VOLUME NO. 45 OPINION NO. 17

COUNTY GOVERNMENT - What constitutes a public record;
EMPLOYEES, PUBLIC - Application of public record law to lists of county employees' destroyed personal property submitted to county's insurance carrier;
PUBLIC RECORDS - Application of public record law to lists of county employees' destroyed personal property submitted to county's insurance carrier;
PUBLIC RECORDS - What constitutes;
RIGHT TO KNOW - What constitutes a public record;
MONTANA CODE ANNOTATED - Sections 2-6-101, 2-6-102, 2-6-104;
MONTANA CONSTITUTION - Article II, section 9;
OPINIONS OF THE ATTORNEY GENERAL - 39 Op. Att'y Gen. No. 17 (1981)..

HELD: Lists of destroyed personal property generated by individuals, for no governmental function or purpose, do not constitute public writings or records subject to disclosure laws.

December 3, 1993

Mr. Robert M. McCarthy
Silver Bow County Attorney
155 West Granite Street
Butte, MT 59701

Dear Mr. McCarthy:

You have requested my opinion on the following issue:

> Are claims for loss of personal property, which were generated only for the purpose of communicating personal information to the county's insurance company and not for any governmental function, public records subject to disclosure laws?

Your question stems from a request by the media for disclosure of all claims submitted by the county and by the employees of the county to the county's insurance carrier for property lost during a fire in the county courthouse on February 17, 1992. There has been full disclosure of the claims made by the county and the county's file includes an accounting of payment made pursuant to

the policy, including the amounts paid for individual claims. However, some claims for personal property destroyed in the fire were submitted directly to the insurance carrier by employees. Those lists of personal property were not copied or retained by the county and are therefore not part of the county's records. Your question is whether these claims are public records and therefore subject to disclosure laws.

Montana law generally requires the disclosure of all public documents unless there is a specific statutory exclusion from the requirement or the demand of individual privacy outweighs the merit of public disclosure. According to article II, section 9 of the Montana Constitution:

> 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 question you raise requires the initial determination of whether the lists of personal property at issue constitute public documents, writings, or records. Only after resolution of this threshold issue must there be consideration of whether disclosure is required. Since I conclude that the documents are not public records, and that no disclosure is therefore required, I express no opinion here on any issue dealing with exceptions to the rule of disclosure of public records.

There is no definition of "documents . . . of . . . public bodies" in the Constitution and the issue of what constitutes such documents has not been addressed by the Montana Supreme Court. The Constitutional Convention Bill of Rights Committee, which reviewed article II, section 9 of the Constitution, deleted the word "public" from the original section allowing examination of public documents "to avoid tying the viability of this provision to the 1895 legislative efforts [currently Mont. Code Ann. § 2-6-101] to define public and private writings." The Committee went on to comment that "[the statutory] list of public writings is admirably broad; however, using this type of statutory construction is dangerous when one is attempting to establish a public right to know." IV 1972 Mont. Const. Conv. 631-32 (1981).

The Montana Supreme Court has held that the constitution is the supreme law of the state and overrides any conflicting statutes or rules. Associated Press v. Board of Pub. Educ., 246 Mont. 386, 804 P.2d 376 (1991). See also 39 Op. Att'y Gen. No. 17 (1981).

However, the statutes regarding public writings are not in conflict with, but are consistent with, the constitutional provision. Thus, I believe the statutory definitions are relevant and must be considered in determining whether the documents in issue here are "documents of public bodies" under article II, section 9.

Mont. Code Ann. § 2-6-101 defines public writings as follows:

(1) Writings are of two kinds:

(a) public; and

(b) private.

(2) Public writings are:

(a) the written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial, and executive, whether of this state, of the United States, of a sister state, or of a foreign country;

(b) public records, kept in this state, of private writings, except as provided in 22-1-1103 and 22-3-807.

(3) Public writings are divided into four classes:

(a) laws;

(b) judicial records;

(c) other official documents;

(d) public records, kept in this state, of private writings.

(4) All other writings are private.

Mont. Code Ann. § 2-6-102(1) states: "Every citizen has a right to inspect and take a copy of any public writings of this state, except as provided in 22-1-1103 [relating to adoption records] or 22-3-807 [relating to attachment records] and as otherwise expressly provided by statute." And Mont. Code Ann. § 2-6-104 provides: "Except as provided in 40-8-126 and 27-18-111, the public records and other matters in the office of any officer are

at all times during office hours open to the inspection of any person."

The lists of personal property sought here by the media do not fit into any of the categories of public writings or documents described by statute. They were generated strictly for the purpose of relating to the insurance carrier the items of personal property that were destroyed by fire. The lists do not record an act or acts of the county. They do not contain information regarding governmental matters or the duties of the employees. Similarly, the lists contain no information which would make them "documents of public bodies," as that phrase is used in the Montana Constitution. "Documents of public bodies," though not defined in the Constitution, must reasonably be taken to mean documents generated or held by a public body or somehow related to the function and duties of the public body.

The purpose of the public records provisions in the Montana Constitution and statutes is to secure the public's right to know the workings of its government. In this case, the workings of the county government are not related to nor are they reflected in the documents requested. The documents were neither created by nor held by the county. Given these facts, a conclusion that lists are not public writings or records is consistent with the meaning and spirit of both the constitutional provision and the statutes.

It is asserted by the media that all claims made by individuals to the insurance company must be reported to the public because the insurance premiums are paid with public funds. Although the expenditure of public funds is relevant to issues concerning the government's insurance policy, it is not determinative as to whether the writings sought are public records or writings. As stated above, the county's files regarding the policy are public records subject to disclosure laws. The files include information as to how much money was paid for personal property claims pursuant to the policy. By contrast, the listings of personal property, not kept in the county's file and not related to agency functions, are not public writings or records.

My conclusion is also not changed by the fact that the county, as the insured, could request access to the lists retained by the insurance company. Accessibility to a document by a governmental entity does not change the content of the document and thereby make it a public document or record.

This conclusion is consistent with court decisions regarding the issue of what constitutes an agency or public record. In United States Dep't of Justice v. Tax Analysts, 492 U.S. 136 (1989), the

United States Supreme Court considered the issue of whether the Freedom of Information Act (5 U.S.C. § 552) required the United States Department of Justice to make available copies of tax opinions. The Department receives copies of all tax opinions by the federal district courts, courts of appeals, and the Claims Court; the opinions are filed and kept by the Department as a function of its representation in the courts. In considering whether the decisions were "agency records," the Supreme Court relied on its earlier decisions in Kissinger v. Reporters Comm. for Freedom of Press, 445 U.S. 136 (1980), and Forsham v. Harris, 445 U.S. 169 (1980), and stated:

> Two requirements emerge from *Kissinger* and *Forsham*, each of which must be satisfied for requested materials to qualify as "agency records." First, an agency must "either create or obtain" the requested materials "as a prerequisite to its becoming an 'agency record' within the meaning of the FOIA." . . .
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> Second, the agency must be in control of the requested materials at the time the FOIA request is made. By control we mean that the materials have come into the agency's possession in the legitimate conduct of its official duties. This requirement accords with *Kissinger*'s teaching that the term "agency records" is not so broad as to include personal materials in an employee's possession, even though the materials may be physically located at the agency. See 445 U.S., at 157.

492 U.S. at 144-45.

In Salt River Pima-Maricopa Indian Community v. Rogers, 815 P.2d 900 (Ariz. 1991), the Supreme Court of Arizona considered, absent a statutory definition, what constitutes a public record. The Court recognized the following:

> The term "public record" comprehends three alternative definitions in American case law, all of which this court set forth in *Mathews v. Pyle*, 75 Ariz. 76, 78, 251 P.2d 893, 895 (1952). The term first refers to a record "made by a public officer in pursuance of a duty, the immediate purpose of which is to disseminate information to the public, or to serve as a memorial of official transactions for public reference." *Id.* . . .
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> . . . .

> A public record is also one that is "required to be kept, or necessary to be kept in the discharge of a duty imposed by law or directed by law to serve as a memorial and evidence of something written, said or done." *Id.* . . .
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> Finally, the term "public record" comprehends any "written record of transactions of a public officer in his office, which is a convenient and appropriate method of discharging his duties, and is kept by him as such, whether required by . . . law or not. . . ." *Mathews*, 75 Ariz. at 78, 251 P.2d at 895.

815 P.2d at 907-08.

These opinions generally support my conclusion that, given the nature of the documents involved in this case, you are not concerned with public documents. It is clear that the lists of personal property given to the county's insurance adjuster were not the result of fulfillment of a public employee duty and were not for the purpose of documenting government business.

Because the lists of personal property are not public documents, there is no need to discuss a balancing of the public's right to know and a right of privacy. The law regarding disclosure does not apply unless the documents at issue are public writings, documents, or records.

THEREFORE, IT IS MY OPINION:

> Lists of destroyed personal property generated by individuals, for no governmental function or purpose, do not constitute public writings or records subject to disclosure laws.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/bch/brf