

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 97-F-06

Date Issued: September 10, 1997

Requested by: Sparb Collins, Public Employees Retirement System

- QUESTION PRESENTED -

What information received by the Public Employee Retirement System (PERS) on forms submitted by members or beneficiaries is confidential under N.D.C.C. §§ 54-52-26, 54-52.1-11, and 54-52.3-05?

- ATTORNEY GENERAL'S OPINION -

It is my opinion that N.D.C.C. §§ 54-52-26, 54-52.1-11, and 54-52.3-05 make confidential any recorded information submitted on the forms having a logical or natural association with: a member's or beneficiary's retirement benefits, including the person's identity and other personal identifying information; medical claims by a member and amounts of life insurance coverage, which does not include the application for participation in the PERS health care plan; and an employee's medical or dependent care reimbursement under the pre-tax benefits program.

- ANALYSIS -

Under N.D.C.C. § 54-52-04, the PERS Board is responsible for administering the public employees retirement system, the uniform group insurance program, the deferred compensation plan for public employees, and the pre-tax benefits program. Generally, each program has its own statute concerning the confidentiality of records obtained by PERS pursuant to the administration of that program. Certain records under the public employees retirement system and the deferred compensation plan are confidential under N.D.C.C. § 54-52-26; certain records under the uniform group insurance program are confidential under N.D.C.C. § 54-52.1-11; and certain records under the pre-tax benefits program are confidential under N.D.C.C. § 54-52.3-05.

The answer to the question presented involves the interaction of these three confidentiality statutes with the North Dakota open records law, which provides in relevant part: "Except as otherwise specifically provided by law, all records of a public entity are

public records, open and accessible for inspection during reasonable office hours." N.D.C.C. § 44-04-18(1); see also N.D. Const. Art. XI § 6. The first two questions under the open records law are whether PERS is a "public entity" and whether the requested information is a "record." "Public entity" includes state agencies such as PERS. N.D.C.C. § 44-04-17.1(12). Accord Letter from Attorney General Nicholas Spaeth to Alan Person (March 17, 1987) (records possessed by agent of PERS are subject to open records law). "Record" is defined broadly as "recorded information of any kind . . . which is in the possession or custody of a public entity or its agent" and pertains to public business. N.D.C.C. § 44-04-17.1(15). Thus, each item of recorded information possessed or kept by PERS regarding public business, including each entry of information on forms submitted to PERS, is open unless "otherwise specifically provided by law." See 1985 Op. Att'y Gen. 77, 78.

Worded differently, the question presented asks to what extent N.D.C.C. §§ 54-52-26, 54-52.1-11, and 54-52.3-05 remove the recorded information provided to PERS from the application of the open records law.<sup>1</sup> The application of each statute depends on its specific language, and I will address the confidentiality of records maintained by PERS in the order in which the programs are listed in the North Dakota Century Code.

Turning first to the records maintained by PERS through its administration of the state retirement program, N.D.C.C. § 54-52-26 provides:

All records relating to the retirement benefits of a member or a beneficiary under this chapter or chapter 54-52.2 are confidential and are not public records. This section does not prohibit any party from obtaining this information from other agencies or governmental sources.

. . .

The core issue addressing your question under the statute is what constitutes a "record[]" relating to the retirement benefits of a member or a beneficiary" under this section.

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<sup>1</sup> N.D.C.C. 44-04-18.1, as amended in 1997, exempts "personal information" from the open records law, including "payroll deduction information," if the information is given to the state or a political subdivision by the employee in the course of employment. Much of the information contained in the forms used by PERS in the administration of these programs would thus be considered "personal information," but such information would merely be exempt rather than confidential.

N.D.C.C. § 54-52-26 does not define "record" or "relating to" the retirement benefits of a member or beneficiary. The primary goal in construing a statute is to ascertain the Legislature's intent. Berg Transport, Inc. v. North Dakota Workers Compensation Bureau, 542 N.W.2d 729 (N.D. 1996). Statutes are construed as a whole to determine the legislative intent, and provisions must be harmonized, if at all possible, to give full force and effect to each provision. Electric Cooperative, Inc. v. Public Service Commission, 534 N.W.2d 587 (N.D. 1995). In construing a statute, every effort must be made to give each word, phrase, clause, and sentence meaning and effect. Stewart v. Ryan, 520 N.W.2d 39 (N.D. 1995). Deference is given "to the interpretation given to a statute by the agency which is responsible for enforcing the statute, especially when such interpretation is consistent with the statutory language." Holtz v. North Dakota Workers Compensation Bureau, 479 N.W.2d 469, 470 (N.D. 1992). However, exceptions to the open records law must be specific and cannot be implied. Hovet v. Hebron Public School District, 419 N.W.2d 489 (N.D. 1988).

Information under this program is received by PERS through several different forms completed by PERS members or beneficiaries.<sup>2</sup> I understand that PERS has taken the position that each form in its entirety is a "record[] relating to the retirement benefits of a member or a beneficiary" and all the information contained in the form is therefore confidential. I believe the agency's interpretation of "record" to include an entire form is overly broad. The North Dakota Supreme Court has given the open records law a broad interpretation. See City of Grand Forks v. Grand Forks Herald, 307 N.W.2d 572 (N.D. 1981). In conjunction with this interpretation, exceptions to the open records law, such as N.D.C.C. § 54-52-26, should be narrowly construed to minimize the amount of recorded information regarding public business that is withheld from the public.

There are numerous alternative definitions for the plain meaning of "record." See The American Heritage Dictionary 1034-35 (2d coll. ed. 1991). Some definitions interpret "record" as simply meaning a written or otherwise-preserved piece of information; other definitions focus on the form in which information is stored. Id.

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<sup>2</sup> These forms currently include: Employee's Membership Application for Retirement (SFN 2561); Designation of Beneficiary for the Group Retirement Plan (SFN 2560); Notice Of Termination and Application for Refund, Direct Rollover, or Later Withdrawal for Terminating Employees (SFN 17032); Notice of Death/Application for Surviving Spouse Benefits (SFN 14137); and Application for NDPERS Monthly Benefits and Insurance (SFN 2562).

Thus, the Board's interpretation of "record" as meaning a complete document or form is reasonable. However, it subjects the meaning of "record" to the rather artificial standard of how a document is created or stored, and focuses on the form of the record rather than its substance. An argument could just as easily be made that "record" means an entire file containing several documents on the same subject, and that by using the term "record", a statute intended to withhold one small item of information from public disclosure could be used to justify closing an entire file or document containing large amounts of information that would otherwise be subject to public disclosure.

I believe the sounder interpretation of "record" in N.D.C.C. § 54-52-26, and the one most consistent with the intent of the open records law, is that "record" refers to each separate item of recorded information contained in a document. Not only is this interpretation consistent with the definition of "record" in N.D.C.C. § 44-04-17.1(15) to mean any item of recorded information, it is also consistent with the requirement in N.D.C.C. § 44-04-18.10 that closed or confidential information be excised from an open public record and the remainder be disclosed to the public upon request. This interpretation avoids making the public's right of access to records dependent on the form in which a public entity has decided to receive and store its information. Therefore, the appropriate standard to apply under N.D.C.C. § 54-52-26 to the completed forms received by PERS is whether each item of recorded information in each form "relat[es] to the retirement benefits of a member or beneficiary."

One source defines the term "relate" as "[t]o have connection, relation, or reference." The American Heritage Dictionary 1043 (2d coll. ed. 1991). To be related is to have a "logical or natural association." Id. I have reviewed the forms used by PERS in administering the state retirement program that are listed in footnote one of this opinion, and have determined that it is reasonable to conclude that all information outside the section containing the member's name, address, and other identifying information has a logical or natural association with the retirement benefits of a member or beneficiary and is therefore confidential under N.D.C.C. § 54-52-26.

A closer question is whether a member's name and other identifying information contained in each form has a "logical or natural association" with a member's retirement benefits. I do not believe this question can be answered simply by saying that the person's name and identifying information must be provided to obtain benefits, and therefore relate to those benefits. Rather, would disclosure of the fact that a member is participating in PERS, or has completed a

specific form, provide information regarding the member's retirement benefits?

I believe disclosing a member's participation in PERS would provide information relating to the member's retirement benefits. For example, the fact a particular person has completed an application for receipt of retirement benefits indicates that the person is no longer contributing to PERS as an active employee and instead is now drawing retirement benefits. The fact that a person completes an application for PERS membership indicates the person is not participating in other public retirement plans such as TFFR or TIAA-CREF, which have different contribution and benefit levels. Nothing in N.D.C.C. § 54-52-26 limits the application of that section to present retirement benefits. Therefore, it is my opinion that all the information contained in a completed form listed in footnote one, including personal identifying information, relates to the retirement benefits of the member completing the form and is therefore confidential under N.D.C.C. § 54-52-26.

The confidentiality of certain records maintained by PERS under the uniform group insurance program is described in N.D.C.C. § 54-52.1-11, which provides:

Information pertaining to an eligible employee's group medical records for claims and amounts applied for under the supplemental life insurance coverage under this chapter is confidential and is not a public record. . . .

Similar to the administration of the state retirement program, PERS uses various forms in its administration of the group insurance program. The agency uses the following forms: NDPERS Group Health Application, Evidence of Good Health, Group Life Insurance Application, and the Continuation of Group Health Coverage for Terminating Employees. The plain language of N.D.C.C. § 54-52.1-11 applies to information pertaining to an employee's medical records for claims and amounts applied for under the supplemental life insurance coverage. "Pertain" has a similar plain meaning to the definition of "relate" discussed earlier in this opinion. See The American Heritage Dictionary 926 (2d coll. ed. 1991) ("to have reference; relate). Thus, for information to be confidential under N.D.C.C. § 54-52.1-11, it is my opinion the information must have a logical or natural association to claims under the health insurance program or amounts of supplemental life insurance coverage.

After reviewing the forms used in the group health insurance program that are listed in the previous paragraph, it is my opinion that nothing in those forms has a logical or natural association with any

claims made under the health insurance plan. Although completing the forms makes a person eligible to submit such claims, disclosing the completed form would reveal no information pertaining to a claim submitted by an employee. Indeed, an employee could complete the forms and never submit a claim for medical benefits. Therefore, the information in these forms is not confidential under N.D.C.C. § 54-52.1-11. As for the Group Life Insurance Application, Part B of the form lists the levels of coverage requested and would be confidential under N.D.C.C. § 54-52.1-11, but the remainder of the form is not "information pertaining to" the amounts of coverage applied for by the PERS member, and therefore is not confidential.

Some information in these forms may be confidential under N.D.C.C. § 44-04-18.1(1) as a record of a public employee's medical treatment. Furthermore, much of the information in these forms that is not confidential, especially information provided on the Evidence of Good Health form, would be exempt from the open records law under N.D.C.C. § 44-04-18.1(2). This would not include the employee's name.

The confidentiality of certain records maintained by PERS under the pretax benefits program is described in N.D.C.C. § 54-52.3-05, which provides:

Any records and information pertaining to a public employee's medical and dependent care reimbursement under the pretax benefits program are confidential and are not public records subject to section 44-04-18 and section 6 of article XI of the Constitution of North Dakota. . . .

A member takes advantage of the pretax benefits program by completing an "Annual Flexcomp Benefit Election Salary Reduction Agreement." Looking at this form, the agreement is divided into six parts detailing (A) applicant information, (B) premium conversion, (C) medical spending account, (D) dependent care reimbursement account, (E) authorization, and (F) a participation waiver. Because of the strong correlation between a member's participation in the pretax benefits program and reimbursement under that program, it is my opinion that the information in all six parts of the pretax benefits agreement is confidential since that information has a logical or natural association with an employee's medical or dependent care reimbursement.

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This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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