Opinion No. 74-34

October 11, 1974

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: The Honorable Robert A. Mondragon Lieutenant Governor State Capitol Santa Fe, New Mexico 87501

QUESTIONS

FACTS

A client of the Division of Vocational Rehabilitation has requested permission from his caseworker to see his own records. Permission was denied him on the grounds that the Division of Vocational Rehabilitation **Manual of Operating Procedures** states under its guidelines for counselors that clients should never be given access to their own case folders. The client is interested not in his medical report, but only in the report of himself compiled by his caseworker.

QUESTIONS

Does denial of access to one's own personal record per the guidelines set forth in the Division of Vocational Rehabilitation's **Manual of Operating Procedures** conflict with the right to inspect public records as set forth in Article 5, Section 71-5-1 of the New Mexico Statutes?

CONCLUSION

See analysis.

OPINION

*{*66}* **ANALYSIS**

Section 71-5-1, NMSA, 1953 Comp. (1973 P.S.) states:

"Right to inspect public records -- Exceptions. *{*67}* -- Every citizen of this state has a right to inspect **any public records** of this state except:

A. records pertaining to physical or mental examinations and medical treatment of persons confined to any institutions;

B. letters of reference concerning employment, licensing or permits;

C. letters or memorandums which are matters of opinion in personnel files or students' cumulative files; and

D. as otherwise provided by law." (emphasis added)

See Attorney General Opinion No. 72-46, dated September 11, 1972. Thus, before the right to inspect attaches, the record in question must be a public record, and if the record is a public record, the right to inspect applies generally to all people.

Attorney General Opinion No. 61-137, dated December 27, 1961 stated:

"As stated in 76 C.J.S., 'Records' Section 1, the term 'public record' is defined as follows:

'A "public record" has been defined as one required by law to be kept, or necessarily to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done, or a written memorial made by a public officer authorized to perform that function, or a writing filed in a public office. The elements essential to constitute a public record are, namely, that it be a written memorial, that it be made by a public officer, and that the officer be authorized by law to make it . . .'

Not every document, memorandum or record which is kept by public officers are 'public records.' Under the definition of the term 'public record' specified above, papers or memoranda in the possession of public officers and which are not required by law to be kept by them as official records, are not public records. Section 71-6-2, N.M.S.A., 1953 Comp., defines the term 'public records' kept by governmental agencies on the State level in even broader language. It is clear that those records which are necessary and incidental to carrying out the duties imposed upon an individual by operation of law are generally deemed public records. In 76 C.J.S., 'Records', Sec. 1, it is similarly stated that:

'All records which the law requires public officers to keep, as such officers, are public records; and whenever a written record of the transactions of a public officer in his office is a convenient and appropriate mode of discharging the duties of the office, and is kept by him as such, it is a public record.'"

That opinion dealt with public school records, and after reciting the above general principles, the opinion concluded that:

". . . such records or memoranda as may be kept by a teacher, or other school official, for informational purposes on individual students, and which may contain data of a personal nature for use in assisting teachers or school personnel in educating pupils, in our opinion does not fall within the classification of public records entitled to be scrutinized by the public."

We believe that this rationale is applicable to your question concerning vocational rehabilitation records. The record in question is a memorandum which is used for informational purposes within the division. With specific reference to case folders of clients in vocational rehabilitation programs, we are informed that these folders contain medical, psychological, psychiatric, and specialist reports. The vocational rehabilitation counselors submit reports periodically based on interviews with clients and also on medical and psychological data from the above-mentioned reports. The counselor reports are *{*68}* prepared as a means of reaching the ultimate goal of writing a plan for the client. This is done **with the client,** and the client signs the final plan. We do not believe that such personal information as is contained in client folders should be open to public inspection. This result naturally follows our conclusion that such records are not by definition public records. However, even if the records in question were considered public records, Section 71-5-1, **supra,** excepts from the right to inspect public records those records **pertaining** to physical or mental examinations.

Furthermore, we believe that the interest in keeping such records confidential outweighs the citizen's right to inspection. See Attorney General Opinion No. 72-46. In order for those in need of vocational rehabilitation to be encouraged to participate in the program and to interact freely with counselors, client folders should be confidential rather than open to public perusal.

Therefore, in answer to your specific question, it is our conclusion that denial of access to the records in question is not in conflict with the Public Records Act.

With respect to the client's right to see his own folder, however, we are unable to find authority requiring that an individual be given access to such information concerning himself. The trend today is definitely toward allowing an individual to see and challenge the contents of files which concern him personally. Two examples of this are the Consumer Credit Reporting statute, 15 USCA § 1681 and federal legislation creating the boards for correction of military records, 10 USCA § 1552.

The apparent rationale behind the Vocational Rehabilitation Division's guideline is that for the client's own good, he should not be allowed access to raw medical and psychological data, which is contained not only in the medical reports but also in the caseworker report, without the aid of explanation by a physician, psychiatrist, or psychologist.

The same reasoning was deemed sufficient to exempt any medical-related reports from inspection under the Consumer Credit Reporting statute. A conference report, Report No. 91-1587, 91st Congress, 2nd Session, on the amended version of H.R. 15073 of which the above-named statute was a part stated:

"The House Amendment added the definition of the term 'medical information' in the new section 603(i) in restricting this type of information from being examined by the consumer when he attains access to his file as authorized in section 609. The rationale was that **raw medical information should only be tendered with the counsel of a**

physician or other medically trained personnel. The Senate bill contained no similar provision, but was agreed to by the conferees." (emphasis added)

Since the rationale behind the policy of the Vocational Rehabilitation Division seems to be an accepted view concerning access to one's own records, we feel the denial of access to the records concerned was not improper.

By: Jane E. Pendleton

Assistant Attorney General