

Opinion No. 68-110

October 31, 1968

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Mr. Harold Bibo Director State Personnel Office N.M.E.A. Building Santa Fe, New Mexico

QUESTION

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1. Is the test score of a job applicant which is possessed by the State Personnel Office a public record?
2. Is a job applicant's position on an eligibility list possessed by the State Personnel Office a public record?
3. Is salary information pertaining to a state employee which is possessed by the State Personnel Office a public record?
4. Is all information contained in a state employee's personnel file which is possessed by the State Personnel Office a matter of public record?
5. May the State Personnel Office establish reasonable rules whereby public records may be seen by members of the public?

CONCLUSIONS

1. Yes.
2. Yes.
3. Yes.
4. See Analysis.
5. Yes.

OPINION

{*178} ANALYSIS

This office answered questions pertaining to public records previously. A general discussion of those opinions is helpful.

Section 71-5-1, N.M.S.A., 1953 Compilation, states:

Every citizen of this state has a right to inspect any public records of this state except records pertaining to physical or mental examinations and medical treatment of persons confined to any institution and except as otherwise provided by law.

Section 71-5-2, N.M.S.A., 1953 Compilation, states:

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

A violation of the above section is a misdemeanor. The offender is subject to a jail term and fine. Section 71-5-3, N.M.S.A., 1953 Compilation.

The definitions of public record appears in various Attorney General's opinions. Opinion of the Attorney General No. 61-137, issued December 27, 1961; Opinion of the Attorney General No. 63-55, issued May 20, 1963; Opinion of the Attorney General No. 67-57, issued April 6, 1967.

A 'public record' has been defined as one required by law to be kept or necessarily to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done, or a written memorial made by a public officer authorized to perform that function, or a writing filed in a public office. The elements essential to constitute a public record are, namely, that it be a written memorial, that it be made by a public officer and that the officer be authorized by law to make it. . . . (Opinion of the Attorney General No. 61-137, supra, at 242).

Public records are those records which are necessary and incidental to fulfilling the public officer's duties which are imposed upon his office by operation of law. Opinion of the Attorney General No. 61-137, supra.

However, not all records kept by a public officer are public records. The State Personnel Board has, within the above statutory limits, a limited and restricted right to classify certain portions of an applicant's file as confidential. Any portion which would be made available to the state only on a confidential and restricted basis may be treated by the State Personnel Board as confidential. This right however, should be narrowly and restrictively applied. Opinion of the Attorney General No. 64-19, issued March 4, 1964; Opinion of the Attorney General No. 66-113, issued October 13, 1966; Opinion of the Attorney General No. 67-57, supra. The issue is then: Do the records mentioned in your questions fall within the general rule or the exception?

You ask whether scores achieved by job applicants on examinations are public records. It is the opinion of this office that such scores are public records. An application for state

employment is a public record, Opinion of the Attorney General No. 66-113, supra. The State Personnel Board is required by the law to give and administer examinations for job applicants. Section 5-4-34, N.M.S.A., 1953 {*179} Compilation (P.S.); §§ 300-309, State Personnel Board Rules. The Board must grade the examinations, § 306.1, supra. An eligibility list is composed from the test scores, § 401, State Personnel Board Rules. The normal duration of the list is two years, § 403, State Personnel Board Rules. These rules, properly filed, have the effect of law. Section 5-4-36, N.M.S.A., 1953 Compilation (P.S.). Accordingly, it is the opinion of this office that an applicant's test score is a public record.

The applicant's position on an eligibility list is a public record. The above reasoning and law may be applied.

The State Personnel Director is required by law to establish and maintain a roster for all state employees showing the employee's pay rate. Section 5-4-35, N.M.S.A., 1953 Compilation (P.S.). It is the opinion of this office that the salary of a state employee is a matter of public record.

Your final question involves various items contained in an employee's personnel file. The listed items are:

1. Personnel actions (these reflect any salary raises or deductions, demotions, promotions, etc);
2. Supervisor's ratings;
3. Arrest records (these are obtained from a law enforcement agency);
4. Letters of commendation or condemnation from the employing agency;
5. Employment history;
6. Medical history;
7. The job application itself;
8. Educational history.

It is the opinion of this office that all of the above documents, with two exceptions, are public records. The two exceptions are the medical history and the employment history; provided, the latter is solicited from an applicant's previous employer. Opinion of the Attorney General No. 66-113, supra; Section 71-5-1, supra. The Board is not required by law to obtain and retain past employment records. Further, the Board might restrict the availability of arrest records by subsequent rule.

Finally, you asked whether the State Personnel Office may establish reasonable rules establishing the time, method, etc. of review of public records by a member of the public. It is the opinion of this office that the answer to that question is yes. The office may require inquirers to be specific as to which records may be reviewed. Such inquiries need only be honored during office hours. Opinion of the Attorney General No. 67-57, supra.

By: Donald W. Miller

Assistant Attorney General