

Private vs. Public Criminal Justice Information

The Expectation of Transparency in Governmental Operations

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The Government Response to a Records Request



Why should we tell anyone what we know or what we do?

- You can trust me I work for your government!
- Information on a “need to know” basis.
- The rules of procedure- civil and criminal
- Freedom of Information Act
- I don't like you or you work for the “dark” side



Objectives

- The 21st Century reality of the “their” expectation of transparency in the operation and accountability of the government at all levels!



Objectives

- Identify the sources of law and principles governing the balance between privacy and the public's right to know.
- Gain a better understanding of the **law** governing the dissemination of public records.
- Differentiate between public and confidential criminal justice information



Some Considerations to Guide You

- Montana Constitution
- Criminal Justice Information Act
- Administrative Rules of Montana
- Montana Public Records Act
- Montana Attorney General Opinions
- Montana Supreme Court Rulings



Universal Truths

- The office of the Attorney General is a criminal justice agency as defined in §44-5-103, §2-15-501, MCA.
- The Montana Board of Crime Control may be a criminal justice agency for the purpose of criminal justice information (CJI). § 44-2-201, 44-2-301, 44-5-103, MCA.




The Devil Is In the Detail

- 2-15-2306, MCA- MBCC is established under the Department of Corrections.
- 44-7-101- “state planning agency”
 - Functions under the Omnibus Crime Control and Safe Streets Act of 1968
 - Provide criminal justice agencies “technical services and supportive services”
- Purpose of each program varies?



What is a Criminal Justice Agency?

- (7) "Criminal justice agency" means:
- (a) any court with criminal jurisdiction;
 - (b) any federal, state, or local government agency designated by statute or by a governor's executive order to **perform as its principal function the administration of criminal justice**, including a governmental fire agency organized under Title 7, chapter 33, or a fire marshal who conducts criminal investigations of fires;
 - (c) any **local government agency** not included under subsection (7)(b) that performs as its principal function the administration of criminal justice pursuant to an ordinance or local executive order; or
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Montana Constitution

- The Montana Constitutional Convention of 1972 was a result of Montanans growing dislike of federal over regulation and the need to address **certain principles** Montanans felt were important to the freedoms we should enjoy within the boundaries of our state.



Are those fundamental
principles any less
important in 2021??



Montana Constitution

- There are 14 Articles contained in Montana's Constitution. Article II is the Declaration of Rights and has 35 Sections. ("Marsy's Law/CI-116 was #36")
- Article II, Section 8 guarantees to "the public" **the right** to expect governmental agencies will afford reasonable opportunity for participation. **TRANSPARENCY**



- Article II, Section 9 “No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state and its subdivisions, **except** in cases in which the demand of individual privacy **clearly** exceeds the merits of public disclosure”.



- Article II, Section 10 – “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**”.
- **Montana’s unique “enhanced right to privacy.”**



Figuring It Out

- In constitutional law there are no (few) absolutes!
- Everything is subject to a balancing of governmental interests, private interests, and

Objective Reasonableness



Balancing the Inherent Conflict

- Montana's Constitution clearly provides for the **public's right to know** and the **individual's right to privacy**. It is the effort by governmental officers, agencies, criminal justice agencies, (the cops), prosecutors, attorneys and courts to balance the two that creates the challenge.



Montana Public Records Act

- 2-6-1001, MCA- Ensures “efficient and effective management of public records and public information.”
- “Confidential information” is defined as that accorded confidential status or is prohibited from disclosure by **applicable law**.
- **Determination is not a matter of whim, personal belief, or a greater purpose!**



- There is a **presumption** that all information is open and subject to inspection!
 - 2-6-1003. Access to public information -- **safety** and **security** exceptions -- Montana historical society exception. (1) Except as provided in subsections (2) and (3), **every person has a right to examine and obtain a copy of any public information of this state.**



Public Information?

- (11) "Public information" means information prepared, owned, used, or retained by any public agency relating to the transaction of official business, regardless of form, except for confidential information that must be protected against public disclosure under applicable law.



Criminal Justice Information Act

- Enacted in 1979, Montana's Criminal Justice Information Act attempts to address the issues created by the right to know vs. right to privacy dilemma. Two categories of CJI
 - 1 – **public** criminal justice information
 - 2 – **confidential** criminal justice information



What Is Criminal Justice Information?

- (8) (a) "Criminal justice information" means information relating to criminal justice collected, processed, or preserved by a criminal justice agency, 44-5-103, MCA
- Clearly MBCC is in the business of developing, collecting, processing, and disseminating criminal justice information.



Public CJI 44-5-103 (13), MCA

- information made public by law
- court records and proceedings
- **information originated by a criminal justice agency, including**
 - initial offense reports
 - initial arrest records



public CJI continued

- information considered necessary by a criminal justice agency to secure public assistance in the apprehension of a suspect
- statistical information (data derived from records in which individuals are not identified or identification is deleted)



Dissemination of Public CJI

- 44-5-301. Dissemination of public criminal justice information. (1) **There are no restrictions on the dissemination of public criminal justice information.**
- (2) **All** public criminal justice information is available from the department or the agency that is the source of the original documents and that is authorized to maintain the documents according to applicable law. **These documents must be open, subject to the restrictions in this section,** during the normal business hours of the agency. A reasonable charge may be made by a criminal justice agency for providing a copy of public criminal justice information.



Confidential CJI

- (3) "Confidential criminal justice information" means:
 - (a) criminal **investigative** information;
 - (b) criminal **intelligence** information;
 - (c) fingerprints and photographs;
 - (d) criminal justice information or records made confidential by law; and
 - (e) **any other** criminal justice information **not clearly defined as public criminal justice information.**



Dissemination of Confidential CJI

- 44-5-303, MCA: Dissemination of confidential criminal justice information is **restricted to criminal justice agencies, to those authorized by law to receive it**, and to those authorized to receive it by a district court upon a written finding that the demands of individual privacy do not clearly exceed the merits of public disclosure



- Exception - *If the prosecutor determines that dissemination of confidential criminal justice information would not jeopardize a pending investigation or other criminal proceeding, the information may be disseminated to a victim of the offense by the prosecutor or by the investigating law enforcement agency after consultation with the prosecutor.*



CJI Is Like Fruit- It Ripens



CJI Is Like Fruit- It Ripens

Much of the information law enforcement (any criminal justice agency) generates in the course of a criminal investigation falls under "criminal investigative information" or criminal intelligence information" and is therefore confidential until such time as its nature changes.



The Initial Offense Report?

- DCI definition: (3) "Initial offense report" means the first record of a criminal justice agency that indicates that a criminal offense may have been committed and includes the initial facts associated with that offense. 23.12.201
- But it also may be confidential or intelligence information and not ripe!



What About Victims?

- Once again, the presumption is that victim information is public CJI. This **DOES NOT** include medical information!
- 44-5-311, MCA: Victim Information: **If a victim requests** confidentiality, an agency may withhold information including the address, telephone number or place of employment of the victim or a member of his or her family.

HIPPA and FOIA

- Be careful of blanket denials that are not grounded in both law and policy.
- HIPPA
 - What is it?
 - Does it apply?
- FOIA
 - What is it?
 - Does it apply?



Administrative Rules of Montana (ARM's)

- State agency regulations, standards or statements of applicability that implement, interpret, or set law or policy. An agency can also adopt administrative rules that describe the organization, procedures or practice requirements of the agency. Agencies are given rulemaking authority through the legislative process.



DOJ/DCI ARM's

23.12.201

(1) "Criminal justice agency" means any state, or local government agency that performs as its **principal function** the administration of criminal justice, including a fire agency or fire marshal that conducts criminal investigations of fires.

(2) "Initial arrest record" means the first record made by a criminal justice agency indicating the facts of a particular person's arrest and includes:

- (a) name of the accused;
- (b) time and place of the arrest;
- (c) location of the accused;
- (d) pending charges against the accused; and
- (e) any available information regarding bail and court appearances.

(3) "Initial offense report" means the first record of a criminal justice agency that indicates that a criminal offense may have been committed and includes the initial facts associated with that offense.

23.12.202 PUBLIC CRIMINAL JUSTICE INFORMATION

- (1) Pursuant to the Criminal Justice Information Act, 44-5-101 through 44-5-602, MCA, **initial offense reports** and **initial arrest records** are public criminal justice information.



23.12.203


INITIAL OFFENSE REPORTS

- (1) Initial offense reports **should** contain the following:
 - (a) the general nature of the charges against the accused;
 - (b) the offense location;
 - (c) the name, age, and residence of the accused;
 - (d) the name of the victim, unless the offense charged was a sex crime; and
 - (e) the identity of a witness unless the witness has requested confidentiality.
- (2) Initial offense reports **should not** contain:
 - (a) driver's license numbers;
 - (b) social security numbers;



(c) **medical records**, including but not limited to, mental health records and records relating to drug and alcohol addiction or treatment;

(e) with respect to the victim of any offense other than those described in (2)(d) **who requests confidentiality**, any information other than the offense location that may directly or indirectly disclose the address, telephone number, or place of employment of the victim or a member of the victim's family.



MBCC ARM Guidance

- 20.24.101
- (3) It is the responsibility of the board to administer the provisions of the Omnibus Crime Control and Safe Streets Act of 1968 (P.L. 90-351), as amended by the Victims of Crime Assistance Act and the Drug Free Schools and Communities Act. Under these provisions, the board may:



(a) develop a comprehensive statewide plan defining needs and problems and outlining priorities for the improvement of the **criminal and juvenile justice system** throughout the state.

(b) develop and coordinate police, courts and corrections programs and projects for the state and units of general local government.

(c) be responsible for administering planning grants in the funding and implementation of **state and local justice programs**.



Freedom of Information Act

- The FOIA was signed into law by President Johnson in 1966 (Amended 1996, 2002, 2007). The Act allows for the full or partial disclosure of previously unreleased information and documents controlled by the United States Government. The Act defines agency records subject to disclosure, outlines mandatory disclosure procedures and grants exemptions to the statute. **The FOIA explicitly applies only to federal government agencies.**



What About the Courts?

- “The right-to-know guarantees of Article II, Section 9, of the Montana Constitution, are among the most important guarantees that Montanans enjoy. As this right is contained in the Constitution's Declaration of Rights, it is a fundamental right. *State v. Tapson*, 2001 MT 292, P 15, 307 Mont. 428, P 15, 41 P.3d 305, P 15.



In interpreting this provision, we have held that there is a constitutional presumption that all documents of every kind in the hands of public officials are amenable to inspection. *Great Falls Tribune v. Mont. Public Service Comm'n*, 2003 MT 359, P 54, 319 Mont. 38, P 54, 82 P.3d 876, P 54.



Additionally, we have held that this right to examine government documents, together with the public's right of participation as provided for in Article II, Section 8, [2Link to the text of the note](#) imposes "an 'affirmative' duty on government officials to make all of their records and proceedings available to public scrutiny."

Yellowstone County v. Billings Gazette, P37 P2006
Mt 218, 333 Mont. 390, 143 P.3d135 (Nelson concurring)



What's The Bottom Line?

- Although initial incident reports are classified as public information, some information on them will be confidential and therefore not released.
- Names of arrested persons, age, address and general information about the incident are public CJI.
- Witnesses and victims may have a reasonable expectation of privacy but must assert it.



- Sensitive or harmful information (medical information) ought to be treated as confidential.
- Do not delay or stonewall in the process
- Reasonable fees- check DOA
- **Be transparent in all respects- even when denying access or dissemination**



Unsure What to Do

- Identify or develop a clear policy and protocol
- Always follow the chain of command when releasing information . . . Narrow responsibility within the organization
- If in doubt seek legal advice and a prompt judicial decision.



It Is All About Balance!

