

**LETTER OPINION
2000-L-48**

April 4, 2000

Mr. Warren R. Emmer
Director
Division of Field Services
PO Box 5521
Bismarck, ND 58506-5521

Dear Mr. Emmer:

This letter is in response to your letter dated March 3, 2000, regarding the effect of 2000 N.D. Op. Att'y Gen. L-18 (Feb. 14 to Elaine Little) (referred to as "the February 14 letter opinion") on various statutory obligations of the Department of Corrections and Rehabilitation (DOCR).

Your first question is whether the February 14 letter opinion prevents the DOCR from providing victims and witnesses the information outlined under N.D.C.C. ch. 12.1-34. There are two different subsections in N.D.C.C. § 12.1-34-02 that relate to the DOCR's obligations regarding victim and witness notification. N.D.C.C. § 12.1-34-02(16) provides that a custodial authority must inform victims and witnesses whenever a defendant receives a temporary, provisional, or final release from custody or whenever the defendant escapes from custody. This subsection also provides that notification must include the transfer of the defendant to a work-release program, a community residential program, or a mental health facility. N.D.C.C. § 12.1-34-02(17) requires the DOCR to provide notice of pending Parole and Pardon Advisory Board reviews and of the decision of the Parole Board and of the recommendations of the Pardon Advisory Board and the Governor's decision. This subsection also requires the DOCR to provide the victim notice of the date of the prisoner's release on parole or the prisoner's pardon, conditional pardon, reprieve, commutation, or remission of fine.

There are several provisions of statutory construction that are applicable to your question. N.D.C.C. § 12.1-34-02(16) relating to notice of custodial releases uses the word "must."

The ordinary meaning of the word "must" is to impose a duty or grant a right which is mandatory or imperative. The word "must" cannot be construed to impose or grant a merely directory or non-mandatory duty or right unless the context <PAGE NAME="p.L-49">within which it is used clearly indicates that such was the intent of the Legislature.

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In Interest of D.S., 263 N.W.2d 114, 119 (N.D. 1978). N.D.C.C. § 12.1-34-02(16) imposes a mandatory duty on the Department of Corrections and Rehabilitation to provide notice to victims and witnesses of various changes in an inmate's status. N.D.C.C. § 12-59-04, on the other hand, provides that all inmate records are confidential. N.D.C.C. § 1-02-07 provides that whenever a general provision in a statute is in conflict with a special provision in the same or in another statute, the two must be construed, if possible, so that effect may be given to both provisions. If the conflict between the two provisions is irreconcilable, the special provision must prevail and must be construed as an exception to the general provision. The provisions of N.D.C.C. § 12.1-34-02(16) imposing a mandatory obligation on the DOCR to notify victims and witnesses of the events specified in the statute are special provisions and must be construed as an exception to the general provisions of N.D.C.C. § 12-59-04. Therefore, it is my opinion that the DOCR is obligated to continue to provide victim and witness notification under N.D.C.C. § 12.1-34-02(16).

N.D.C.C. § 12.1-34-02(17) requires the DOCR to notify victims of pending Parole and Pardon Advisory Board proceedings and of the decisions of the Parole Board, the recommendations of the Pardon Advisory Board, and the decision of the Governor. The DOCR must also provide notice to victims of the date of a prisoner's release on parole or pursuant to a prisoner's pardon, reprieve, or commutation. N.D.C.C. § 12-59-04 provides that an application for parole and the decision of the Parole Board on the application for parole are open records. N.D.C.C. § 12-55.1-11 allows for inspection of an application for a commutation, reprieve, pardon, conditional pardon, or remission of fine and for the inspection of the recommendations of the Pardon Advisory Board, if any, and the decision of the Governor. It is my opinion that the DOCR is obligated to continue to provide victim and witness notification under N.D.C.C. § 12.1-34-02(17).

You also ask whether the February 14 letter opinion prevents the DOCR from complying with sex offender registration requirements, DNA sample requirements, and criminal record information reporting requirements.

N.D.C.C. § 12.1-32-15(5) specifies the DOCR's obligations regarding the sex offender registration process when the individual is confined by the DOCR. N.D.C.C. § 12.1-32-15(5) requires that the DOCR inform the individual of the duty to register under N.D.C.C. § 12.1-32-15 and to require the individual to read and sign a form that states that the duty to register has been explained to the individual. The DOCR must <PAGE NAME="p.L-50">also obtain the address where the individual expects to reside, attend school, or work upon discharge, parole, or release, and forward this address to the North Dakota Attorney

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General. The DOCR is to provide three copies of this form to the Attorney General. The Attorney General must then forward one copy of the form to local law enforcement where the individual expects to reside, one copy to the state's attorney, and one copy to the court. N.D.C.C. § 12-59-04 provides that the DOCR inmate records are subject to N.D.C.C. § 12-47-36. This section provides that DOCR inmate records may be inspected by, or disclosed to, employees of the North Dakota Attorney General, the state's attorney and district court of the county where the judgment of conviction was entered, and to any municipal, county, state, or federal law enforcement agency. Thus, the DOCR is obligated to continue meeting the requirements of N.D.C.C. § 12.1-32-15.

DNA testing is governed by the provisions of N.D.C.C. ch. 31-13. While the administrative rules found in chapter 33-40-01 of the North Dakota Administrative Code provide that the DOCR is responsible for collecting, storing and sending sample DNA specimens to the Forensic Science Division of the Department of Health (crime laboratory) pursuant to N.D.C.C. § 31-13-05, the actual DNA identification records are not DOCR records, but are part of a centralized data base established by the crime laboratory. N.D.C.C. § 31-13-06 provides for confidentiality of DNA identification records. Disclosure of DNA identification records is only allowed in accordance with the provisions of N.D.C.C. § 31-13-06 or in accordance with N.D.C.C. § 31-13-09, which allows law enforcement agencies to use DNA records for official purposes. The DOCR is obligated to continue to collect, store and send sample DNA specimens to the crime laboratory in accordance with N.D.C.C. ch. 31-13 and the administrative rules.

N.D.C.C. ch. 12-60 requires criminal justice agencies to provide criminal history record information to the Bureau of Criminal Investigation, a state law enforcement agency which, pursuant to N.D.C.C. § 12-60-01, is part of the office of the Attorney General. The DOCR is a criminal justice agency as defined in N.D.C.C. § 12-60-16.1(4) and is obligated to provide criminal history record information to the Bureau of Criminal Investigation. N.D.C.C. § 12-60-16.2(5) specifically requires the North Dakota State Penitentiary, the pardon clerk, and the Parole Board to furnish the Bureau of Criminal Investigation with all information concerning the receipt, escape, death, release, pardon, conditional pardon, reprieve, parole, commutation of sentence, or discharge of an individual sentenced to that agency's custody for any reportable offense, and also to furnish information to the Bureau of Criminal Investigation regarding any escape from custody or death while in custody. I have previously stated that under N.D.C.C. § 12-47-36, DOCR inmate records <PAGE NAME="p.L-51">may be disclosed to, or inspected by, any employee of the office of the Attorney General or by any municipal, county,

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state, or federal law enforcement agency. I have also previously stated that Parole Board decisions, including release dates, and the recommendations of the Pardon Advisory Board and the decision of the Governor for a pardon, conditional pardon, reprieve, or commutation, are records that are open to inspection. The DOCR is obligated to continue to provide criminal history record information to the Bureau of Criminal Investigation or to any other law enforcement agency.

In summary, please understand that the February 14 letter opinion interprets N.D.C.C. § 12-59-04 as a general rule of confidentiality. When a member of the public requests DOCR records under the open records law, N.D.C.C. § 44-04-18, that request must be denied under N.D.C.C. § 12-59-04. However, if a statute such as those discussed in this opinion specifically authorizes or requires disclosure of certain DOCR records, those specific provisions will generally prevail over N.D.C.C. § 12-59-04.

Sincerely,

Heidi Heitkamp
Attorney General

krs/pg