

OFFICE OF THE CITY ATTORNEY

435 Ryman • Missoula MT 59802
(406) 552-6020 • Fax: (406) 327-2105
attorney@ci.missoula.mt.us

Legal Opinion 2018-007

TO: Mayor John Engen; City Council; Dale Bickell; Steve Johnson; Leigh Griffing; Laurie Pfau; Marty Rehbein; Kirsten Hands; Kelly Elam; Mike Brady; Scott Hoffman; Jason Diehl; Jeff Brandt; Gordy Hughes; Ellen Buchanan; Donna Gaukler; Mike Haynes; Don Verrue; Carl Horton; Rod Austin; Tiffany Brander; Laurie Clark; Ron Regan; Betsy Willet; Kathleen Jenks; Tina Reinicke; Ginny Merriam; Jessica Miller; Heidi Bakula; Department Attorney

FROM: Jim Nugent, City Attorney

DATE February 1, 2018

RE: Montana public agency issued compilations of lists of persons might be identified as a distribution list that may not be utilized to facilitate unsolicited contact of those persons identified on the public agency compiled and issued list.

FACTS:

Recently a City of Missoula department received a request from a person requesting that the City provide the person with a city-compiled list of all City of Missoula employees and their job titles. While a Montana public government agency employee's name and job title are public record, the City department staff appropriately had some questions pertaining to addressing the request. There are specific statutory limitations or restrictions in Montana state law with respect to individuals requesting and obtaining a public agency compiled list of persons with respect to subsequent use of such a list by anyone to facilitate unsolicited contacts of the persons whose names are on the public government agency compiled list. Whenever the City issues a city-compiled list, the City should also warn about Montana state law restrictions or limitations.

This legal opinion is intended as a cautionary measure for all City of Missoula officials and employees and is intended to inform and/or remind city officials and city employees of Montana state law limitations or restrictions pertaining to a person obtaining a public agency compiled list of persons and then attempting to utilize the government-compiled list to facilitate unsolicited contact with individuals on the distribution list compiled by and obtained by the person from the public agency.

ISSUE(S):

Are there Montana state law statutory restrictions or limitations for a person obtaining a public agency compiled list of persons pertaining to use of the public agency compiled lists of persons?

CONCLUSION(S):

Yes, pursuant to Montana state law, section 2-6-1017, MCA, there is a statutory prohibition on the dissemination or use of public agency compiled and issued lists that might be utilized to facilitate unsolicited contact with individuals identified on the distribution list.

LEGAL DISCUSSION:

Initially, it should be noted that Montana Constitution provision, Article II, section 10 entitled, "RIGHT OF PRIVACY", provides that:

"Section 10. 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."

This Montana Constitutional right of privacy has relevance to government compiled and issued lists of persons with respect to statutory restrictions or limitations that exist with respect to government compiled and issued lists according to Montana Attorney General pursuant to 43 Montana Attorney General Opinion 73(1990). The Montana Attorney General indicated that the Montana state law restricting or limiting the distribution of government lists pertained to both individual persons and corporations. In 1990, the Montana Attorney General held that the then statutory prohibition "applies with equal force to lists of both individual persons and corporations." It is not yet determined if the same legal conclusion applies to the 2015 revised state law.

Earlier, the Montana Attorney General pursuant to 38 Opinion Attorney General No. 109 (1980) indicated that the names and job titles of public employees are public record. However, even though the information is public record, if such information is obtained pursuant to a public government agency compilation of the information into a list prior to being issued by the public agency to a person, there are significant statutory limitations or restrictions pertaining to any use of a government-compiled list of persons.

Montana state law section 2-6-1017, MCA, prohibits a public agency from distributing or selling a government compiled list as a "distribution list" without first obtaining the permission of the persons identified on the government-compiled list of persons. Further, there also is a statutory prohibition on any person obtaining a compilation list of persons from a public agency government and then utilizing the government-compiled list as a "distribution list" without first obtaining the permission of the persons identified in the government-compiled list. See subsection 2-6-1017(1), MCA.

The above mentioned statutory limitations or restrictions, with respect to a person's utilization of a list of persons compiled and issued by a government, relies on the statutory definition of the phrase "distribution list". Subsection 2-6-1017(2), MCA, defines a "distribution list" as meaning "any list of personal contact information collected by a public agency and used to facilitate unsolicited contact with individuals on the distribution list".

Montana's public records or public information laws define the term "public agency" as including Montana local governments. See subsection 2-6-1002(10), MCA.

It should be generally noted that, pursuant to section 2-6-1006, MCA, pertaining to public information requests, a public agency is authorized to charge a fee for fulfilling a public information request as long as the fee does not exceed actual costs directly incident to fulfilling the request. See subsection 2-6-1006(3), MCA.

Also, it should be generally noted that Montana's state law pertaining to public information requests specifically provides that "A PUBLIC AGENCY IS NOT REQUIRED TO ALTER OR CUSTOMIZE PUBLIC INFORMATION TO PROVIDE IT IN A FORM SPECIFIED TO MEET THE NEEDS OF THE REQUESTING PERSON." See subsection 2-6-1006(4).
(*Emphasis added*)

Section 2-6-1017, MCA, is entitled, "PROHIBITION ON DISSEMINATION OR USE OF DISTRIBUTION LISTS-EXCEPTIONS-PENALTIES". Section 2-6-1017, MCA, is the Montana State Legislature's replacement update for former section 2-6-109, MCA, entitled "PROHIBITION ON DISTRIBUTION OR SALE OF MAILING LISTS", originally enacted in 1979. The original 1979 law was enacted after the Montana electorate adopted the 1972 Montana Constitution that contained the afore-mentioned "RIGHT OF PRIVACY" set forth above.

Section 2-6-1017 MCA states:

2-6-1017. Prohibition on dissemination or use of distribution lists -- exceptions -- penalties. (1) Except as provided in subsections (3) through (10), to protect the privacy of those who deal with state and local government:

(a) a public agency may not distribute or sell a distribution list without first securing the permission of those on the list; and

(b) a list of persons prepared by a public agency may not be used as a distribution list without first securing the permission of those on the list except by that agency.

(2) As used in this section, "distribution list" means any list of personal contact information collected by a public agency and used to facilitate unsolicited contact with individuals on the distribution list.

(3) This section does not prevent an individual from compiling a distribution list by examination of records that are otherwise open to public inspection.

(4) This section does not apply to the lists of:

(a) registered electors and the new voter lists provided for in **13-2-115**;

(b) the names of employees governed by Title 39, chapter 31;

(c) persons holding driver's licenses or Montana identification cards provided for under **61-5-127**;

(d) persons holding professional or occupational licenses governed by Title 23, chapter 3; Title 37, chapters 1 through 4, 6 through 20, 22 through

29, 31, 34 through 36, 40, 47, 48, 50, 51, 53, 54, 60, 65 through 69, 72, and 73; and Title 50, chapters 39, 72, 74, and 76; or

(e) persons certified as claims examiners under **39-71-320**.

(5) This section does not prevent an agency from providing a list to persons providing prelicensing or continuing education courses subject to state law or subject to Title 33, chapter 17.

(6) This section does not apply to the right of access by Montana law enforcement agencies.

(7) This section does not apply to the secretary of state's electronic filing system developed pursuant to **2-15-404** and containing corporate and uniform commercial code information.

(8) This section does not apply to the use by the public employees' retirement board of a list of board-administered retirement system participants to send materials on behalf of a retiree organization formed for board-administered retirement system participants and with tax-exempt status under section 501(c)(4) of the Internal Revenue Code, as amended, for a fee determined by rules of the board, provided that the list is not released to the organization.

(9) This section does not apply to lists of individuals who sign attendance sheets or sign-in sheets at a hearing or meeting of a public agency.

(10) This section does not apply to a public school providing lists of graduating students to representatives of the armed forces of the United States or to the national guard for the purposes of recruitment.

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

Note that subsection 2-6-1017(11), MCA, provides that a person violating the provisions of subsection 2-6-1017(1)(b), MCA, is guilty of a misdemeanor.

Montana state law, section 2-6-1017, MCA, must be construed/interpreted in a manner consistent with both Montana's Right to Know, Article II, section 9 and Article II, Section 10, Right of Privacy. Some balancing of these two Montana Constitutional rights must occur.

Pursuant to section 2-6-1017, MCA, the Montana State Legislature is protecting the privacy of the individual persons whose names appear on government compiled and issued lists of persons. The Montana State Legislature is providing that it is a misdemeanor criminal offense for a person to utilize a government compiled and issued list of persons to use the list to facilitate unsolicited contact with individuals on the distribution list except for statutorily authorized exceptions.

CONCLUSION(S):

Yes, pursuant to Montana state law, section 2-6-1017, MCA, there is a statutory prohibition on the dissemination or use of public agency compiled and issued lists that might be utilized to facilitate unsolicited contact with individuals identified on the distribution list.

OFFICE OF THE CITY ATTORNEY

/s/

Jim Nugent, City Attorney

JN:ajg