constitution; and

3. Whether denial of public access is required to protect the individual's privacy right.

Missoulian v. Board of Regents, 207 Mont. 513, 675 P.2d 962 (1984).

1. Whether There Is a Protected Privacy Interest.

The Court has relied on the following two-part test in determining whether there is a constitutionally protected privacy interest.

> [W]hether the person involved had a subjective or actual expectation of privacy and whether society is willing to recognize that expectation as reasonable.

Missoulian, 207 Mont. at 513, 675 P.2d at 967; see also Montana Human Rights Division v. City of Billings, 199 Mont. 434, 442, 649 P.2d 1283, 1287 (1982).

In the case of "initial offense reports" and "initial arrest records," it is clear that situations may arise involving an expectation of privacy by the individuals involved. Victims and families of victims of certain crimes, particularly sex crimes and criminal offenses affecting domestic relations, may well have such an expectation. Informants, complainants, and witnesses may also entertain an actual expectation of privacy. Suspects may have such an expectation in certain instances, because the vagaries of criminal investigation occasionally result in the designation of the innocent as suspects, particularly in the "early and unsubstantiated stages" of investigation. See 37 Op. Att'y Gen. No. 112 at 485 (1978).

Once having determined that a subjective expectation of privacy exists, the Montana Supreme Court has focused closely on the nature of the information sought in determining whether society is willing to recognize an individual's privacy interest as reasonable. Missoulian, 207 Mont. at 523-24, 675 P.2d at 968-69; Montana Human Rights Division, 199 Mont. at 441-43, 649 P.2d at 1287-88; Belth, 44 St. Rptr. at 1137, 740 P.2d at 642. Family problems, health problems, drug and alcohol problems, and interpersonal relations have all been acknowledged by the Court as entailing the kind of sensitive and personal information which society recognizes as involving a reasonable privacy interest. See Missoulian, 207 Mont. at 524, 675 P.2d at 968; Montana Human Rights Division, 199 Mont. at 442, 649 P.2d at 1287.

The Court has also registered its concern with the potential inaccuracy of information sought, and the damage to reputation caused by public disclosure of inaccurate information, in evaluating the reasonableness of an individual's expectation of privacy. Belth, 44 St. Rptr. at 1137, 740 P.2d at 642, 643. Finally, the Court has cited the advancement of socially desirous goals, such as frank and candid evaluations of state university presidents, in recognizing that certain privacy interests are reasonable. Missoulian, 207 Mont. at 526, 675 P.2d at 972.

2. Whether the Right of Privacy Clearly Exceeds the Public's Right to Know.

If a privacy interest has been found to exist, it must be determined whether that interest clearly exceeds the public's right to know under Article II, section 9 of the Montana Constitution. This requires balancing "the competing rights in the context of the purposes,

functions, and needs of the governmental entity involved and the purposes and merits of the asserted public right to know." Missoulian, 207 Mont. at 531, 675 P.2d at 971-72.

Any attempt to balance these rights must begin with recognition of the public's long-standing right to know about the existence of crime within the community, and about the treatment of a particular crime by the criminal justice agencies involved. Disclosure alerts the public that a particular crime has occurred and serves to warn the community about any danger involved. Law enforcement officials may always make public information which they deem necessary "to secure public assistance in the apprehension of a suspect." § 44-5-103(12)(f), MCA. An alerted and cooperative public can provide law enforcement officials with valuable investigative information, as well as witnesses and physical evidence. Disclosure generally serves to "open" public agencies, providing the people with the means to evaluate agency performance, and that of elected officials. Disclosure also educates the community about the operation of an important public institution, the criminal justice system, and can thus serve the laudable function of fostering public trust in that institution.

However, it is obvious that extremely sensitive and private information may occasionally be contained in initial offense reports and initial arrest records--for example, in the case of sexual crimes, where disclosure can have devastating familial consequences--and may compound what is already a deeply traumatic experience for the victim. Moreover, revealing the identity of such victims in the initial stages of an investigation does not advance any of the policy underpinnings of the right to know.

Finally, I am aware that acknowledging and protecting the sensitive privacy concerns discussed above serve the public's interest in efficient law enforcement, because they promote prompt reporting of criminal activity. Routine public disclosure of the child victims of incest, for example, would have an obvious chilling effect on the reporting of this widespread and insidious crime. Furthermore, witnesses to crime, who are often placed at risk by their very status as witnesses, are understandably reluctant to cooperate with criminal justice agencies without some assurance that their identity will be kept confidential to the greatest extent possible.

To summarize, initial offense reports and initial arrest records must be made publicly available as a general rule. Occasions may arise, however, when these documents involve a privacy interest which clearly exceeds the public's right to know. This is particularly true in those instances where protecting a meritorious privacy right also advances the general goals of criminal justice agencies in gathering information about and successfully prosecuting crime.

It is impossible to provide a hard and fast rule for balancing these competing rights that would be applicable to all the multifarious situations that give rise to initial offense reports and initial arrest records. Ultimately, the particular custodian of the criminal justice information sought must make the determination concerning whether public disclosure is merited on a case-by-case basis, guided by the principles discussed in this opinion.

The American Bar Association Standards for Fair Trial and Free Press (1978) (hereinafter ABA Standards), and Standard 8-2.1 in particular, offer concrete and practical assistance in making that determination. The ABA Standards are pertinent because they balance the public's right to know with the constitutional right of an accused to a fair trial, a balance that limits public disclosure of sensitive criminal investigative information in the interest of preserving the right to a fair trial. Although different constitutional concerns are involved in protecting an individual's right of privacy and an individual's right to a fair trial, the correlation between these two individual rights balanced against the public's right to know has been recently observed by the Montana Supreme Court. State ex rel. Smith v. District Court, 201 Mont. 376, 381, 654 P.2d 982, 985 (1982); Great Falls Tribune v. District Court, 186 Mont. 433, 438, 608 P.2d 116, 119 (1980).

Because it provides useful and pertinent guidance, I have provided the following summary of ABA Standard 8-2.1. (The text of the entire standard has been attached to this opinion as an appendix.)

The standard encourages the public dissemination of information by law enforcement agencies concerning the following matters:

(1) A factual statement of the accused's name, age, residence, occupation, and family status, and, if the accused has not been apprehended, any further information necessary to aid in the accused's

apprehension or to warn the public of any dangers that may exist;

(2) The facts and circumstances of arrest, including the time and place of arrest, resistance, pursuit, and the use of weapons;

(3) The identity of the investigating and arresting officer or agency and the length of the investigation;

(4) The seizure of any physical evidence (other than a statement of the accused) which is limited to a description of the evidence seized;

(5) The nature, substance, or text of the charge, including a brief description of the offense charged;

(6) The scheduling or result of any stage in the judicial process; and

(7) A request for assistance in obtaining evidence.

The standard discourages the public dissemination of information by law enforcement agencies concerning the following matters:

(1) The identity of a suspect prior to arrest except to the extent deemed necessary by a criminal justice agency to aid in the investigation, to assist in the apprehension of the suspect, or to warn the public of any dangers;

(2) The existence or contents of any statement, confession, or admission given by the accused or the refusal or failure of the accused to make a statement;

(3) The prior criminal record, character, or reputation of the accused, or any opinion as to the accused's guilt or innocence;

(4) Any opinion as to the merits of the case, or the evidence of the case;

(5) The performance of any examinations or tests, or the accused's refusal or failure to submit to an examination or test;

(6) The identity, testimony, or credibility of prospective witnesses;

(7) Information about juvenile offenders which is contrary to provisions of existing law. See §§ 41-5-601 to 604, MCA.

ABA Standard 8-2.1(d) also permits release of the identity of the victim or complainant if the release of that information is not otherwise prohibited by law. Such a release is prohibited by law under the Act when the victim or complainant has a protected privacy interest which clearly exceeds the merits of public disclosure, as discussed above.

3. Whether Nondisclosure Is Required.

A final observation is necessary with respect to the third step of the Montana Supreme Court analysis regarding the conflict between right to know/right of privacy, i.e., whether denial of access to initial offense reports and individual arrest records is required to protect the individual privacy right involved. When these records contain information involving a protected privacy right which clearly outweighs the merits of public disclosure, the only sufficient remedy is to deny disclosure of that information. This does not mean that initial offense reports or initial arrest records can be withheld in their entirety; the Act clearly provides that they are to be publicly available. §§ 44-5-103(12), 44-5-301, MCA. When a significant privacy right is involved, information should be altered by deletion or other means which preserves the particular individual privacy interest in question. This can usually be accomplished by providing for the anonymity of the person or persons involved, including "elimination of names, specific ethnic designations and other classifications which reasonably might allow identification of the person(s) whose privacy right is to be protected." Montana Human Rights Division, 199 Mont. at 450, 649 P.2d at 1291. Social security numbers, phone numbers, registration and driver's license information should all be considered as classifications which could destroy the anonymity of an individual with a protected privacy interest. However, only the very minimum amount of information necessary to protect the privacy interest involved should be deleted. Criminal justice information custodians should also note that a person with a constitutionally protected privacy right may knowingly and intelligently waive that right. See 37 Op. Att'y Gen. No. 107 at 460 (1978). In such a case, it would be unnecessary to provide for anonymity prior to public disclosure of initial offense reports and initial arrest records.

IV. DISPATCH RECORDINGS.

Your third question concerns whether recordings of phone calls reporting offenses, and dispatch recordings should be considered confidential criminal justice information. The Act defines public criminal justice information, inter alia, as "information ... originated by a criminal justice agency, including: initial offense reports; initial arrest records; bail records; and daily jail occupancy rosters." § 44-5-103(12), MCA. To the extent that the recordings mentioned fall within the quoted definition, they should be considered public criminal justice information. If the recordings would fall within the quoted definition but for the fact that they contain some information defined as confidential by the Act, it may become necessary to delete that information, consistent with the discussion above relating to the right to know versus the right of privacy. Providing a transcript of such recordings, altered to protect privacy interests when required, adequately complies with the Act's dissemination provisions.

V. AUTHORIZATION TO RECEIVE CONFIDENTIAL INFORMATION.

Regarding your fourth question, a person not otherwise statutorily authorized is "authorized by law" to receive confidential criminal justice information pursuant to section 44-5-303, MCA, only when that person has obtained a district court order or subpoena requiring such disclosure. See §§ 44-5-111, 44-5-302, 26-2-101, 26-2-102, MCA. Confidential criminal justice information that is disseminated to such a person must be designated as confidential by the disseminating agency, pursuant to section 44-5-303, MCA.

VI. DISSEMINATION TO PERSONS NAMED IN REPORTS.

Your fifth question concerns whether persons named in police investigative reports of criminal offenses, including traffic offenses, are entitled to receive those reports. Although such reports are criminal investigative information, and thus confidential, section 44-5-303, MCA, permits dissemination "to those authorized by law to receive them." Otherwise, the Act does not contain any authorization for disseminating confidential criminal investigative information to persons named in investigative reports. Anyone who is the subject of an investigation and who is charged with a crime as a result of that investigation is entitled, under the specific statutory authority of section 46-15-322, MCA, to receive investigative reports.

Furthermore, the Montana Uniform Accident Reporting Act, §§ 61-7-101 to 118, MCA, provides that traffic accident reports prepared by law enforcement officers and submitted to the Department of Justice "may be examined by any persons named in such report or reports or by any driver, passenger, or pedestrian involved in the accident or by his representative." § 61-7-114(2), MCA. Additionally, a person named in a criminal investigative report does have the option to seek dissemination of the report by obtaining a district court order or subpoena. And, as discussed above, original documents such as initial offense reports and initial arrest records are publicly available from the originating criminal justice agency.

You have suggested that a distinction be made between traffic offenses and other offenses with respect to dissemination of criminal investigative reports. I find no such distinction in the Act, and therefore, the rules discussed above regarding dissemination of criminal investigative reports apply equally to reports concerning traffic and nontraffic offenses.

VII. TRAFFIC OFFENSE RECORDS

Finally, you have asked about the relation of section 44-5-301(1)(b), MCA, to dissemination of records of traffic offenses. Under section 44-5-301(1)(b), MCA, when a person's conviction record reflects only misdemeanors or deferred prosecutions and reflects no convictions of any kind for a period of five years from the last conviction, excluding convictions for traffic, regulatory, or fish and game offenses, then no information of any kind from record or index compilations, including traffic offense records, may be publicly disseminated. 40 Op. Att'y Gen. No. 35 at 145 (1984).

Again, the original documents "are available to the public from the originating criminal justice agency." § 44-5-301(1)(b), (2), MCA. In addition, court records noting convictions for any offense, including traffic offenses, are available to the public by operation of section 44-5-103(12)(b), MCA. Records of traffic offenses maintained by the Department of Justice are specifically excluded from the Act's definition of "criminal history record information." § 44-5-103(4)(b)(i), MCA. A certified abstract of a person's operating record is publicly available from the Department of Justice under section 61-6-107, MCA.

THEREFORE, IT IS MY OPINION:

1. Under section 44-5-301, MCA, the "original documents" available to the public are those documents originated by a criminal justice agency which fall within the definition of public criminal justice information as defined in section 44-5-103(12), MCA, including initial offense reports, initial arrest records, bail records, and daily jail occupancy rosters.

2. Under section 44-5-103(12), MCA, an initial offense report is the first record of a criminal justice agency which indicates that a criminal offense may have been committed, including the initial facts associated with that offense; an "initial arrest record" is the first record made by a criminal justice agency indicating the fact of a particular person's arrest, including the initial facts associated with that arrest. If an initial offense report or initial arrest record contains information defined as confidential by the Act, that information may have to be deleted prior to public dissemination.

3. The interests of the public's right to know and an individual's right of privacy must be balanced on a case-by-case basis by the custodian of the criminal justice information sought in determining whether criminal investigative information contained in an initial offense report or an initial arrest record should be publicly disseminated.

4. Recordings of phone calls reporting offenses and dispatch recordings should be considered public criminal justice information if they fall within the definition given in section 44-5-103(12), MCA, except that if those recordings contain information defined as confidential by the Act, deletion of that information may be required prior to public dissemination.

5. A person not otherwise statutorily authorized is authorized by law to obtain confidential criminal justice information pursuant to section 44-5-303, MCA, when that person has obtained a district court order or subpoena requiring such disclosure.

6. Persons other than one charged with an offense are not entitled to receive confidential

criminal investigative reports without either specific statutory authority or a district court order or subpoena requiring dissemination.

7. Under section 44-5-301(1)(b), MCA, if a person's conviction record (1) reflects only misdemeanors or deferred prosecutions, and (2) that conviction record reflects no convictions of any kind for a period of five years from the last conviction, excluding convictions for traffic, regulatory, or fish and game offenses, then no record or index information of any kind, including traffic offense records, may be publicly disseminated. However, the Act specifically provides that records of traffic offenses maintained by the Department of Justice are not considered criminal history record information, and those records are publicly available by operation of section 61-6-107, MCA.

Very truly yours,

MIKE GREELY
Attorney General

APPENDIX TO OPINION NO. 119, ABOVE

Standard 8-2.1 Release of information by law enforcement agencies

The following regulations should be made effective in each jurisdiction:

(a) A regulation governing the release of information relating to the commission of crimes and to their investigation, prior to the making of an arrest, issuance of an arrest warrant, or the filing of formal charges. This regulation should establish appropriate procedures for the release of information. It should further provide that, when a crime is believed to have been committed, pertinent facts relating to the crime itself and to investigative procedures may properly be made available, but the identity of a suspect prior to arrest and the results of investigative procedures shall not be disclosed except to the extent necessary to aid in the investigation, to assist in the apprehension of the suspect, or to warn the public of any dangers.

(b) A regulation prohibiting:

(i) the deliberate posing of a person in custody for photographing or televising by representatives of the news media, and

(ii) the interviewing by representatives of the news media of a person in custody except upon request or consent by that person to an interview after being informed adequately of the right to consult with counsel and of the right to refuse to grant an interview.

(c) A regulation providing as follows:

From the commencement of the investigation of a criminal matter until the completion of trial or disposition without trial, a law enforcement officer within this agency shall not release or authorize the release of any extrajudicial statement, for dissemination by any means of public communication, if such statement poses a clear and present danger to the fairness of the trial. In no event, however, shall a law enforcement officer make an extrajudicial statement concerning the following matters:

(i) The existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make statement, and

(ii) the possibility of a plea of guilty to the offense charged or a lesser offense or other disposition.

Consistent with the clear and present danger standard in paragraph (c), a law enforcement officer may be subject to disciplinary action with respect to extrajudicial statements concerning the following matters:

(A) the prior criminal record (including arrests, indictments, or other charges of crime), the character or reputation of the accused, or any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case;

(B) the performance of any examinations or tests, or the accused's refusal or failure to submit to an examination or test;

(C) the identity, testimony, or credibility of prospective witnesses; and

(D) information which the law enforcement officer knows or has reason to know would be inadmissible as evidence in a trial.

(d) A regulation authorizing a law enforcement officer at any time:

(i) to make a factual statement of the accused's name, age, residence, occupation, and family status, and, if the accused has not been apprehended, to release any further information necessary to aid in the accused's apprehension or to warn the public of any dangers that may exist;

(ii) to announce the fact and circumstances of arrest, including the time and place of arrest, resistance, pursuit, and use of weapons;

(iii) to announce the identity of the investigating and arresting officer or agency and the length of the investigation;

(iv) to announce the identity of the victim or complainant if the release of that information is not otherwise prohibited by law;

(v) to make an announcement, at the time of seizure of any physical evidence (other than a confession, admission, or statement), which is limited to a description of the evidence seized;

(vi) to disclose the nature, substance, or text of the charge, including a brief description of the offense charged;

(vii) to quote from or refer without comment to public records of the court in the case;

(viii) to announce the scheduling or result of any stage in the judicial process; and

(ix) to request assistance in obtaining evidence.

(e) A regulation providing for the enforcement of the foregoing rules by the imposition of appropriate disciplinary sanctions.

Nothing in this standard is intended to preclude any law enforcement officer from replying to charges of misconduct that are publicly made against him or her or from participating in any legislative, administrative, or investigative hearing, nor is this standard intended to supersede more restrictive rules governing the release of information concerning juvenile offenders.

[End of Appendix to Opinion No. 119.]