

**LETTER OPINION
2002-L-06**

January 29, 2002

Mr. Mike Mullen
Senior Advisor for Health Policy
Department of Health
600 East Boulevard Ave Dept. 301
Bismarck, ND 58505-0200

Dear Mr. Mullen:

Thank you for your letter asking for my opinion on the authority of the North Dakota Department of Health (Department) to disclose complete copies of birth and death records (including certain confidential information) to the University of North Dakota School of Medicine and Health Sciences (Medical School) for general research by medical students. You also ask whether the Medical School can be considered a “branch” or “extension” of the Health Department so that the copies may be disclosed without a “data use agreement” and whether the Department may be held liable for any damages that result from unauthorized disclosure of confidential information by the Medical School.

The background information you provided to this office indicates that the Medical School has approached the Department with a proposal under which the Department would disclose to the Medical School all information contained in the birth and death records maintained by the Department. Attached to your letter was a sample “CERTIFICATE OF LIVE BIRTH” and “CERTIFICATE OF DEATH” showing the types of information maintained by the Department that would be released to the Medical School under its proposal.¹

The Department and the Medical School are both agencies of the State of North Dakota. As a result, all recorded information of each entity regarding public business is open to the public upon request except as otherwise specifically provided by law. N.D.C.C. § 44-04-18. See also N.D.C.C. § 44-04-17.1(12)(a), (15) (definitions of “public entity” and “record”). Generally, since exceptions to the state open records law must be specific, public entities possessing the same record must independently determine whether an exception applies to a record in the entity’s possession. 2000 N.D. Op. Att’y Gen. F-09. Thus, even if the Department is authorized to release confidential

¹ I will assume for purposes of this letter that the Medical School proposes to use the information received from the Department for “statistical purposes” under N.D.C.C. § 23-03.3-28(3).

information to the Medical School, it cannot be assumed that those records remain confidential when they are in the possession of the Medical School. See 1998 N.D. Op. Att'y Gen. L-73. Unless the Medical School possesses the confidential information exclusively as an agent of the Department, such as in a joint study, the Medical School must identify a specific exception in federal or state law that applies to the Medical School's copy of the confidential information before it is authorized to keep the information confidential. Id. See also 2000 N.D. Op. Att'y Gen. F-09 (public entities may not create an exception to the open records law by contract).

There are two specific exceptions in state law that apply to birth and death records maintained by the Department. Section 23-01.3-02, N.D.C.C., prohibits unauthorized disclosure of "protected health information."² Disclosure of "protected health information" is not prohibited if another law explicitly authorizes disclosure of the information. N.D.C.C. § 23-01.3-02. Section 23-02.1-27, N.D.C.C., makes confidential all information in vital records "relating to the birth or fetal death of a child to a woman who was not married to the child's father when the child was conceived or born," except that the information may be disclosed to the child's parent or guardian, to the child if he or she is over 18 years old, or upon order of a court. Section 23-02.1-27, N.D.C.C. also makes confidential all information in vital records "indicating cause of death" of a person, except that the information may be disclosed to a relative or personal representative of the deceased, the attorney or agent of a relative or personal representative, the child fatality review panel, or upon order of a court.

The Department is authorized to furnish information in vital records "for statistical purposes to federal, state, local, or other public or private agencies ... upon such terms and conditions as may be prescribed by the [Department] through rules and regulations adopted pursuant to [chapter 23-02.1]." N.D.C.C. § 23-02.1-28(3). One might argue that the disclosures authorized in N.D.C.C. § 23-02.1-27 are exclusive and, as a result, the authority of the Department to disclose vital record information for statistical purposes under N.D.C.C. § 23-02.1-28(3) does not include disclosure of information that is confidential under N.D.C.C. § 23-02.1-27. However, for reasons discussed below, I conclude N.D.C.C. § 23-02.1-28(3) authorizes disclosure of information that is confidential under N.D.C.C. § 23-02.1-27 for statistical purposes.

Prior to 1993, public disclosure of information in vital records was governed by regulations adopted by the Department. In 1993, N.D.C.C. § 23-02.1-27 was amended. See 1993 N.D. Sess. Laws ch. 249. The amendments removed the authority of the

² "Protected health information" is defined in N.D.C.C. § 23-01.3-01(7) as information, including demographic information, in the possession of certain listed entities (including the Department as a "public health authority") which relates to the physical or mental health or condition of an individual and identifies (or could lead to the identification of) the individual.

Department to determine by regulation what information in vital records is available to the public and added the current provisions regarding children of unmarried women and causes of death. Id. Under the 1993 amendments, information in vital records was, and is, available to the public under N.D.C.C. § 44-04-18 except for the information described in N.D.C.C. § 23-02.1-27.³ The summaries in the committee minutes of the remarks of witnesses and legislators regarding the 1993 amendments reiterate that vital records (except for the information made confidential under N.D.C.C. § 23-02.1-27) are open to the public upon request under N.D.C.C. § 44-04-18. See Hearing on S.B. 2277 before the Conference Committee 1993 N.D. Leg. (Apr. 8) (committee minutes).

The fact that vital records are generally open to the public is important in applying the provision in N.D.C.C. § 23-02.1-28(3) authorizing disclosure of “data or copies” for statistical purposes. Since almost all the information in vital records is open to the public, the authority in N.D.C.C. § 23-02.1-28(3) to release vital records for statistical purposes (including the regulations enacted under that subsection) would be meaningless if it did not include the information that is made confidential under N.D.C.C. § 23-02.1-27. Statutes are interpreted to give meaning to every part, and the Legislature is presumed not to perform idle acts. N.D.C.C. § 1-02-38; Bickel v. Jackson, 530 N.W.2d 318, 320 (N.D. 1995) (“There is a presumption the legislature acts with purpose and does not perform idle acts.”). It is my opinion that the authority to disclose vital records for statistical purposes under N.D.C.C. § 23-02.1-28 includes disclosure of information that is confidential under N.D.C.C. § 23-02.1-27. Since disclosure of the information is specifically authorized by N.D.C.C. § 23-02.1-28(3), the disclosure of any “protected health information” in the records is also permitted under N.D.C.C. § 23-01.3-02.

Your second question is whether the Medical School can be considered as a “branch” or “extension” of the Health Department so that the copies of birth and death records may be disclosed without a “data use agreement.” As previously noted, N.D.C.C. § 23-02.1-28(3) authorizes the disclosure of vital record data “for statistical purposes to ... state ... agencies ... upon such terms and conditions [i.e., an agreement regarding the security and confidentiality of the records satisfactory to the registrar of vital records] as may be prescribed by the state department of health.” In other words, confidential information under N.D.C.C. § 23-02.1-27 may be disclosed for statistical purposes to the Medical School without a data use agreement only if the Medical School and the Department are part of a single agency.

Although “agency” is not defined in N.D.C.C. § 23-02.1-28, that term is defined in the Administrative Agencies Practices Act. Under N.D.C.C. § 28-32-01(2), an “administrative agency” or “agency” means “each board, bureau, commission, department, or other administrative unit of the executive branch of the state government

³ The 1993 amendments also preserved the authority of the Department to protect the integrity of the original vital records filed with the Department.

...” The Medical School operates as a “school” within the University of North Dakota. The control and operation of the Medical School “is the duty and responsibility of the administrative authorities of University of North Dakota and its medical center under the policies of the state board of higher education” N.D.C.C. § 15-52-02. Nothing in N.D.C.C. chapter 23-01, which defines the general responsibility of the Department, N.D.C.C. § 23-01-05, which defines the duties of the state health officer, or any other statute gives the Department or the state health officer any authority to supervise or control the faculty or staff of the Medical School. It is, therefore, my opinion, based on the plain meaning of N.D.C.C. § 23-02.1-28(3), that the Medical School is a separate agency of state government to which confidential vital records information may be disclosed for “statistical purposes” only if the Medical School signs an agreement to meet the terms and conditions required by the State Registrar of Vital Records in the Office of Statistical Services as required in N.D. Admin. Code § 33-04-13.1-02(3).

Your final question is, assuming a data use agreement exists between the Department and the Medical School under which the Medical School is required to maintain the security and confidentiality of any confidential information it receives from the Department, may the Department be held liable for any damages that result from unauthorized disclosure of the confidential information by the Medical School.

Because the discussions between the Medical School and the Department are in their preliminary stages, and the details of the specific conditions under which any confidential information may be disclosed are unknown, I am unable to render an opinion on the possibility of liability for unauthorized release of that information.

In general, under N.D.C.C. § 32-12.2-02(3)(b), “[n]either the state nor a state employee may be held liable ... for ... [a] claim based upon a decision to exercise or perform or a failure to exercise or perform a ‘discretionary function’ or duty on the part of the state or its employees ...” Therefore, assuming that the state registrar has exercised due diligence in verifying the identity of the person requesting confidential vital records, and verifying that person is authorized by the person’s agency to request and receive those records, then the decision to disclose and the conditions of disclosure, which are discretionary acts, will generally impose no liability on the Department for the subsequent intentional or negligent unauthorized disclosure of confidential information by the Medical School.

Sincerely,

Wayne Stenehjem
Attorney General