

## APPROPRIATENESS OF PENALTIES FOR DISCLOSURE OF CERTAIN PUBLIC RECORDS - BACKGROUND MEMORANDUM

House Concurrent Resolution No. 3011 (attached as an appendix) directs the Legislative Council to study the North Dakota open records statutes and the appropriateness of the penalties for an unauthorized disclosure of certain records. Testimony on the resolution indicated there is a concern regarding the appropriateness of the penalties for the release of confidential information. Concerns were raised as to whether the penalty for the release of public records classified as confidential, a Class C felony, in all cases matches the crime.

### BACKGROUND

#### North Dakota's Open Records Statute and Constitutional Provision

In 1957 the North Dakota Legislative Assembly enacted North Dakota Century Code (NDCC) Section 44-04-18. This section provides, in part:

1. **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.** As used in this subsection, "reasonable office hours" includes all regular office hours of a public entity. If a public entity does not have regular office hours, the name and telephone number of a contact person authorized to provide access to the public entity's records must be posted on the door of the office of the public entity, if any. Otherwise, the information regarding the contact person must be filed with the secretary of state for state-level entities, for public entities defined in subdivision c of subsection 12 of section 44-04-17.1, the city auditor or designee of the city for city-level entities, or the county auditor or designee of the county for other entities. (emphasis supplied)

In 1979 a constitutional measure was submitted to and approved by the people of North Dakota. The language of the amendment is codified as Article XI, Section 6, of the Constitution of North Dakota and closely tracks NDCC Section 44-04-18. The constitutional amendment reads as follows:

Unless otherwise provided by law, all records of public or governmental bodies, boards, bureaus, commissions, or agencies of the state or any political subdivision of

the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records, open and accessible for inspection during reasonable office hours.

The purpose behind the open records statute and constitutional amendment was outlined by the North Dakota Supreme Court in *Grand Forks Herald v. Lyons*, 101 N.W.2d 543, 546 (N.D. 1960) as:

To provide the public with the right and the means of informing itself of the conduct of the business in which the public has an interest, in order that the citizen and taxpayer might examine public records to determine whether public money is being properly spent, or for the purpose of bringing to the attention of the public irregularities in the handling of public matter.

#### Agencies Subject to Section 44-04-18

North Dakota Century Code Section 44-04-18(1) provides that North Dakota's open records law applies to records of a "public entity." Section 44-04-17.1(12) defines "public entity" to include three categories of entities:

- a. Public or governmental bodies, boards, bureaus, commissions, or agencies of the state, including any entity created or recognized by the Constitution of North Dakota, state statute, or executive order of the governor or any task force or working group created by the individual in charge of a state agency or institution, to exercise public authority or perform a governmental function;
- b. Public or governmental bodies, boards, bureaus, commissions, or agencies of any political subdivision of the state and any entity created or recognized by the Constitution of North Dakota, state statute, executive order of the governor, resolution, ordinance, rule, bylaw, or executive order of the chief executive authority of a political subdivision of the state to exercise public authority or perform a governmental function; and

- c. Organizations or agencies supported in whole or in part by public funds, or expending public funds.

There are three circumstances under which the records of a nongovernmental organization may be open to the public. These circumstances include whether the organization was created or recognized by state law or by an action of a political subdivision to exercise public authority or perform a governmental function; if the organization is supported by public funds or is expending public funds; and if the organization performs a governmental function or possesses records regarding public business on behalf of a public entity.

### Records Subject to Section 44-04-18

North Dakota Century Code Section 44-04-17.1 defines "record" as "recorded information of any kind, regardless of the physical form or characteristic by which the information is stored, recorded or reproduced, which is in the possession or custody of a public entity or its agent and which has been received or prepared for use in connection with public business or contains information relating to public business." "Record" does not include unrecorded thought processes or mental impressions, but does include preliminary drafts and working papers and does not include records in the possession of a court of this state. Section 44-04-17.1(11) provides that "public business" means "all matters that relate or may foreseeably relate in any way to . . . [t]he performance of the public entity's governmental functions, including any matter over which the public entity has supervision, control, jurisdiction, or advisory power; or . . . [t]he public entity's use of public funds."

### Exemptions From the Open Records Law

As discussed earlier, NDCC Section 44-04-18 provides "[e]xcept as otherwise specifically provided by law, all records of a public entity are public records, open and accessible for inspection during reasonable office hours." However, certain public records need not be disclosed if they fall within a specific exemption from the open records law. "Law" is defined in Section 44-04-17.1(7) to include "federal statutes, applicable federal regulations, and state statutes." The North Dakota Supreme Court, in *Hovet v. Hebron Public School District*, 419 N.W.2d 189, 191 (N.D. 1988) held:

[B]ecause the open-records law provides that governmental records are to be open to the public "Except as otherwise specifically provided by law," an exception to the open-records law may not be implied. In order that a record to be excepted from the open-records law the Legislature must specifically address the status of that type of record--e.g., statements that a certain type of

record is confidential or that it is not open to the public.

## Enforcement of Open Records Law

### Administrative Review

North Dakota Century Code Section 44-04-21.1 provides that any interested person may request an Attorney General's opinion to review an alleged violation of the open records law by any public entity other than the Legislative Assembly or any legislative committee. Section 44-04-21.1 provides that the Attorney General is to issue to the public entity involved an opinion on the alleged violation unless the request is withdrawn by the person requesting the opinion or a civil action has been filed involving the possible violation.

### Civil Action

In 1997 the Legislative Assembly enacted a law that authorized any interested person to bring a civil action against a public entity for violations of the open records law. North Dakota Century Code Section 44-04-21.2 provides that "[i]f a court finds that any of these sections have been violated by a public entity, the court may award declaratory relief, an injunction, a writ of prohibition or mandamus, costs, disbursements, and reasonable attorney's fees against the entity." This section also provides that damages may be assessed in the amount of \$1,000 or actual damages, whichever is greater, for an intentional or knowing violation of these laws. The section also provides that a public entity may not be sued for attorneys' fees or damages, or both, until at least three working days after the chief administrative officer for the public entity receives notice and opportunity to cure the alleged violation. This opportunity to cure a violation does not apply if the public entity has previously been found by the Attorney General to have violated the open records or meetings laws.

### Criminal Violations

North Dakota Century Code Section 44-04-21.3 provides that a public servant who knowingly violates the open records laws is guilty of a Class A misdemeanor under Section 12.1-11-06. Section 12.1-11-06 provides that any public servant who knowingly refuses to perform any duty imposed by law is guilty of a Class A misdemeanor. Section 12.1-01-04 defines "public servant" as "any officer or employee of government, including law enforcement officers, whether elected or appointed, and any person participating in the performance of a governmental function, but the term does not include witnesses."

## Classifications of Public Records

North Dakota law provides for three classifications of public records. The first class of documents consists of those documents that are subject to the open records law, and the disclosure of these documents is generally required. These records are discussed in more depth in the background portion of this memorandum.

North Dakota Century Code Section 44-04-17.1(5) provides for a second class of documents consisting of those documents that are not confidential but are also not subject to the open records law. The disclosure of these exempt documents by a public entity is discretionary. This section provides that an "exempt record" means "all or part of a record . . . that is neither required by law to be open to the public, nor is confidential, but may be open in the discretion of the public entity."

The third class includes those documents that are confidential, the disclosure of which is generally prohibited.

### **Confidential Records**

North Dakota Century Code Section 44-04-17.1(3) provides that "confidential records" means "all or part of a record . . . that is either expressly declared confidential or is prohibited from being open to the public." A public entity generally has no discretion regarding the disclosure of a confidential record and a public release of a confidential record. Confidential records are characterized by a lack of discretion to disclose documents to the public, and the public servant who releases the confidential records generally can be punished.

The disclosure of confidential information is prohibited by NDCC Section 12.1-13-01, which provides in part 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."

Records do not need to be expressly declared confidential for their disclosure to be prohibited by NDCC Section 12.1-13-01. Section 12.1-13-01 also provides that "confidential information" means "information made available to the government under a governmental assurance of confidence as provided by statute." The Attorney General in an August 1, 1994, opinion stated that this definition "includes not only those documents which a statute specifically states are confidential, but also those which a statute provides cannot be disclosed or for which the Legislature has provided a penalty for disclosure."

### **Disclosure of Confidential Information**

North Dakota Century Code Section 12.1-13-01 provides that disclosure of confidential records is generally a Class C felony. Section 44-04-17.1(5) provides that the disclosure of exempt records is left to the

discretion of the public entity. However, circumstances may arise under which a public entity is required or authorized to disclose confidential or closed records. Section 44-04-18.10(4) provides that if not prohibited by federal law, a public entity may share confidential or closed records with any other public entity for the purpose of law enforcement or collection of debts owed to a public entity. This subsection provides that the recipient public entity may not use the records "for other purposes and the closed or confidential nature of the records" must otherwise be maintained. This subsection limits "public entity" to governmental entities only and does not apply to nongovernmental organizations that are expending or supported by public funds.

Disclosure of confidential or closed information also may be required by a court. North Dakota Century Code Section 44-04-18.11 provides that if a public entity receives a valid subpoena or other court order to produce closed records, the public entity is required to comply with the subpoena or order unless disclosure under a court order is otherwise prohibited or limited by law. This section also provides that a court order is required to compel disclosure of confidential information that is not privileged or otherwise protected by law from court-ordered disclosure. Section 44-04-18.11(2) provides that upon request of the public entity, the court ordering disclosure is also required to issue a protective order to preserve the confidentiality of the records. Under Section 44-04-18.11(3), any person who discloses confidential information under this section is immune from prosecution for breaching the confidentiality of the record.

### **Conflicting Penalties for the Disclosure of Confidential Information**

As discussed above, North Dakota Century Code Section 12.1-13-01 provides that a person who knowingly discloses confidential information is guilty of a Class C felony. There are, however, several sections throughout the Century Code which provide a penalty, other than the one provided for in Section 12.1-13-01, for the disclosure of confidential information. These sections include:

- Section 4-18.1-14, which relates to the Milk Stabilization Board, provides that the disclosure of confidential information is a Class A misdemeanor;
- Section 50-19-10 provides that the records of maternity homes are confidential. Section 50-19-15 provides that a violation of Chapter 50-19 is a Class B misdemeanor;
- Section 50-25.1-14, which relates to child abuse and neglect records, provides that any person who permits or encourages the unauthorized disclosure of confidential information

under Chapter 50-25.1 is guilty of a Class B misdemeanor; and

- Section 65-05-32, which relates to confidential information contained in injured employees' claim files, provides that the willful communication of the confidential information is a Class B misdemeanor.

Whether the penalty for a violation of this list of sections is the general Class C felony penalty provided for in NDCC Section 12.1-13-01 or whether the penalty for a violation is the misdemeanor offense provided for in each of these specific sections is unclear. Under the rules of interpretation contained in Section 1-02-07, "[w]henver 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 . . . ." Because Section 12.1-13-01 does not contain language, such as "except as otherwise provided by law," which would authorize a different penalty from the one provided for in Section 12.1-13-01, and the specific sections do not contain language, such as "notwithstanding section 12.1-13-01," which would exempt a violation of the section from the penalty in Section 12.1-13-01, it appears that under the rules of interpretation, the penalty contained in the specific sections would apply.

### **Health Insurance Portability and Accountability Act of 1996**

The privacy provisions of the federal law, the Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191 (HIPAA), apply to health information created or maintained by health care providers who engage in certain electronic transactions, health plans, and health care clearinghouses. The federal law includes provisions designed to encourage electronic transactions and requires new safeguards to protect the security and confidentiality of health information. Congress called on the Department of Health and Human Services to issue patient privacy protections as part of the HIPAA. The Department of Health and Human Services issued the regulation, "Standards for Privacy of Individually Identifiable Health Information," which is applicable to entities covered by HIPAA. The regulation covers health plans, health care clearinghouses, and those health care providers who conduct certain financial and administrative transactions electronically. Most health insurers, pharmacies, and doctors and other health care providers were required to comply with these federal standards beginning April 14, 2003.

The new federal privacy standards do not affect state laws that provide additional privacy protections for patients. The confidentiality protections are

cumulative; the privacy rule sets a national "floor" of privacy standards. Any state law providing additional protections will continue to apply. When a state law requires a certain disclosure--such as reporting an infectious disease outbreak to the public health authorities--the federal privacy regulations would not preempt the state law.

Congress provided civil and criminal penalties for covered entities that misuse personal health information. The Office for Civil Rights is the departmental component responsible for implementing and enforcing the privacy regulation. For civil violations of the standards, the Office for Civil Rights may impose monetary penalties up to \$100 per violation, up to \$25,000 per year, for each requirement or prohibition violated. Criminal penalties apply for certain actions such as knowingly obtaining protected health information in violation of the law. Criminal penalties range up to \$50,000 and one year in prison for certain offenses; up to \$100,000 and up to five years in prison if the offenses are committed under "false pretenses"; and up to \$250,000 and up to 10 years in prison if the offenses are committed with the intent to sell, transfer, or use protected health information for commercial advantage, personal gain, or malicious harm.

In an October 4, 2002, letter opinion, the Attorney General was asked about the confidentiality of information regarding a public employee's participation in uniform group health insurance coverage. According to the opinion, "even if state law did not make information on an employees participation and the amount paid for that participation confidential, HIPAA and the rules adopted under HIPAA would make information concerning an employees participation in the health, vision, dental, and EAP programs and the payment for that participation confidential under federal law beginning April 14, 2003." According to the opinion, 45 C.F.R. § 164.502 states that a "covered entity may not use or disclose protected health information" except in certain circumstances. In the opinion of the Attorney General, for purposes of this regulation, Public Employees Retirement System's health insurance plans are covered entities. Thus, according to the opinion, in light of the regulations adopted pursuant to HIPAA, information on an employee's participation and the amount paid for that participation is confidential.

The 2003 Legislative Assembly enacted a number of bills intended to ensure compliance with the HIPAA requirements. A summary of these bills is provided later in this memorandum.

### **Examples of Records Generally Considered Confidential or Exempt**

There are a number of types of records for which there is a specific exception to the state's open records law. The specific exceptions include exempt records, which are authorized to be released at the

discretion of the agency; and confidential records, which may not be released and for which the penalty for release is a Class C felony. Examples of these records include:

- **Law enforcement records.** Some of the most expansive exemptions from the open records law involve law enforcement records. Law enforcement agencies are subject to the open records law. As is the case with most records, the records of law enforcement agencies are not automatically excluded from the application of the open records law. To exempt law enforcement records, a specific exemption from the law is required. Some of the law enforcement records fall under the numerous statutory exceptions, including law enforcement records of a child, criminal intelligence and investigative information, records of law enforcement and correctional employees, confidential informants, criminal history information, crime against child and sex offender registration information, reports of student alcohol and drug violations, notification of serious injury or death, and accident reports.
- **Attorney work product.** Exempted from the open records law by the 1989 Legislative Assembly, NDCC Section 44-04-19.1(6) provides that to be exempt under this statute, an attorney work product must be prepared by an attorney or at the attorney's express direction, reflect a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency, and be prepared exclusively for litigation or adversarial administrative proceedings or in anticipation of reasonably predictable litigation or adversarial administrative proceedings.
- **Trade secrets, proprietary, commercial, and financial information.** The 1989 Legislative Assembly enacted a statute declaring certain information confidential. This statute, NDCC Section 44-04-18.4, which was substantially amended in 1993, provides, in part, that "[t]rade secret, proprietary, commercial, and financial information is confidential if it is of a privileged nature and it has not been previously publicly disclosed."
- **Economic development records.** North Dakota Century Code Section 44-04-18.4(5) provides that unless the records are confidential under Section 44-04-18.4(1) or another statute, "[r]ecords and information pertaining to a prospective location of a business or industry, including the identity, nature, and location of the business or industry, when no previous public disclosure has been made by the business or industry of the interest or intent of the business or industry to locate in, relocate within, or expand within this state" are exempt.
- **Minutes and recordings of executive sessions.**
- **Personal medical and health records.** There are several exemptions to the open records law for personal medical and health records possessed by public entities. North Dakota Century Code Section 54-52.1-11 provides that information pertaining to an eligible public employee's group medical records for claims, employee premium payments made, salary reduction amounts taken, history of any available insurance coverage purchased, and amounts and types of insurance applied for under the supplemental life insurance coverage are confidential. Section 54-52.1-12 provides that medical records obtained as a result of enrollment in the uniform group insurance plan are confidential. Under Section 44-04-18.1 any record of a public employee's medical treatment or use of an employee assistance program is confidential. Under this section other medical information of public employees which has been provided in the course of employment with the state or a political subdivision is exempt. The broadest exemption for personal health information is located in NDCC Chapter 23-01.3. Under this chapter, disclosure of "protected health information" in the possession of a "public health authority" is generally prohibited. Section 23-01.3-01(7) defines protected health information as any information that either identifies an individual or could be used to identify an individual, and which relates to the individual's physical or mental condition, health care, or payment for the provision of health care.
- **Student records.**
- **Reports of child abuse or neglect.**
- **Disease control records.**
- **Motor vehicle records.** The 2001 Legislative Assembly enacted legislation, codified as NDCC Section 39-33-05, prohibiting release of "personal information" in a motor vehicle record to the general public unless expressly authorized by the person to whom the information pertains.
- **State agency risk management and loss control records.**
- **Multistate investigations and litigation.**
- **Lists of children.**
- **Computer programs.**
- **Financial account numbers.**
- **Personal information of licensed professionals.**
- **Consumer complaint information.**
- **Inmate records.**

- **Legislative records and information.** The 1989 legislature declared certain legislative records and information exempt from the open records law. North Dakota Century Code Section 44-04-18.6 provides that records of a purely personal and private nature, records of attorney work product or attorney-client communication, and records that reveal the content of private communications between a legislator and any person and a record of telephone usage are not subject to the open records law. However, telephone records are available to governmental entities to determine the proper use of telephone service. This exception only applies to records of the Legislative Council and the Legislative Assembly or its members.

## NORTH DAKOTA SUPREME COURT DECISIONS REGARDING OPEN RECORDS

### **Grand Forks Herald v. Lyons, 101 N.W.2d 543 (N.D. 1960)**

In *Grand Forks Herald v. Lyons*, 101 N.W.2d 543 (N.D. 1960), the North Dakota Supreme Court addressed the issue of whether county court records are subject to disclosure under NDCC Section 44-04-18. The court held that the open records law does not apply to county court records. According to the court, county courts are not "agencies of the state" as that phrase is used in the open records law. The court found that access to county court records was limited to persons having business with those records. The court also found that the purpose of the open records law is to make information available to the public relative to the spending of public money and the handling of public business. The court found that applications for marriage licenses and records evidencing the issuance of marriage licenses are not records of the county court, but are public records, and as such are subject to disclosure under Section 44-04-18.

### **State ex rel. Williston Herald, Inc. v. O'Connell, 151 N.W.2d 758 (N.D. 1967)**

In *State ex rel. Williston Herald, Inc. v. O'Connell*, 151 N.W.2d 758 (N.D. 1967), the Supreme Court found that judicial records, generally, are accessible to the public for any proper purpose. According to the court, the public has a right to inspect records of judicial proceedings after such proceedings are completed and entered in the docket of the court; however, this right of inspection is not unlimited. The court held that a court, in its discretion, may impound its files in a given case when justice so requires and in that event may deny inspection of the files. Any right of inspection of the criminal records of a county court of increased jurisdiction is subject to reasonable rules and regulations

regarding who may inspect the records and where and how such inspection may be made.

### **City of Grand Forks v. Grand Forks Herald, Inc., 307 N.W.2d 572 (N.D. 1981)**

In *City of Grand Forks v. Grand Forks Herald, Inc.*, 307 N.W.2d 572 (N.D. 1981), the Supreme Court held that a police chief's personnel file was a public record for purposes of the open records statute. The court said that the open records statute's requirement that all records be open and available for public inspection was unequivocal and thus the personnel file had to be made available to the *Grand Forks Herald*. The court held that public records are not limited to those records which are required by law to be kept and maintained. According to the court, the use of the term "record" implies that a document of some official import be retained by the public officer or employee in the course of that public officer's or employee's public duties. The court found that disclosure of the contents of a former city police chief's personnel file did not constitute an impermissible invasion of the former city police chief's privacy.

### **Forum Publishing Company v. City of Fargo, 391 N.W.2d 169 (N.D. 1986)**

In *Forum Publishing Company v. City of Fargo*, 391 N.W.2d 169 (N.D. 1986), the Supreme Court held that public documents in the possession of a nongovernmental third party must nevertheless be made available to the public. According to the court, the purpose of the open records law would be thwarted if the court were to hold that documents so closely connected with public business, but in the possession of an agent or independent contractor of the public entity, were not public records.

### **Hovet v. Hebron Public School District, 419 N.W.2d 189 (N.D. 1988)**

In *Hovet v. Hebron Public School District*, 419 N.W.2d 189 (N.D. 1988), the Supreme Court held that an implied exception to the open records law does not exist for a teacher's personnel file. According to the court, the open records law provides that governmental records are to be open to the public except as otherwise specifically provided by law, and the Legislative Assembly has not specifically provided an exception for teacher personnel files. The court found that allowing the public to view a teacher's personnel file would not violate the teacher's right to privacy. According to the court, the federal right to privacy has not been recognized as applying to personnel records, and even if a right to privacy existed under the Constitution of North Dakota, there would be no right to privacy in the personnel record of a person employed by a public agency.

**Adams County Record v. Greater North  
Dakota Association, 529 N.W.2d 830  
(N.D. 1995)**

*Adams County Record v. Greater North Dakota Association*, 529 N.W.2d 830 (N.D. 1995) addresses the application of the open records law to a private, nonprofit corporation that was alleged to have been supported by public funds. According to the Supreme Court, the open records law, which provides for inspection of records of organizations or agencies supported in whole or in part by public funds, or expending public funds, requires that public funds be used as "support" for the organization before inspection is required, but not every transfer of public funds to a private entity is support. The court found that "support" means something other than a quid pro quo, or bargained-for exchange of money for identifiable and specific goods and services. According to the court, when membership dues result in a quid pro quo, in sufficiently identifiable quantities, there is not "support" under the open records law which would allow public inspection of records of a nongovernmental organization, but those dues which are for the general support of the organization constitute "support" for purposes of the open records law. The court also found that "records" subject to inspection under the open records law should be given an expansive meaning, and the term is not limited to those records which are required by law to be kept and maintained, but once it has been determined that an entity falls under a category of organization subject to the law, then by the plain language of the open records law, all records of the entity are open to inspection. According to the court, exceptions to the open records law must be specific and may not be implied.

**Toth v. Disciplinary Board of the Supreme  
Court of North Dakota, 562 N.W.2d 744  
(N.D. 1997)**

The Supreme Court held, in *Toth v. Disciplinary Board of the Supreme Court of North Dakota*, 562 N.W.2d 744 (N.D. 1997), that a settlement agreement between the State Board of Chiropractic Examiners, which is a state agency, and a chiropractor was an open record. The court, relying on *Adams County Record v. Greater North Dakota Association*, 564 N.W.2d 304 (N.D. 1997), held that a state agency cannot circumvent the open records law through a confidentiality clause in a settlement agreement.

**Robot Aided Manufacturing, Inc. v. North  
Dakota Department of Transportation,  
589 N.W.2d 187 (N.D. 1999)**

According to the court in *Robot Aided Manufacturing, Inc. v. North Dakota Department of Transportation*,

589 N.W.2d 187 (N.D. 1999), a law authorizing a specific fee for a compilation of information does not apply to the source documents used to create the compilation. Instead, the Supreme Court held, the source documents are subject to the "reasonable fee" requirement in NDCC Section 44-04-18. According to the court, a public entity is not required to comply with a continuing request for records and can require separate, periodic requests.

## PREVIOUS STUDIES

### 1993-94 Interim

During the 1993-94 interim, the Jobs Development Commission, pursuant to Senate Concurrent Resolution No. 4070, studied open records, open meeting, and bidding law for nonprofit corporations and organizations. Because the North Dakota Supreme Court had not ruled in the Greater North Dakota Association open records case, the commission generally agreed that it may be premature to recommend any changes in the open records laws. Commission members also agreed that further study of the open records area may be necessary after a review of the decision of the Supreme Court in the pending appeal.

## 2003 OPEN RECORDS LEGISLATION

**House Bill No. 1143** provided that plans, records, information, surveys, communications, and consultations used to produce the plans relating to protection of the public or public officials against threats of violence or other harm are exempt records not subject to the open records requirements. The bill also provided that those portions of a meeting which would reveal a security system plan, a public health or security plan, or a portion of any such plan are exempt from the open meetings requirements. The bill was declared to be an emergency measure and became effective upon its filing with the Secretary of State on March 20, 2003.

**House Bill No. 1092** provided that Social Security numbers in the possession of a public entity are confidential and may not be released unless otherwise authorized by law. The bill provided that a Social Security number may be released for purposes of participation in retirement or other employment benefits programs or as authorized by the individual to whom the Social Security number is assigned, that individual's lawful agent or guardian, or by order of a court. The bill also provided that information in the files of private clients receiving legal services through the clinical education program of the University of North Dakota School of Law is confidential unless the information has been requested and is properly obtainable through applicable discovery rules. The bill provided

that an investigation of a fire department or rural fire protection district is confidential until the investigation is closed and not referred for further criminal investigation or prosecution or until the criminal investigation is no longer active. The bill further provided that standard operating procedures written for emergency response, prefire action plans, plans of a building, pipeline, electrical system, or any other infrastructure plan in the hands of a fire department or rural fire protection district are exempt from open records requirements. The bill provided that individually identifiable health information obtained by a fire department or rural fire protection district is confidential. The bill authorized the Attorney General to request and obtain information claimed to be exempt or confidential for the purpose of determining whether the information is exempt or confidential when the Attorney General is requested to issue an opinion regarding the matter. The bill provided that the provisions relating to the confidentiality of Social Security numbers do not apply to county recorders until December 1, 2003. The bill was declared to be an emergency measure and became effective upon its filing with the Secretary of State on April 21, 2003.

**House Bill No. 1320** provided that autopsy photographs or other visual images or video or audio recordings of an autopsy are confidential. The bill authorized a criminal justice agency to use or disclose the autopsy images or recordings for purposes of an investigation or prosecution. The bill also provided that after redacting all information identifying the decedent and anonymizing facial recognition, a medical examiner, coroner, or physician may use an autopsy photograph, image, or recording for medical or scientific teaching or training purposes, teaching or training of law enforcement personnel, teaching or training of attorneys or others with a bona fide professional need to understand or use forensic science, conferring with medical or scientific experts, or publication in a scientific or medical journal or textbook. The bill provided that a medical examiner, coroner, or physician who has in good faith complied with the redacting and anonymizing provisions is not subject to any penalty or liability for using an autopsy photograph, image, or recording. The bill authorized the decedent's spouse, child, parent, or sibling to view an autopsy photograph, image, or recording in the business office of a medical examiner, coroner, or physician who has possession of the materials if there is not an active criminal investigation or prosecution and authorizes disclosure of an autopsy photograph, image, or recording pursuant to subpoena or a court order.

**House Bill No. 1213** provided that a telephone number or home address of a juvenile court supervisor or probation officer is confidential.

**Senate Bill No. 2038** provided that security codes, passwords, combinations, or security-related plans used to protect electronic information or to prevent

access to computers, computer systems, or computer or telecommunications networks of a public entity are confidential. The bill was declared to be an emergency measure and became effective upon its filing with the Secretary of State on March 19, 2003.

**House Bill No. 1078** provided that personal information regarding a licensee maintained by a state agency is exempt and not subject to the open records requirements.

**Senate Bill No. 2228**, with respect to the confidentiality of records acquired under an agreement between a governmental agency in another jurisdiction and the Attorney General, removed the requirement that the record be acquired pursuant to a written agreement between the entities in order for the record to be deemed confidential. The bill also provided that such a record that involves a governmental agency in another jurisdiction and the Attorney General is confidential. If the Attorney General determines the record is necessary to further a civil investigation or litigation by the state, the record can be obtained only by agreeing to keep the record confidential, and the record is treated as confidential by the provider of the records. The bill was declared to be an emergency measure and became effective upon its filing with the Secretary of State on April 4, 2003.

**House Bill No. 1438** addressed the state's compliance with the privacy provisions of the federal Health Insurance Portability and Accountability Act. The bill, as it affected NDCC Title 23, updated the language regarding to whom and under what circumstances a public health authority may disclose protected health information; clarified that a health care provider may report patient information to the Department of Transportation under limited circumstances if the report is necessary to prevent or lessen a serious and imminent threat to the health or safety of the patient or the public; and updated the law relating to physician-reporting of infection of, disclosure of patient information relating to, and exposure to human immunodeficiency virus.

The bill, as it affected NDCC Title 25, provided, subject to exceptions for certain judicial and law enforcement purposes, all information relating to an individual with a disability, including individually identifiable health information, which is in the possession of the Protection and Advocacy Committee, Protection and Advocacy Project, or any advocate is confidential; and provided that, subject to exceptions for certain judicial and law enforcement purposes, the Department of Human Services and the Developmental Center at Westwood Park, Grafton, may not disclose the contents of the individual records of a treatment or care center for developmentally disabled persons.

The bill, as it affected NDCC Title 26.1, provided that it is not a prohibited practice for a health insurance company with participating provider agreements to



require that a subscriber or member using a nonparticipating provider be responsible for providing the insurer a copy of medical records used for claims processing.

The bill, as it affected NDCC Title 28, provided that appropriate authorizations permitting access to the written medical record and other information must be provided by the party commencing the action at the time the action is commenced; that if the party commencing the action fails to provide the authorization at the time the action is commenced, the health care provider or facility may use other means to obtain the records, such as by subpoena or court order; and that if alternative means are used to obtain the records, the court must award reasonable costs and attorney's fees to the health care provider or facility.

The bill, as it affected NDCC Title 43, provided an updated definition of "confidential information" for purposes of the regulation of pharmacists and updated the provision relating to the confidentiality of information acquired by a counselor in the process of rendering counseling services.

The bill, as it affected NDCC Title 44, provided that if a public entity is acting as a business associate of another public entity, the entity acting as a business associate must comply with all requirements to a business associate under federal law.

The bill, as it affected NDCC Title 50, provided that the State Department of Health may not disclose the contents of the records of a maternity home for unmarried mothers except in a judicial or administrative proceeding in response to an order of a court or administrative tribunal or to a law enforcement agency for law enforcement purposes.

The committee, in its study of the method of the North Dakota open records statutes and the appropriateness of the penalties for an unauthorized disclosure of certain records, may wish to approach this study as follows:

- Receive information and testimony from representatives of the Attorney General's office regarding concerns and issues relating to the penalties for unauthorized disclosure of records; and conflicting provisions throughout the North Dakota Century Code regarding penalties;
- Receive information and testimony from a representative of the Attorney General's office regarding the impact of the individually identifiable health information provisions of the federal Health Insurance Portability and Accountability Act on the penalties provided under the state's open records laws;
- Receive information and testimony from representatives of the media regarding concerns regarding penalties for unauthorized disclosure of public records that are exempt or confidential;
- Receive information and testimony on any history or experience of unauthorized disclosure and prosecutions for those disclosures under this state's open records law;
- Receive information on penalties in other states for disclosure of public records that are exempt or confidential; and
- Develop recommendations and prepare legislation necessary to implement the recommendations.

## **SUGGESTED STUDY APPROACH**

ATTACH:1