

LETTER OPINION
94-L-309

November 9, 1994

Mr. Sparb Collins
Public Employees Retirement System
Box 1214
Bismarck, ND 58502

Dear Mr. Collins:

Thank you for your October 28, 1994, letter concerning the release of confidential information to participating members pursuant to North Dakota Century Code (N.D.C.C.) ? 54-52-26. I understand that the present Public Employees Retirement System (PERS) policy is not to release confidential information over the phone to a participating member, but to provide that information by mail or fax to the member's address on the same day of the inquiry, if possible. I further understand that the PERS Board wants to modify the present policy to more readily accommodate the needs of participating members by providing confidential information to them over the telephone if they have identified themselves by name and can authenticate who they are by correctly answering three of the following five personal items: Social Security number, beginning participation date in the retirement system, birth date, latest month's salary, and spouse's birth date.

N.D.C.C. ? 54-52-26 provides:

All records relating to the retirement benefits of a member or a beneficiary under this chapter are confidential and are not public records. This section does not prohibit any party from obtaining this information from other agencies or governmental sources. Information and records may be disclosed, under rules adopted by the board, only to:

1. A person to whom the member has given written consent to have the information disclosed.
2. A person legally representing the member, upon proper proof of representation, and unless the member specifically withholds consent.

Mr. Sparb Collins
November 9, 1994
Page 2

3. A person authorized by a court order.

N.D.C.C. ? 12.1-13-01 provides that "[a] person is guilty of a class C felony if, in knowing violation of a statutory duty imposed on him as a public servant, he discloses any confidential information which he has acquired as a public servant."

The obvious motivation for the present policy is to guard against the accidental or unauthorized disclosure of a member's confidential information to someone other than the member. Thus, the proposed policy seeks to strike a balance between protecting the member's confidential information and accommodating a member's ready need, at times, to access this information by phone. The plain language of N.D.C.C. ? 54-52-26 authorizes the PERS Board to adopt rules relating to the disclosure of information and records to third parties. Also implicit in the right of a member under N.D.C.C. ? 54-52-26 to authorize the disclosure of confidential information to a third party or legal representative is the right of the member to receive the information directly. Accordingly, it is my opinion that the Board is authorized to adopt the proposed policy as a reasonable implementation of that section. See Mulford v. Davey, 186 P.2d 360, 362 (Nev. 1947) (custodians should require reasonable proof of identity or qualification before releasing confidential information); 76 C.J.S. Records ? 63 (1994). See also 5 U.S.C. ? 552a(e)(10) (federal agencies are required to "establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained.").

Sincerely,

Mr. Sparb Collins
November 9, 1994
Page 3

Heidi Heitkamp
ATTORNEY GENERAL

dec\jfl