

OFFICIAL OPINION NO. 77-68, DWI arrest records: collection, storage and dissemination by Human Factors Laboratory and Division of Highway Safety

August 8, 1977

Mr. Dale V. Christensen, Director  
Division of Highway Safety  
Department of Public Safety  
Public Safety Building  
Pierre, South Dakota 57501

Official Opinion No. 77-68

**DWI arrest records: collection, storage and dissemination by Human Factors Laboratory and Division of Highway Safety**

Dear Mr. Christensen:

You have requested an official opinion based on the following facts:

**FACTS:**

For the past five years, DWI arrest and conviction records have been maintained by the Division of Highway Safety. The DWI arrest information is reported on Form LE-1.1, while the disposition of these cases is reported on Form LE-1.3. This information is stored on computer tape by the Human Factors Laboratory at the University of South Dakota under the supervision of the Division of Highway Safety. A file containing the driver's arrest and conviction history is maintained at Vermillion to aid prosecuting attorneys' offices throughout the State by supplying DWI information on defendants who have previously been arrested or convicted of a DWI offense.

The Court Management System will soon be implementing a system similar to the one that is being maintained by the Human Factors Laboratory, but arrest history will not be available through the Court Management System.

**QUESTION:**

May the Human Factors Laboratory, acting under the supervision of the Division of Highway Safety, continue to maintain and utilize the DWI *arrest* portion of the file?

Criminal arrest records are open to public inspection. 1977 Session Laws, Ch. 16, § 3, repealed SDCL 1-27-2. The DWI arrest information being stored on computer tape is all a matter of public record. There appears to be no *statutory* prohibited which would bar the Human Factors Laboratory's continued use of the DWI arrest records.

The collection, storage and dissemination of arrest data has been subjected to constitutional challenge in a number of jurisdictions. Courts have generally adopted the rule that arrest records may be collected, stored, and disseminated if the "law enforcement value of an arrest record is sufficient to override an innocent person's rights to privacy and due process." *United States v. Hudson*, 16 Crimin. L. Rptr. 2468 (D.C.

Super. Ct. 1975). Applying this balancing test, courts have generally found that the law enforcement value of an arrest record outweighs any alleged invasion of privacy suffered by the person arrested. (An exception to this rule has been found in the area of mass arrests following public demonstrations, where hundreds of persons are arrested, but few are ever prosecuted. E.g., *Sullivan v. Murphy*, 478 F.2d 938 (D.C. Cir. 1973).) In *United States v. Linn*, F.2d 925 (10th Cir. 1975), the court held that where there was no indication that arrest records had been or would be used "improperly or intrusively" against the defendant, and where the record clearly indicated defendant's subsequent acquittal, there was no invasion of privacy sufficient to override the government's justification in keeping arrest records. Similarly, in *Loder v. Municipal Court for San Diego County*, 535 P.2d 624, 132 Cal. Rptr. 464 (1976), the court found that the purposes for which law enforcement authorities might consult records of arrests not resulting in convictions created a substantial governmental interest which was not outweighed by the arrestee's privacy concerns.

The law enforcement value of the DWI arrest record system maintained by the Human Factors Laboratory would clearly seem to outweigh the arrestee's interest in privacy. First, the governmental interest in keeping drunken drivers off the road is overwhelming. In 1976, 35.6 percent of the drivers in fatal accidents in South Dakota had been drinking. Nearly one out of every ten accidents involved drinking drivers. Secondly, the invasion of privacy is minimal. The information disclosed is a matter of public record. Disclosures are not made indiscriminately. Dissemination is strictly controlled. On balance, the law enforcement value in maintaining DWI arrest records far outweighs any alleged invasion of the arrestee's privacy. The record-keeping system appears to

meet *constitutional requirements*.

An examination of the Department of Justice (LEAA) Regulations, Criminal History Records: Collection, Storage and Dissemination of the Information, 28 C.F.R. Part 20, provides further evidence of the legality of the Division of Highway Safety/Human Factors Laboratory record system. The regulations define the parameters of permissible record disclosure for agencies (including the South Dakota Department of Public Safety) receiving LEAA funds. The guidelines require that arrest records contain a record of disposition within ninety days after disposition, that the security and privacy of all information be adequately provided for, that the information be used for law enforcement or "other lawful purposes," and that an individual be allowed to review the data upon request for the purpose of challenge or correction. Maintenance of records of traffic offenses is specifically authorized. 28 C.F.R. § 20.20(b)(5). The regulations also give a stamp of approval to cooperative record-keeping agreements between private agencies and law enforcement.

[D]issemination of nonconviction data has been limited, whether directly or through any intermediary only to:

. . .

(3) Individuals and agencies pursuant to a specific agreement with a criminal justice agency to provide services required for the administration of criminal justice pursuant to that agreement. The agreement shall specifically authorize access to data, limit the use of data to purposes for which given, insure the security and confidentiality of the data consistent with these regulations, and provide sanctions for violation thereof;

(4) Individuals and agencies for the express purpose of research, evaluative, or statistical activities pursuant to an agreement with a criminal justice agency. The agreement shall specifically authorize access to data, limit the use of data to research, evaluative, and statistical purposes, insure the confidentiality and security of the data consistent with these regulations . . . and provide sanctions for the violation thereof.

Conviction data may be disseminated without limitation. 28 C.F.R. § 20.21(b).

Cooperative agreements such as the one between the Division of Highway Safety and the Human Factors Laboratory are authorized, and even encouraged, under the Department of

Justice guidelines.

Based on the foregoing, there appears to be no legal barrier--statutory, constitutional, or regulatory--which would prevent the Human Factors Laboratory, acting under the supervision of the Division of Highway Safety, from continuing to maintain and utilize the DWI arrest portion of the file. The answer to your question is therefore yes.

Respectfully submitted,

William J. Janklow  
Attorney General

WJJ:LLF:jo