

Opinion No. 41-3935

October 28, 1941

BY: EDWARD P. CHASE, Attorney General

TO: Mrs. Jennie M. Kirby Director Department of Public Welfare Santa Fe, New Mexico

{*117} In your letter dated October 22, 1941, you enclose copy of Rules and Regulations, No. 11, in connection with the confidential nature of records in your office, and you also enclose a proposed Manual release purporting to be instructions to employees of your department pertaining to disclosure of such confidential information.

You inquire whether the provisions set forth in these rules and regulations come within the authority granted the Department of Public Welfare under Section 1, Chapter 116, Laws of 1941, which reads as follows:

"The New Mexico Department of Public Welfare shall have power to establish and enforce reasonable rules and regulations governing the custody, use and preservation of the records, papers, files and communications of its State and County Departments and to restrict the use or disclosure of information contained therein concerning applications for and recipients for relief of any kind to purposes directly connected with the administration of the Public Welfare Act and of related Federal Act."

The legislature has the power to delegate to a state department authority to establish and enforce reasonable rules and regulations and the legislature may provide a penalty for the violation of rules promulgated by such department. (12 C. J. Section 33, Page 484).

It is my opinion that the rules which you have set forth come within the provisions of the above mentioned law.

Your next question is with regard to disclosure of such confidential information in this language:

"In the event that a request, order or subpoena is received for information not directly connected with the administration of the public assistance laws, information is to be withheld on the grounds that the law of the State and the Rules and Regulations of the Department prohibit such disclosure."

You inquire as to legality of this instruction and as to the possibility of being held in contempt of court if you operate thereunder.

I notice that this provision does not appear in the rules and regulations which you have promulgated, but is in the proposed Manual release which is in the nature of instructions for the enforcement of the rules and regulations. It is doubtful whether your department,

by a rule or regulation, could create the confidential information into information that is privileged and as to which upon proper occasion disclosure could be refused in court on the theory that the same is privileged. However, since this provision does not appear in the rules and regulations, I do not believe that your instructions pertaining to the same would, in any manner, make the information {*118} privileged.

Public employees and executive officers are not exempt from the power of a court to compel their appearance before it when they are necessary witnesses. (70 C. J. Section 15, Page 41) A witness can be compelled to attend at a trial or hearing with books or papers desired in connection therewith and no one is immune to the process if the production of such documents will shed light on the matter or transaction under investigation. (70 C. J., Section 36 (5), Page 49). If the information, record or communication should be considered as privileged, that a claim should be made to the court, but such claim would not excuse failure to appear with the records required in response to a subpoena for that purpose.

In view of the above authorities, it is my suggestion that you do not instruct employees of the department to refuse to submit to court process, but at most, that you merely instruct them to claim that the records are privileged and leave the determination of such question to the court, and in no event should the employees of the department refuse to submit to process under penalty of being held in contempt of court.

By C. C. McCULLOCH,

Asst. Atty. General