

VOLUME NO.35**Opinion No. 19**

ENVIRONMENT — Impact statements, application information under Hard Rock Mining Act not included; MINES AND MINING — Confidentiality, hard rock mining application; MINES AND MINING — Hard rock mining applications, confidentiality of; STATUTES — Confidentiality, hard rock mining applications. Article II, section 9, Constitution of Montana, 1972; section 50-1221, R.C.M. 1947.

- HELD:**
- 1. The Montana statute providing for confidential applications under the Hard Rock Mining Act is constitutional under Article II, section 9, Montana Constitution, 1972.**
 - 2. Confidential information contained in an application to the department for a hard rock mining permit cannot be made public through an environmental impact statement.**

August 7, 1973

Mr. Ted Schwinden, Commissioner
Department of State Lands
State Capitol
Helena, Montana 59601

Dear Mr. Schwinden:

You have requested my opinion on the following questions:

1. What is the status of the confidentiality provision of the Hard Rock Mining Reclamation Act (section 50-1221, R.C.M. 1947) in light of the Right to Know section of the new Montana Constitution (Article II, section 9)?
2. May the information in an application for a mining permit or license under section 50-1221, R.C.M. 1947, be made public through the environmental impact statement required by the Montana Environmental Policy Act, section 69-6504, R.C.M. 1947?

Courts, both state and federal, have long recognized the power of the government to enact specific legislation requiring that certain documents and records remain confidential. **Myrland v. Warner**, 240 F. 310, and **Boske v. Comington**, 177 U.S. 459. In construing such legislation, the courts have held that the wisdom and policy of a state statute forbidding disclosure of information, records or documents must be conclusively assumed, and where statutory language is clear, legislative pronouncement must be given full effect. **In re Rid**, 155, F. 933, and **Tax Commission v. Clendinning**, 193 Okla. 271, 143 P.2d 143.

Although there is no Montana case directly in point, these general principles of law apparently have been accepted and applied in Montana. **State ex rel. Powell v. State Bank**, 90 M. 530, 4 P.2d 717. A considerable number of statutes preserving the confidentiality of various documents presently exist in the laws of Montana. For instance, hospital reports (section 69-4218, Revised Codes of Montana, 1947), certain records pertaining to adoptions (section 61-213, R.C.M. 1947), personal income tax records (section 84-4931, R.C.M. 1947), accident reports (section 32-1213, R.C.M. 1947), and many other documents are shielded from public view.

This opinion will focus upon the effect of Article II, section 9 of the new Montana Constitution on existing confidentiality statutes, and in particular the confidentiality provision of the Hard Rock Mining Act. Article II, section 9, *supra*, provides:

Right to Know. 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.** (Emphasis supplied)

The expressed purpose of this provision was to constitutionally provide public access to government documents and operations. However, the Constitutional Convention Bill of Rights proposal on the right to know specifically proclaimed:

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 in 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. Montana Constitutional Convention, **Bill of Rights Proposal**, No. VIII, p. 23. (Emphasis supplied)

It is evident from this statement that section 9 was not intended to open all documents to public scrutiny. The drafters recognized the right of the legislature to promulgate provisions, consistent with section 9, respecting individual privacy. To the extent, then, that confidentiality statutes conform to Article II, section 9, they are constitutional, and in full force and effect.

Section 50-1221, R.C.M. 1947, provides:

Any and all information obtained by the board or by the director or his staff by virtue of applications for licenses or permits is confidential between the board and the applicant. Any information obtained by the board or by the director or his staff by virtue of applications for licenses or permits is, however, properly admissible in any hearing conducted by the director, the board, appeals board or in any judicial proceeding to which the director and the applicant are parties. Failure to comply with the secrecy provisions of this act shall be punishable by a fine of up to ten thousand dollars (\$10,000) or one (1) year in jail.

As discussed *supra*, the constitutional provision on the right to know expressly provides for exceptions, and is subject to the demands of individual privacy. The confidentiality section of the Hard Rock Mining Act can be construed to fit within this exception. Legislative intent that applications for mining permits and licenses merited confidential protection is evident from the strict penalty clause in that provision, "Failure to comply with the secrecy provisions of this act shall be punishable by a fine of up to ten thousand dollars ... or one (1) years in jail." Thus, there has been a legislative determination that in this particular instance the merits of public disclosure are outweighed by the need for privacy.

Section 50-1221, *supra*, was a duly and regularly adopted act of the legislature, and a general principle of law is that statutes are presumed to be constitutional. **State Highway Commission v. Chapman**, 152 M. 79, 446 P.2d 709 (1968). Furthermore, a statute will not be declared unconstitutional unless conflict with the constitution is beyond a reasonable doubt, and will be upheld if possible. **Harvey v. Blewitt**, 151 M. 247, 443 P.2d 902 (1968).

In view of the express exception provided for in Article II, section 9, relative to individual privacy, legislative determination of meritorious privacy, and construction of statutes in favor of constitutionality, section 50-1221, *supra*, does, in my opinion, conform to the right to know provision of the new constitution.

In construing Article II, section 9, consideration must be given to the meaning of the term "individual". The phrase "**individual** privacy" referred to therein must be interpreted in order to delineate those parties to whom the term applies.

The word "individual", while sometimes used to refer only to a natural person, is broad enough to include corporations unless the context in which it is used indicates otherwise. **Accounting Co. v. Dorman**, 11 F. Supp. 872. The language of section 9 gives no indication as to any particular or specific interpretation of the term. The ordinary dictionary meaning of individual is "a single member of a category, a particular **person** or thing." **Webster's Third New International Dictionary**. Case law provides that individual may be construed to be used in the sense of person, but also embraces artificial or corporate persons as well as natural. **State v. Bell Telephone Co.**, 36 Ohio St. 310, 38 Am.Rep. 583. Section 19-103, R.C.M. 1947, defines the word "person" as including a corporation. The Montana Supreme Court has held that the construction of a word in the constitution which has been defined by the legislature should have considerable weight in determining the meaning of the term. **Northern Pacific Ry. Co. v. Mjelde**, 48 M. 287, 137 P. 386.

Applying these general principles, the word "individual" in section 9 refers to corporate privacy as well as a natural person's privacy. To hold otherwise would open the door to many statutorily protected confidential areas. Bidding on state contracts (section 82-1131), executive sessions (section 82-3402), certain bank reports and records (section 7-147), and corporate license tax records (section 84-1507) are examples. Thus, corporations applying for permits under the Hard Rock Mining Act can avail themselves of the "individual" privacy exception provided for in the right to know section of the constitution.

The Montana Environmental Policy Act (MEPA), section 69-6504, R.C.M. 1947, requires that state agencies prepare environmental impact statements on actions of state government which significantly affect the quality of the human environment. However, MEPA provides that impact statements be made available to the public and such statements will of necessity contain material obtained from the application for an operating permit. Section 50-1221, *supra*, provides that all information submitted in applications for permits is confidential and, thus, may not be used for the preparation of impact statements.

THEREFORE, IT IS MY OPINION:

1. Section 50-1221, R.C.M. 1947, relating to confidentiality of hard rock mining applications, does not violate Article II, section 9 of the Montana Constitution, and the statute remains in full force and effect; and

2. Section 50-1221, R.C.M. 1947, providing for confidentiality of information contained in hard rock mining applications, precludes the department from making such information public through an environmental impact statement.

Very truly yours,

ROBERT L. WOODAHL
Attorney General