VOLUME 32 **Opinion No. 12**

ATTORNEY GENERAL; Criminal Investigator, confidentiality of reports —BOARD OF INSTITUTIONS; Confidentiality of communications to—OFFICES AND OFFICERS; Confidentiality of communications to—Section 82-417, R.C.M. 1947.

HELD: 1. Reports of the state criminal investigator which are delivered to another agency of state government are not protected from public disclosure by the provisions of Section 82-417, R.C.M. 1947.

2. The Board of Institutions, within the sound exercise of its discretion, may treat certain communications made to it as confidential.

November 1, 1967

Honorable Tim Babcock
Governor of Montana
Helena, Montana

Dear Governor Babcock:

You have requested my opinion on the following questions:

1. Are reports of the state criminal investigator, when delivered to another agency of state government, confidential under the provisions of Section 82-417, R.C.M. 1947?

2. If the answer to the first question is no, in what situations may a public official refuse to divulge communications made to him in his official capacity?

I.

Section 82-417, R.C.M. 1947, provides:

A person with a known criminal record shall not be permitted access to **the files of the investigator,** nor shall anyone else,

without the order of a district judge or a supreme court justice. (Emphasis supplied.)

Generally, statutes such as this which restrict the divulgence of information by public officials are strictly construed. 165 A.L.R. 1308. In construing a statute, our courts have consistently held that statutes must be interpreted according to the natural and most obvious import of the language used. See, e.g., **Doull v. Wohlschlager,** 141 Mont. 354, 377 P. 2d 758 (1963); **Green v. City of Roundup,** 117 Mont. 160, 157 P. 2d 1010 (1945).

Application of these principles of statutory construction leads me to conclude that the statutory confidentiality imposed by Section 82-417 on the files of the criminal investigator applies only to those files and does not extend to reports made by that officer and delivered to other persons. Therefore, it is my opinion that reports of the state criminal investigator which are delivered to another agency of state government are not protected from public disclosure by the provisions of Section 82-417, R.C.M. 1947.

II.

Your next question requires a thorough consideration and analysis of the legal right and duty of public officials to divulge information acquired by them in their official capacities. As a people, we are committed to the philosophy that the public has a right to inform itself on the conduct of the affairs of its government. Montana has implemented this philosophy by enacting Sections 59-512 and 93-1001-4, R.C.M. 1947, which provides that public records shall be open to inspection, and Sections 82-3401, et seq., the "open meeting law."

On the other hand, Montana law also recognizes the right of individuals to protection from the damage to themselves and their families which could result from the indiscriminate inspection of the files of public officials and the publicity resulting therefrom. Every public officer receives this type of communication daily. Many letters to state officers and public bodies contain allegations of misconduct on the part of numerous persons. Some of these letters are obscene, many are anonymous, but the charges they contain are usually investigated. And, of course, any investigation involves interviews with a subject's enemies as well as his friends. It uncovers rumors, gossip and hearsay and the competent investigator reports these things too—judging their validity only to the extent of reporting whether or not additional evidence has been found to substantiate and corroborate them. In many cases, to release this type of information to persons untrained in analyzing such reports would be a flagrant abuse of the trust imposed in a public official.

Montana has also recognized this problem by enacting several statutes restricting public access to certain official files. Section 82-417 is such a statute. Section 82-3402, R.C.M. 1947, which closes to the public meetings of state agencies involving complaints against a

public officer or employee, the employment, promotion or dismissal of a public employee, law enforcement, crime prevention, probation, parole, etc., is another. Obviously, the investigative report in question involves many of these areas.

California has statutes identical with those of Montana's requiring public records to be open to inspection. In **Runyon v. Board of Prison Terms and Paroles,** 79 P. 2d 101 (Cal. 1938), it was held that letters sent to the state parole board in connection with hearing and determining applications for paroles were not open to public inspection. That court stated:

> ". . . the courts have consistently declared that in another class of cases public policy demands that certain communications and documents shall be treated as confidential and therefore are not open to indiscriminate inspection, notwithstanding that they are in the custody of a public officer or board and are of a public nature (23 R.C.L. pp 160-163). Included in this class are . . . the files in the offices of those charged with the execution of the laws relating to the apprehension, prosecution, and punishment of criminals."

To the same effect, see **People v. Wilkins,** 287 P. 2d 555 (Cal. 1955); **City and County of San Francisco v. Superior Court,** 238 P. 2d 581 (Cal. 1952); **Lee v. Beach Publishing Co.,** 173 So. 440 (Fla. 1937); **Jordan v. Loos,** 125 N.Y.S. 2d 447 (N.Y. 1953) Annotation, 165 A.L.R. 1302; 45 Am. Jur., **Records and Recording Laws** §26, pp. 433-34; 58 Am. Jur., **Witnesses,** §533, pp. 298-300; 23 R.C.L., **Records** §11, p. 161.

In **City Council v. Superior Court,** 21 Cal. Rptr. 896 (1962), it was held that a private investigator's report to the city council of the circumstances surrounding the dismissal of the city police chief was confidential and therefore not open to public inspection. In refusing to order the production of the report, the court stated:

> It is obvious that not every piece of correspondence or written statement lodged in the office of a public officer partakes of such a public interest as to be open to general inspection. It was early stated in Colnon v. Orr, 71 Cal. 43, 44, 11 P. 814, 815: "To declare such to be the law would be to say that any communication aspersing the character of a public officer, being received by the board of directors, to which he is amenable, and filed with the custodian of their records, would thereby become a public record, and be open to the idle curiosity of any and all persons.
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> "In this way the most honorable of men might be attacked, and each individual of the whole public be permitted to inspect the document containing such attack without having the slightest beneficial interest in the matter, and actuated by no other motive than to repeat what might or might not be a slander, all over a community."

"If every citizen who knows of the unfitness of an officer or employee, or of facts he thinks require an investigation, believes it his duty to lodge information before the board, he will hesitate a long while before doing so if he knows his complaint is to be made public and become of the public records, so that any one may have access to it and he subjected to action for a possible libel. It is not to be expected, if that is so, that very many will come forward and lodge a complaint. * * * In our opinion these communications by citizens to the Complaint Board, covering the conduct of public officers and employees, are to be considered as highly confidential, and as records to which public policy would forbid the confidence to be violated." (State v. Tune, 199 Mo. App. 404, 203 S.W. 465, 467. See also People v. Pearson, 111 Cal. App. 2d 9, 24, 244 P. 2d 35, wherein it was held that public policy requires that documents in the sheriff's office relating to law enforcement be treated as confidential.) **Whether confidential matters shall be made public is within the sound discretion of the municipal body.** See Chronicle Pub. Co. v. Superior Court, supra, 54 Cal. 2d 548, 572, 7 Cal. Rptr. 109, 354 P. 2d 637; 18 Ops. Cal. Atty. Gen. 231. (Emphasis supplied.)

In this particular situation, there is an additional reason not to make the report in question public. As you are well aware, the death of this prisoner is now the subject of a lawsuit. I am professionally prohibited from, and philosophically adverse to, engaging in "trial by newspaper." Further, I believe it would be a distinct disservice to those individuals whose personal fortunes are now at stake to do so. There are definite legal procedures available to the plaintiff in that lawsuit to obtain this information and I believe this information should be released, if at all, only after those procedures have been utilized.

Under the rules of law above enunciated, the Board of Institutions has properly refused to make public the report in question.

Very truly yours,

FORREST H. ANDERSON
Attorney General

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