OPINION
79-201

January 26, 1979 (OPINION)

Mr. John A. Zuger
Bismarck City Attorney
Box 1695
Bismarck, North Dakota 58501

Dear Mr. Zuger:

This is in reply to your request for an opinion of this office " . . . whether all police records are public records open to public inspection under North Dakota's open record law or if there are any limitations that can be imposed by the police department.

You note that applicable statutes appear to be Section 44-04-18 (open records); Section 65-13-05 (5) (power of Workmen's Compensation Bureau to request data from prosecutors and law enforcement officials); Section 12.1-13-01 (disclosure of confidential information by a public servant prohibited); Section 27-20-52 (confidentiality of juvenile records); Section 39-08-13 (opinion of law enforcement officers in accident reports confidential); and Section 39-08-14 (accident reports made by persons involved and garages confidential).

You state that the police records in question consist of " . . . complaints received from individuals, investigation records of ordinance violations or state laws by the police officers, statements taken from individuals, chemical reports, State Lab reports, interdepartment memorandums, policy statements and correspondence and the record of calls to the department."

You further note that full access to the police department's records would cause serious handicaps and disruption, particularly if such access is unlimited in the case of an uncompleted criminal investigation that might be disrupted.

You also suggested problems involving the privacy rights of persons under investigation, informants, information sources, and complainants, and say that full access would interfere with the police department's information sources and its ability to secure statements.

North Dakota voters in November 1978 overwhelmingly approved a new Article to North Dakota's Constitution, Article 100, that states:

> "Unless otherwise provided by law, all records of public or governmental bodies, boards, bureaus, commissions, or agencies of this state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records, open and accessible for inspection during reasonable office hours."

With the exception of a penalty clause, the new constitutional provision is nearly identical to Section 44-04-18 of the North Dakota Century Code, the statutory open records provision.

There is no doubt police departments and other official state or political subdivision law enforcement agencies or departments are public agencies within the scope of Article 100 and Section 44-08-18.

While many of the statutes you have cited, and others, appear to specifically exempt some of the material that might be found in some police records, there are no statutes that speak directly in North Dakota to the overall openness or confidentiality of police, law enforcement, or criminal investigation records (hereinafter referred to collectively as police records). Many other states' open records statutes follow the federal Freedom of Information Act ›5 USCA 552 (b)(7)! and list specific exemptions for police records (e.g., Texas, Oregon and North Carolina).

While the landmark case of Griswold v. Connecticut (381 U.S. 479) generally established a right of privacy inherent in the United States Constitution, the 1976 case of Paul v. Davis (96 Sup. Ct. 1155) considered a matter involving the dissemination of criminal justice information and refused to extend the concepts of federally protected privacy to that subject. Thus, the privacy issue, as it relates to criminal history information, may not be the basis for much protection.

Neither the North Dakota Supreme Court nor this office have issued opinions directly on the applicability of Article 100 of the North Dakota Constitution and Section 44-04-18 to police records, although we have generally held in our previous opinions and letters concerning open meetings and open records that these statutes should be construed liberally to mandate a policy of openness. I believe our prior opinions and letters on this subject have generally been in favor of the disclosure of records.

This office has long recognized the problems such as addressed by your request, but a measure we had introduced in the 1975 Legislative Assembly regarding access to police records (House Bill No. 1568, Forty-fourth Legislative Assembly) was withdrawn.

A more elaborate plan dealing with police records, prepared jointly by the North Dakota Combined Law Enforcement Council and the Legislative Council's Interim Judiciary "B" Committee, was defeated by the 1977 Legislative Assembly (Senate Bill No. 2056, Forty-fifth Legislative Assembly).

Thus, absent direct North Dakota authority on the subject, we must look elsewhere for guidance on your request.

The Second Edition of American Jurisprudence deals extensively with records and recording laws (66 Am. Jur. 2d., Records and Recording Laws) and states at Section 27: "In the absence of statutory requirements, it is generally held that police records are confidential."

Am. Jur. further states at Section 29 that:

> "Reports based on an investigation are not usually subject to inspection, both because of their confidentiality and because they are based on heresay and consist largely of the opinions and conclusions of the investigator."

The prevailing feeling of many courts is perhaps best summed up by a statement in Runyon v. Board of Prison Terms and Parole (79 p. 2, 101, California - 1938):

> " . . . courts have consistently declared that in another class of cases public policy demands that certain communications and documents shall be treated as confidential and therefore not open to indiscriminate inspection, not withstanding that they are in the custody of a public officer or board and are of a public nature."

The court went on to declare that prison, pardon, parole, and certain police and prosecution records fall into that category and would be confidential.

The 1961 Oregon case of MacEwan v. Holm (359 p. 2, 413, 8 S. A.L.R. 2d. 1086) contains an extensive and scholarly analysis of access to public records. The case dealt with investigatory records of the Oregon State Board of Health concerning nuclear radiation (access was allowed).

In its decision, the Court introduced a balancing test we believe is persuasive and should be controlling in open records questions such as posed by your request.

The Oregon Court stated (85 A.L.R. 2d. 1986, 1096) that:

> "In determining whether the records should be made available for inspection in any particular instance, the court must balance the interest of the citizen in knowing what the servants of government are doing and the citizen's proprietary interest in public property against the interest of the public in having a business of government carry on without undue interference."

The Court further stated that (85 A.L.R. 2d. 1086, 1097):

> "In balancing the interest referred to above, the scales must reflect the fundamental right of a citizen to have access to the public records as contrasted with the incidental right of an agency to be free from unreasonable interference."

What we are dealing with here, then, is a matter of balancing public policy regarding the public's undeniable general right to know public information with a public policy that the state's efficient operation of law enforcement agencies is necessary and vital for the protection of the health and welfare of its citizens.

Granted, this balancing standard of public policy is not an easy standard to apply. It is rather nebulous and must be applied to each specific instance when rights and interests collide, as in the case

of access to police records.

It has been the general public policy in North Dakota for many years, absent any specific statutes or directives to the contrary, to allow the news media access to police records of the police blotter genre, but to deny access to investigatory files and records and other criminal history information.

The Texas Court of Civil Appeals dealt with a similar situation in Houston Chronicle v. Houston (531 S.W. 2d. 117, 82 A.L.R. 3d. 1 - 1975). In this case, the Court was dealing with a Texas open records statute that excepted " . . . records of law enforcement agencies that deal with the detection and investigation of crime and the internal records and notations of such law enforcement agencies which are maintained for its internal use in matters related to law enforcement."

Most police departments in Texas had been routinely granting the news media access to basic police blotter information and personal criminal history information prior to the enactment of the Texas Open Records Act. After enactment of the Act, this blanket access was denied and the court case resulted.

The Houston case dealt with five classes of records:

1. Offense Report. This report includes the offense committed, location, identification and description of complainant, premises, time of the occurrence, property involved, vehicles involved, identification and description of witnesses, weather, details of the offense in question, and the names of the investigating officers. Supplementary reports are often added which may include such items as a synopsis of a purported confession and speculation about the suspect's guilt. The results of laboratory tests and other matters might also be included.

2. Personal History and Arrests Record. This relates to the arrests and criminal activities of individuals. It contains various identifying numbers, name, race, sex, aliases, place and date of birth, and a physical description, with particular emphasis on scars and tattoos. The main information maintained by this record is the chronological history of any arrests of the particular individual.

3. Houston Police Blotter. This includes the arrestee's social security number, name, aliases, sex, age, occupation, address, and physical condition. The blotter also shows by whom the arrest was made, the date and time of the arrest, and booking information, as well as the charge made and the court in which it was filed. Details of the arrest are also given and it records or notes any release or transfer and bonding information.

4. Showup Sheet. This is maintained for each 24-hour period and shows in chronological order the name of each person arrested in Houston. It lists in numbered order the

arrested person's name, age, the place of arrest, the officer who made the arrest, and other statistical information.

5. Arrest Sheet. This reflects the arrests made from 8 a.m. one day to 8 a.m. the next day. It simply lists in numbered order the name, race, and age of the suspect in addition to the place of arrest, the names of the arresting officers and the offenses for which the person was arrested.

The Court reviewed what it termed a constitutional right of access and concluded that, while the First Amendment does not guarantee the news media a constitutional right to special access to information not available to the public generally, the news media and the public do have a constitutional right of access to information concerning crime in the community and to information relating to activities of law enforcement agencies.

The Court determined the extent of this constitutional right of access by weighing and evaluating what it termed legitimate competing interest. One interest considered by the Court was the people's right to know. The Court said this is particularly sensitive and important when applied to police activity.

The Court also said that the city and the state have a legitimate interest in preserving the secrecy of their records, and an interest in preventing excess publicity that might lead to a denial of due process and endanger prosecution.

The Court reviewed the front page of the Offense Report that included the offense committed, location of the crime, identification and description of the complainant, the premises involved, the time of the occurrence, property involved, vehicles involved, description of the weather, a detailed description of the offense in question, and the name of the investigating officers. This is information to which the news media is constitutionally entitled, said the Court. The Court added that this information would also allow the news media to interview investigating officers and to seek additional information in particularly newsworthy crimes.

However, this right of access to information should not extend to such matters as a purported confession, officers' speculations of a suspect's guilt, officers' views as to the credibility of witnesses, informants statements, ballistic reports, other test results, etc. We agree with the Texas Court in this matter and believe that to open such material to the news media and the public in all cases might reveal the names of informants and other information vital to law enforcement officials and the prosecution. And in any event, much of this material is of a speculative, hearsay nature that could not be used in Court and probably, because of libel and defamation problems, could not be used by the news media either.

The Personal History and Arrests Record was placed in a different category by the Court and we would do likewise. It is important to maintain records of this type for law enforcement purposes, but to open these records to inspection by the news media and the public

would, as the Texas Court said, " . . . contain the potential for massive and unjustified damage to the individual." The complete accuracy of these records cannot be guaranteed, for example, and may not reflect the latest dispositions of charges.

The Texas Court believed that the information designated as the Houston Police Blotter, Showup Sheet, and Arrests Sheet did not fall within the exclusion under Texas law and were public records available to the news media and the public.

We believe the type of information and records listed as available by the Texas Court, regardless of the terminology applied in North Dakota, should also be available to the news media and the public in North Dakota, and that the information declared confidential by the Texas Court should also remain confidential in North Dakota.

The records that should be open include records of the police blotter or police log variety, regardless of the title given them, that contain information concerning:

1. Offenses including, but not limited to, the offense, location, identification and description of the complainant, the premises, time of occurrence, property involved, vehicles involved, weather conditions, details of the offense, and names of the investigating officers;

2. Arrest information including, but not limited to, the name of the person arrested, social security number, alias, race, sex, age, occupation, address, physical condition, arresting officer, date and time of arrest, booking information, charges made and the court they were made in, details of the arrest, and information concerning release, transfer, or bonding; and

3. Showup sheets or logs that show the activities as described in this paragraph during certain periods of time, such as twenty-four hour periods, eight-hour periods, overnight reports, and similar compilations.

It is interesting to note the similarity between the information that the United States Justice Department personnel may furnish in criminal and civil proceedings, and the information we believe must be released. Federal guidelines allow release of the defendant's name, age, residence, employment, martial status, and similar background information; the substance or text of the charge, such as a complaint, indictment, or information; the identity of the investigating or arresting agency and the length or scope of the investigation; and the circumstances immediately surrounding arrest, including the time and place of arrest, resistance, pursuit, possession of weapons, any description of any physical items seized at the time of arrest. (28 CFR 50.2)

We thus believe that a balancing of the various public interests and public policies involved in the release of police records in North Dakota requires findings similar to the Texas Court described above and that the basic information listed in that decision and described above as open to public access in Texas should also be open to public

access here in North Dakota, regardless of the names of the records that might contain the information.

Any police records, or other records held by law enforcement agencies, that are specifically made confidential by law should, of course, remain confidential as specific exceptions to Article 100 and Section 44-04-18.

I believe also that law enforcement official should, in cases where records contain a mixture of confidential and nonconfidential information, make every effort to make available upon request for public use the nonconfidential information.

I should also note that this opinion deals only with the so-called "law enforcement" type of records, i.e. those dealing specifically with the investigation, detection, prosecution, etc., of criminal activities. Law enforcement agencies, just as other government agencies, keep many other records as well pertaining to their general functioning and administration. These records unless specifically exempted by state law from disclosure or unless otherwise directly related to the investigation and detection of crime, would be open records under the provisions of Article 100 of the Constitution and Section 44-04-18 of the North Dakota Century Code.

If you have any further questions concerning this matter, particularly as to specific records or information, please feel free to contact our office. We hope this information will be helpful to you and to those dealing with police records and the public's right to know.

Sincerely,

ALLEN I. OLSON

Attorney General