

**OPINION
73-488**

November 28, 1973 (OPINION)

Dr. N. G. S. Rao
State Toxicologist
State University Station
Fargo, ND 58102

Dear Doctor Rao:

This office is in receipt of a letter from Vernon Pederson, Special Assistant Attorney General, State Highway Department, dated November 21, 1973, which reads as follows:

"In establishing the office of State Toxicologist in 1961, the Legislature stated in Section 15-12-21 that it was 'for the purpose of providing toxicological services to any person or the state or any political subdivision utilizing such services.'

"In 1967 the Legislature enacted Section 39-20-13 which provided for a two year study of deaths involving motor vehicles and for that purpose required that a blood specimen be collected and then analyzed by the State Toxicologist in each of such deaths. In 1969 the two year limitation of such program was extended indefinitely.

"Until the 1973 Legislature authorized the release of the results of the Toxicologist's analysis of such blood specimens 'upon the issuance of a subpoena duces tecum by a court of competent jurisdiction in any civil or criminal action,' the law had specifically provided that 'the results of the examinations referred to in this Section shall not be admissible in evidence in any action of any kind in any court or before any tribunal, board, agency, or person, but shall be used only for statistical purposes.'

"On April 13, 1967, the Attorney General issued an official opinion to the State Toxicologist in which it was stated that while the Legislature did not positively state that the results were to be confidential, 'we do not believe the State Toxicologist is required or authorized to release his findings of individual examinations of blood specimens to any person or agency, including law enforcement officials and agencies, since the same is not contemplated by the Act.'

"That opinion further considered a proposal that involved the collection of two samples and the question of whether the results of the analysis of the second specimen could be made available, presumably as a service contemplated by Section 15-12-21, to the party submitting such specimen. The conclusion was that if the results are to be used for purposes other than the gathering of cumulative statistics, the authority to do so must be found elsewhere than in Section 39-20-13. Section 15-12-21 was not mentioned.

"Considering the change made in the use of the test results as authorized by the 1973 Legislative Assembly in its amendment of Section 39-20-13, you are respectfully requested to review the Opinion of April 13, 1967, and advise the State Toxicologist of your current opinion in answer to the following questions:

1. When the toxicologist is served with a subpoena duces tecum, what limitations remain insofar as his release of the test results? May he prepare a certificate showing the results and supply a copy to anyone requesting it or are the results only to be released by appear as a witness in court, in answer to the subpoena? Does the authority to release results apply to specimens obtained prior to July 1, 1973?
2. Does Section 15-12-21 supply the authority to the State Toxicologist to provide 'toxicological services' in the form of an analysis to the party supplying the blood specimen even in cases in which the specimen was from a deceased person, killed in a motor vehicle accident?"

Section 39-20-13 of the North Dakota Century Code, as amended by the 1973 Legislature, provides in part:

"The results of the examinations referred to in this Section shall be used only for statistical purposes, except that the results shall be released upon the issuance of a subpoena duces tecum by a court of competent jurisdiction in any civil or criminal action. The cumulative results for the examinations, without identifying the individuals involved, shall be disseminated to interested state and local officials and made public by the State Toxicologist. * * * "

We would note that the opinion of April 13, 1967, was written before Section 39-20-13 was enacted in 1969. The opinion was based on the provisions of Section 19 of Chapter 292 of the 1967 Session Laws which was not a permanent statute and expired June 30, 1969. However, the 1969 enactment was, for purposes of this opinion, identical to the 1967 enactment. The rationale of the 1967 opinion is obviously altered by the amendment of Section 39-20-13 by the 1973 Legislative Assembly. We will consider the questions in the order presented.

1. The statute provides that the statistical results are to be used only for statistical purposes "except that the results shall be released upon the issuance of a subpoena duces tecum by a court of competent jurisdiction in any civil or criminal action." It appears to us that the statute carefully circumscribes the instances in which the results may be used for other than statistical purposes, i. e., they may be released upon the issuance of the subpoena by a court of competent jurisdiction in any civil or criminal action. A subpoena is defined by Section 31-03-01 as "the process by which the attendance of a witness is required." Rule 45(a)(1) of the North Dakota Rules of Civil Procedure provides in part: "Every subpoena shall be issued by the

clerk under the seal of the court, * * * and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified." The subpoena duces tecum in an order to produce the books, papers, documents, or tangible things designated therein. See Rule 45(b) of the North Dakota Rules of Civil Procedure. It appears to us that if the subpoena requires the attendance of the State Toxicologist, as well as his records, the State Toxicologist must appear in person. It further appears to us that the State Toxicologist may only release the results in compliance with the subpoena and the mere fact a subpoena has been issued does not authorize the State Toxicologist to release the information to anyone who might subsequently request it.

Insofar as the question of releasing results of specimens obtained prior to July 1, 1973, is concerned, a statute is usually considered to be prospective in its operation unless otherwise specifically stated. However, we do not believe we are giving the statute a retroactive effect by determining it applies to specimens obtained prior to July 1, 1973, the effective date of the 1973 amendment. The amendment is concerned with the release of results after July 1, 1973. The fact the results might have been obtained prior to July 1, 1973, does mean a retroactive application of the statute. We therefore believe the amendment by the 1973 Legislature applies to specimens obtained prior to July 1, 1973, as well as those obtained subsequent thereto.

With regard to the second question, we adhere to the 1967 opinion on the matter. While it does not refer to Section 15-12-21, it appears to us it was considered in the answer. Section 15-12-21 is a general statute. Section 39-20-13 is a specific statute dealing with a specific subject matter. It would, under the general rules of statutory construction, prevail in this instance if the statutes were in conflict. It appears to us that if two blood samples were to be submitted one for statistical purposes and another for other purposes, and if the latter were not governed by Section 39-20-13, i. e., the results could be disseminated without subpoena, the provisions of Section 39-20-13 would be circumvented. We are aware that the State Toxicologist might not, in each instance, be aware the blood samples were taken from the same body unless he was so informed.

In addition, we note the amendments by the 1973 Legislature now makes it possible to obtain the results for the test by means of a subpoena. Therefore the need, if a need previously existed, to submit a second sample in order to obtain the results of the test, is satisfied by the 1973 amendment.

Sincerely yours,

Allen I. Olson

Attorney General