

**LETTER OPINION
2001-L-36**

September 14, 2001

Honorable Robert R. Peterson
State Auditor
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Mr. Peterson:

Thank you for your letter regarding the effect of income tax confidentiality provisions upon your attempt to conduct a performance audit on the Department of Human Service's Service Payments for the Elderly and Disabled (SPED) and Expanded SPED programs.

It is my understanding from your letter that the performance audit is being conducted in an attempt to verify the accuracy of financial information provided by program recipients when applying for services. As part of this audit, you requested access to selected program recipients' income tax returns on file with the Tax Commissioner in your effort to verify the accuracy of the financial information provided by the applicants for the SPED program. The Tax Commissioner denied your request for access to these returns on the basis that there is no statutory exception to the confidentiality provisions of N.D.C.C. § 57-38-57 that would authorize the State Auditor access to this information for the reasons stated in your request. You noted that in a previously conducted audit of the Child Support Enforcement Program (CSEP), access to return information was granted by the Tax Commissioner.

Your question is whether there is any statutory exception to the confidentiality provisions of N.D.C.C. § 57-38-57 that would authorize access by the State Auditor to income tax return information of SPED program recipients held by the Tax Commissioner as part of a performance audit conducted to verify the accuracy of the financial information provided by program recipients when applying for services with the Department of Human Services.

Section 57-38-57(1), N.D.C.C., provides, in pertinent part:

The secrecy of returns must be guarded except as follows:

1. Except when otherwise directed by judicial order, or as is otherwise provided by law, the tax commissioner, the tax commissioner's deputies, agents, clerks, and other officers and employees, may not divulge nor make known, in any manner, whether or not any report or return required under this chapter has been filed, the amount of income, or any particulars set forth or disclosed in any report or return required under this chapter, including the copy or any portion thereof or information reflected in the taxpayer's federal income tax return that the tax commissioner may require to be attached to, furnished with, or included in the taxpayer's state income tax return.

(Emphasis supplied.)

A violation of this provision can constitute a class C felony. N.D.C.C. § 12.1-13-01.

It is for common policy considerations that states imposing an income tax enact confidentiality statutes similar to N.D.C.C. § 57-38-57:

[T]he purpose in enacting state statutes prohibiting tax or other government officials from divulging information contained in income tax returns has been not only to protect the individual taxpayer's privacy or his privilege against self-incrimination, but also to facilitate tax enforcement by encouraging the taxpayer to make full and truthful declarations in his returns, without fear that his statements will be revealed or used against him for other purposes. The statutes under consideration here typically contain exceptions to nondisclosure, for example, upon a proper judicial order or where the returns or information contained therein are sought in connection with an investigation or prosecution of tax law violations.

Joel E. Smith, Annotation, Confidentiality of Income Tax Returns, 1 A.L.R.4th 959 (1980).

See also N.Y. State Dept. of Tax. v. N.Y. Dept of Law, 406 N.Y.S.2d 747 (N.Y. 1978); Wales v. Tax Commission, 412 P.2d 472 (Ariz. 1966); In re Hampers, 651 F.2d 19 (1st Cir. 1981) (North Dakota appeared on an amici curiae brief in support of the Massachusetts Commissioner of Revenue).

The North Dakota Supreme Court has held that filing an income tax return upon which a tax liability can be determined is mandatory. Dorgan v. Kouba, 274 N.W.2d 167 (N.D. 1979). The confidentiality provisions of N.D.C.C. § 57-38-57 facilitate this mandate.

An examination of N.D.C.C. § 57-38-57 reveals no exception to its confidentiality provisions that would authorize access by the State Auditor to tax returns of SPED recipients for the reasons stated in your request. Therefore, it is necessary to examine the provisions of N.D.C.C. §§ 54-10-24 and 54-10-22.1 to determine if there is additional statutory language granting you the necessary authority.

Section 54-10-24, N.D.C.C., was enacted in 1969 and amended and reenacted in 1977. 1969 N.D. Sess. Laws ch. 435, § 1; 1977 N.D. Sess. Laws ch. 486, § 1. It provides in pertinent part:

The state auditor and persons employed by him, when necessary in conducting an audit and examination of the books and records of the tax commissioner as authorized by law, may examine any return, report, or other information filed with the tax commissioner, and confirm the authenticity of such return, report, or other information with the taxpayer who filed it.

This section relates only to an audit of the Office of the Tax Commissioner as required by N.D.C.C. § 54-10-01. In your letter you made reference to an audit you conducted of the CSEP wherein you were given access to income tax return information. This program is the child support refund program in which the Tax Commissioner offsets income tax refunds with debt owed under the CSEP. This offset program is authorized under N.D.C.C. ch. 57-38.3 and is administered by the Tax Commissioner. Because the Tax Commissioner administers it, the State Auditor had access to income tax returns under N.D.C.C. § 54-10-24. However, this section does not authorize the State Auditor to examine income tax returns of SPED recipients as requested since this program is not administered by the Tax Commissioner.

Section 54-10-22.1, N.D.C.C., was enacted in 1977. 1977 N.D. Sess. Laws ch. 485, § 1. It provides as follows:

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.

To the extent that a statute is ambiguous, legislative history may be considered. N.D.C.C. § 1-02-39(3). This ambiguity can be created when two statutes are read together. Bland v. Com'n On Medical Competency, 557 N.W.2d 379, 382 (N.D. 1996).

Legislative history reveals that N.D.C.C. § 54-10-22.1 was introduced in 1977 on behalf of the State Auditor as Senate Bill 2281. Hearing on S.B. 2281, 1977 N.D. Leg. (Jan. 24) (Testimony of Sen. Thane). A representative of the State Auditor gave pertinent testimony on January 24, 1977:

Mike Schwindt, Chief Auditor, State Auditor's Office, stated that the current state law provides that their office shall have access to information in stated agencies subject to audit by their department. A number of departments have laws or regulations that information should be restricted. A specific statute over-rides a general statute, which means that they would be excluded in some cases. For instance, Workmen's Compensation can keep information from them and at times they might have need for some of this information. The Social Service Board restricts the information to a very few people. Sometimes they need this to see that the payments are made to the proper people. At institutions, to determine appropriate rates, you must be able to find out when people were born or die, so birth and death certificates should be available for their office to use. These vital statistics should be available.

Hearing on S.B. 2281, 1977 N.D. Leg. (Jan. 24) (Statement of Mike Schwindt). The testimony was limited to the State Auditor getting access to information while auditing a state agency "notwithstanding" the fact that the agency being audited was bound to keep certain information confidential under a specific statute. There was no suggestion that this statute be read to provide access to tax return information in the possession of the Tax Commissioner as part of the audit of another agency.

In 1977, N.D.C.C. § 54-10-24 was amended and reenacted in Senate Bill 2509. It related to the report that the State Auditor was required to make to the Legislative Review Committee regarding audits of the Office of the Tax Commissioner. On February 2, 1977, Chief Auditor Mike Schwindt also testified at the hearing on this legislation. He did not express a need to increase the State Auditor's access to tax return information filed with the Tax Commissioner. Hearing on S.B. 2509, 1977 N.D. Leg. (Feb. 2) (Statement of Mike Schwindt).

I am aware of 1994 N.D. Op. Att'y Gen. L-305, relating to N.D.C.C. § 54-10-22.1 and to its application to an audit of the Committee on Protection and Advocacy, which held certain records confidential under N.D.C.C. § 25-01.3-10. The opinion considered the

definition of "notwithstanding" and concluded that your office had access to the otherwise confidential information for the purpose of auditing the Protection and Advocacy Project. It was further determined that this conclusion was consistent with federal law which also protected these records. The opinion did not address the issue whether the State Auditor had access to confidential information held by one state agency, such as income tax returns on file with the Tax Commissioner, for the purpose of auditing another unrelated agency.

Based upon this analysis, it is my opinion that there is no statutory exception to the confidentiality provisions of N.D.C.C. § 57-38-57 that would authorize the State Auditor to access income tax return information of SPED program recipients held by the Tax Commissioner as part of a performance audit on the Department of Human Services conducted to verify the accuracy of the financial information provided by program recipients when applying for services.

You wish to know what language could be drafted for legislation to be introduced in the next legislative session, which would grant you the authority to request tax return information in a case of this kind. The technical aspects of drafting appropriate language for legislation would not be difficult. I invite you to review this policy matter with the Tax Commissioner and me if you wish to proceed with legislation.

Sincerely,

Wayne Stenehjem
Attorney General

rww/pg
cc: Rick Clayburgh, Tax Commissioner