

Opinion No. 72-46

September 11, 1972

BY: OPINION OF DAVID L. NORVELL, Attorney General David L. Norvell, Attorney General

TO: Honorable Bruce King, Governor, State of New Mexico, Legislative Executive Building, Santa Fe, New Mexico 87501

QUESTIONS

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What are the rights of citizens and the duties of officials regarding inspection of public records.

CONCLUSION

See analysis.

OPINION

{*75} ANALYSIS

This opinion is a recapitulation of a memorandum to your office dated August 17, 1971. We have updated the contents of that memorandum and placed it in opinion form so that it will be more readily available to public officers and interested parties.

Your question is of great importance to the conduct of public business and to the public's right to oversee its affairs. An answer to the question must begin with the Inspection of Public Records Law, Section 71-5-1 to 71-5-3, NMSA, 1953 Comp. It is essential that we as public officers understand and follow the requirements and spirit of this law.

The language of Section 71-5-1, **supra**, is clear:

"Every citizen of this state has a right to inspect any public records of this state . . ."

The only exception provided for **in this provision** relates to physical and mental examination and treatment records. Section 71-5-1, **supra**. The legislature may from time to time provide other specific exceptions, however. See for example, Section 13-14-14A, NMSA, 1953 Comp. (1972 Interim Supp.) relating to records kept by law enforcement officials for juveniles and juvenile probation offices; Section 46-12-9, NMSA, 1953 Comp., relating to certain records of the Commission on Alcoholism, and Section 72-13-25, NMSA, 1953 Comp. (1969 Supp.), relating to records of taxpayers.

These exceptions are specific and narrowly drawn, and in their absence disclosure of public records is the rule. Officers having custody of public records are required to furnish reasonable opportunities for their inspection and copying to any person wishing to examine them for a lawful purpose during usual business hours. Section 71-5-2, NMSA, 1953 Comp. Any public officer refusing to permit lawful inspection by a citizen is guilty of a misdemeanor and subject to criminal punishment. Upon conviction, for each separate violation he can be fined not less than \$ 250.00 nor more than \$ 500.00 or imprisoned for not less than sixty days nor more than six months, or receive a fine and a jail sentence both. Section 71-5-3, NMSA, 1953 Comp. Being legally guaranteed the right to inspect public records, a private citizen can enforce that right by seeking a writ of mandamus in court. Section 22-12-4, NMSA, 1954 Comp., **Nowack v. Fuller**, 219 N.W. 749 (Mich. 1938).

A citizen's right to inspect cannot be diminished by his motive. **State v. McGrath**, 67 P.2d 838 (Ment. 1937). The statute gives the citizen the right to inspect provided only that his purpose be lawful. Thus, the citizen does not have to establish any paramount interest in the information before he is entitled to access. A desire to gather and publish news is clearly lawful and {*76} sufficient. **Booth Newspapers, Inc. v. Cavanaugh**, 166 N.W.2d 546 (Mich. 1968). The citizen may desire the information for purely personal reasons, such as to support a law suit against another private party or to criticize the conduct of a public official. **Lord v. Registrar of Motor Vehicles**, 199 N.E.2d 316 (Mass. 1964); **State ex rel. Wellford v. Williams**, 75 S.W. 948 (Tenn. 1903).

The legislature has not chosen to define "public records" for the purpose of the inspection law. A definition does appear in the Public Records Act, but that Act is limited to the safe-keeping, storage, and filing of public documents. Section 71-6-2, NMSA, 1953 Comp. (1979 Supp.). The law recognizes that the proper definition of a public record varies according to the context. **MacEwan v. Holm**, 359 P.2d 413 (Ore. 1961). The established meaning of the term in the inspection context includes two general categories of documents: (1) those records which the law requires public officers to keep, and (2) writings which constitute a convenient and appropriate mode of discharging the duties of public office. **Conover, et al. v. Board of Education**, 267 P.2d 768 (Utah 1954); Opinion of the Attorney General No. 61-137, dated December 7, 1961.

It was once rigidly believed that only documents representing final decisions by public officials took on the dignity of the public records classification. However, modern courts have broadened the scope of the term to include preliminary information which a government unit generates in performing its duties. **MacEwan v. Holm, supra**. This view is more realistic, and one in which we concur, in that it recognizes that, as a practical matter, a citizen's chances of influencing public decision-making are much greater while a problem is still under consideration than after the process is completed.

The right to inspect is not absolute. Public officials may make reasonable regulations to insure that the inspection of records does not interfere with the orderly functioning of their offices. But the regulations may not be of such an arbitrary nature as to in effect

deny or inhibit the right to inspect. **State v. McGrath, supra.** Situations may exist where the public interest in keeping certain records confidential outweighs the citizen's right to inspection. Investigative reports may be confidential in certain circumstances. For example, where information about a prospective public employee has been obtained by the government under a pledge of confidentiality to his former employer, a breach of the pledge would seriously hamper the ability of the government to gain such information in the future. **City and County of San Francisco v. Superior Court**, 238 P.2d 581 (Cal. 1951). Another example is illustrated in **State ex rel. Spencer v. Freedy**, 223 N.W. 561 (Wis. 1929) where inspection of a state fire marshal's records would have frustrated the apprehension of arsonists, which was the record's purpose. The New Mexico Supreme Court apparently applied this principle in the recent case of **Sanchez and Dula v. Board of Regents**, 82 N.M. 672, 486 P.2d 608 (1971), ruling that public exposure of salary offers to state employees before the employees themselves knew the contents of the offer was contrary to the public interest.

Such situations are extremely rare, however, and the law recognizes that the government's legitimate need to prevent disclosure must be unusually great.

"In reaching a determination so based upon the balancing of the interests involved, . . . public policy favors the right of inspection of public records and documents, and it is only in the exceptional case that inspection should be denied."

State ex rel. Youmans v. Owens, 137 N.W.2d 470, 475 (Wis. 1965). See also Opinion of the Attorney General No. 68-110, dated October 31, 1968. There was broad dicta in the **Sanchez** case, **supra**, suggesting that because the information desired was of a preliminary nature it was not a public record; however, a narrow interpretation of this holding is more consistent with both the underlying public policy as established in other states and with the protection of public officers subject to this Act in New Mexico.

In a perplexing case, I encourage you to seek an advisory opinion from this {77} office. However, in general you will be well served to remember that the law strongly favors an open book policy. The citizen deserves the fullest opportunity to observe and to influence the spending of his tax money.