

**LETTER OPINION
2002-L-19**

April 1, 2002

Mr. Kenneth L. Dalsted
Jamestown City Attorney
PO Box 1727
Jamestown, ND 58402-1727

RE: N.D.C.C. § 12.1-31-03 - Disclosure of Records

Dear Mr. Dalsted:

Thank you for your February 25, 2002, letter in which you have asked several questions regarding public access to law enforcement and municipal court records regarding minors who violate the Jamestown municipal ordinance establishing civil penalties for possession or use of tobacco products adopted pursuant to North Dakota Century Code §12.1-31-03(2). You specifically state that school and public health officials have requested the Jamestown Police Department to release the names or other identifying information of minors charged with a violation of N.D.C.C. § 12.1-31-03(2) or the corresponding Jamestown municipal ordinance.

You asked about N.D.C.C. § 27-20-52 which limits public access to law enforcement records of a child "alleged or found to be delinquent, unruly, or deprived." If a child falls within this category, the law enforcement records maintained by the Jamestown Police Department pertaining to the child would be subject to the disclosure restrictions of that section.

As it pertains to a N.D.C.C. § 12.1-31-03(2) violation, application of the disclosure restrictions in N.D.C.C. ch. 27-20, the Uniform Juvenile Court Act, is dependent upon the age of the offender. The juvenile court has exclusive original jurisdiction in proceedings in which a child is alleged to be delinquent, unruly, or deprived. N.D.C.C. § 27-20-03.

Section 27-20-02(6), N.D.C.C., defines a "delinquent act" as an act designated a crime under the law of this or another state, the federal government, or local ordinances. The definition specifically excludes, however, offenses falling within N.D.C.C. § 27-20-02(18)(c). An offense under section 27-20-02(18)(c) is one applicable only to a child, except for an offense committed by a minor 14 or older under subsection 2 of section 12.1-31-03 or an equivalent local ordinance or resolution. Therefore, a person who is at least 14 years old who has committed the noncriminal violation as defined in N.D.C.C. §12.1-31-03(2) or an equivalent local ordinance would not be an "unruly child" subject to the jurisdiction of the juvenile court or N.D.C.C. ch. 27-20. Any action taken against the offender for the noncriminal offense will be

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taken in an “adult” court in the same manner as if the person had been charged with a “traffic offense” as that term is defined in N.D.C.C. § 27-20-02(17).

A person under age 14 who has violated N.D.C.C. §12.1-31-03(2) is, however, an “unruly child,” N.D.C.C. § 27-20-02(18)(f), subject to the sole and exclusive jurisdiction of the juvenile court. N.D.C.C. §27-20-03. Since any action taken against this offender will occur in the juvenile court, the release of any information regarding the offender will be subject to the statutory restrictions on public disclosure of both law enforcement records (N.D.C.C. § 27-20-52) and records of the juvenile court (N.D.C.C. § 27-20-51).

Since chapter 27-20 does not apply to an individual who is at least 14 years old and who is charged with a violation of N.D.C.C. § 12.1-31-03(2) or an equivalent municipal ordinance, the restrictions found in N.D.C.C. § 27-20-51 (regarding the release of court records) or N.D.C.C. § 27-20-52 (regarding law enforcement records) do not apply to information obtained by the municipal court or law enforcement officials in investigating, charging, or resolving the noncriminal offenses. In addition, law enforcement records held by the Jamestown Police Department relating to the ordinance or statutory violation will be subject to the North Dakota open records law (N.D.C.C. ch. 44-04) and its relevant exceptions.

Court records, however, are not subject to the North Dakota open records law. N.D.C.C. § 44-04-17.1(15). Therefore, public disclosure of the municipal court records will be subject to the same general rules and regulations for disclosure of its records whether the offender is over or under the age of 18 years. The disclosure of such records, however, may be governed by the rules and procedures established by the municipal court or in accordance with administrative action of the North Dakota Supreme Court and its court administrator. See, generally, N.D.C.C. §§ 27-02-05.1 and 40-18-06.1 and N.D. Sup. Ct. Admin. R. 19, 26, and 41.

With regard to school records, sections 15.1-07-25 and 44-04-18 make school district records open records unless otherwise provided by law. The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, provides for confidentiality of all “education records” under the penalty of the loss of federal funds for education for a school district that has a policy of releasing education records unless authorized by the federal act. For purposes of FERPA, “education records” means “those records, files, documents, and other materials which . . .

- i. contain information directly related to a student; and
- ii. are maintained by an educational agency or institution or by a person acting for such agency or institution.”

20 U.S.C. § 1232g(a)(4)(A). The federal act has been held to be a specific exception to the open records requirement contained in N.D.C.C. §§ 15.1-07-25 and 44-04-18. 1994 N.D. Op. Att’y Gen. F-28.

Section 27-20-52(7) authorizes inspection of law enforcement records by a superintendent or principal of the school in which the child is currently enrolled or of the school in which the child

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wishes to enroll. For violations of N.D.C.C. § 12.1-31-03(2), N.D.C.C. § 27-20-52(7) is relevant only to violations by minors less than 14 years of age because violations by older minors are resolved outside N.D.C.C. ch. 27-20. However, it is conceivable that records of violations of N.D.C.C. § 12.1-31-03(2) by minors 14 or older may also come into the possession of and be maintained by a school. Thus, if a school superintendent or principal obtained information pursuant to N.D.C.C. § 27-20-52(7), or from a source outside N.D.C.C. ch. 27-20 relating to a violation of N.D.C.C. § 12.1-31-03(2), that related to a specific student and was maintained by a school, it would become an education record under FERPA and not subject to release without the consent of the child's parent or under an exception to the consent requirement contained in FERPA.

Your final question asks whether school records containing information about minors charged with noncriminal offenses involving tobacco may be released to public health entities. There is one exception to the parental consent requirement for release of education records that relate to health and safety. This exception authorizes release of records without the parents' consent in connection with an emergency, to appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons. 20 U.S.C. § 1232g(b)(1)(I). The release of student information regarding tobacco-related offenses does not appear to constitute the type of emergency envisioned by the federal law. Thus, information obtained by a school superintendent or principal pursuant to N.D.C.C. § 27-20-52(7), if concerning a specific student and maintained by the school, cannot be released to public health entities.¹

Sincerely,

Wayne Stenehjem
Attorney General

rpb/rel/vkk

¹ 20 U.S.C. § 1232g(a)(4)(B)(ii) and 34 C.F.R. § 99.8 authorize retention of records by a law enforcement unit of a school or school district, and provide separate requirements for release of records of that law enforcement unit. N.D.C.C. § 15.1-19-14 authorizes schools to create a law enforcement unit and indicate to whom its records may be released. Such a unit was not mentioned in your letter, but it appears that the information in question obtained from a police agency and provided to a school would not be relevant to your circumstances because those records would not be law enforcement unit records as defined in 20 U.S.C. § 1232g(a)(4)(B)(ii) and 34 C.F.R. § 99.8.