

## Opinion No. 72-56

October 13, 1972

**BY:** OPINION OF DAVID L. NORVELL, Attorney General Thomas Patrick Whelan, Jr.,  
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**TO:** Howard A. Geis, Director, Traffic & Rate Division, State Corporation Commission,  
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### QUESTIONS

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Are the railroad accidents reports submitted to the Traffic & Rate Division public records which every citizen of the state may inspect?

#### CONCLUSION

Yes.

### OPINION

#### {\*89} ANALYSIS

This state has a strong policy in favor of its citizens' right to inspect public records. Section 71-5-1, N.M.S.A., 1953 Comp., provides that,

"Every citizen of the 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 institutions and except as otherwise provided by law."

Officials having custody of public records are subject to fine and imprisonment for refusing a citizen the opportunity to inspect public records. Section 71-5-3, **supra**.

In Attorney General Opinion No. 72-46 we discussed in some detail the duties which Section 71-5-1, **supra**, imposes on officials having custody of public records. Such officials are obligated to afford a reasonable opportunity for inspection to any citizen who wishes to inspect either "those records which the law requires the official to keep" or "those records which constitute a convenient and appropriate mode of discharging the duties of the public office." Attorney General Opinion 72-46. The citizen's right to inspect is unaffected by his motive for inspection so long as that motive is lawful.

The legislature can provide for exceptions to inspection. In some instances the government's interest in the confidentiality of records may outweigh the citizen's right to know even absent an express legislative exemption of the records from the inspection

laws. There is, however, a heavy presumption in favor of public disclosure. See Attorney General Opinion 72-46.

Applying these principles to the present question, it is clear that railroad safety reports are governed by Section 71-5-1, **supra**. These reports are records which constitute a convenient and appropriate mode of discharging the duties of the Corporation Commission. There is no statute making these reports confidential. The only remaining question is whether there is an overriding governmental interest in the confidentiality of the reports. To determine that question we must weigh the Commission's interest in keeping the reports confidential against the public's right to inspect government records.

We consider two variables in order to measure the Commission's interest in confidentiality. First is the importance of the purpose for which the records are kept. Second is the extent to which public inspection will unduly interfere with the Commission's ability to gather the information contained in the records. The second variable is dependent upon the first to a great extent. For example, the Commission's chief interest in keeping railroad safety reports confidential is the encouragement of full disclosure by the railroads. The importance of this interest is a function of the extent and importance of the Commission's responsibilities for railroad safety. We examine those responsibilities first.

{\*90} Article XI, Section 7 of the New Mexico Constitution charges the Commission with the duty to require reasonable safety appliances on intrastate carriers. The same section also requires the Commission to require **all** railroads to maintain "adequate" depots, stations and facilities for the accommodation of passengers and reception of freight. To the extent that "adequate" means "safe," the Commission can be said to have a very limited jurisdiction over the safety of certain aspects of interstate railroads as well. Article XI, Section 11 of the New Mexico Constitution empowers the Commission to require special reports and statements of all common carriers. The legislature has enacted only one statute relating to railroad safety, which requires adequate lighting on the rear of all trains and in cabooses, Section 69-8-1, et seq., N.M.S.A., 1953. The Commission has passed only one order on safety for railroads. State Corporation Commission Order No. 2202 as amended by Order No. 2919. The Commission has promulgated two orders requiring safety reports. State Corporation Commission Orders No.'s 2191-A and 2370.

What jurisdiction the Commission does have is qualified by the "Federal Railway Safety Act of 1970," 45 U.S.C.A. § 431, et seq. (P.S.). Section 434 of that act provides that a state may only adopt or continue to enforce a safety regulation until the Secretary of Transportation has adopted a rule covering the same subject. A state may adopt a rule more stringent than a federal rule when it is necessary to eliminate an essentially local safety hazard. Such a rule, however, may not be "incompatible" with federal rules, and it may not unduly burden interstate commerce. 45 U.S.C.A. § 434. A state may participate in investigative and surveillance activities for the enforcement of federal safety rules if it is certified by the Secretary of Transportation. 45 U.S.C.A. § 435. The Corporation

Commission is not certified and does not participate in the enforcement of federal safety rules.

It is apparent from the limited nature of the Commission's jurisdiction and from the preeminence of the federal government in the field of railroad safety that the Commission's responsibilities are not extensive. They certainly do not outweigh the interests of the public in inspecting the activities of government agencies. As the courts have said,

"In reaching a determination so based upon the balancing of the interests involved, . . . public policy favors the right of inspection of public records and documents, and it is only in the exceptional case that inspection should be denied."

**State ex rel. Youmans v. Owens**, 137 N.W.2d 470, 475 (Wis. 1965). See also Attorney General Opinion 72-46. We conclude that the interests of the Commission in the confidentiality of railroad safety reports are not sufficiently crucial to constitute an exceptional case. Having determined the question of the importance of the purpose for which the records are kept as we have, we deem it unnecessary to speculate on the extent to which public inspection will unduly interfere with the Commission's ability to gather thorough safety reports. Suffice it to say that in view of our determination of the first question railroad safety reports should be open for public inspection.

It is true that the federal government has placed some limits on the inspection of railroad safety reports made to the Secretary of Transportation and to the Federal Railroad Administration. See 45 U.S.C.A. § 40, 45 U.S.C.A. 41, 49 C.F.R. § 2259. Those provisions refer only to federal agencies; however, they have no import for state agencies.