

VOLUME NO. 38

OPINION NO. 59

MAILING LISTS - Distribution by state agency;  
PRIVATE PARTIES - Use of state agency lists as mailing lists;  
RIGHT TO KNOW - Use of mailing lists;  
SECRETARY OF STATE - Prohibition on distribution of mailing lists;  
SECRETARY OF STATE - Duty to ascertain intended use of agency lists;  
1979 MONTANA LAWS - Chapter 606;  
MONTANA CODE ANNOTATED - Section 2-15-401(8);  
MONTANA CONSTITUTION - Article II, section 9.

- HELD: 1. Under the provisions of chapter 606, 1979 Montana Laws, 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.

28 November 1979

The Honorable Frank Murray  
Secretary of State  
State Capitol  
Helena, Montana 59601

Dear Mr. Murray:

You have requested an opinion regarding the application of 1979 Montana Laws, chapter 606, to certain duties and responsibilities of the office of Secretary of State. Chapter 606 establishes a general policy prohibiting state and local government agencies from distributing or selling "lists of persons" for use as "mailing lists."

Section 2-15-401(8), MCA, provides that it is one of the duties of the Secretary of State to:

[f]urnish, on demand, to any person paying the fees therefor, a certified copy of all or any part of any law, record, or other instrument filed, deposited, or recorded in his office.

Montana law has numerous provisions that require various documents and other information to be filed with the Secretary of State as a matter of public record. Some examples of that information include: campaign expense statements with names and addresses of contributors to political campaigns; lobbyist registrations with names and addresses of lobbyists and principals of lobbyists; nominating certificates with names and addresses of candidates for public office; electors' petitions with the names and addresses of electors; executive appointments with names and addresses of persons appointed to offices, departments and boards; articles of incorporation, annual corporation reports and other corporate documents with the names and addresses of incorporators, corporate directors and corporate officers; certificates of information with names and addresses of incorporators of corporations, corporate

directors and officers and names and addresses of partners; certificates of information under the uniform commercial code with names and addresses of debtors and secured parties in commercial transactions.

In addition it has been the practice of the Secretary of State, in his capacity as the state election administrator and custodian of public records, to prepare and furnish information abstracted from source documents of fundamental and general interest to the public. Some examples of that information are: rosters of legislators with the names and addresses; rosters of state and county elected officials with the names and addresses of the officials; rosters of election administrators with names, addresses and telephone numbers of the administrators; rosters of candidates for public office with the names and addresses of the candidates; rosters of lobbyists with the names and addresses of registered lobbyists.

It is my opinion that the provisions of chapter 606 do not necessarily conflict with the existing duties or practices of the Secretary of State.

Subsection (1) of chapter 606 provides:

(a) [N]o 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.

That proscription extends to both state and local agencies. Subsection (2). It is accompanied by a concomitant prohibition extending to third persons who may gain access to such lists. Subsection (1)(b) provides that:

(b) [n]o 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.

Use of a list of persons in violation of subsection (1)(b) is a misdemeanor. Subsection (7).

The general proscription against distribution and use of agency lists as mailing lists is qualified by the specific exemptions set forth in chapter 606. Initially, there is a specific provision for use of lists of persons as mailing lists where the persons have consented to such use.

Subsections (4) and (6) provide additional, self explanatory exceptions:

(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, or to lists of the names of employees governed by Title 39, chapter 31, MCA.

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(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.

Obviously lists of registered electors compiled by your office are not subject to the proscription. Persons providing prelicensing or continuing educational courses are also exempt by the provisions of subsection (5).

Subsection (3) permits third persons to compile and use mailing lists from original documents or applications which are otherwise open to public inspection. It provides:

(3) 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.

In determining the scope and limits of the general prohibition established in chapter 606, careful attention must be given to the words and language used in the chapter, particularly to the phrases "lists of persons" and "mailing lists." Both phrases have specific meanings which are critical to interpreting and applying the chapter.

A "mailing list" is commonly understood to mean a list of persons or businesses, often accompanied by their addresses and/or telephone numbers, used for unsolicited mass mailings, house calls or distributions, and/or telephone calls, see generally Annotation, 56 A.L.R.3d 457 (1974). Terms of a statute, unless the context indicates otherwise, must be given their "natural and popular meaning in which they are usually understood." Jones v. Judge, \_\_\_ Mont. \_\_\_, 577 P.2d 846 (1978). There is no indication in the context of chapter 606 that the Legislature intended to use the term "mailing list" in any other sense than its ordinarily understood meaning. Therefore, 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. Agencies are not precluded from distributing or selling such lists for other uses.

"Lists of persons" similarly delimits the scope of chapter 606. Although reference to "persons" in some instances may include corporations, associations, organizations or other artificial entities, the reference to "persons" in chapter 606 is to natural persons. As noted in the bill, the interest promoted by chapter 606 is the right of privacy. The right of privacy is by its nature a personal one of individual human beings. See Mont. Const., art. II, § 10. It is my opinion that chapter 606 does not forbid the dissemination of lists of names of corporations, associations, governmental bodies and businesses for use as mailing lists.

The implementation of chapter 606 must be consistent with article II, section 9 of the Montana Constitution. Section 9 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.

The right of privacy, in turn, has a specific constitutional basis in article II, section 10, which provides:

Right of Privacy. 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.

Section 9 has not been interpreted by the Montana Supreme Court as of this date, but has been the subject of three recent Attorney General opinions, specifically, 37 Op. Att'y Gen. Nos. 107 and 170 and 38 Op. Att'y Gen. No. 33. Number 107 is the seminal opinion. Initially, section 9 does not require state agencies to afford the public the most convenient mode of access or examination. The constitutionality of prohibiting copying of public documents may depend on the nature and reasons for doing so. See 38 Op. Att'y

Gen. No. 8. The Attorney General's opinions recognize what is apparent in the words of section 9--that the public right to know must be balanced against an individual's interest in personal privacy. Specific considerations involved in balancing the two interests are addressed in Opinion No. 107.

A proper application of this balancing test involves the following steps: (1) determining whether a matter of individual privacy is involved, and (2) determining the demands of that privacy and the merits of publicly disclosing the information at issue, and (3) deciding whether the demand of individual privacy clearly outweighs the demand of public disclosure.

As to the first prong of the balancing test, the Legislature by enacting chapter 606 has declared that a matter of individual privacy is involved in the dissemination of agency lists for use as mailing lists. That determination is fully consistent with "controlling access to information about oneself," State v. Brackman, \_\_\_ Mont. \_\_\_, 582 P.2d 1216, 1221 (1978). But as stated in Opinion No. 107, "The degree of infringement will vary according to the type of information sought, e.g., the name of an individual as compared to his medical history." It will also vary with the nature of the resulting invasion, see State ex rel. Zander v. District Court, \_\_\_ Mont. \_\_\_, 591 P.2d 656 (1979). If the list is unique, in that it establishes the personal habits or characteristics of the individuals whose names appear thereon, then the privacy interest increases. But generally, the additional, unique information yielded about an individual by the mere appearance of his or her name and/or address in an agency list will be minimal. The information disclosed typically will be information which has already been publicly disclosed, albeit in a less accessible or convenient form. Moreover, individuals who receive unsolicited communications because their name appears on a list are free to ignore them.

Arrayed against the privacy interest is the interest of the public in disclosure and reproduction of such lists. As with the privacy interest, the public interest will vary with the nature of the list. It will also vary with the purpose to which the list is put. As to lists that are used for commercial profit making purposes, the public interest is minimally implicated. The right of privacy in such

instances may easily outweigh the public right to know. However, if the list is to be used in conjunction with educating the public or soliciting public participation in governmental or public matters, the public interest may well outweigh the privacy interest. For example, the public interest may outweigh privacy where an agency list is sought for purposes of informing the persons thereon of proposed legislation or agency regulations or actions.

Section 2-15-401(8), MCA, imposes an affirmative duty on the Secretary of State to furnish copies of virtually all documents on file in his office. The "right to know" provision of the Montana Constitution imposes additional responsibilities on governmental agencies. Those provisions could conceivably conflict with chapter 606.

In light of the foregoing discussion, it is my opinion that chapter 606 should be given a liberal interpretation. Agencies are not required, under the provisions of the bill, to affirmatively ascertain whether lists will be used as "mailing lists." Only when an agency has been made aware that the information sought is to be used as a "mailing list" would they be prohibited from providing it.

In reaching this conclusion I am aware of the possibility that a list of persons which is disseminated for legitimate purposes could be used by the requesting party as a mailing list. Such possibility, however, does not affect my opinion. Subsection 1(b) specifically prohibits third persons from using agency lists of persons as mailing lists. The subsection is accompanied by attendant penalties. Subsection (7).

For agency purposes it is sufficient to attach a letter or other appropriate written disclaimer to the disseminated lists advising the recipient of the prohibitions and sanctions contained in chapter 606 making it unlawful for third persons to use agency lists as mailing lists.

THEREFORE, IT IS MY OPINION:

1. Under the provisions of chapter 606, 1979 Montana Laws, 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.

Very truly yours,

MIKE GREELY  
Attorney General