

VOLUME NO. 43

OPINION NO. 73

CORPORATIONS - Prohibition on distribution of state agency list of corporations as mailing list;

PRIVACY - Use of state agency list of corporations as mailing list;

RIGHT TO KNOW - Use of state agency list of corporations as mailing list;

SECRETARY OF STATE - Prohibition on distribution of list of corporations as mailing list;

MONTANA CODE ANNOTATED - Section 2-6-109;

MONTANA CONSTITUTION - Article II, sections 9, 10;

OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 119 (1988), 38 Op. Att'y Gen. No. 59 (1979).

HELD: The prohibition of section 2-6-109, MCA, against the distribution of mailing lists by state agencies applies to mailing lists of both individual persons and corporations. 38 Op. Att'y Gen. No. 59 at 207 (1979) is overruled insofar as it conflicts with the holding of this opinion.

October 31, 1990

The Honorable Mike Cooney
Secretary of State
Room 225, State Capitol
Helena MT 59620

Dear Mr. Cooney:

You have requested my opinion concerning the following question:

Should 38 Op. Att'y Gen. No. 59 (1979) concerning distribution of state agency mailing lists be overruled in light of subsequent case law?

Your question is prompted by an individual's request that he be provided with a list of all nonprofit corporations in good standing on file in the Secretary of State's office. Furthermore, that individual has indicated that he intends to use the requested information as a mailing list, as that phrase has been defined by the Attorney General. See 38 Op. Att'y Gen. No. 59 at 210-11 (1979). The question raised by the request is whether the Secretary of State can lawfully release the list for use as a mailing list in light of the restrictions set forth in section 2-6-109, MCA, which provides:

(1) Except as provided in subsections (3), (4), (5), and (6), in order to protect the privacy of those who deal with state and local government:

(a) no agency may distribute or sell for use as a mailing list any list of persons without first securing the permission of those on the list; and

(b) no list of persons prepared by the agency may be used as a mailing list except by the agency or another agency without first securing the permission of those on the list.

(2) As used in this section, "agency" means any board, bureau, commission, department, division, authority, or officer of the state or a local government.

(3) Except as provided in 30-9-403, this section does not prevent an individual from compiling a mailing list by examination of original documents or applications which are otherwise open to public inspection.

(4) This section does not apply to the lists of registered electors and the new voter lists provided for in 13-2-115 and 13-38-103, to lists of the names of employees governed by Title 39, chapter 31, or to lists of persons holding driver's licenses provided for under 61-5-126.

(5) This section shall not prevent an agency from providing a list to persons providing prelicensing or continuing educational courses subject to Title 20, chapter 30, or specifically exempted therefrom as provided in 20-30-102.

(6) This section does not apply to the right of access either by Montana law enforcement agencies or, by purchase or otherwise, of public records dealing with motor vehicle registration.

- (7) A person violating the provisions of subsection (1)(b) is guilty of a misdemeanor.

The issue raised by your request was previously addressed in 38 Op. Att'y Gen. No. 59 at 207 (1979). Noting that section 2-6-109, MCA, must be construed in a manner consistent with the Montana Constitution, Article II, sections 9 and 10 (the right to know and right of privacy provisions, respectively), the Attorney General held that:

1. Under the provisions of chapter 606, 1979 Montana Laws [section 2-6-109, MCA], agencies are prohibited from distributing a list of persons only if the intended use of such list is for unsolicited mass mailings, house calls or distributions, or telephone calls.
2. The prohibition pertains only to lists of natural persons, not businesses, corporations, governmental agencies or other associations.
3. Agencies are not required to affirmatively ascertain the intended use for which the list is sought; a clear written disclaimer from the agency as to the proscriptions and penalty of chapter 606 is sufficient.

38 Op. Att'y Gen. No. 59 at 207-08. The second holding quoted above was based on the Attorney General's opinion that the right of privacy mentioned in section 2-6-109, MCA, could be consistently construed with the right of privacy provisions of the Montana Constitution if it applied only "to individual human beings," and not to "corporations, associations, governmental bodies and businesses[.]" 38 Op. Att'y Gen. No. 59 at 211 (1979). Since that opinion was issued, the Montana Supreme Court has twice held that the right of privacy exception to the right to know provision of the Montana Constitution (Mont. Const. Art. II, § 9) applies to corporations as well as individuals. Mountain States Telephone and Telegraph v. Department of Public Service Regulation, 38 St. Rptr. 1479, 1486, 634 P.2d 181, 188 (1981); Belth v. Bennett, 227 Mont. 341, 345, 740 P.2d 638, 640-41 (1987). As you have observed, the holdings in these two cases cast doubt on the validity of the second holding in 38 Op. Att'y Gen. No. 59 at 207 (1979).

In Belth, the State Insurance Commissioner withheld from the editor of a monthly insurance publication information on file in the Commissioner's office concerning financial statements of insurance companies. The Commissioner's decision to withhold was based on section 33-1-412(5), MCA:

The commissioner may withhold from public inspection any examination or investigation report for so long as he deems such withholding to be necessary for the protection of the person

examined against unwarranted injury or to be in the public interest.

Finding that the statute protected a privacy interest coextensive with the privacy exception within the right to know provision of the Montana Constitution, Art. II, § 9, the Court held that the exception applied to corporations as well as natural persons. Belth, 227 Mont. at 345, 740 P.2d at 640-41, citing Mountain States, 38 St. Rptr. at 1486, 634 P.2d at 188. The Court also held that the Commissioner had standing to raise the constitutional issue on behalf of the insurance companies since a breach of the privacy rights of those companies could lead to a lawsuit against the Commissioner. Belth, 227 Mont. at 345, 740 P.2d at 641, citing Montana Human Rights Division v. City of Billings, 199 Mont. 434, 443, 649 P.2d 1283, 1288 (1982). In Mountain States the Court held that the demands of individual privacy of a corporation as well as of a person might clearly exceed the merits of public disclosure and thus come within the privacy exception of the "right to know." Consequently a corporate utility could seek to preserve confidentiality of certain trade secrets required to be disclosed to the Public Service Commission when the utility applied for a rate increase. 634 P.2d at 188-89. It is my opinion that the holdings in these cases are fully applicable to the issue raised here. I therefore hold that the prohibition against public distribution of state agency mailing lists set forth in 38 Op. Att'y Gen. No. 59 at 207 (1979) applies with equal force to lists of both individual persons and corporations.

There are, however, two important caveats which attend my holding. First, the Montana Supreme Court has made it clear that it will construe statutes protecting privacy interests in a manner that does not violate the mandate of the right to know provision of the Montana Constitution. Belth, 227 Mont. at 346, 740 P.2d at 641; Allstate Insurance Co. v. City of Billings, 46 St. Rptr. 1716, 1719-20, 780 P.2d 186, 188-89 (1989). Compliance with the right to know provision requires that a decision to withhold mailing lists pursuant to the statute must be based on a determination that "the demand of individual privacy clearly exceeds the merits of public disclosure." Belth, 227 Mont. at 346, 740 P.2d at 641. In short, the custodian of the information sought must determine whether there is a constitutionally protected privacy interest at stake, and if so, whether that right clearly exceeds the public's right to know. Belth, 227 Mont. at 346-48, 740 P.2d at 641-43; see also Missoulian v. Board of Regents, 207 Mont. at 513, 675 P.2d at 962 (1984); 42 Op. Att'y Gen. No. 119 at 454, 461-62 (1988). If the Secretary of State determines that there is no privacy interest at stake, or that a protected privacy interest does not clearly exceed the public's right to know, the prohibition of the statute does not apply, and the mailing lists at issue may be publicly disseminated. Second, it must be noted that the statute specifically allows an individual to compile "a mailing list by examination of original documents or applications which are otherwise open to public inspection." § 2-6-109(3), MCA. Because you have indicated that the original documents involved here are open to

public inspection, a requestor may be permitted in any case to compile his or her own mailing list by examining those original documents.

THEREFORE, IT IS MY OPINION:

The prohibition of section 2-6-109, MCA, against the distribution of mailing lists by state agencies applies to mailing lists of both individual persons and corporations. 38 Op. Att'y Gen. No. 59 at 207 (1979) is overruled insofar as it conflicts with the holding of this opinion.

Very truly yours,

MARC RACICOT
Attorney General