N.D.A.G. Letter to Hagerty (April 15, 1985)

April 15, 1985

Ms. Gail H. Hagerty
Burleigh County State's Attorney
514 East Thayer Avenue
Bismarck, North Dakota 58501

Dear Ms. Hagerty:

By copy of a letter you sent to Clerk of the District Court Marian Barbie on March 20, 1985, you have requested an opinion from this office as to whether records and papers on file with the clerk of the district court concerning an individual who has pled guilty to a criminal offense and who has received probation, but has not yet had the opportunity to withdraw his plea of guilty resulting in the setting aside of the conviction by the court, are open to the public.

N.D.C.C. § 12-53-18 discusses the situation where an individual who has received probation in return for a guilty plea has fulfilled the conditions of the probation and, as a result, has had his guilty verdict set aside by the court and the charge dismissed. In this factual situation the statute clearly indicates that the records and papers of the case shall be subject to examination by the clerk, judges of the court, the juvenile commissioner, and the state's attorney. No one else may examine these records except by the written permission of one of the district judges.

The factual situation described in your letter apparently involves unfulfilled probation where the court has yet to set aside the plea of guilty nor dismiss the charge. N.D.C.C. § 12-53-18 does not address this factual situation and is of no assistance to us in resolving the question. The open records law, as found in N.D.C.C. § 44-04-18, makes a strong argument for the labeling of such records as open records.

However, the North Dakota Supreme Court has previously indicated that the open records law is not applicable to court records. By these decisions, the Supreme Court has indicated that the phrase "agencies of the state" do not include the courts of the state.

We have examined the legislative proceedings which resulted in passage of this law [open records law], and nowhere do we find any indication that the Legislature intended "agencies of the state" to include the court or to include anything except those departments, agencies, and bureaus of the State which it clearly included, such as "governmental bodies, boards, bureaus, commissions,* * * or political subdivisions." The Legislature no doubt intended to make information available to the public relative to the spending of public monies and the handling of public business. And that is all that it intended. Grand Forks Herald v. Lyons, 101 N.W.2d 543, 546 (N.D. 1960).

Further, the Supreme Court has indicated that public access to judicial records exists not because of any statutory authority, but because judicial records generally are accessible to the public for any proper purpose as determined by the judges who have custody of such records. State v. O'Connell, 151 N.W.2d 758 (N.D. 1967).

Therefore, any right of inspection of the respondent's criminal records is subject to reasonable rules and regulations as to who may inspect the records and where and how such inspection may be made. It is not, as the petitioner contends, an unrestricted right. Granting an unrestricted right of inspection at any time during business hours would disrupt the normal operation of any court. Unlimited and unsupervised inspection would also expose certain files which are privileged under the law, to view by persons who are not authorized to see them. Id. at 763.

In light of the fact that N.D.C.C. § 12-53-18 does not answer the question posed and in consideration of the decisions of the North Dakota Supreme Court clearly concluding that the open records law is not applicable to records of the courts of our state and that the courts have the authority to provide for the inspection of its own records, it is my opinion that the question posed in your letter response to the clerk of the district court should be posed to the applicable presiding judge of the district rather than to this office for an opinion. As state law does not resolve the question and as the Supreme Court has concluded that the courts are responsible for providing for the inspection of their own records, it would be inappropriate for me to issue a formal opinion on this subject.

However, for your general information, it would be my position that records concerning an individual who has pled guilty to a criminal offense and who has received probation, but has not yet had his guilty plea withdraw resulting in the setting aside of the conviction by the court, are public records. N.D.C.C. § 44-04-18 states that public records are presumed to be open for public disclosure unless specifically exempted from such disclosure by law. There is no law specifically exempting records found in the above factual situation from disclosure. Indeed, had the Legislature wanted to exempt such records from public disclosure, it could have easily done so by changing a few words in N.D.C.C. § 12-53-18. As it chose not to exempt these records from disclosure, it is my position that the records are subject to the spirit, if not the actual language, of the open records law.

Sincerely,

Nicholas J. Spaeth

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