STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL

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November 25, 2020

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Re: Opinion Request – Interpretation of Arrest Record Information Act

Dear District Attorney Torrez,

You have requested our opinion as to the proper interpretation of the Arrest Record Information Act (hereinafter "ARIA"), NMSA 1978, Sections 29-10-1 to -8 (1975, as amended through 1999). Specifically, you inquire as to the statute's scope in the context of individuals accused but not charged with a criminal offense. Based on our examination of the relevant statutory and case law authorities, as well as the information available to us at this time, we conclude that ARIA's confidentiality provision is inapplicable to information about individuals who have been personally charged with committing a crime and to those circumstances where no charges have been filed at all. Rather, the confidentiality conferred by the statute is applicable to individuals accused but not charged with a crime whose identifying information is contained in arrest record information pertaining to other individuals who have been personally charged with committing a crime.

Background

Your opinion request is framed in the context of two public records requests submitted to the Office of the Second Judicial District Attorney (the "District Attorney's Office"). The first of these was a subpoena for records pertaining to a suspect who was investigated twice for possible criminal violations. Neither of these investigations, however, resulted in an arrest or formal criminal charge. The District Attorney's Office objected to the subpoena for investigatory records on the basis of ARIA, later explaining that its position was that "when an individual is neither arrested nor charged, we do not release the files nor even confirm the identity of the suspected individual."

The second records request at issue in your opinion request was made pursuant to the Inspection of Public Records Act ("IPRA"), NMSA 1978, Sections 14-2-1 to -12 (1947, as amended through 2019). This records request sought, in relevant part, records containing information as to the alibi of a criminal suspect who was arrested but never formally charged with committing a crime. The District Attorney's Office apparently relied on this information in dismissing the case against the

defendant. The District Attorney's Office invoked ARIA in denying this request, taking the position that "we could not release the alibi information … because it has not been filed in court."

Analysis

Before interpreting ARIA in the context of these two records requests, we believe it would be helpful to review the rules of statutory construction that guide our analysis. First, we acknowledge that the purpose of statutory interpretation is to "determine and effectuate the intent of the legislature." *State v. Ogden*, 1994-NMSC-029, ¶ 24, 118 N.M. 234, 242. *See also* NMSA 1978, § 12-2A-18(A)(1) (providing that "[a] statute or rule is construed, if possible, to… give effect to its objective and purpose"). Where the plain language of a statute is clear, courts will refrain from further analysis unless a literal interpretation would lead to an absurd or erroneous result. *See Inv. Co. of the Sw. v. Reese*, 1994-NMSC-051, ¶ 13, 117 N.M. 655, 658 (noting that "the Court must look beyond the four corners of the statute" in cases where "the literal meaning leads to conclusions that are unjust or nonsensical"). A statute must also be read in its entirety and interpreted "as a whole so that each provision may be considered in relation to every other part." *New Mexico Pharm. Ass'n v. State*, 1987-NMSC-054, ¶ 8, 106 N.M. 73, 74. Because New Mexico does not have a "state-sponsored system of recording the legislative history of particular enactments," courts will "not attempt to divine what legislators read and heard and thought at the time they enacted a particular item of legislation. If the intentions of the Legislature cannot be determined from the actual language of a statute, then we resort to rules of statutory construction, not legislative history." *Regents of Univ. of New Mexico v. New Mexico Fed'n of Teachers*, 1998-NMSC-020, ¶ 30, 125 N.M. 401, 411.

The Arrest Record Information Act

Prior to its amendment in 1993, see N.M. Laws 1993, Chapter 260, Sections 2 through 5, ARIA's confidentiality provisions were considerably narrower and more straightforward than they appear today. The earlier version of ARIA contained a definition of arrest record information which was limited to those notations of an arrest, detention, or formal criminal charge that ultimately "resulted in a negative disposition." NMSA 1978, § 29-10-3 (1977, amended 1993). This meant that ARIA did not apply where a defendant had previously been convicted or pled guilty or no contest. It also did not apply to those circumstances where the criminal proceedings against the defendant had not yet been fully adjudicated.

The confidentiality provision in the pre-1993 version of ARIA, read as follows:

> 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 shall be confidential and dissemination or the revealing the contents thereof, except as provided in the Arrest Record Information Act, is unlawful.

NMSA 1978, § 29-10-4 (1975). Notably, this version of Section 29-10-4 provided confidentiality to arrest record information that "pertain[ed] to any person charged with the commission of any crime," not third parties. As a whole, prior to 1993 ARIA did not contain any provisions addressing or even mentioning individuals accused but not charged with a crime, instead focusing on those

actually charged with a criminal offense which resulted in a negative disposition. Even for those individuals who had been charged but not convicted, however, confidentiality was limited because ARIA also outlined seven distinct categories of information to which this confidentiality did not apply, including court records. *See generally* NMSA 1978, § 29-10-7(A)(1979, as amended through 1987). As noted in a 1978 Attorney General opinion, ARIA's pre-1993 provisions "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." N.M. Att'y Gen. Op. 78-09 (1978).

Both ARIA and IPRA were amended in 1993 generally to provide for greater confidentiality of arrest record information. Most importantly, Section 29-10-4 was amended to read:

> Arrest record information that reveals confidential sources, methods, information or individuals accused but not charged with a crime and that is maintained by the state or any of its political subdivisions pertaining to any person charged with the commission of any crime is confidential and dissemination or revealing the contents of the record, except as provided in the Arrest Record Information Act or any other law, is unlawful.

NMSA 1978, § 29-10-4 (1975, as amended through 1993). The effect of this language, evident from its plain text, was to remove confidentiality protections from those who had been charged with a crime and to provide confidentiality towards other types of information and people. As amended, arrest record information maintained by governmental entities became confidential upon satisfying two separate criteria: it had to reveal "confidential sources, methods, information or individuals accused but not charged with a crime," and it had to "pertain[…] to any person charged with the commission of any crime." The 1993 amendment to ARIA also broadened the definition of "arrest record information" by eliminating the requirement that the charge or prosecution ultimately result in a negative disposition. As amended and as the definition appears today, 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." Section 29-10-3.

IPRA also was amended by the same legislation in 1993 to create the so-called "law enforcement records exception," which, as initially adopted, excepted from obligatory disclosure the following records:

> law enforcement records that reveal confidential sources, methods, information or individuals accused but not charged with a crime. Law enforcement records include evidence in any form received or compiled in connection with any criminal investigation or prosecution by any law enforcement or prosecuting agency, including inactive matters or closed investigations to the extent that they contain the information listed above

NMSA 1978, § 14-2-1 (1993). This amendment is noteworthy because the new exception to IPRA contained the same phrase as was used to confer confidentiality in ARIA: "confidential sources, methods, information or individuals accused but not charged with a crime."

Our Office interpreted the 1993 amendments to ARIA and IPRA in an Attorney General Opinion published in 1994. In relevant part, that opinion concluded that the confidentiality conferred by Section 29-10-4 was not afforded to the individual charged with a crime but instead to third parties who were accused but not charged while still being named in arrest record information. *See* N.M. Att'y Gen. Op. 94-02 (1994) (concluding that Section 29-10-4 "does not protect the identity of the person charged. The reference to 'individuals accused but not charged with a crime' clearly is intend [sic] to distinguish such persons from the person charged, and to protect the identity of third parties about whom information may be recorded in investigatory or other records made in connection with the person charged with a crime."). As a prerequisite, the opinion explained, Section 29-10-4 only applied where an individual had been charged with a crime, but this individual's identity and information was not made confidential. Only a third party who was accused but not charged was entitled to confidentiality. It also concluded that the amendment to IPRA "should not be read more broadly than Section 29-10-4 to protect from public inspection information identifying an individual who has been arrested." N.M. Att'y Gen. Op. 94-02 (1994). Finally, it summarized the amendments as follows:

> To summarize, neither the Arrest Record Information Act nor the Inspection of Public Records Act authorize a law enforcement agency to protect the identity of persons who have been arrested or charged with a crime. Section 29-10-4 of the Arrest Record Information Act protects the confidentiality of information concerning the identity of a person who has been accused but not charged with a crime only if that information has been collected in connection with an investigation of, or otherwise relates to, another person who has been charged with committing a crime. However, information in other records which identifies a person accused but not charged with or arrested for a crime may be protected from public disclosure under the Inspection of Public Records Act.

Id.

Although the relevant provisions of ARIA have not been amended since 1993, the law enforcement records exception was amended in 2019. As most recently amended, the exception in IPRA diverged from its counterpart in ARIA by bifurcating "confidential sources, methods or information" from information as to individuals who have been "accused but not charged with a crime." Section 14-2-1(D). The exception now permits law enforcement agencies to redact "confidential sources, methods or information" at any stage of the prosecutorial or investigatory process, but information as to individuals who have been "accused but not charged with a crime" may only be redacted "before charges are filed." *Id.*

Records Held by the District Attorney's Office

Although the two records requests at issue in your opinion differ with respect to their circumstances, both depend on the scope of Section 29-10-4. In the case of the first request (the subpoena), the records at issue are investigatory records of a suspect who was never arrested or charged with a crime. In the second case, the defendant was arrested but not charged, and the records at issue contain alibi information that was never filed in court. The District Attorney's

Office has taken the position that the records involved in both of these cases are confidential pursuant to ARIA. We disagree.

With respect to the first request, the records involved are clearly not confidential under ARIA because they simply are not arrest record information. As mentioned previously, ARIA defines "arrest record information" as "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." Here, the suspect was never arrested, detained, or charged with a crime. As a result, the records involved cannot possibly be notations of an arrest, detention or criminal charge, and therefore ARIA does not apply.

To clarify, the District Attorney's Office position that "when an individual is neither arrested nor charged, we do not release the files nor even confirm the identity of the suspected individual," is inconsistent with ARIA and overbroad. For ARIA to apply at all, the information involved must be notations of an individual's arrest, detention or criminal charge. Moreover, confidentiality under ARIA exists only for those records which pertain "to any person *charged* with the commission of any crime." Section 29-10-4 (emphasis added). *See also* N.M. Att'y Gen. Op. 94-02 (1994) (explaining that, "on its face, the confidentiality provided under Section 29-10-4 does not apply to a person who has been arrested but not formally charged by indictment, filing of information or otherwise"). Information as to an individual who has been accused but not charged with a crime is confidential under ARIA only when contained in arrest record information pertaining to another individual who has been criminally charged.[1]

This same reasoning also resolves the second records request facing the District Attorney's Office. Because the information involved in that case exclusively pertains to an individual who has been arrested but not criminally charged, ARIA cannot be construed to confer confidentiality. Section 29-10-4 provides for confidentiality for certain types of information "pertaining to any person charged with the commission of any crime." Where the individual "has been arrested but not formally charged by indictment, filing of information or otherwise," this confidentiality does not apply.[2] N.M. Att'y Gen. Op. 94-02 (1994).

We conclude by noting that we do not agree that the above interpretation of ARIA – that is, the recognition of its plain meaning – renders the remaining language of the statute superfluous or meaningless. The fact that the statute is not written broadly to exempt all possible investigatory material from disclosure does not contravene its underlying purpose of preventing the "inaccurate, incomplete," or irresponsible dissemination of information. NMSA 1978, § 29-10-2. This is especially clear in light of the "public policy" of the State of New Mexico that "all persons are

[1] This conclusion also resolves your more recent inquiry as to whether ARIA confers confidentiality where a law enforcement agency refers a criminal investigation to the District Attorney's Office for possible prosecution but charges are never filed. In such a circumstance, because charges were never filed, ARIA cannot be interpreted to make the records confidential.

[2] Even if this particular arrestee had been criminally charged, however, the arrestee still would not enjoy confidentiality by virtue of Section 29-10-4. Where an individual has been charged with the commission of a crime, by definition that individual cannot simultaneously be "accused but not charged with a crime." Section 29-10-4. This is the plain language of the statute, as we emphasized in our prior opinion on this subject. *See* N.M. Att'y Gen. Op. 94-02 (1994). The only way this arrestee could be afforded confidentiality under ARIA would be if the information at issue pertained to some other individual who had been charged with the commission of a crime.

entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees." NMSA 1978, § 14-2-5. (We would also note that, ironically, an interpretation of ARIA that did not take its plain meaning into account would most definitely have the effect of rendering much of the statute's language superfluous.)

Conclusion

As we have before in interpreting this statute, we conclude that the plain language of ARIA clearly outlines the scope of its confidentiality provision in Section 29-10-4. Information as to individuals accused but not charged with a crime is only confidential under ARIA where it is contained in arrest record information pertaining to another individual who has been criminally charged. ARIA simply does not provide a blanket exception shielding from disclosure all information about individuals accused but not charged with a crime, nor does it exempt from disclosure information about a person who has been arrested.

You have requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Therefore, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Respectfully,

John F. Kreienkamp
Assistant Attorney General