Opinion No. 78-09

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OPINION OF: Toney Anaya, Attorney General

BY: Toney Anaya, Attorney General

TO: Honorable Ira Robinson Second Judicial District Attorney Post Office Box 488 Albuquerque, New Mexico 87103

ARREST RECORD INFORMATION; CONFIDENTIAL RECORDS; NEGATIVE DISPOSITION; RECORDS EXEMPTED; RECORDS ACCESS; REPEAL OF FELONY PENALTY

Intent of Arrest Record Information Act is to prohibit disclosure of specified criminal charge records following a "negative disposition" of the charge. The Act's exception, however, heavily dilute this prohibition. No criminal penalty for violation.

QUESTIONS

1. What records maintained by the State or any of its political subdivisions pertaining to a person charged with the commission of any crime may be disclosed to the public pursuant to the provisions of the Arrest Record Information Act, Sections 39-10-1 to 39-10-9, NMSA 1953 Comp., as amended by Laws 1977, ch. 339, §§ 1 through 6.

2. Are any criminal sanctions available in the event of violations of the provisions of the Act?

CONCLUSIONS

1. See Analysis.

2. No.

ANALYSIS

Opinion of the Attorney General No. 75-39, dated July 23, 1975, which interpreted the 1975 Arrest Record Information Act, is no longer valid and is superceded by this opinion because of the 1977 amendments to that Act.

OPINION

1. The basic policy of the State with respect to access to the public records has been set out in **State ex rel. Newsome v. Alarid,** 90 N.M. 790, 797, 568 P.2d 1236 (1977) in which the Supreme Court stated:

"We hold that a citizen has a fundamental right to have access to public records. The citizen's right to know is the rule and secrecy is the exception. Where there is no contrary statute or countervailing public policy, the right to inspect public records must be freely allowed."

The Arrest Record Information Act, Sections 39-10-1, **et seq.,** N.M.S.A. 1953 Comp., as amended by Chapter 339, Laws 1977, may be viewed as establishing statutory exceptions to the fundamental right to inspect. It does so, however, in a rather conflicting manner, and, after careful analysis, it appears that virtually all arrest record information is subject to at least a limited or conditional disclosure.

It should first be noted that the Arrest Record Information Act does not come into play until after the filing of a "formal criminal charge" or the "arrest" of an individual followed by a "negative disposition" of the charges. See Section 39-10-3A.

Essentially, the Act is structured to achieve its intended results by defining "arrest record information" (Section 39-10-3A), by excluding certain records from its provisions (Section 39-10-8A), and by providing that such information remain confidential (Section 39-10-4) **except** as otherwise provided in the Act (Sections 39-10-5, 39-10-6, 39-10-8 and 39-10-9). In effect, however, the 1977 amendments so limit the circumstances in which arrest record information may remain confidential that as a statutory exception to the fundamental right to public access, it actually exempts very few records from public disclosure.

Section 39-10-3 establishes by definition those records which are subject to the confidentiality provisions of the Act. Although the definition of "arrest record information" includes "all notations of arrest or detention, or indictment or filing of information or other formal criminal charge against an individual made by a law enforcement agency," it further requires that, in order to be classed as "arrest record information," such notations must result in a "negative disposition." Even so, that confidentiality may be obviated by some other provision of the Act. It should be emphasized that the definition of "arrest record information" does not include investigative reports.

Apparently, what the legislature intended by the term "negative disposition" is a disposition which is either not favorable to the State, favorable to the individual charged, or inconclusive. Section 39-10-3B defines "negative disposition" as:

"(1) criminal proceedings have been concluded and the defendant was found not guilty;

(2) a prosecutor has elected not to refer a matter for prosecution; or

(3) criminal proceedings have been indefinitely postponed, and includes but is not limited to acquittal, case continued without finding, charge dismissed, charge dismissed due to insanity or mental incompetence, charge still pending due to insanity or mental incompetence, nolle prosequi, deceased, deferred disposition, pardoned, extradition proceedings have been concluded and mistrial - defendant discharged."

The 1977 amendments, by inference, deleted from the "arrest record information" proceedings those resulting in positive dispositions, **i.e.,** those in favor of the State, such as a guilty plea, a nolo contendere plea, a conviction, a sentence commuted and an adjudication withheld. See Laws 1975, Chapter 260, Section 3. Whether those dispositions **now** enumerated are in fact all "negative," the legislature, in making the deletions to Section 39-10-3B, must be presumed to have intended to change the law as it had theretofore existed. **Bettini v. City of Las Cruces,** 82 N.M. 633, 485 P.2d 967 (1971). Thus, information relating to criminal proceedings which do not result in a "negative disposition" as defined by the 1977 amendment is excluded from the definition of "arrest record information" and is not afforded a statutory protection of confidentiality under the terms of the Act.

In sum, as a result of the 1977 amendments, only those notations of an arrest or detention or formal criminal charge filed by a law enforcement agency which results in a disposition which is included in Subsections 39-10-3B(1), (2), and (3) are subject to the confidentiality provisions of the Act. However, further provisions in the Act remove even these confidentiality restrictions to varying degrees.

For example, Section 39-10-8A excludes from coverage of the Act, regardless of whether it constitutes "arrest record information" as defined by Section 39-10-3, criminal history record information contained in:

"(1) posters, announcements, or lists for identifying or apprehending fugitives or wanted persons;

(2) original records of entry such as police blotters maintained by criminal justice agencies, compiled chronologically and required by law or long-standing custom to be made public, if such records are organized on a chronological basis;

(3) court records of public judicial proceedings;

(4) published court or administrative opinions or public judicial, administrative or legislative proceedings;

(5) records of traffic offenses and accident reports;

(6) announcements of executive clemency; and

(7) statistical or analytical records or reports in which individuals are not identified and from which their identities are not ascertainable."

The 1977 amendments made several changes in the original listing of records to which the Act does not apply. For instance, in subsection 39-10-8A(2), the phrase "indexed chronologically" was amended to read "compiled chronologically," thus removing the requirement that the records must be "indexed" to qualify as "original records of entry." Also, significantly, the 1977 amendments added the phrase "or long-standing custom."

This has the effect of excluding from the Act not only original records of entry required by law to be made public, but also those required by long-standing custom" to be made public. Many law enforcement agencies had, prior to the 1975 Act, established a "long-standing custom" of releasing information from police blotters and from other such "original records of entry." If that information is "compiled chronologically" as we understand most is, it would be excluded from the confidentiality provisions of the Act and thus subject to disclosure.

Perhaps the most significant exception from the provisions of the Act is that contained in Section 39-10-8A(3). That exception, of course, relates to "court records of public judicial proceedings." This exception must be viewed in the light of what is defined as a "negative disposition" in Section 39-10-3B. Section 39-10-3B(1) and (3) as set forth above, describes situations where the criminal proceedings have terminated and are **not** in favor of the State, or are inconclusive. However, almost each of the situations described would most probably comprise information contained in the "court records of public judicial proceedings."

What remains then of the definitional provisions of a "negative disposition" in Section 39-10-3B is subsection (2). That subsection contemplates the situation where the prosecutor has elected not to refer a matter for prosecution. Although there may be no public court records in such situations, the arrest record information of an individual who, after being arrested, is not formally charged or is referred to a "preprosecution diversion" program, and thus again not formally charged, may be subject to public disclosure pursuant to the other categories in Section 39-10-8A.

In Section 39-10-8E of the 1975 Act, "records of traffic offenses disseminated to or maintained by the Department of Motor Vehicles for purposes of regulating the issuance, suspension, revocation or renewal of driver's or other operator's licenses" were excluded from the Act's coverage. The 1977 repealer and enactment of new Section 39-10-8, in subsection A(5), now applies the exception to records of traffic offenses and accident reports. All such information is therefore subject to public disclosure.

Thus, as the Act is structured, records which fall within the definition of "arrest record information" at Section 39-10-3 but which are not exempted by virtue of Section 39-10-8A are subject to the confidentiality requirements of Section 39-10-4. That Section, which was not amended in 1977, provides that:

"arrest record information maintained by the state or any of its political subdivisions pertaining to any person charged with the commission of any crime shall be confidential and dissemination or revealing the contents thereof, **except as provided in the [Act],** is unlawful." (Emphasis added.)

The exceptions provided in the Act, however, constitute a substantive erosion of the confidentiality presumably guaranteed by the Act.

Section 39-10-5 authorizes the dissemination of arrest record information to other law enforcement agencies. It permits direct access to such information by the Attorney General, District Attorneys or courts when necessary in the performance of their functions under law. It also permits direct access by law enforcement agencies "to automated wanted information pertaining to a person or stolen property." Section 39-10-6A permits the inspection by an individual of records concerning him, and Section 39-10-9 allows an individual to obtain a copy of such information for the purpose of challenge or correction. Section 39-10-6B permits access to arrest record information for research undertaken by a "state or federally approved criminal justice project" so long as such information is not further disseminated except as statistical or analytical records in which individuals are not identified or identifiable. All confidential records are, therefore, subject to at least some limited disclosure.

The exceptions provided at Section 39-10-8B, however would render otherwise confidential records subject to full disclosure in two instances. First, there are no confidentiality requirements where the arrest record information is "related to the offense for which an adult individual is currently within the criminal justice system." While the Act does not specify what is meant by being "within the criminal justice system," we would suggest that, with respect to "arrest record information," it relates to an adult who has been arrested or formally charged with a criminal offense until such time as there is a final "negative disposition." Only then would his records not be subject to disclosure, pursuant to Section 39-10-8B, by a law enforcement agency. However, such information may, in any event, be obtainable as permitted by the Act, e.g., pursuant to Section 39-10-8A. The records of an adult charged with an offense which does **not** result in a "negative disposition" would be disclosable as those records would not constitute arrest record information subject to the Act as defined by Section 39-10-3.

Second, Section 39-10-8B excepts from confidentiality, at least insofar as confirmation, "prior arrest record information . . . upon specific inquiry as to whether a named individual was arrested, detained, indicted or whether any information or other formal charge was filed, on a specified date" if that information relates to data found in the seven items listed in Section 39-10-8A.

Thus, even records which would otherwise survive the maze of exceptions to the confidentiality provisions of the Act would be subject to confirmation by a law enforcement agency if a request for information is made with respect to a particular individual and the basis for the request can be related to some record described in Section 39-10-8A. As a practical matter, however, the requirement that the information to be disclosed is "based on data enumerated" in Section 39-10-8A is essentially unenforceable, and the exception for prior arrest record information confirmation would probably extend to any specific request.

2. Generally, the Act attempts to establish the confidentiality of "arrest record information," as defined, with certain exceptions. The 1977 amendments not only substantially limited the type of information which may be protected against disclosure but also repealed Section 39-10-7, the fourth degree felony penalty provision contained

in the 1975 enactment. Thus, while Section 39-10-4 still provides that violations of the Arrest Record Information Act are "unlawful," there are no longer any criminal sanctions for releasing arrest record information in violation of the provisions of the Act.

ATTORNEY GENERAL

Toney Anaya, Attorney General