

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 64

EMPLOYEES, PUBLIC - Availability for public inspection of original applications to Public Employees' Retirement System for purpose of compiling mailing list;
PRIVACY - Availability for public inspection of original applications to Public Employees' Retirement System for purpose of compiling mailing list;
RETIREMENT - Availability for public inspection of original applications to Public Employees' Retirement System for purpose of compiling mailing list;
STATE GOVERNMENT - Availability for public inspection of original applications to Public Employees' Retirement System for purpose of compiling mailing list;
MONTANA CODE ANNOTATED - Sections 2-6-109, 2-6-109(3), 33-19-201;
MONTANA CONSTITUTION - Article II, sections 9, 10;
OPINIONS OF THE ATTORNEY GENERAL - 38 Op. Att'y Gen. No. 59 (1979), 38 Op. Att'y Gen. No. 1 (1978); 37 Op. Att'y Gen. No. 107 (1978).

HELD: Original documents submitted by applicants to the Public Employees' Retirement Division of the Department of Administration contain private information about third parties and thus are not open to public inspection for the purpose of compiling a mailing list.

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10 February 1988

Beda J. Lovitt
Chief Counsel
Department of Administration
Sam W. Mitchell Building
Helena MT 59620

Dear Ms. Lovitt:

On behalf of the Public Employees' Retirement Board you have requested an opinion on the following issue:

Are the original documents or applications prepared by members of the Public Employees' Retirement System and submitted to the Public Employees' Retirement Division of the Department of Administration open to public inspection for the purpose of compiling a mailing list?

Distribution or sale of mailing lists by agencies of Montana state government is controlled by section 2-6-109, MCA. This statute makes it unlawful for any agency to sell or distribute any mailing list without first securing the permission of those on the list. Among the several exceptions to this general prohibition is the following:

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.

§ 2-6-109(3), MCA. Section 30-9-403, MCA, is part of the Uniform Commercial Code and does not concern us here.

In the context of section 2-6-109(3), MCA, your question becomes whether original applications submitted to the Public Employees' Retirement Division are "applications which are otherwise open to public inspection." In answering this question, I look first to the following rights enumerated in Montana's Constitution:

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

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demand of individual privacy clearly exceeds the merits of public disclosure.

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.

Mont. Const. art. II, §§ 9, 10. The legislative history of section 2-6-109, MCA, shows clearly that in passing that law, the Legislature was concerned with balancing these two fundamental rights. See Minutes of the Montana Senate, State Administration Committee, Jan. 31, 1979, pp. 4-6; Feb. 9, 1979, pp. 1-3. Minutes of the Montana House of Representatives, State Administration Committee, Mar. 1, 1979, pp. 2, 3.

Opinions of the Montana Supreme Court and the Montana Attorney General have also spoken of the need to reconcile these two rights. Based on the Constitution and the statutes, the following balancing test for dealing with these questions has been developed:

[P]roper application of this balancing test involves the following steps: (1) determining whether a matter of individual privacy is involved, (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.

37 Op. Att'y Gen. No. 107 at 462 (1978). See also Missoulian v. Board of Regents, 41 St. Rptr. 110, 116, 120, 675 P.2d 962, 967, 970 (1984).

The Montana Supreme Court has spoken several times of a party's subjective expectation of privacy and whether society considers that expectation reasonable. Montana Human Rights Division v. City of Billings, 39 St. Rptr. 1504, 1509, 649 P.2d 1283, 1287 (1982); Missoulian v. Board of Regents, 675 P.2d at 967. My reading of the Supreme Court's test has been that "[i]nformation which reveals facts concerning personal aspects of an individual's life necessarily involve[s] individual privacy." 38 Op. Att'y Gen. No. 1 at 4 (1978). I conclude that applicants to the Public Employees' Retirement System (PERS) have an expectation that the information provided about beneficiaries in their original applications will remain private. See also Missoulian v. Board of Regents, 675 P.2d at 969. Does

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society consider this expectation reasonable? I believe it does. Because PERS is in part an insurance plan (§§ 19-3-1002, 19-3-1201, MCA), Montana's Insurance Information and Privacy Protection Act (§§ 33-19-101 to 409, MCA) is an indication of public policy in this area. See, for example, section 33-19-201, MCA, which restricts the use of information gathered for insurance transactions. Also, the policy of the Social Security Administration on the disclosure of information about individuals, 20 C.F.R. § 401.300, is directed toward protecting against "clearly unwarranted invasion of personal privacy."

Passing to the second step of the test set forth above, I must determine the comparative demands of individual privacy and the merits of public disclosure. Because information about beneficiaries involves the "disclosural privacy" of third persons, I believe a significant demand of individual privacy is involved. See 37 Op. Att'y Gen. No. 107 at 463 (1978). On the other hand, because the compilation of a mailing list is involved, I do not believe that the merits of public disclosure are substantial. See 38 Op. Att'y Gen. No. 59 at 212 (1979); see also legislative history of § 2-6-109, MCA, supra. I note that this analysis appears consistent with the policy of the Social Security Administration: "[S]ince there is usually little or no public interest in disclosing information for disputes between two private parties or for other private or commercial purposes; we generally do not share information for these purposes." 20 C.F.R. § 401.300.

Applying the final part of the three-part test, I conclude that in this case the demand of individual privacy clearly outweighs the demand of public disclosure.

THEREFORE, IT IS MY OPINION:

Original documents submitted by applicants to the Public Employees' Retirement Division of the Department of Administration contain private information about third parties and thus are not open to public inspection for the purpose of compiling a mailing list.

Very truly yours,

MIKE GREELY
Attorney General