

LETTER OPINION
96-L-200

November 7, 1996

James D. Anders, Director
Division of Microbiology
ND Department of Health
PO Box 5520
Bismarck, ND 58506-5520

Dear Mr. Anders:

Thank you for your letter asking whether confidential information communicated to a person entitled to receive that information through the telecommunications relay system violates confidentiality laws. As I understand it, a disabled employee who uses a telecommunications device for the deaf (TDD) transmits confidential information through the telecommunications relay system to a party entitled to receive the information.

Your concern is that use of the relay operator to transmit confidential information may violate state confidentiality laws. A public servant is guilty of a class C felony if the public servant knowingly discloses any confidential information acquired as a public servant. N.D.C.C. § 12.1-13-01. For example, your concern implicates the unauthorized disclosure of results of a test for the presence of human immunodeficiency virus (HIV) antibodies reported to the state health officer, which is a class C felony. N.D.C.C. §§ 23-07.5-05, 23-07.5-08. A report by a physician treating a patient with a diagnosis of HIV infection, acquired immune deficiency syndrome (AIDS) or HIV related illness to the State Department of Health (Department) is confidential and may not be released except under certain circumstances and to medical personnel. N.D.C.C. § 23-07-02.2(3). Contagious and infectious sexually transmitted diseases are required to be reported to the state Department of Health under N.D.C.C. ch. 23-07. Unauthorized disclosure of disease control records or test results is an infraction. N.D.C.C. § 23-07-20.1, 23-07-21. See also N.D.C.C. § 23-07.3-03 (making unauthorized release of confidential information concerning exposure to contagious diseases by an emergency medical services provider a class C felony).

The telecommunications relay system is required under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C.A. §§ 12101-12213, 47 U.S.C.A. § 225, to allow hearing and speech impaired persons to communicate by telephone in the same manner as a person who does not have such a disability. The state telecommunications relay system

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was adopted in furtherance of the ADA. 1993 N.D. Op. Att'y Gen. L-286; N.D.C.C. ch. 54-44.8

"Current technology allows for communications between a TDD user and a voice telephone user by employing a type of relay system. Such systems include a third party operator who completes the connection between the two parties and who transmits messages back and forth between the TDD user and the hearing individual. The originator of the call communicates to the operator either by voice or TDD. The operator then uses a video display system to translate the typed or voice message simultaneously from one medium to the other." H.R. Rep. No. 485, 101st Cong., 2d Sess. 130 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 413. In other words the relay services required by the ADA "involve a relay operator using both a standard telephone and a TDD to type the voice messages to the TDD user and read the TDD messages to the standard telephone user." 28 C.F.R. pt. 35, Appendix A § 35.161 at 471 (1995).

This is consistent with the ADA which requires telecommunications relay services to allow a hearing or speech impaired person to communicate "by wire or radio with a hearing individual in a manner that is functionally equivalent to the ability of an individual who does not have a hearing impairment or speech impairment to communicate using voice communication services by wire or radio. Such term includes services that enable two-way communication between an individual who uses a TDD or other nonvoice terminal device and an individual who does not use such a device." 47 U.S.C.A. § 225(a)(3).

Congress intended that amendments to the Communications Act of 1934 under the ADA "better serve to incorporate the hearing-and speech-impaired communities into the telecommunications mainstream by requiring that telephone services be provided to hearing and/or speech impaired individuals in a manner that is functionally equivalent to telephone services offered to those who do not have these impairments. This requirement will serve to bridge the gap between the communications-impaired telephone user and the community at large. To participate actively in society, one must have the ability to call friends, family, businesses and employers." H.R. Rep. No. 485, 101st Cong., 2d Sess. 129-130 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 412-413.

"Attaining meaningful universal service for [the hearing-and speech-impaired] also requires that some level of minimum federal standards for service, service quality, and functional equivalency to voice telephone services be established and maintained. The FCC [Federal Communications Commission] is therefore required to

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establish certain minimum federal standards that all telecommunications relay service providers must meet." Id. at 413.

The ADA requires that the FCC, which generally regulates the telecommunications relay system, adopt regulations assuring confidentiality. 47 U.S.C.A. § 225(c),(d)(1)(F). Consistent with Congressional intent, federal regulations prohibit relay system operators from disclosing relayed conversations or keeping a record of such conversations beyond the duration of the call. 47 C.F.R. §§ 64.601(5), 64.604(a)(2). This is consistent with the obligations of common carriers. FCC Report and Order and Request for Comments, No. 90-571, 6-7 (July 26, 1991) (FCC Report). Furthermore, the ADA prohibits "relay operators from failing to fulfill the obligations of common carriers by refusing or limiting . . . relay services" calls. 47 U.S.C.A. § 225(d)(1)(E). 47 U.S.C.A. § 225(d)(1)(E) "specifies that a relay operator is subject to the same standards of conduct that other operators are subject to under the Communications Act of 1934." H.R. Rep. No. 596, 101st Cong., 2d Sess. 83 (1990) reprinted in 1990 U.S.C.C.A.N. 267, 592; see also H.R. Rep. No. 558, 101st Cong., 2nd Sess. 78 (1990) (to the same effect). The FCC believes that "Congress, in adopting Section 225(d)(1)(E), intended relay operators to have the same service obligations as common carriers generally." FCC Report at 8.

47 U.S.C.A. § 605(a) "generally prohibits any person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio from divulging the existence or content of a telephone call except through authorized channels of transmission or reception." FCC Report at 7 n.11.

Pursuant to the ADA confidentiality requirements, the North Dakota act provides that the telecommunications relay service provider contract include terms requiring the provider to maintain the privacy of persons using the intrastate system and preserve confidentiality of communications in conformity with federal law. N.D.C.C. § 54-44.8-05(3)(c),(d),(e). Thus, in my opinion, the use of the telecommunications relay system by an impaired employee of the Health Department to transmit confidential information to a person entitled to receive it does not violate state confidentiality laws because messages are relayed by a telecommunications relay system operator. As a practical matter, there is no breach of confidentiality because a relay system operator is an integral part of the system under current technology required to convey messages between a TDD user and a nonimpaired person using a telephone and the operator is obliged not to breach the confidentiality of the communication. To conclude otherwise would frustrate the purpose of the ADA which is to allow an

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impaired person to communicate "in a manner that is functionally equivalent to the ability of an individual who does not have [an] impairment." 47 U.S.C.A. § 225(a)(3); N.D.C.C. §§ 54-44.8-01(10), 54-44.8-03(1), (2).

To conclude that use of the telecommunications relay system involves a breach of confidentiality which would prohibit a hearing or speech-impaired Health Department employee from transmitting confidential information would also thwart the requirement of the ADA that employers make reasonable accommodations to allow employees to carry out essential job elements. Providing a hearing or speech-impaired employee a TDD to convey information by telephone is reasonable accommodation which employers are obligated to make to known limitations of individuals with a disability. 29 C.F.R. pt. 1630, Appendix § 1630.2(o) at 406-408 (1995). See also 29 C.F.R. § 1630.9 (1995).

"The reasonable accommodation requirement is best understood as a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated. These barriers may, for example, be . . . inflexible job procedures that unduly limit the modes of communication that are used on the job, or the way in which particular tasks are accomplished." 29 C.F.R. pt. 1630, Appendix § 1630.9 at 413 (1995). Regulations under 29 C.F.R. pt. 1630 apply to employment in any covered government service, program or activity. 28 C.F.R. § 35.140(b)(1) (1995).

A reasonable accommodation must be effective and provide an opportunity for a person with a disability "to achieve the same level of performance . . . of an average similarly-situated nondisabled person." A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act (Manual) para. 3.4 at III-3,4. Accommodations may include obtaining or modifying equipment. Id. para. 3.5 at III-5,6. Examples of equipment and devices that may be reasonable accommodations include "TDDs (Telecommunication Devices for the Deaf) [which] make it possible for people with hearing and/or speech impairments to communicate over the telephone." Id. para. 3.10(6) at III-27. Limiting a hearing or speech-impaired employee's use of the telephone in connection with an essential job function because the employee uses a TDD would, in my opinion, be discriminatory. This would be inconsistent with the intent of Congress. For example, if two applicants for a typing position "are an individual with a hearing impairment who requires a telephone headset with an amplifier and an individual without a disability, both of whom have the same typing speed, the employer is not permitted to choose the individual without a disability because of the need to provide the needed reasonable accommodation to the

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person with the disability." H.R. Rep. No. 485, 101st Cong., 2d Sess. 56 (1990) reprinted in 1990 U.S.C.C.A.N. at 267, 338. "In other words, the employer's obligation is to consider applicants and make decisions without regard to an individual's disability, or the individual's need for a reasonable accommodation." Id. Moreover, an employer may not discriminate because of a disability regarding job assignments or position descriptions. 29 C.F.R. § 1630.4(d) (1995). In view of my conclusion that use of the telecommunications relay system does not involve a breach of confidentiality it is not necessary to respond to your question about transfer of telephone duties to others.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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