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AND CONSERVATION



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MEMORANDUM

TO: Jan Langel, Millie Heffner, Brian Bramblett

FROM: Barbara Chillcott, Attorney, DNRC *BC*

DATE: December 13, 2017

RE: Prohibition against sharing a distribution list under Mont. Code Ann. § 2-6-1017

Background

In past years, the Department compiled and distributed lists that included the names and contact information for water right holders to the Department of Fish, Wildlife, and Parks (DFWP), and potentially other entities, agencies, and individuals. DFWP used these lists to facilitate contacting water right holders to alert them of a call on their water rights by DFWP. Lists have also been used by entities and groups, such as the Blackfoot Drought Committee, to contact water right holders about drought mitigation and other water management practices.

Under the prior law, state agencies were prohibited from sharing a "list of persons" if that list was to be used as a "mailing list," without first securing the permission of the individuals on the list. The prior statute allowed the agency that created the list – or another public agency – to use it as a mailing list.

In 2015, the legislature passed HB 123, which amended the statutory language pertaining to the dissemination of lists of names with contact information by state agencies. With the passage of HB 123, the term "mailing list" (which was undefined in the statute) was deleted and replaced with the term "distribution list." A "distribution list" is defined in statute as "any list of personal contact information collected by a public agency and used to facilitate unsolicited contact with individuals on the distribution list." Mont. Code Ann. § 2-6-1017(2). The amendment also deleted the language that allowed other public agencies to use the list without securing permission from the individuals identified therein. This leaves the statute to read that a public agency can compile and create a distribution list for its own use, but not for the use of anyone else, including other public agencies.

The Water Resources Division has interpreted this revised language to mean that it can no longer compile and share a list that includes the names and contact information for water right holders with anyone, including DFWP. The information is readily available on the Department's water right query system, in which one can search and sort by source, legal description, priority date, water right type, etc. The query system

generates a list organized by water right number. To obtain addresses of record, one must click on the "abstract" link for each water right record and cut and paste the address into another document. The Department can generate the equivalent list via its internal system relatively effortlessly.

ISSUE: Is the Department allowed to generate a list that includes the names and contact information of water right holders and share the list outside of the agency?

Analysis

Mont. Code Ann. § 2-6-1017 (replaced § 2-6-109).

The previous statute regarding a public agency's responsibility regarding mailing lists provided:

2-6-109. Prohibition on distribution or sale of mailing lists --

exceptions -- penalty. (1) Except as provided in subsections (3) through (9), in order to protect the privacy of those who deal with state and local government:

(a) an agency may not distribute or sell for use as a mailing list any list of persons without first securing the permission of those on the list; and

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

(2) As used in this section, "agency" means any board, bureau, commission, department, division, authority, or officer of the state or a local government.

(3) This section does not prevent an individual from compiling a mailing list by examination of records that are otherwise open to public inspection . . . ¹

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

HB 123, passed by the 2015 Legislature, amended this statutory provision as follows (now at Mont. Code Ann. § 2-6-1017):

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.

¹ Subparts (4) through (9) included an itemized list of exemptions from the prohibition against sharing mailing lists, none of which relate to water rights records.

(3) This section does not prevent an individual from compiling a distribution list by examination of records that are otherwise open to public inspection . . .²

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

The amendments were considered and the bill draft passed out of the Education and Local Government Interim Committee on September 15, 2014. At that last meeting of the interim, the committee passed a motion to amend out the language that a list could be used by another public agency (other than the agency that compiled the information) without securing the permission of the people on the list. Even though there was not a great deal of discussion regarding the motion to strike “or another public agency,” it was intentional on the part of the committee. The main concern seemed to be the use of these distribution lists generated by a public agency and provided to private or outside interests that use the lists for commercial activity.³ It does not appear that this particular provision was subject to debate as the bill made its way through the legislature.

Attorney General Opinions

There have been three Attorney General (AG) Opinions related to the use of mailing lists under the prior version of the statute. In the first Opinion, the AG held that “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.” 38 Mont. Op. Atty. Gen. 207 p.3 (Nov. 28, 1979) (emphasis added). The AG focused on the common meanings of “mailing list” and “list of persons” in determining what prohibitions apply to an agency’s dissemination of the information. The AG found that “‘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 . . .” Therefore, the AG found that agencies are prohibited from distributing a list of persons only if the intended use is for unsolicited mass mailings, house calls or distributions, and /or telephone calls.

The two subsequent AG Opinions focused on specific questions related to the application of the statute. The 1988 Opinion concerned the privacy interests associated with original applications filed with the Public Employees’ Retirement System, and the AG held that the documents were not open to public inspection for the purpose of compiling a mailing list. 42 Mont. Op. Atty. Gen. 253 (1988). The 1990 Opinion partially overruled the 1979 Opinion by holding the prohibition against distribution mailing lists applies to both mailings lists of individual persons and corporations. 43 Mont. Op. Atty. Gen. 280 (1990). While neither of these succeeding opinions is directly on point with the question presented here, there is a common theme through each of the AG Opinions that may inform our analysis. That common theme is that – despite the plain language of the statute – each AG took his analysis a step further and scrutinized

² Subparts (4) through (10) include an itemized list of exemptions from the prohibition against sharing mailing lists, none of which relate to water rights records.

³ See 2013-2014 Education and Local Government Committee, Minutes Log (Sept. 15, 2014) and committee hearing video starting at 8:40 (available at http://montanalegislature.granicus.com/MediaPlayer.php?view_id=8&clip_id=13469)

the constitutional provisions at stake in decisions by public agencies to disseminate or withhold from dissemination lists of persons – namely an individual’s right to privacy and the public’s right to know. Below are relevant excerpts from the 1979 Opinion⁴ and the 1990 Opinion.⁵

A plain reading of the statute indicates that a list of water right holders with mailing addresses is a “distribution list” and the Department is prohibited from sharing that list because it will be used to “facilitate unsolicited contact” with the water right holders on the list. Further, none of the enumerated statutory exemptions to the prohibition apply to water right lists that include contact information. Considering this legislative history, any limitations on DNRC’s authority to provide a distribution list to a private individual or entity applies equally to state and federal agencies. Finally, the penalty for violating the law is a misdemeanor. The Department may, therefore, refuse to provide lists of water right holders with mailing addresses to any public agency or private individual pursuant to Mont. Code Ann. § 2-6-1017.

However, because the information that would be included on such the list at issue is not otherwise protected from disclosure (anyone can create a mailing list using the Department’s water right query system to search for water rights and associated owners), it seems clear that constitutional privacy interests are not implicated. Since the

⁴ “As to the first prong of the balancing test, the legislature by enacting ch. 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*, 178 Mont. 105, 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*, 180 Mont. 548, 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.”

⁵ “There are, however, two important caveats which attend my holding [that the prohibition against public distribution of state agency mailing lists applies with to lists of both individuals and corporations]. First, the Montana Supreme Court has made it clear that it will construe statutes protecting privacy interests in a manner that does not violate the mandate of the right to know provision of the Montana Constitution. *Belth*, 227 Mont. at 346, 740 P.2d at 641; *Allstate Insurance Co. v. City of Billings*, 46 St.Rptr. 1716, 1719-20, 780 P.2d 186, 188-89 (1989). Compliance with the right to know provision requires that a decision to withhold mailing lists pursuant to the statute must be based on a determination that “the demand of individual privacy clearly exceeds the merits of public disclosure.” *Belth*, 227 Mont. at 346, 740 P.2d at 641. In short, the custodian of the information sought must determine whether there is a constitutionally protected privacy interest at stake, and if so, whether that right clearly exceeds the public's right to know. *Belth*, 227 Mont. at 346-48, 740 P.2d at 641-43; see also *Missoulain v. Board of Regents*, 207 Mont. at 513, 675 P.2d at 962 (1984); 42 Op.Att’y Gen. No. 119 at 454, 461-62 (1988). If the Secretary of State determines that there is no privacy interest at stake, or that a protected privacy interest does not clearly exceed the public's right to know, the prohibition of the statute does not apply, and the mailing lists at issue may be publicly disseminated. Second, it must be noted that the statute specifically allows an individual to compile “a mailing list by examination of original documents or applications which are otherwise open to public inspection.” § 2-6-109(3), MCA. Because you have indicated that the original documents involved here are open to public inspection, a requestor may be permitted in any case to compile his or her own mailing list by examining those original documents.”

Department is charged with maintaining up-to-date water right records, one could argue that the public's constitutional right to know who holds rights to use water belonging to the people of Montana outweighs a water right holder's interest in maintaining privacy of those records. Using that rationale, the Department could decide to provide the list to DFWP and others who request such a list. However, because the information is still readily available to the public, and members of the public may make their own lists using the Department's query system, it is unlikely that the Department's compliance with Mont. Code Ann. § 2-6-1017 would violate the public's right to know. The public may access the information and create a list, but in strict compliance with the statute, the Department would not generate the list for the public.⁶

Recommendation

The Water Resource Division's current interpretation of the statute as prohibiting it from sharing a distribution list with water right holder contact information outside of the agency is consistent with the plain language and legislative history of Mont. Code Ann. § 2-6-1017.⁷

⁶ It may be helpful to identify how other state agencies handle such requests. One example is the Department of Environmental Quality, which includes the following disclaimer on its public records request webpage:

"Please Note: DEQ will not provide distribution lists to anyone. Montana Code Annotated at 2-6-1017 forbids public agencies from distributing mailing lists and further forbids anyone from using an agency-prepared list as a distribution list. Anyone violating this law is guilty of a misdemeanor."

⁷ Pursuant to Mont. Code Ann. § 85-2-243(1)(a), the Department is required to "provide such information and assistance as may be required by the water judge to adjudicate claims of existing rights." This includes compiling and providing mailing lists of water right holders to the water judge upon request. These lists do not meet the definition of "distribution lists" in Mont. Code Ann. § 2-6-1017(2), and dissemination of these mailing lists to the Water Court by the Department is not prohibited by the statute.