

LETTER OPINION
94-L-305

November 3, 1994

Mr. Gordy L. Smith, CPA
Audit Manager
Office of State Auditor
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Mr. Smith:

Thank you for your September 27, 1994, letter asking whether North Dakota Century Code (N.D.C.C.) ? 54-10-22.1 authorizes the State Auditor and the Auditor's employees to review records declared confidential by other state law. Your specific inquiry relates to the Committee on Protection and Advocacy, the Protection and Advocacy Project (N.D.C.C. ch. 25-01.3), and a performance audit of the project under N.D.C.C. ? 54-10-01(3).

N.D.C.C. ? 25-01.3-10 states:

1. All documents, records, information, memoranda, reports, complaints, or written or nonwritten communication in the possession of the committee, project, or any advocate relating to an identified or identifiable person with developmental disabilities or mental illness are confidential and are not subject to disclosure, except:

a. When release is consented to in writing by all persons with developmental disabilities or mental illnesses identified or identifiable in the documents, records, information, memoranda, reports, complaints, or written or nonwritten communications;

b. In a judicial proceeding when ordered by the presiding judge; or

c. To officers of the law or, in the discretion of the committee, any other legally constituted board or agency serving the interests of persons with mental illness or developmental disabilities; or

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d. To the parents of a minor who is an eligible person under sections 25-01.3-01 through 25-01.3-12 or legal guardians of the person with mental illness or developmental disability except that no information may be released to the person with mental illness who is the subject of the information when such release is prohibited by state or federal law.

2. Unless ordered by a court of competent jurisdiction, the name of a person who in good faith makes a report or complaint may not be released or disclosed by the committee or the project.

N.D.C.C. ? 54-10-22.1 states:

Notwithstanding any other specific sections of law, the state auditor and persons employed by him, when necessary in conducting an audit, shall have access to all information relating to operations of all governmental units subject to audit. The state auditor and persons employed by him examining any information which is confidential by law, shall guard the secrecy of such information except when otherwise directed by judicial order, or as is otherwise provided by law.

The term "notwithstanding" means without prevention or obstruction from or by, or in spite of. King v. Sununu, 490 A.2d 796, 800 (N.H. 1985); Letter from Attorney General Heidi Heitkamp to Ronald C. Stastney (October 28, 1993). Therefore, the phrase "notwithstanding any other specific sections of law" used in N.D.C.C. ? 54-10-22.1 means that in spite of and without prevention by other sections of state law that may make records confidential, those records are available to the State Auditor and the Auditor's employees for audit purposes. Furthermore, this is consistent with the presumption that all laws are enacted with knowledge of those already in existence. Tharaldson v. Unsatisfied Judgment Fund, 225 N.W.2d 39, 45 (N.D. 1974). Thus, N.D.C.C. ? 25-01.3-10, enacted in 1989, is regarded as having been adopted in light of N.D.C.C. ? 54-10-22.1, enacted in 1977. 1989 N.D. Sess. Laws ch. 333, ? 10; 1977 N.D. Sess. Laws ch. 485, ? 1; Lapland v. Stearns, 54 N.W.2d 748, 753 (N.D. 1952).

The balance of N.D.C.C. ? 54-10-22.1 requires the State Auditor and employees to protect the confidentiality of those records. Penalties for disclosure of the records would be the same as for any

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other public official. N.D.C.C. ? 12.1-13-01.

Disclosure under the special circumstances provided by N.D.C.C. ? 54-10-22.1 would appear to be consistent with federal law and rules concerning the confidentiality of records held by a protection and advocacy system. 42 U.S.C.A. ? 6042 (1994) describes the system requirements for a protection and advocacy system for persons with developmental disabilities. 42 U.S.C.A. ? 6042(j) states that for the purposes of any periodic audit, report, or evaluation required under the chapter (42 U.S.C. ch. 75), the Secretary of Health and Human Services shall not require disclosure of the identity of or any other personally identifiable information relating to an individual requesting assistance. This provision relates only to disclosures to the Secretary of Health and Human Services.

Administrative rules adopted for protection and advocacy systems for persons with developmental disabilities provide that a protection and advocacy system must protect a client's record from loss, tampering, or use by unauthorized individuals and keep it confidential. 45 C.F.R. ? 1386.21 (1993). The protection and advocacy system is to have written policies governing access to a client's records and is to obtain written consent from the client, if competent, or a guardian, before release of information to individuals "not otherwise authorized to receive it." 45 C.F.R. ? 1386.21(b)(3) (1993). This section does not preempt state law nor prohibit limited disclosure of such records for state performance audit purposes. Compare 42 C.F.R. ? 2.20 (1991) concerning disclosure of drug and alcohol treatment records. See Jane H. v. Rothe, 488 N.W.2d 879, 881, 882 (N.D. 1992); Letter from Attorney General Nicholas J. Spaeth to Bruce Haskell (March 25, 1991); and Letter from Attorney General Heidi Heitkamp to Henry C. "Bud" Wessman (October 7, 1994).

A protection and advocacy system is required to maintain confidentiality of records of persons with mental illness "to the same extent as is required of the provider" of mental health services under federal or state law. 42 U.S.C.A. ? 10806(a). Because mental health service providers in North Dakota would be subject to N.D.C.C. ? 54-10-22.1, so is the Protection

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and Advocacy Project with respect to its records concerning individuals with mental illness under N.D.C.C. ? 25-01.3-10.

It is therefore my opinion that records declared confidential by N.D.C.C. ? 25-01.3-10 are, nonetheless, available under N.D.C.C. ? 54-10-22.1 to the State Auditor and the Auditor's employees for audit purposes.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

rel/pg
cc: Barbara C. Braun, Protection and Advocacy Project