Opinion No. 72-32

July 5, 1972

BY: OPINION OF DAVID L. NORVELL, Attorney General Winston Roberts-Hohl, Assistant Attorney General

TO: All Interested Public Officials, State of New Mexico

QUESTIONS

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1. What is the extent of the prohibition in the Children's Code against disclosure of a child's record to the public?

2. To what law enforcement agencies does this prohibition apply?

CONCLUSIONS

1. See Analysis.

2. See Analysis.

OPINION

*{*55}* ANALYSIS

Section 13-14-41 (A), NMSA, 1953 Comp. (1972 Interim Supp.) reads:

"Law enforcement records and files concerning a child shall be kept separate from the records and files of arrests of adults. Unless the charge of delinquency is transferred for criminal prosecution, or the interest of national security requires, or the court otherwise orders in the interest of the child, these records and files shall not be opened to public inspection nor their contents disclosed to the public.?

We examine this subsection in the light of the First Amendment guarantee of freedom of the press and find it to be constitutional. One of the expressed legislative purposes of the Children's Code is "to provide for the care, protection and wholesome mental and physical development of children." Section 13-14-2 (A), NMSA, 1953 Comp. (1972 Interim Supp.). It is well established that the well-being and protection of children is a subject within *{*56}* the state's power to regulate. **Ginsberg v. New York,** 390 U.S. 629, 20 L. Ed. 2d 195 (1968); see **State v. McKinley,** 53 N.M. 106, 202 P.2d 964 (1949). Furthermore, "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults." **Prince v. Massachusetts,** 321 U.S. 158, 88 L. Ed. 645 (1944).

The privacy on a child's record imposed by the Children's Code bears a rational relation to the objective of safeguarding the child. Any notoriety attached to a delinquent child is not likely to be beneficial to the child, but on the contrary can reasonably be expected to impede that child's wholesome development.

After finding a legitimate legislative interest in imposing secrecy, we next inquire whether the interest to be served justifies the apparent restriction of First Amendment freedom. See **Garland v. Torre,** 259 F.2d 545 (2nd Cir. 1958), **cert. denied** 358 U.S. 910; **Kovack v. Maddux,** 238 F. Supp. 835 (M.D. Tenn. 1965); **In Re Green,** 220 Pa. Super. 191, 286 A.2d 681 (1971). Regarding the acquisition of news, the Supreme Court in **Zemel v. Rusk,** 381 U.S. 1, 14 L. Ed. 2d 179, 85 S. Ct. 1271 (1965) said: "The right to speak and publish does not carry with it the unrestrained right to gather information." Secondly, we observe that the constitutional guarantees of freedom of speech and press "are not for the benefit of the press so much as for the benefit of all of us." **Time v. Hill,** 385 U.S. 374, 17 L. Ed. 2d 456 (1967); see also **Branzburg v. Hayes,** U.S. , decided June 29, 1972. With this principle as a guide it is constitutionally permissible for the legislature to conclude that the interest of all people is better served when the well-being of children is accorded higher priority than the dissemination of data about them.

"A democratic society, rests, for its continuance, upon the healthy, well-rounded growth of young people into full mature citizens, with all that that implies. [The State] may secure this against impending restraints and dangers within a broad range of selection." **Prince v. Massachusetts, supra.**

In this instance the legislature has decided to spare children the stigma of a criminal record for violations of laws at a time when for lack of maturity of judgment they do not realize the full consequences of their actions.

Furthermore, the Children's Code is by no means an absolute and repressive ban on all information regarding children. First, the silence imposed by the legislature relates only to data gathered by official agencies. There is no ban on non-official sources of information on children. Contrast **Washington Post v. Kleindienst,** Civil No. 467-72 (U.S. D. Ct., Dist. of Columbia 1972).

Secondly, it is our opinion that the secrecy imposed by Section 13-14-41 (A), **supra,** refers only to records and files which concern a child who has committed a forbidden act. This subsection refers to "records and files concerning a child" but when this section is read in light of the entire Children's Code, it is clear that the legislative intent was to make secret only those records and files wherein the child was the perpetrator of some malfeasance. In construing any particular statutory provision the entire act must be read and considered in order to glean the legislative intent. **Drink Inc. v. Bebcock,** 77 N.M. 277, 421 P.2d 798 (1966). Normally, in instances where official records contain the names of children who were victims or were involved in accidents wherein they were not wrongdoers, our argument for the protection of the child has no validity. This means that there would be no legitimate interest in secrecy as far as First Amendment right

goes except perhaps in unusual circumstances. For this reason, we do not use the literal meaning of the word "concerning" but we look at the intention of the lawmakers and conclude that records referred to are those records, the release of which would be detrimental to the well-being of children and not mere information concerning a child. See **Martinez v. Research Park, Inc.,** 75 N.M. 672, 410 P.2d 200 (1966).

Section 13-14-41 (C) is somewhat problematic. It reads:

"Except as allowed by this section, whoever discloses, receives, makes use of or knowingly permits the use of information concerning a child *{*57}* known to the law enforcement officials directly or indirectly derived from law enforcement records or files concerning a child, or acquired in the course of official duties, shall be guilty of a misdemeanor and shall be punished by imprisonment in the county jail for not more than one [1] year or the imposition of a fine of not more than one thousand dollars ($ 1,000.00), or both imprisonment and fine."

It would appear this section is overboard in scope. However, we are committed to the rule that every presumption must be indulged in for the validity of the statute. **Bureau of Revenue v. Dale F. Bellamah Corp.,** 82 N.M. 13, 474 P.2d 499 (1970). Furthermore, even if this section were to be declared unconstitutional, it is our opinion that Subsection A would still bind public officials who had obtained data on children through their official capacity.

As to the mechanics of record keeping, it is the opinion of this office that the statute commands no one to keep the records and files of children physically separate from the records and files of adults so long as the privacy of the former and the public nature of the latter can simultaneously and completely be maintained, or so long as the record keeping is such that it would require more than mere negligence or an occasional slip to result in an inadvertent disclosure of a child's record. For an obvious instance, a listing of arrests to which the public has access should not list both children and adults.

2. It is our opinion that the secrecy mandate of Section 13-14-41 (A), **supra,** applies to all previously described records and files obtained by any law enforcement agency. The Children's Code refers to "law enforcement records" and does not limit its prohibition to records of the Family Court.

Under Sections 13-4-3 (N) and 13-14-11, NMSA, 1953 Comp. (1972 Interim Supp.) it appears that municipal and magistrate courts can exercise jurisdiction over children for traffic offenses which are not designated delinquent acts under the Children's Code. See Opinion of the Attorney General No. 72-27, dated June 8, 1972. In these instances these records could not be public. By necessary implication, like-wise, records obtained by officers issuing traffic citations are covered by the secrecy mandate of Subsection (A), **supra,** and should list separately the names of children and adults.