## Opinion No. 75-37

July 11, 1975

**BY:** OPINION OF TONEY ANAYA, Attorney General

**TO:** Honorable Julian Grace and Honorable Vernon N. Kerr New Mexico State Representatives New Mexico Legislature Santa Fe, New Mexico 87503

## QUESTIONS

FACTS

The 1975 New Mexico Legislature enacted the Arrest Record Information Act (Chapter 260, Laws 1975) declaring as confidential the arrest record information maintained by the state or any of its political subdivisions pertaining to any person charged with the commission of any crime and making it unlawful to disseminate or reveal such information, except as provided in the Arrest Record Information Act.

QUESTIONS

1. What are the penalties for violating the provisions of the Arrest Record Information Act?

2. Does the Act make any distinction between felony and misdemeanor cases?

3. What records are excluded from the confidentiality provisions of the act?

4. Who may have access to arrest record information and under what circumstances?

CONCLUSIONS

1. See Analysis.

2. No.

3. See Analysis.

4. See Analysis.

## OPINION

*{*106}* **ANALYSIS**

1. Section 7 of the Arrest Record Information Act (Chapter 260, Laws 1975) provides that a violation of the provisions of the Act is a fourth degree felony.

Pursuant to Section 40A-29-3, NMSA, 1953 Comp. a person convicted of a fourth degree felony may be sentenced to imprisonment in the New Mexico State Penitentiary for the term of not less than one year nor more than five years, or a fine or not more than five thousand dollars ($ 5,000), or to both imprisonment and fine in the discretion of the judge.

It should be noted that the Arrest Record Information Act does not limit the violation of the Act to any particular class of persons.

2. The Arrest Record Information Act does not make any distinction between felony and misdemeanor arrest records.

Section 3 of the Act which lists the definition of terms used in the Act only states that arrest record information means "notations of the arrest or detention, or indictment or filing of information or other formal criminal charge against an individual made by a law enforcement agency." That definition would include both felony and misdemeanor arrest records.

The Act in Section 4 also states that the confidentiality of arrest record information shall pertain to "arrest information maintained by the state or any of its political subdivisions pertaining to any person charged with the commission of **any crime.** . ." (Emphasis added.) The word "crime" is defined in Sections 40A-1-4, 40A-1-5 and 40A-1-6, NMSA, 1953 Comp., and includes felonies, misdemeanors and petty misdemeanors.

Therefore, arrest record information as contemplated by the Act would include information concerning all arrests made for felonies, misdemeanors and petty misdemeanors.

3. The question as to what records are excluded from the confidentiality provisions of the Act has undoubtedly elicited the most discussion and controversy. The act itself does not contain a complete listing of records that must be confidential and those that are excluded from the confidentiality provisions of the Act. In seeking to interpret the intent of the legislature, we must consider not only the provisions of the Act itself but must also take into consideration earlier expressions of the legislature in enacting other measures to afford the public with better access to information developed and maintained by governmental agencies. See, for example, Section 71-5-1, NMSA, with respect to inspection of public records, and Chapter 91 of the Laws of 1974 prohibiting closed meetings.

Section 2 of the Act sets out the intent of the legislature and states:

"The legislature finds and declares that the responsible exchange of complete and accurate information among law enforcement agencies is recognized as *{*107}* necessary and indispensable to effective law enforcement. Individual rights, however, may be infringed **if information is inaccurate, incomplete or is disseminated**

**irresponsibly.** The Arrest Record Information Act is for the purpose of protecting those rights." (Emphasis added.)

Section 3A of the Act defines "arrest record information" to mean:

". . . Notations of the arrest or detention or indictment or filing of information or other formal criminal charge against an individual made by a law enforcement agency, which may or may not include a disposition;"

Reading only the above two sections, any notation of any arrest or detention or of any formal criminal charge against an individual made by a law enforcement agency would be confidential and could not be released to anyone. However, Sections 5, 6 and 8 specify certain exceptions and provide for dissemination of certain information contained within the definition of arrest record information without violating the confidentiality provisions of the Act. Section 5 states that:

"Section 5. EXCHANGE OF INFORMATION. A law enforcement agency may disseminate arrest record information to a federal, state or local government law enforcement agency, provided that when such arrest record information is disseminated to a law enforcement agency situated outside this state, such information shall be accompanied by a statement substantially embodying the intent set forth in Section 3 of the Arrest Record Information Act. Nothing in the Arrest Record Information Act prohibits direct access by the attorney general, district attorney or the courts to such information where it is deemed necessary in the performance of their functions under law. Nothing in the Arrest Record Information Act prohibits direct access by a law enforcement agency to automated wanted information pertaining to a person or to stolen property information."

Thus, law enforcement agencies may disseminate certain arrest record information to "federal, state or local law enforcement agency" with the only provision being that if the information is disseminated to a law enforcement agency situated outside of New Mexico that the information has to be accompanied by a statement setting out the intent of the Act. The reference to "the intent set forth in Section 3" is apparently a mistake and was meant to be "intent set forth in Section 4." Also, Section 5 provides that the Attorney General, district attorney or the court shall have access to arrest record information "where it is deemed necessary in the performance of their functions under law."

Section 6 provides for access to arrest record information by individuals. The provisions of Section 6 are self-explanatory and provide as follows:

"A. Upon satisfactory verification of his identity, any individual may inspect, in person, through counsel or through his authorized agent, arrest record information maintained by law enforcement agency concerning him.

"B. Personnel assigned to contractual research for a valid criminal justice project shall be *{*108}* permitted access to arrest record information, provided such personnel shall be subject to the provisions of Section 6 of the Arrest Record Information Act."

It will be incumbent upon law enforcement agencies to satisfactorily verify the identity of the individual before permitting the individual to inspect their own records. Likewise law enforcement agencies must satisfactorily verify that counsel or an authorized agent is in fact authorized by the individual whose records they seek to inspect before inspection of such records is allowed.

Section 6B permits "personnel assigned to contractual research for a valid criminal justice project" access to arrest record information. It is not clear from the Act what the legislature meant by "contractual research" nor what was intended by the phrase "a valid criminal justice project." We can conclude only that the legislature meant that any personnel working on a governmentally sanctioned criminal justice project may have access to arrest record information, but such personnel may not further disseminate such information except as statistical or analytical data. Section 8E provides that the confidentiality provisions of the Act shall not apply to "statistical or analytical records or reports in which individuals are not identified and from which their identities are not ascertainable." Apparently, a typographical error was made in Section 6B in the reference to Section 6. It cannot be conclusively ascertained as to whether the legislature meant to refer to Section 4 in Section 6B, but that would appear to be the most logical explanation.

Despite the seemingly strict provisions of Section 4 which would, at first glance, appear to make confidential all arrest record information maintained by the state or any of its political subdivisions pertaining to any person charged with the commission of any crime, Section 4 further states "except as provided in the Arrest Record Information Act." As has been noted above, Sections 5 and 6 make certain exceptions with respect to the release of such arrest record information. However, the most significant and important exceptions to the confidentiality of such arrest record information are contained in Section 8. A close analysis of the provisions of Section 8 is necessary to determine what records otherwise included in the definition of "arrest record information" may be released.

Section 8 states that the provisions of the Arrest Record Information Act do not apply to five categories of records. The first category defined by the legislature is:

"A. Original records of entry such as police blotters maintained by law enforcement agencies, indexed chronologically and permitted by law to be made public, if such records are organized on a chronological basis;"

We must seek to define what the legislature meant by "original records of entry" and what the legislature meant by "indexed chronologically" in order to determine which of these records are not covered by the confidentiality provision of the Arrest Record Information Act. A review of case law and other standard tools used in interpretation of

statutes does not shed any light on what are "original records of entry." Even the phrase utilized by the legislature in Section 8A as an example of an original record of entry, namely "police blotters," has not been the subject of any case law. In fact, a review of state and local *{*109}* law enforcement agencies in New Mexico reveal virtually as many varieties of "police blotters" as the number of agencies contacted. The practice in law enforcement agencies in New Mexico with respect to information contained on "police blotters" varied from one agency which entered only a number to other agencies that gave considerable history with respect to the individual arrested and with respect to the nature and circumstances of the arrest.

Nevertheless, Webster's New International Dictionary, Second Edition, defines a blotter as "a book in which entries of transactions or occurrences are made as they take place, pending their transfer to permanent record books; as, a police blotter." This would appear to be what the legislature had in mind, especially in view of the fact that, while the entry of transactions or occurrences which are made by the various law enforcement agencies in New Mexico vary considerably, there is nonetheless certain information which is customarily included. It is our opinion that, unless otherwise prohibited by law, the following information may be appropriately included by a law enforcement agency in a "police blotter" or original record of entry: the name, physical description, place and date of birth, address, and occupation of the individual arrested; the time and place of arrest; the offense for which the individual was arrested or detained; and the name of the arresting officer. This list should be interpreted as a minimum requirement but not to the exclusion of additional information which may presently appear on the initial records of entry or police blotters being used by some law enforcement agencies.

Such information contained on original records of entry can thus be released if they are indexed chronologically, organized chronologically, and "permitted by law to be made public." It is our opinion that the reference by the legislature to "permitted by law to be made public" was meant as a direction that an original record of entry is excluded from the confidentiality provisions of the act unless there are other statutes specifically prohibiting the release of the particular information. For example, the Children's Code protects from public disclosure certain information with respect to juveniles. Accordingly, an initial record of entry containing arrest record information chronologically organized and indexed would still appear to be a "public record" as that phrase has been construed with respect to Section 71-5-1, NMSA, 1953 Comp. (1973 Supp.). As explained in Opinion of the Attorney General No. 72-17, issued April 4, 1972:

"A 'public record' is a document, report or writing which is prepared, ordered or obtained by a public official in connection with the orderly, customary or appropriate discharge of the responsibilities imposed by law upon his office or governmental agency. MacEwan v. Holm, 359 P.2d 413 (Ore. 1961); Conover v. Board of Education, 238 P. 2d 581 (Cal. 1951). And see opinions of the Attorney General No. 72-3, issued January 12, 1972; No. 69-139, issued December 4, 1969; No. 61-137, issued December 27, 1961."

Such information would thus be open to public inspection pursuant to Section 71-5-1, **supra,** unless some other provision of law specifically prohibits disclosure.

Section 8B further excludes from the confidentiality provisions *{*110}* of the Act, "court records of public criminal proceedings." Section 8C excludes from the confidentiality provisions of the Act "public criminal proceedings and court opinions, including public compilations thereof."

It is our opinion that all arrest record information that becomes part of the court record in a public criminal proceeding or is contained within a court opinion is not covered by the confidentiality provisions of the Act. Such information becomes a part of a court record upon it being duly filed with the district court clerk. Therefore, any information which has been compiled in an arrest record and which may or may not have been previously made public, will become a public record upon being filed with the court as part of a case file and is open for public inspection and dissemination. Sections 8B and C apply to all records of public criminal proceedings in all courts.

Section 8D provides another broad exemption with respect to the confidentiality provisions of the Act. Section 8D reads:

"D. records of traffic offenses disseminated to or maintained by the department of motor vehicles for the purpose of regulating the issuance, suspension, revocation or renewal or driver's or other operator's licenses;"

Thus, the legislature has provided that any records of traffic offenses which are supplied to the Department of Motor Vehicle or maintained by it are not covered by the confidentiality provisions of the Act if those records of traffic offenses are "disseminated to or maintained by" the Department of Motor Vehicles "for the **purpose** of regulating the issuance, suspension, revocation or renewal of driver's or other operator's licenses." Such records of traffic offenses which are disseminated to or maintained by the Department for such purposes include, but may not necessarily be limited to, uniform traffic citations, records supplied to the Department of Motor Vehicles for the purpose of revoking licenses under the Implied Consent Act, reports filed by individuals as required by the Financial Responsibility Act since these reports may eventually be used by the Department for the suspension or revocation of drivers' licenses, and accident reports filed with the Department of Motor Vehicles by law enforcement agencies since these reports too may be used by the Department in their regulation of driver's or other operator's licenses. However, if such records of traffic offenses contain only information on non-moving violations or information with respect to the charge of speeding between 55 and 70 miles per hour then such records must remain confidential under the Act since such records would not be disseminated to or maintained by the Department for the purpose of the issuance, suspension, revocation or renewal of driver's or other operator's licenses.

We would stress that such records in order to be covered by the confidentiality provisions of the Act must be limited to arrest record information with respect to only

non-moving violations and/or violations of speeding between 55 and 70 miles per hour since that information cannot be used by the Department of Motor Vehicles in assessing points to a driver for the purpose of suspension or revocation of driver's licenses. If a record contains information with respect to such non-moving violations or speeding between 55 and 70 miles per hour and also contains information *{*111}* with respect to other offenses which the Department could take into consideration in regulating the issuance, suspension, revocation or renewal of driver's or other operator's licenses, then the entire record is exempted from the confidentiality aspects of the Act. Moreover, there is no stipulation that the Department of Motor Vehicles is the only agency which may disseminate a record kept by that office for the aforementioned purposes.

We would further note that Section 39-2-26, NMSA, 1953 Comp. (2nd Repl. Vol. 6) requires the state police to furnish a copy of all reports of motor vehicle accidents in the custody of that office when so requested and for a designated fee. There is no conflict between the Arrest Record Information Act and Section 39-2-26, **supra,** where the accident report falls within Section 8D of the Act, where the information on the accident report is the same as that information on the initial record of entry, or where any arrest information on the report is deleted from the copy disseminated.

4. Arrest record information that is included in the exceptions specified in Section 8 of the Act may be obtained by any person in the usual and legal manner.

Concerning other arrest record information not excepted in Section 8, the Act contains specific guidelines as to who may obtain arrest record information and in what manner such information may be obtained. Two separate categories are specified by the Act.

First, the Act states in Section 2 that the responsible exchange of complete and accurate information among law enforcement agencies is necessary and indispensable to effective law enforcement. The Act then provides guidelines in Section 5 for the exchange of arrest record information between law enforcement agencies.

Those guidelines are as follows:

a. A law enforcement agency may disseminate arrest record information to a federal, state or local law enforcement agency provided that when such information is disseminated to law enforcement officials outside of New Mexico such information must be accompanied with a statement of the intent of the Arrest Record Information Act.

b. The Attorney General, district attorneys and the courts shall have direct access to arrest record information where such information is necessary for the performance of their official responsibilities.

c. A law enforcement agency shall also have direct access to automated wanted information pertaining to individuals or to stolen property.

Secondly, the Act in Section 6 for access by individuals to arrest record information in accordance with the following guidelines.

a. Any individual may upon satisfactory verification of his identity have access to his own arrest record information. This may be done either in person or through his counsel or authorized agent.

What constitutes satisfactory verification of identity is not specified in the Act and is therefore to be reasonably determined by the law enforcement agency releasing the arrest information. Nothing in the Act prohibits the custodian of the arrest record from allowing copies of the record to be made *{*112}* once proper identification has been established.

A law enforcement agency or other custodian of arrest record information is not prohibited by the Act from giving information to the effect that there is no arrest record of an individual. The Act only applies to records that are in existence.

b. Any person who is assigned to contractual research for a valid criminal justice project shall have access to arrest record information.

Such persons, however, are subject to Section 4 of the Act and should be upon notice that any release of arrest information in violation of the Act would subject such individuals to prosecution for a fourth degree felony.