

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 98-F-09

Date Issued: April 9, 1998

Requested By: Kenneth L. Dalsted, Jamestown City Attorney

- QUESTIONS PRESENTED -

I.

Whether information obtained under a search warrant obtained by a criminal justice agency and issued by the District Court is criminal investigative information under N.D.C.C. § 44-04-18.7.

II.

Whether criminal investigative information may or must be disclosed upon request.

III.

Whether other exceptions exist to further limit the disclosure of criminal investigative information.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that information obtained under a search warrant obtained by a criminal justice agency and issued by the District Court is criminal investigative information under N.D.C.C. § 44-04-18.7.

II.

It is my further opinion that while criminal investigative information is active, it may be disclosed at the discretion of the criminal justice agency subject to the restrictions contained in other statutes or federal law. It is my further opinion that once the criminal investigation is no longer active, the information must be disclosed unless disclosure is restricted under another statute or the information is subject to an exemption such as personal information as defined in subsection six of N.D.C.C. § 44-04-18.7.

III.

It is my further opinion that disclosure of criminal investigative information is also limited by the provisions of law governing release of specific information which would reveal the identity or endanger the life or safety of an undercover law enforcement officer; identify a confidential informant; reveal the names of child victims or witnesses; disclose records of a child alleged or found to be delinquent, unruly, or deprived; or otherwise disclose confidential information.

- ANALYSES -

I.

Criminal investigative information is defined broadly as "information with respect to an identifiable person or group of persons compiled by a criminal justice agency in the course of conducting a criminal investigation of a specific act or omission, including information derived from laboratory tests, reports of investigators or informants, or any type of surveillance." N.D.C.C. § 44-04-18.7(3). The term criminal justice agency includes any law enforcement agency or prosecutor. N.D.C.C. § 44-04-18.7(4).

The property which may be seized under a search warrant is described in Rule 41 of the North Dakota Rules of Criminal Procedure as property that is evidence of a crime, contraband, fruits of crime or otherwise illegally possessed, or instrumentalities of crime. Consequently, the property seized must have a nexus to a crime. Warden v. Hayden, 387 U.S. 294 (1967). The purpose of obtaining a search warrant is to obtain information which would assist law enforcement in investigating a crime. The information obtained by a criminal justice agency through a search warrant, therefore, would necessarily be "criminal investigative information" as defined in subsection three of N.D.C.C. § 44-04-18.7.

II.

"Except as otherwise specifically provided by law, all records of a public entity are public records, open and accessible for inspection during reasonable office hours." N.D.C.C. § 44-04-18. A "record" is defined in subsection 15 of N.D.C.C. § 44-04-17.1 as "recorded information of any kind, regardless of the physical form or characteristic by which the information is stored, recorded, or reproduced, which is in the possession or custody of a public entity or its agent and which has been received or prepared for use in connection with public business or contains information relating to

public business." Active criminal investigative information is not subject to the open records law. N.D.C.C. § 44-04-18.7. However, active criminal investigative information generally is not confidential and disclosure generally is not prohibited. Therefore, disclosure of any active criminal investigative information which is not confidential under other provisions of law is an "exempt record" disclosure of which would be in the discretion of the criminal justice agency. N.D.C.C. § 44-04-17.1(5). Criminal investigative information is considered active as long as it is "related to an ongoing investigation which is continuing with a reasonable good faith anticipation of securing an arrest or prosecution in the foreseeable future". N.D.C.C. § 44-04-18.7(3).

Once a criminal investigation is no longer active, the criminal investigative information is a public record required to be open and accessible to the public, unless the information is related to another ongoing criminal investigation, is personal information as defined in subsection 6 of N.D.C.C. § 44-04-18.7, or disclosure is otherwise restricted by law.

Consequently, unless a specific law prohibits or limits the disclosure of the particular type of information, the disclosure of active criminal investigative information is discretionary with the criminal justice agency and the disclosure of inactive criminal investigative information is required.

III.

Various statutory provisions prohibit the disclosure of certain types of information. Criminal investigative information may include many types of information, disclosure of any particular piece of information would be governed by the specific statutes addressing the confidentiality or limitations of the particular information.

For example, N.D.C.C. § 44-04-18.3 declares confidential "information that would reveal the identity, or endanger the life or physical well-being, of an undercover law enforcement officer" and "[a]ny information that would identify or provide the means of identifying a confidential informant if the informant is not otherwise publicly known". N.D.C.C. § 44-04-18.4 provides that certain trade secret, proprietary, commercial, and financial information is confidential. Information obtained from a financial institution to investigate a pattern of racketeering activity may not be released except in the discharge of official duties under N.D.C.C. § 12.1-06.1-07. The name and identifying biographical information of a child victim or witness

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of a crime, other than a criminal offense under Title 39 of the North Dakota Century Code or the victim of a fire, is confidential under N.D.C.C. § 12.1-35-03. "Law enforcement records and files of a child alleged or found to be delinquent, unruly, or deprived" may not be disclosed except in very limited circumstances under N.D.C.C. § 27-20-52. Likewise, results of DNA testing are confidential and may be disclosed only as provided in N.D.C.C. § 31-13-06.

Depending on the information, other provisions of law also may limit disclosure of criminal investigative information.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.

Heidi Heitkamp
ATTORNEY GENERAL

Assisted by: Beth Angus Baumstark
Assistant Attorney General

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