

47 Op. Att'y Gen. No. 15

CRIMINAL LAW AND PROCEDURE - Application of sexual and violent offender registration laws to persons convicted of sexual or violent offense outside the State of Montana;
CRIMINAL LAW AND PROCEDURE - Release of information regarding persons registered due to commission of sexual or violent offenses outside the State of Montana;
RIGHT TO KNOW - Dissemination of information regarding sexual offenders by local law enforcement agency;
SEXUAL OFFENDER REGISTRATION ACT - Registration of out-of-state sexual offenders and dissemination of that information by local law enforcement agency;
STATUTES - Sexual offender registration act;
MONTANA CODE ANNOTATED - Sections 46-23-502(6), (9), -504(1)(c), -508, -509, -511;
MONTANA LAWS OF 1997 - Chapter 375;
MONTANA LAWS OF 1995 - Chapter 407;
MONTANA LAWS OF 1989 - Chapter 293.

HELD:

1. A sexual or violent offender convicted of any violation of law of another state or the federal government reasonably equivalent to a violation under the provisions of Mont. Code Ann. § 46-23-502(6) or (9), and sentenced on or after July 1, 1989, must register with the local law enforcement agency within ten days of entering a county of this state for the purpose of taking up residence in Montana on either a permanent or a temporary basis.
2. At a minimum, the name of the registered sexual offender may be disclosed. Additional information may be disclosed if the offender is determined to be a risk to the safety of the community and disclosure may protect the public.

May 26, 1998

Mr. Gerald Navratil
Dawson County Attorney
P.O. Box 1307
Glendive, MT 59330-1307

Dear Mr. Navratil:

You have requested my opinion on the following question:

Does the sexual or violent offender registration act require registration with the local law enforcement agency by an individual who was convicted of a sex offense in another state, but who has not been in custody or under supervision in Montana? If so, is the local law enforcement agency authorized to make such information public under Mont. Code Ann. § 46-23-508?

In 1989 the legislature enacted the Sexual Offender Registration Act (SORA) requiring the registration of sexual offenders. In 1995 the SORA was amended to require registration of certain violent offenders and to clarify confidentiality requirements to allow additional public notification. 1995 Mont. Laws, ch. 407. The SORA was again amended in 1997 to require community notice of the location of registered offenders where necessary for public safety. The provisions relating to registration are retroactive to 1989 for sex offenders and to 1995 for violent offenders. 1997 Mont. Laws, ch. 375. While your question refers specifically to the case of a sex offender, the SORA generally treats sexual and violent offenders alike, and the conclusions expressed herein apply to both classes of offenders.

In enacting these provisions the legislature found that the danger of recidivism posed by sexual and violent offenders and the protection of the public from these offenders were of paramount concern to government and the people. The legislature further found that law enforcement is impaired in its efforts to protect communities when there is a lack of information about offenders. Offender registration provides

law enforcement with the information critical to preventing victimization and resolving incidents of sexual or violent offenses promptly, including notification of the public when necessary. In addition, the legislature found that persons who have committed a sexual or violent offense have a reduced expectation of privacy because of the public's interest in safety. See preamble to 1997 Mont. Laws, ch. 375. Consistent with these findings, the statement of intent with respect to the 1997 amendments provides:

[I]t is the policy of the State of Montana to assist local law enforcement agencies' efforts in protecting their communities by requiring that sexual or violent offenders register and to authorize the release of necessary and relevant information about sex offenders to the public.

To fully implement the policy of the SORA, the legislature extended its application not only to sex offenders convicted and sentenced in this state, but also to out-of-state offenders who reside in Montana. Montana Code Annotated § 46-23-504 designates those persons who must register under the SORA. Applicable to your question is subsection (1)(c), which requires registration of a sexual or violent offender "within 10 days of entering a county of this state for the purpose of residing or setting up a temporary domicile for 10 days or more *if the offender was sentenced in another state.*" (Emphasis supplied.) A "sexual or violent offender" is anyone who has been convicted of a sexual or violent offense. Mont. Code Ann. § 45-23-502(7). A "sexual offense" includes specifically enumerated offenses under Montana law and "any violation of a law of another state or the federal government reasonably equivalent to a violation listed" under Montana law. Mont. Code Ann. § 46-23-502(6). In answer to your first question, the SORA explicitly requires registration by an offender who is convicted of a sexual offense, as defined by § 46-23-502(6), and who is sentenced on or after July 1, 1989, upon setting up residence or temporary domicile in Montana. This requirement applies whether or not the state in which the offender was convicted has a registration program.

The more difficult question is the extent to which this information may be disseminated by the local law enforcement agency. Montana Code Annotated § 46-23-508(1) provides that information maintained under the SORA is confidential criminal justice information. There are two exceptions to this rule. First, the name of a registered sexual or violent offender is public criminal justice information. Mont. Code Ann. § 46-23-508(1)(a). Public criminal justice information may generally be disseminated upon request without restriction under the Criminal Justice Information Act. See Mont. Code Ann. § 44-5-301. This would include the name of an out-of-state sexual offender who is registered in Montana under the SORA.

The second exception to the general rule of confidentiality is contained in Mont. Code Ann. § 46-23-508(1)(b). That subsection mandates dissemination of information in the following circumstances:

[A] law enforcement agency shall release any offender registration information relevant to the public if the agency determines that a registered offender is a risk to the safety of the community and that disclosure of the registration information may protect the public and, at a minimum:

(i) if an offender was given a level 1 designation under 46-23-509, the agency with which the offender is registered shall notify the agency in whose jurisdiction the offense occurred of the registration;

(ii) if an offender was given a level 2 disposition under 46-23-509, the agency with which the offender is registered may disseminate the offender's name to the public with the notation that the offender is a sexual or violent offender and may notify a victim of the offense and any agency, organization, or group serving persons who have characteristics similar to those of a previous victim of the offender of:

(A) the offender's approximate, but not exact, address, such as by stating the neighborhood, town, or part of a county;

(B) the type of victim targeted by the offense;

(C) the name, photograph, and physical description of the offender;

(D) the offenses for which the offender is required to register under this part; and

(E) any conditions imposed by the court upon the offender for the safety of the public; and

(iii) if an offender was given a level 3 designation under 46-23-509, the agency shall give the victim and the public notification that includes the information contained in subsection (1)(b)(ii), except that the offender's exact address must be included. The agency shall also include the date of the offender's release from confinement or if not confined, the date the offender was sentenced, with a notation that the offender was not confined, and shall include the community in which the offense occurred.

Obviously, an out-of-state offender will not have been given a level designation under Mont. Code Ann. § 46-23-509, so that the "minimum" dissemination requirements of Mont. Code Ann. § 46-23-508(1)(b)(i) to (iii) are not controlling. Nonetheless, the general language of § 46-23-508(1)(b) is relevant and governs the dissemination of information regarding out-of-state sexual offenders who are registered in Montana. That subsection contemplates release of "any offender registration information relevant to the public if the agency determines that a registered offender is a risk to the safety of the community and that disclosure of the registration information may protect the public."

In making the risk assessment for purposes of dissemination under Mont. Code Ann. § 46-3-508(1)(b), it would be helpful for the local law enforcement agency to obtain any available information on the offender from the sentencing state. Of particular importance would be a level designation already imposed by a state which has a system similar to ours. Under Montana law, a level 1 designation is given if the risk of a repeat sexual offense is low; level 2 is given if the risk is moderate; and level 3 is given if the risk is high, there is a threat to public safety, and the offender is a "sexually violent predator." Mont. Code Ann. § 46-23-509(2).

Under the federal sexually violent offender registration program, known as the Jacob Wetterling Act, as well as its amendments, states are free to adopt their own rules on risk assessment, but the designation as a "sexually violent predator" is a requirement which should be applied by all states that have come into compliance with the federal Act. If that designation has been assigned to an out-of-state offender registering in Montana, it would be appropriate to consider that offender the equivalent of a level 3 designation under Montana law for purposes of information dissemination, regardless of the label given by the originating state to the risk assessment.

In the absence of a level designation comparable to Montana law, the local law enforcement agencies will have to rely on other sources of information. The registration form will note the date and place of conviction, and there is nothing that would prohibit law enforcement from contacting their counterparts in the state of the offender's conviction to obtain additional information that would aid in the determination of what information to release. At a minimum, the name of an offender is always public criminal justice information (§ 46-23-508(1)(a)) and law enforcement is required to notify "the agency in whose jurisdiction the offense occurred of the registration." Mont. Code Ann. § 46-23-508(1)(b)(i). At the time that notice is given, the law enforcement agency may be able to obtain additional information about the offender that would aid in the determination whether the offender is a risk to the safety of the community. If local law enforcement authorities determine that the offender is a risk to community safety and that disclosure of the information may protect the public, they may release additional information. Law enforcement also has the option of requesting a review by the district court of its determination of how much information should be disseminated. Mont. Code Ann. § 46-23-508(1)(c). Note that the identity of a victim cannot be released without his or her permission. Mont. Code Ann. § 46-23-508(2).

As a final point, the SORA explicitly exempts state or local agencies, private entities, and their employees from liability as a result of good faith decisions regarding the release of information. Mont. Code Ann. § 46-23-511. However, immunity does not extend to gross negligence or willful or wanton misconduct. The Ninth Circuit has recognized that release of information is "tailored to help the community protect itself from sexual predators under the guidance of law enforcement, not to punish sex offenders." Russell v. Gregoire, 124 F.3d 1079, 1090 (1997).

THEREFORE, IT IS MY OPINION:

1. A sexual or violent offender convicted of any violation of law of another state or the federal government reasonably equivalent to a violation under the provisions of Mont. Code Ann. § 46-23-502(6) or (9), and

sentenced on or after July 1, 1989, must register with the local law enforcement agency within ten days of entering a county of this state for the purpose of taking up residence in Montana on either a permanent or a temporary basis.

2. At a minimum, the name of the registered sexual offender may be disclosed. Additional information may be disclosed if the offender is determined to be a risk to the safety of the community and disclosure may protect the public.

Very truly yours,

JOSEPH P. MAZUREK

Attorney General

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