

Opinion No. 67-57

April 6, 1967

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Mr. Albert Amador, Member State Board of Education 1030 Sixth Street Las Vegas, New Mexico

QUESTION

QUESTIONS

1. Is a public school teacher, as an employee or as a member of the public, entitled to examine the records of the Board of Education employing him which relate to his personnel record, including such matters as written reports of his supervisors, comments of other teachers, letters from parents, evaluations and other employment matters?
2. Is a public school teacher entitled to examine the personnel records maintained by his or her Board of Education relating to supervisory and administrative personnel and regarding such matters as salary, evaluation and other employment material?
3. Is a public school teacher entitled to examine the records maintained by the State Board of Education pertaining to his certification, training and other matters?
4. If the answer be "yes" to any of questions numbered 1, 2 and 3, to what extent, if any, is his or her right restricted in terms of privileged material relating to health or to hours or other circumstances under which he or she may examine such records?
5. Would it be "insubordinate" for a public school teacher to demand to examine the records designated under questions numbered 1, 2 or 3 as public records if he or she followed the restrictions set forth herein?
6. Upon the refusal by a Board of Education to permit a public school teacher to examine such records, what is the legal recourse of a public school teacher?

CONCLUSIONS

1. See Analysis.
2. See Analysis.
3. See Analysis.
4. See Analysis.

5. See Analysis.

6. See Analysis.

OPINION

{*80} ANALYSIS

Section 71-5-1, New Mexico Statutes Annotated, provides:

Every citizen of this state has a right to inspect any **public records** of this state except records pertaining to physical or mental examinations {*81} and medical treatment of persons confined to any institutions and except as otherwise provided by law.
(Emphasis added)

All school records not relating to medical or mental examinations which are public records are open to inspection by the public.

In Opinion of the Attorney General No. 61-137, dated December 27, 1961 we discussed at length the term "public record" and its application to certain school records. We said that a public record is a record which is required by law to be kept or is a record which is necessarily kept in the discharge of a duty imposed by law. However, every record kept by a public official is not a public record. Papers and memoranda in the possession of public officers which are not required by law to be kept by a public official as an official record may not be public records. Generally, reports of private individuals to government officials, correspondence of public officials to private individuals and memoranda of public officers made for their own convenience are not public records.

Whether a record is or is not a public record depends in part upon the type of record in question, the reason for its existence, the rules of the governing body of the school or Board of Education and the circumstances under which the document was received by the school system or State Board of Education. Some of your questions relate to materials which are necessarily a part of the permanent personnel records of the school or Board of Education and which are always available for public inspection. Other portions of your questions concern documents which, subject to the rules previously stated, may or may not be public records. Since the particular documents or memoranda are not before us, we cannot make specific determination as to their availability for public inspection. See Opinion of the Attorney General No. 60-155, dated August 31, 1960. Following these rules, we have said that the attendance records and the grade and achievement records of students were public records, but that records of information kept for informational purposes or which contained data of a personal nature for use in assisting teachers and school personnel in educating pupils did not fall within the category of public records. In Opinion of the Attorney General No. 64-19, dated March 4, 1964 and Opinion of the Attorney General No. 66-113, dated October 13, 1966, the rules set forth in Opinion No. 61-137 were further refined. In both Opinion No. 64-19, supra, and Opinion No. 66-113, supra, this office said that certain personnel

records could by regulation be kept confidential. We said that there existed a limited and restricted right to make, confidential, information which would not otherwise be available to the agency. Accordingly, data concerning the reliability, honesty, capability and personality traits of an individual which had been solicited with the understanding that they would be kept confidential were held not to be public records. See Opinion of the Attorney General No. 66-113. However, information concerning where the person was employed, his home address, his pay status, and information contained in the person's application for employment were said to be public records which were open for inspection by the public.

As to your question number one, we must advise that a public school teacher as an employee of the school system or any member of the public may at all reasonable times examine the personnel records of the school system. However, the reports of supervisors, comments of fellow teachers and parents concerning the reliability, honesty, capability and personality traits of the public school teacher are not, following the holding of Opinions Nos. 66-113 and 64-19, public records which are available for inspection by the teacher except in accordance with the regulations of the governing body of the school.

{*82} The reasoning which governs our advice as to your first question also governs the answer to question two. So long as the material which the public school teacher wishes to examine is a public record, the teacher may examine the records of the supervisory and administrative personnel of the school system.

In answer to your third question, we believe that the fact of certification as well as records showing the training of a public school teacher are matters of public record which are available for inspection by other public school teachers and the public at large. See Section 73-1-7, New Mexico Statutes Annotated, 1953 Compilation.

Section 71-5-2, New Mexico Statutes Annotated, 1953 Compilation provides:

All officers having custody of any state, county, school, city or town records in this state shall furnish proper and reasonable opportunity for the inspection and examination of all records requested of their respective offices and reasonable facilities for making memoranda abstracts therefrom, during the unusual business hours, to all persons having occasion to make examination of them for any lawful purpose.

Opinion of the Attorney General No. 61-137, dealt with the same problem raised by your fourth question. In that Opinion it was said:

The right of access and inspection [of public records] is not unqualified or unrestricted, however, and is subject to such reasonable regulation and policy as to the local board of education may prescribe governing the place of examination and the time and manner of inspection. The local board of education may properly regulate inspection and access to such records so as not to unduly interrupt or interfere with the board and the administration of such school system in the discharge of their official duties.

Thus, the public records of the local school system and the State Department of Education may be inspected at all reasonable times subject to the regulations of the governing body of the school system or the State Board of Education.

"Insubordination" is defined as a state of being insubordinate or the refusal to obey some order which a superior officer is entitled to give and have obeyed. Black's Law Dictionary, 4th Edition. Under this definition we do not believe that the request of a public school teacher to see public records which the school authorities are duty bound to allow the teacher to inspect and which the teacher has a right to inspect would constitute an act of insubordination. Your fifth question is therefore answered in the negative.

In your sixth question you ask what legal recourse a public school teacher has when the Board of Education refuses to allow the teacher to inspect public records. Section 71-5-3, New Mexico Statutes Annotated, 1953 Compilation provides:

If any officer having custody of any state, county, school, city or town records in this state shall refuse to any citizen of this state the right to inspect any public records of this state, as provided in this act [71-5-1 to 71-5-3], such officer shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not less than two-hundred and fifty dollars (\$ 250.00) nor more than five hundred dollars (\$ 500.00) or be sentenced to not less than sixty (60) days nor more than six (6) months in jail, or both such fine and imprisonment for each separate violation.

This section of course makes it unlawful for an officer having custody of public records to refuse to allow {83} inspection of the records. However, the civil remedy available to the individual citizen is probably through a mandamus action. See Sections 22-12-1 et. seq., New Mexico Statutes Annotated, 1953 Compilation.

As is indicated by this opinion and the annotation following Section 71-5-1 the problems surrounding the disclosure of information in the records of the state and its political subdivisions have plagued this office and various officers and employees of government for a number of years. There exists a reluctance on the part of administrators to divulge information which may be confidential. In many cases this attitude is completely justifiable and is based on sound administrative practices. For this reason the admonition contained in Opinion No. 61-137 should be repeated for the protection of all concerned.

A careful distinction should be drawn also between the right of the public to inspect any public records of this state by virtue of Section 71-5-1, N.M.S.A., 1953 Compilation et. seq., and dissemination of such material. The courts have held in some instances that an improper or unwarranted invasion of an individual's right to privacy against the dissemination of personal information may give rise to a cause of action for damages against the wrong doer. In 77 C.J.S., "Right of Privacy", Sec. 2, at page 339, it is stated that the law will afford relief

"to protect all persons from having matters which they may properly prefer to keep private made public against their will. The right includes protection against mortifying notoriety unless some legal justification for its infliction exists."

By: Joel M. Carson

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