

## **N.D.A.G. Letter to Solberg (May 18, 1992)**

May 18, 1992

Mr. Wayne O. Solberg  
City Attorney  
P.O. Box 1897  
Fargo, ND 58107-1897

Dear Mr. Solberg:

Thank you for your March 12, 1992, letter concerning whether North Dakota Century Code (N.D.C.C.) § 44-04-18.1 applies to a contracted health insurance administrator or provider authorizing that organization to refuse to provide information to a city concerning health insurance benefits received by that city's employees under the contract with the health care administrator or provider.

Records of governmental bodies in North Dakota are open and accessible for inspection. (N.D.C.C.) § 44-04-18 provides:

### **44-04-18. Access to public records - Penalty.**

1. Except as otherwise specifically provided by law, all records of public or governmental bodies, boards, bureaus, commissions or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records, open and accessible for inspection during reasonable office hours.
2. Violations of this section shall be punishable as an infraction.

Therefore, with respect to cities, any record, unless a specific statute provides otherwise, is a public record. Records qualifying as public records are public records even if they happen to be located in the hands of third party contractors. Forum Publishing Co. v. City of Fargo, 391 N.W.2d 169 (N.D. 1986).

The definition of what constitutes a public record is not contained in the law, but the North Dakota Supreme Court has held that it should be given an expansive meaning. City of Grand Forks v. Grand Forks Herald, 307 N.W.2d 572 (N.D. 1981).

Because of the "except as otherwise specifically provided by law" language in N.D.C.C. § 44-04-18, laws have been enacted to exempt certain records from public accessibility. One example of a specific exception is N.D.C.C. § 44-04-18.1 which provides:

**44-04-18.1. Public employee medical and employee assistance records - Confidentiality.** Any record of a public employee's medical treatment or use of an employee assistance program is not to become part of that employee's personnel record and is confidential and may not be released without the written consent of the employee. As used in this section, the term "public employee" includes any person employed by the state or any of its political subdivisions.

The language of N.D.C.C. § 44-04-18.1 relates to "medical treatment" records and "use of an employee assistance program" records, and prohibits such records from being part of an "employee's personnel record" and requires that they be confidential.

N.D.C.C. § 44-04-18.1 was enacted as a specific exception to N.D.C.C. § 44-04-18, and because it prohibits the subject records from being included in a personnel record, it appears the statute was directed at the holdings of the North Dakota Supreme Court in the Forum Publishing Co. and City of Grand Forks cases noted above.

N.D.C.C. § 44-04-18.1 is therefore relevant to material in the hands of a public employer, and limits what that public employer may do with the information. Public records remain public if they are in the hands of a third party contractor and the government entity must disclose them. Forum Publishing Co. v. City of Fargo. Conversely, confidential information remains confidential in the hands of public officials, without regard to the reason for which the public official has use of the record. N.D.C.C. § 12.1-13-01.

Similarly, out of necessity such as a health insurance contract for providing insurance or administration thereof, records of a governmental entity may be in the hands of a third party contractor. If the records are public, they must be disclosed by the governmental entity, and if they are excluded by statute from being public, then the governmental entity may not disclose them. In neither case is the private contracting entity the subject of the statute in question. The duty of the governmental entity with respect to the records is based on the relevant statutes, but the duty of the contractor with respect to the records is based on its contract with the governmental entity.

It is therefore my opinion that N.D.C.C. § 44-04-18.1 does not prohibit a third party contractor from disclosing records which are the subject of a contract between it and a governmental entity to that governmental entity. The statute regulates the conduct of the governmental entity and its duty to maintain the confidentiality of specific personnel records. If the records are in the hands of the governmental entity and are declared by a specific statute to be confidential, then the governmental entity is required to respect that confidentiality. Violations of confidentiality statutes are punishable as a class C felony. N.D.C.C. § 12.1-13-01.

I believe this opinion adequately responds to your question.

Sincerely,

Nicholas J. Spaeth

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