

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 2000-F-09

Date issued: February 28, 2000

Requested by: Representative Frank Wald

- QUESTIONS PRESENTED -

I.

Whether the records of the Southwest Multi-County Correction Center (SWMCCC) regarding a deceased juvenile are confidential under N.D.C.C. § 27-20-52 as "law enforcement records . . . of a child alleged or found to be delinquent, unruly, or deprived."

II.

Whether the phrase "juvenile court" as used in N.D.C.C. § 27-20-51 refers only to the juvenile courts in North Dakota or also includes the juvenile courts of other jurisdictions.

III.

Whether confidential records which are provided to the SWMCCC from a juvenile court or a law enforcement agency as part of the corrections process become open to the public in the possession of the SWMCCC.

IV.

Whether the records of the SWMCCC regarding federal inmates who are incarcerated at the SWMCCC are open under the open records law.

V.

Whether law enforcement records regarding a juvenile continue to be confidential under N.D.C.C. ch. 27-20 if the juvenile has died.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that the phrase "law enforcement" as used in N.D.C.C. § 27-20-52 refers to officers and agencies involved in the detection, investigation, and prosecution of crimes. It is my further opinion that the SWMCCC is not a "law enforcement" agency and its records therefore are not confidential under N.D.C.C. § 27-20-52.

II.

It is my opinion that the provisions of N.D.C.C. § 27-20-51 apply only to the district courts in North Dakota and not to the courts of other jurisdictions.

III.

It is my opinion that confidential records provided to the SWMCCC during the incarceration process under N.D.C.C. ch. 27-20 become open to the public under N.D.C.C. § 44-04-18.

IV.

It is my opinion that records of the SWMCCC regarding federal inmates who are incarcerated at the SWMCCC are open under the open records law unless disclosure is prohibited under 18 U.S.C. § 5038 for juvenile inmates or under another exception to the Federal Freedom of Information Act (5 U.S.C. § 552).

V.

It is my opinion that law enforcement records regarding a juvenile continue to be confidential under N.D.C.C. ch. 27-20 after the juvenile has died.

- ANALYSES -

I.

This office recently issued an opinion to Dickinson City Attorney Tim Priebe in which I concluded that a law enforcement record is confidential under N.D.C.C. § 27-20-52 only if the record has a "juvenile justice connection" to a charge or finding by a juvenile court that a minor was "delinquent, unruly, or deprived." 2000 N.D. Op. Att'y Gen. L-4 (Jan. 18 to Tim Priebe). N.D.C.C. § 27-20-52 by its express terms only applies to law enforcement records. The question presented is slightly different: what is the meaning of "law enforcement" under N.D.C.C. § 27-20-52?

"Law enforcement" is not defined in the North Dakota Century Code. However, "[w]hen interpreting statutes, laws on the same or similar subjects may be considered." 1998 N.D. Op. Att'y Gen. O-132, O-136, citing N.D.C.C. § 1-02-39. N.D.C.C. § 44-04-18.7(4) defines a "criminal justice agency" to mean:

[a]ny law enforcement agency or prosecutor. The term also includes any other unit of government charged by law with criminal law enforcement duties or having custody of criminal intelligence or investigative information for the purpose of assisting law enforcement agencies in the conduct of active criminal investigations or prosecutions.

N.D.C.C. § 12.1-01-04(17) defines a "law enforcement officer" or "peace officer" to mean "a public servant authorized by law or by a government agency or branch to enforce the law and to conduct or engage in investigations or prosecutions for violations of law."

These statutory definitions are consistent with the plain meaning of "law enforcement," which refers to "[p]olice officers and other members of the executive branch of government charged with carrying out and enforcing the criminal law." Black's Law Dictionary 891 (7th ed. 1999). Based on these definitions, it is my opinion that the phrase "law enforcement" as used in N.D.C.C. § 27-20-52 refers to officers and agencies involved in the detection, investigation, and prosecution of crimes.

N.D.C.C. § 12-44.1-01(2) defines a "correctional facility" to mean "a city or county jail or detention center, regional corrections center, or juvenile detention center for the detention or confinement of persons in accordance with law." "Regional corrections center" is further defined in subsection 7 of that section as "a correctional facility established and maintained by more than one county or city, or a combination of counties and cities, for the confinement of inmates." The reference in these definitions to "confinement" is in stark contrast to the references in N.D.C.C. §§ 12.1-01-04(7) and 44-04-18.7 to investigation and prosecution of criminal acts.

As a "regional corrections center," the SWMCCC is involved in the detention or confinement of prisoners rather than the detection of criminal activity. There are no provisions in N.D.C.C. ch. 12-44.1 which define a correctional facility to mean a law enforcement or criminal justice agency, or which give a correctional facility the same authority as either of those agencies. Accordingly, based on the definitions discussed earlier in this opinion, the SWMCCC is not a "law enforcement" agency and its records, therefore, are not confidential under N.D.C.C. § 27-20-52.

II.

N.D.C.C. § 27-20-02(11) defines "juvenile court," for purposes of chapter 27-20, to mean "the district court of this state." (Emphasis added). "A statutory definition which declares what a term means excludes any meaning that is not stated." International Minerals and

Chemical Corp. v. Heitkamp, 417 N.W.2d 791 (N.D. 1987) (citing 2A Sutherland Statutory Construction § 4707 at p. 133 (4th ed. 1984)). Therefore, the provisions of N.D.C.C. § 27-20-51 apply only to the district courts in North Dakota and not to the courts of other jurisdictions.

III.

All recorded information regarding public business in the possession of a public entity, like the SWMCCC, is open to the public "[e]xcept as otherwise specifically provided by law." N.D.C.C. § 44-04-18. See also N.D.C.C. § 44-04-17.1(15) (definition of record). Possession of records, rather than ownership, is the touchstone for application of the open records law. 1998 N.D. Op. Att'y Gen. L-73 (June 8 to Jim Heck).

"When two entities possess the same record, each entity usually possesses the record in its own capacity and 'has an independent duty to determine whether the record is an open record.'" 1998 N.D. Op. Att'y Gen. at L-74, quoting 1994 N.D. Op. Att'y Gen. L-1, L-2 (Jan. 3 to Charles Isakson). Most exceptions to the open records law are specific to the public entity which possesses the records. See, e.g., N.D.C.C. §§ 27-20-52 (records of law enforcement), and 44-04-18.7 (information collected and held by a criminal justice agency). Preserving the application of open records exceptions to records which are shared with another public entity is the exception rather than the rule. See, e.g., N.D.C.C. §§ 44-04-18.10(4) (sharing for purposes of law enforcement and debt collection), 44-04-18.12 (multistate civil investigations).

Although N.D.C.C. §§ 27-20-51(1)(c) and 27-20-52(3) both authorize disclosure of confidential records to a public institution having custody of the juvenile, those sections do not further restrict the disclosure of those records once they are provided to the public institution. There are open records exceptions which apply to inmates in the custody of the Department of Corrections and Rehabilitation. See N.D.C.C. §§ 12-47-36, 12-59-04. However, there is no exception in N.D.C.C. ch. 12-44.1 which applies to county jails or regional corrections centers like the SWMCCC. It is my opinion that confidential records provided to the SWMCCC during the incarceration process under N.D.C.C. ch. 27-20 become open to the public under N.D.C.C. § 44-04-18. If this is not a desired result, an additional exception needs to be enacted by the Legislature.

IV.

As discussed earlier in this opinion, records are not open under the open records law if there is an exception specifically provided by

"law." The term "law" is defined in N.D.C.C. § 44-04-17.1(7) to include federal law and applicable federal regulations. If the Federal Bureau of Prisons places a person in the custody of the SWMCCC, the records of the SWMCCC regarding that person are open to public inspection under N.D.C.C. § 44-04-18 unless there is a specific federal law or applicable regulation which restricts disclosure of those records.

Records of federal juvenile inmates are closed to the public under 18 U.S.C. § 5038. Records of federal inmates who are adults shall not be disclosed except under the provision of the Freedom of Information Act, 5 U.S.C. § 552 (FOIA). 28 C.F.R. § 413.34. Under FOIA, certain records and information regarding federal inmates are closed to the public as "information compiled for law enforcement purposes," 5 U.S.C. § 552(b)(7), or because disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). In some circumstances, these privacy concerns may continue even after a person's death because of the effect that disclosure would have on the surviving family members. See, e.g., New York Times Co. v. NASA, 782 F.Supp. 628 (D.D.C. 1991) (audiotape of Challenger astronauts' last words may be withheld).

Whether an exception to FOIA applies to records of a particular federal inmate can only be determined on a case-by-case basis. To maintain compliance with federal requirements, a correctional facility like the SWMCCC should contact the Federal Bureau of Prisons immediately if it receives a request for records of a federal inmate.

In summary, it is my opinion that records of the SWMCCC regarding federal inmates who are incarcerated at the SWMCCC are open under the open records law unless disclosure is prohibited under 18 U.S.C. § 5038 for juvenile inmates or under another exception to the Federal Freedom of Information Act (5 U.S.C. § 552).

It is important to note that the definition of "law" does not include any contractual commitments by a public entity to maintain the confidentiality of a record. It is the province of the Legislature, rather than each public entity, to weigh the interests of privacy and the public's right to have access to records regarding public business. As the plain meaning of "law" indicates, public entities do not have the authority to create exceptions to N.D.C.C. § 44-04-18 by contract.

V.

Former Attorney General Nicholas Spaeth, in an opinion regarding a law enforcement record of the death of a juvenile, concluded that the record was confidential under N.D.C.C. § 27-20-52. Letter from

Attorney General Nicholas Spaeth to Rod Larson (June 23, 1989). Although the opinion did not specifically address the question presented here, one must assume from the conclusion expressed in the opinion that the confidentiality requirements in N.D.C.C. § 27-20-52 continue to apply even after the death of the juvenile. Otherwise, the statute would no longer have applied and the record would have been open to the public.

Nothing in N.D.C.C. § 27-20-52 limits the duration of the confidential character of the records or provides that the confidentiality of the records changes upon the death of the juvenile. Compare N.D.C.C. § 12.1-35-01 ("victim" and "witness" defined as a "living child"). C.f. 1998 N.D. Op. Att'y Gen. O-132 (Nov. 24 to Douglas Schauer) (the recording of an executive session continues to be closed even if disclosure would no longer defeat the purpose of the executive session). Therefore, it is my opinion that juvenile records which are confidential under N.D.C.C. § 27-20-52 remain confidential after the death of the juvenile.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.

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