

LETTER OPINION
93-L-104

March 22, 1993

Mr. Lyle Gallagher
Director
State Radio Communications
Box 5511
Bismarck, ND 58502-5511

Dear Mr. Gallagher:

Thank you for your February 23, 1993, letter inquiring as to North Dakota laws regulating the disclosure of information regarding an individual's HIV positive status. I am unable to offer a definite answer regarding disclosure of a person's HIV status since the determination of whether the information is confidential must be based on the source of the information.

Most North Dakota legislation addressing the human immunodeficiency virus (HIV) and acquired immune deficiency syndrome (AIDS) was introduced at the 1989 legislative session. See 1989 N.D. Sess. Laws chs. 164, 181, 310, and 314. Such legislation was primarily the end result of an interim Legislative Council study. The various bills comprising the 1989 legislation were thought to make a cohesive and unified package. The 1989 legislation, along with amendments thereto, can predominately be found codified in N.D.C.C. chs. 23-07, 23-07.4, and 23-07.5.

N.D.C.C. ? 23-07-02.1 provides:

Reports of human immunodeficiency virus infection -

Penalty. Every attending physician treating an individual known by the physician to have a diagnosis of human immunodeficiency virus infection, acquired immune deficiency syndrome, or human immunodeficiency virus related illness, including death from human immunodeficiency virus infection, shall make a report on that individual to the state department of health and consolidated laboratories. All persons, other than an attending physician, treating an individual known to have human immunodeficiency virus infection in a hospital, clinic, sanitarium, penal institution, or other private or public institution shall make a report on that individual to an official designated by the respective

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facility to receive reports of significant infectious diseases within the facility. The designated official shall, if satisfied that the report is valid, make a report to the department on each individual having a diagnosis of human immunodeficiency virus infection, acquired immune deficiency syndrome, or human immunodeficiency virus related illness, including death from human immunodeficiency virus infection, unless the diagnosed individual's attending physician has made such a report. The reports required under this section must contain the name, date of birth, sex, and address of the individual reported on and the name and address of the physician or designated official making the report. Failure by a facility to designate an official to whom reports must be made is an infraction. Any person who in good faith complies with this section is immune from civil and criminal liability for any action taken in compliance with this section.

The information contained in such report is strictly confidential. N.D.C.C. ? 23-07-02.2 provides:

Confidentiality of reports. A report required by section 23-07-02.1 and held by the state department of health and consolidated laboratories is strictly confidential information. The information may not be released, shared with any agency or institution, or made public, upon subpoena, search warrant, discovery proceedings, or otherwise, except that:

1. Release may be made of medical or epidemiologic information for statistical purposes in a manner such that no individual person can be identified;
2. Release may be made of medical or epidemiologic information to the extent necessary to enforce section 23-07-02.1 and this section and related rules concerning the treatment, control, and investigation of human immunodeficiency virus infection by public health officials; or
3. Release may be made of medical or epidemiologic information to medical personnel to the extent necessary to protect the health or life of any individual.

No officer or employee of the state department of health and consolidated laboratories may be examined in any judicial, executive, legislative, or other proceeding regarding the existence or content of any individual's report retained by the department under section 23-07-02.1.

N.D.C.C. ? 23-07-21, in part, further establishes that "[a]ny person required to make a report under section 23-07-02.1 who releases or

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makes public confidential information or otherwise breaches the confidentiality requirements of section 23-07-02.2 is guilty of a class C felony."

Corresponding to the confidentiality requirements of HIV reports in N.D.C.C. ? 23-07-02.1, is N.D.C.C. ? 23-07.5-05 dealing with the confidentiality of HIV test results. N.D.C.C. ? 23-07.5-05 provides:

Confidentiality of test results.

1. Except as provided in this section, the results of a test for the presence of an antibody to the human immunodeficiency virus may be disclosed only to the following persons:

a. The subject of the test, in the case of a minor the parent or legal guardian or custodian of the subject of the test, in the case of an incapacitated person the legal guardian of the subject of the test. In the event the subject of a test is placed in a foster home, or is to be adopted, the parent, legal guardian or custodian, as the case may be, may disclose the results of the test to the foster parents or potential adoptive parents.

b. The test subject's health care provider, including those instances in which a health care provider provides emergency care to the subject.

c. An agent or employee of the test subject's health care provider under subdivision b who provides patient care or handles or processes specimens of body fluids or tissues.

d. A blood bank, blood center, or plasma center that subjects a person to a test under subsection 2 of section 23-07.5-02 for any of the following purposes:

(1) Determining the medical acceptability of blood or plasma secured from the test subject.

(2) Notifying the test subject of the test results.

(3) Investigating human immunodeficiency virus infections in blood or plasma.

e. A health care provider who procures, processes, distributes, or uses a human body part donated for a purpose specified under chapter 23-06.1 for the purpose of assuring medical acceptability of the gift for the purpose intended.

f. The state health officer or the state health officer's designee, for the purpose of providing epidemiologic surveillance or investigation or control of communicable disease.

g. An embalmer licensed under chapter 43-10.

h. A health care facility staff committee or accreditation or health care services review organization for the purposes of conducting program monitoring and evaluation and health care services reviews.

i. A person who conducts research, for the purpose of research, if the researcher:

(1) Is affiliated with the test subject's health care provider under subdivision c;

(2) Has obtained permission to perform the research from an institutional review board; and

(3) Provides written assurance to the person disclosing the test results that use of the information requested is only for the purpose for which it is provided to the researcher, the information will not be released to a person not connected with the study, and the final research product will not reveal information that may identify the test subject unless the researcher has first received informed consent for disclosure from the test subject.

2. The results of a test may be disclosed under a lawful order of a court of record.

3. The individual who is tested may authorize disclosure to any person.

Of particular importance is N.D.C.C. ? 23-07.5-06, which further provides that "[a] person to whom the results of a test for the presence of an antibody to the human immunodeficiency virus have been disclosed under subsection 1 of section 23-07.5-05 may not disclose the test results except as provided under that subsection."

Corresponding to N.D.C.C. ? 23-07-21, N.D.C.C. ? 23-07.5-08 establishes that any "person who intentionally discloses the results of a blood test in violation of subsection 1 of section 23-07.5-05 and thereby causes bodily or psychological harm to the subject of the test is guilty of a class C felony."

Except for mandatory testing of prison inmates pursuant to N.D.C.C. ? 23-07-07.5 or testing done at the order of the State Health Officer pursuant to N.D.C.C. ch. 23-07.4, no testing for the presence of the HIV virus can generally be done without a person's consent. N.D.C.C. ? 23-07.5-02 provides:

Informed consent for testing or disclosure - Exception.

1. Except when testing and disclosure is otherwise provided for by law, a health care provider, blood bank, blood center, or plasma center may not subject a person to a test for the presence of an antibody to the human immunodeficiency virus unless the subject of the test, the parent or legal guardian or custodian of a minor who is the subject of the test, or the legal guardian of an incapacitated person who is the subject of the test, first provides informed consent for testing or disclosure as provided under subsection 2.

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2. A health care provider, blood bank, blood center, or plasma center that subjects an individual to a test for the presence of an antibody to the human immunodeficiency virus under subsection 1 shall provide the potential test subject, the parent or legal guardian or custodian of a potential test subject that is a minor, or the legal guardian of a potential test subject who is incapacitated, with an informed consent form and shall obtain the appropriate individual's signature on the form. The form must contain:

a. The name of the potential test subject who is giving consent and whose test results may be disclosed and, where appropriate, the name of the individual providing consent on behalf of the potential test subject.

b. A statement of explanation that the test results may be disclosed as provided under subsection 1 of section 23-07.5-05 and either a listing of the persons or circumstances specified under subsection 1 of section 23-07.5-05 or a statement that the listing is available upon request.

c. Spaces specifically designated for the following purposes:

(1) The signature of the person providing informed consent for the testing and the date on which the consent is signed; and

(2) The name of any person to whom the test results may be disclosed, if any; the date on which the consent to disclosure is signed; and the time period during which the consent to disclosure is effective.

As you can see, the confidentiality of information regarding a person's HIV status, under North Dakota law, to a large extent depends on the source of the information. Outside of North Dakota law, the appropriateness of placing specific information on the NCIC system should be addressed to personnel overseeing its operation.

I trust you will find the above discussion helpful.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

tca/jfl