

N.D.A.G. Letter to Lueder (Feb. 16, 1999)

February 16, 1999

Mr. James D. Lueder
Assistant Director
State Radio Communications
PO Box 5511
Bismarck, ND 58502-5511

Dear Mr. Lueder:

Thank you for your letter inquiring about the legality of your proposed process to impose an NCIC personnel security policy. Your proposal requires criminal history record and fingerprint checks on all law enforcement NCIC terminal operators, programmers, or others having access to or ability to initiate transmission of NCIC information. You attach a proposed letter to law enforcement agencies, a release form, a notification form, and one page from the NCIC security policy book relating to personnel security.

My review of your proposal discloses two areas that will require your attention and modification and another issue of which you should be aware. Your proposal calls for referring issues concerning an individual's access to the NCIC system to the North Dakota Peace Officers Association for that association's decision on whether to allow the individual access to the system if the individual's criminal history discloses certain levels of involvement with the criminal justice system. This delegation to a private nongovernmental entity is not permitted by law without statutory authority because agencies may not delegate duties which involve discretion or require the exercise of judgment. Letter from Attorney General Nicholas J. Spaeth to Parks and Recreation Director Doug Eiken (December 19, 1989) (copy attached). The required decision contemplated by your proposal involves discretion and the exercise of judgment in a governmental matter. Furthermore, the page that you attach from the NCIC security policy also does not authorize delegation of responsibility for determining access in the event of adverse findings in the criminal history, but requires it be referred to the executive head of the control terminal agency or designee. I believe the designee language contained therein refers to a person, such as yourself, who is a designate within the control terminal agency. Therefore, that portion of your proposal will need to be changed.

The release form you attach contains a statement indicating that the information received during the background investigation will not be used for any purpose other than employment at a certain agency. Records of North Dakota governmental agencies are open records unless otherwise specifically provided by law, including state law, federal law, or federal rules. N.D.C.C. § 44-04-18. Federal law and rules on the subject, including 28 U.S.C.A. § 534 nt., 28 C.F.R. § 20.33 and 28 C.F.R. § 50.12, require information acquired from the FBI system to be used only by the receiving agency for

employment-related purposes with state and local governments. Any further dissemination could endanger receipt of future criminal history record information. 28 C.F.R. § 20.33(b). These federal laws and rules constitute an exception to North Dakota's open records law. N.D.C.C. § 44-04-17.1(7). See 1994 N.D. Op. Att'y Gen. 114, and Letter from Attorney General Heidi Heitkamp to Carol K. Olson (March 30, 1998). However, certain criminal history record information generated in North Dakota is releasable pursuant to N.D.C.C. § 12-60-16.6. For that reason, I believe you should amend your statement in the release form to indicate that the information obtained will be used for employment-related purposes and may be released only pursuant to applicable state or federal law or federal rules.

It is conceivable that the agencies following through on your proposed policy could confront resistance from current employees because of a new employment requirement being imposed. However, North Dakota case law supports an employer's authority to alter the terms of employment for at-will employees so long as notice is given to all employees affected by the change and they continue in employment, or consciously agree to the change. Sadler v. Basin Electric Power Cooperative, 431 N.W.2d 296 (N.D. 1988). The outcome may be different than described in the Sadler case, however, if there happens to exist an employment contract in specific terms that describes the terms of employment. You should advise any agencies raising problems with this issue to contact the city attorney or state's attorney that advises those agencies.

Sincerely,

Heidi Heitkamp
Attorney General

rel/pg
Enclosure