

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 98-F-28

Date Issued: November 23, 1998

Requested by: Carol Olson, Executive Director, North Dakota  
Department of Human Services

- QUESTION PRESENTED -

Whether the restrictions in N.D.C.C. § 25-03.1-43 on disclosure of confidential records of a patient at a treatment facility are superseded by the general authority in N.D.C.C. § 44-04-18.10(4) to disclose confidential records for purposes of law enforcement or collection of debts owned to a public entity.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that disclosure of confidential records of a patient at a treatment facility is subject to the restrictions in N.D.C.C. § 25-03.1-43, notwithstanding the general authority in N.D.C.C. § 44-04-18.10(4) to disclose confidential records for purposes of law enforcement or collection of debts owned to a public entity.

- ANALYSIS -

N.D.C.C. ch. 25-03.1 relates to commitment procedures and applies to treatment facilities, including the State Hospital at Jamestown, that treat mentally ill and chemically dependent persons. See N.D.C.C. § 25-03.1-02(19). N.D.C.C. § 25-03.1-43 makes patient records confidential:

All information and records obtained in the course of an investigation, evaluation, examination, or treatment under this chapter and the presence or past presence of a patient in a treatment facility must be kept confidential and not as public records, except as the requirements of a hearing under this chapter may necessitate a different procedure. All information and records are available to the court and, under regulations established by the department, may be disclosed only to:

1. Physicians and providers of health, mental health, or social and welfare services involved in caring for, treating, or rehabilitating the patient to whom the patient has given written consent to have information disclosed.
2. Individuals to whom the patient has given written consent to have information disclosed.
3. Persons legally representing the patient, including attorneys representing the patient in commitment proceedings, upon proper proof of representation.
4. Persons authorized by a court order.
5. Persons doing research or maintaining health statistics, if the anonymity of the patient is assured and the facility recognizes the project as a bona fide research or statistical undertaking.
6. The department of corrections and rehabilitation in cases in which prisoners sentenced to the state prison are patients in the state hospital on authorized transfers either by voluntary admissions or by court order.
7. Governmental or law enforcement agencies when necessary to secure the return of a patient who is absent without authorization from the facility where the patient was undergoing evaluation or treatment, or when necessary to report a crime committed on facility premises or against facility staff or patients, or threats to commit such a crime. The disclosures must be directly related to a patient's commission of a crime or threats to commit such a crime and are limited to the circumstances of the incident, the name and address of the patient involved, and the patient's last known whereabouts.
8. Qualified service organizations and third-party payers to the extent necessary to perform their functions.

9. Victims and witnesses of a crime to the extent necessary to comply with the notification requirements of subsection 16 of section 12.1-34-02.
10. Law enforcement agencies to confirm and investigate the address of a person required to register under section 12.1-32-15.

N.D.C.C. § 25-03.1-43 was originally enacted in 1977. It was amended in 1991 to add subsection 7 permitting limited disclosures to governmental or law enforcement agencies regarding unauthorized absences from a treatment facility or crimes committed on facility premises or against facility staff, including threats to commit such a crime. 1991 N.D. Sess. Laws ch. 293, § 3. It was further amended in 1997 to add subsection 10 authorizing release of information to law enforcement agencies relating to sex offender registration. 1997 N.D. Sess. Laws ch. 242.

N.D.C.C. § 44-04-18.10(4), enacted in 1997, provides:

Unless otherwise prohibited by federal law, records of a public entity which are otherwise closed or confidential may be disclosed to any public entity for the purpose of law enforcement or collection of debts owed to a public entity, provided that the records are not used for other purposes and the closed or confidential nature of records is otherwise maintained.

This section contains an exception for federal prohibitions on disclosure.<sup>1</sup> There are federal statutes and regulations that limit the release of records of substance abuse patients. See 42 U.S.C. § 290dd-2; 42 C.F.R. pts. 2, 2a. "Substance abuse" means the abuse of alcohol or other drugs. 42 U.S.C. § 290cc-34. Accordingly, N.D.C.C. § 44-04-18.10(4) does not authorize the disclosure of records of patients that abuse alcohol or other drugs that are prohibited from being released by federal statutes or regulations. However, it still must be determined whether N.D.C.C. § 44-04-18.10(4) authorizes the disclosure of records of patients other than those who abuse alcohol or other drugs (for example,

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<sup>1</sup> "Federal law" as used in N.D.C.C. § 44-04-18.10(4) would include both federal statutes and applicable federal regulations. See N.D.C.C. § 44-04-17.1(7).

mentally ill patients) when N.D.C.C. § 25-03.1-43 prohibits such disclosure.

N.D.C.C. § 25-03.1-43 prohibits the disclosure of records of patients at the State Hospital except to those persons or entities listed in subsections 1 through 10 of N.D.C.C. § 25-03.1-43. Subsections 7 and 10 authorize the release of information to law enforcement agencies for limited purposes. On the other hand, N.D.C.C. § 44-04-18.10(4) would authorize the release of State Hospital records to any public entity for law enforcement or debt collection purposes not authorized by N.D.C.C. § 25-03.1-43.

N.D.C.C. § 25-03.1-43 is a specific statute relating to the release of records at treatment facilities, including the State Hospital. N.D.C.C. § 44-04-18.10(4) was enacted as part of a general chapter dealing with public records and meetings, but addresses the specific issue of various state confidentiality laws presenting obstacles to law enforcement and collection of debts owed to the state or its political subdivisions. 1997 N.D. Sess. Laws ch. 381, § 4. N.D.C.C. § 1-02-07 guides the interpretation of statutes when a general provision (such as N.D.C.C. § 44-04-18.10(4)) conflicts with a specific provision in the same or another statute (such as N.D.C.C. § 25-03.1-43) and provides:

Whenever a general provision in a statute is in conflict with a special provision in the same or in another statute, the two must be construed, if possible, so that effect may be given to both provisions, but if the conflict between the two provisions is irreconcilable the special provision must prevail and must be construed as an exception to the general provision, unless the general provision is enacted later and it is the manifest legislative intent that such general provision shall prevail.

In accordance with this section, the specific provisions in N.D.C.C. § 25-03.2-43 must prevail over the general provisions of N.D.C.C. § 44-04-18.10(4) if there is an irreconcilable conflict between those provisions unless it was the manifest intent of the Legislature that the general disclosure authority in N.D.C.C. § 44-04-18.10(4) should supersede any conflicting disclosure restrictions in other more-specific statutes, including N.D.C.C. § 25-03.1-43.

The conflict between N.D.C.C. § 44-04-18.10(4) and specific confidentiality statutes is not as large as it might appear.

Statutes should be interpreted to avoid conflicts whenever possible. N.D.C.C. § 1-02-07. The plain language of N.D.C.C. § 44-04-18.10(4) applies to records of a public entity "which are otherwise closed or confidential." "Confidential record" means "all or part of a record . . . that is either expressly declared confidential or is prohibited from being open to the public." N.D.C.C. § 44-04-17.1(3). Thus, there is no conflict between N.D.C.C. § 44-04-18.10(4) and another statute which merely makes specific records confidential or prohibits disclosure of the records.

Another relevant rule of statutory construction in this situation is that the Legislature is presumed not to perform idle acts, and that statutes are not intended to be useless rhetoric. N.D.C.C. § 31-11-05(23); Stutsman County v. State Historical Soc., 371 N.W.2d 321, 325 (N.D. 1985). If I were to conclude that there is an irreconcilable conflict between N.D.C.C. § 44-04-18.10(4) and another statute making specific records confidential, and that manifest intent to supersede specific confidentiality statutes did not exist in N.D.C.C. § 44-04-18.10(4), that subsection would be rendered meaningless. Thus, to the extent there is a conflict between N.D.C.C. § 44-04-18.10(4) and a statute which merely makes specific records closed or confidential, the phrase "records which are otherwise closed or confidential" in N.D.C.C. § 44-04-18.10(4) expresses the manifest intent of the Legislature that the disclosure authority in N.D.C.C. § 44-04-18.10(4) would prevail.

To summarize, a statute declaring specific records closed or confidential generally will not prohibit disclosures under N.D.C.C. § 44-04-18.10(4). However, there is an exception to this general rule. Sometimes a statute will not simply make certain records closed or confidential, but will go further and explain the specific circumstances under which the records may be disclosed. See, e.g., N.D.C.C. § 23-07-02.2 (HIV reports may not be shared with any agency). Such an explanation indicates that the Legislature considered the specific issue of when the records may be shared, and the specific restrictions on disclosure would prevail over any conflicting authority to disclose records in N.D.C.C. § 44-04-18.10(4). Although N.D.C.C. § 44-04-18.10(4) reflects manifest legislative intent to supersede statutes that simply make specific records "closed" or "confidential," that subsection is silent on its application to statutes that go further and indicate how specific closed or confidential records may be shared with other public entities, and an intent to supersede such statutes cannot be construed from the legislative history of that subsection.

November 23, 1998

Page 6

N.D.C.C. § 25-03.1-43 is an example of a statute that explains how certain closed or confidential records may be shared. Subsections 7 and 10 of N.D.C.C. § 25-03.1-43 prohibit disclosure to law enforcement except for certain limited purposes. These specific provisions are more restrictive than the general disclosure authority in N.D.C.C. § 44-04-18.10(4). There is no manifest intent in N.D.C.C. § 44-04-18.10(4) that it prevail over the greater restrictions in N.D.C.C. § 25-03.1-43. Accordingly, it is my opinion that disclosure of confidential records of a patient at a treatment facility is subject to the restrictions in N.D.C.C. § 25-03.1-43, notwithstanding the general authority in N.D.C.C. § 44-04-18.10(4) to disclose confidential records for purposes of law enforcement or collection of debts owned to a public entity.

- EFFECT -

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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