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**OPEN RECORDS AND MEETINGS OPINION
2020-O-08**

DATE ISSUED: July 16, 2020

ISSUED TO: Department of Health

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Jeremy Turley, reporter for Forum Communications Company (Forum) asking whether the Department of Health (Department) violated N.D.C.C. § 44-04-18 by failing to produce requested records.

FACTS PRESENTED

On April 27, 2020, the Department received the following open records request from Jeremy Turley, a reporter for the Forum:

- A list of all cases of COVID-19 in North Dakota known to the North Dakota Department of Health sorted by the patients' five-digit postal code.
 - I request that the list of cases is further sorted to specify the status of the patient, whether active, recovered or deceased.
 - I am not requesting any information that could be used to identify a patient, such as name, age, or gender.¹

On April 28, 2020, the Department responded that it could not disclose the zip code, status, and underlying conditions of the COVID-19 cases as such records are disease control records protected under N.D.C.C. § 23-07-20.1.² The Department explained that information that could be publicly provided in the disease control records without violating the law was available on the Department's website and provided a link to access the information.

¹ Email from Jeremy Turley, Reporter, Forum News Serv., to Dep't of Health (Apr. 27, 2020, 3:11 PM). Further records were requested in the email, however, the Forum is not asking for opinion on whether the denial of the other records was proper.

² Email from Dirk Wilke, Chief Operating Officer, Dep't of Health, to Jeremy Turley, Reporter, Forum News Serv. (Apr. 28, 2020, 3:18 PM).

ISSUE

Whether the Department of Health properly denied a records request.

ANALYSIS

“Records”³ regarding “public business”⁴ in the possession of a “public entity”⁵ are open to the public unless otherwise specifically provided by law.⁶ A public entity has a duty to review records and redact closed or confidential information, turning over the remaining portions of the record that do not contain protected information.⁷

Generally, a public entity is not required to create or compile a record that does not already exist, or “provide an electronically stored record in a different structure, format, or organization.”⁸ However, N.D.C.C. § 44-04-18(3) requires a public entity to provide meaningful access to public information stored in a database, which requires the public entity to produce the information stored in the database in some format when responding to a records request.⁹

The Department has the information requested by the Forum in a database,¹⁰ however, the information and records are disease control records covered by N.D.C.C. § 23-07-20.1,¹¹ which provides:

³ N.D.C.C. § 44-04-17.1(16) (definition of “record”).

⁴ N.D.C.C. § 44-04-17.1(12) (definition of “public business”).

⁵ N.D.C.C. § 44-04-17.1(13) (definition of “public entity”).

⁶ N.D.C.C. § 44-04-18(1).

⁷ N.D.C.C. § 44-04-18.10(1), (2).

⁸ N.D.C.C. § 44-04-18(4).

⁹ N.D.C.C. § 44-04-18(3) (“Automation of public records must not erode the right of access to those records. As each public entity increases its use of and dependence on electronic recordkeeping, each agency must provide reasonable public access to records electronically maintained and must ensure that exempt or confidential records are not disclosed except as otherwise permitted by law. A public entity may not enter into a contract for the creation or maintenance of a public records database if that contract impairs the ability of the public to inspect or copy the public records of the agency . . .”). N.D.A.G. 2008-O-19; N.D.A.G. 2008-O-17; N.D.A.G. 2007-O-01.

¹⁰ Email from Dirk Wilke, Chief Operating Officer, Dep’t of Health, to Att’y Gen.’s Office (June 3, 2020, 7:51 AM).

¹¹ Letter from Dirk Wilke, Chief Operating Officer, Dep’t of Health, to Att’y Gen.’s Office (May 21, 2020).

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To protect the integrity of disease control records, to ensure their proper use, and to ensure efficient and proper administration of the department's disease control function, it is unlawful for any person to permit inspection of or to disclose information contained in disease control records, including results of laboratory tests, or to copy or issue a copy of all or part of any such record except as authorized by rules.¹²

North Dakota Admin. Code § 33-06-03-04 defines "information contained in disease control records" to include:

[A]ll information, records of interviews, written reports, statements, notes, memoranda, or other data procured by the department in connection with disease control, or carried on by the department jointly with other persons, agencies, or organizations, or procured by such other persons, agencies, or organizations, for the purpose of disease control or for such purposes of reducing the morbidity or mortality from any cause or condition of health.¹³

Disease control records may be released at the discretion of the Department under certain circumstances enumerated by law or rule. One such rule states that the Department *may* release the information "for statistical purposes in a manner such that no individual person can be identified."¹⁴ "Identifying information" includes "any information which, alone or in conjunction with information available to the public, could identify a particular person as having or potentially having been exposed to a disease, having or potentially having a disease, or having or potentially having a predisposition for disease."¹⁵

The state health officer also has the authority under N.D.C.C. § 23-01.3-07 to disclose confidential information and protected health information to the public if the state health officer determines disclosure is required to prevent the spread of the disease, to identify the cause or source of disease, or to allay fear and aid in the public in understanding the risk of its exposure to disease.¹⁶ If such a determination is made by the state health officer, information may only be disclosed "to the extent necessary to accomplish the purpose of this section."¹⁷

¹² N.D.C.C. § 23-07-20.1.

¹³ N.D.A.C. § 33-06-03-04.

¹⁴ N.D.A.C. § 33-06-03-04(1) (emphasis added).

¹⁵ N.D.A.C. § 33-06-03-6(b).

¹⁶ N.D.C.C. § 23-01.3-07(1).

¹⁷ N.D.C.C. § 23-01.3-07(2).

Finally, the Department is a covered entity and must comply with the Health Insurance Portability and Accountability Act (HIPAA), which permits, but does not require, disclosure of protected health information (PHI) pursuant to federal law, including when necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public, and to individuals who are at risk of contracting or spreading a disease or condition if state law authorizes disclosure to such individuals as necessary to prevent or control the spread of the disease.¹⁸

The Forum argues that the Department arbitrarily made the determination of what information should be provided and that it should have access to the requested information. In response, the Department contends:

The laws and regulations permit, but do not require, the Department to release information contained in disease control records. A decision to release information contained in disease control records is at the discretion of the Department so long as the release is in accordance with N.D.A.C. § 33-06-03-04. As a result, whether the Department's decision to withhold disease control records is "arbitrary" is irrelevant.

...

Throughout the 2019-nCoV/COVID-19 pandemic, the Department has balanced the need to protect the confidentiality of information contained in disease control records and PHI against the countervailing need to protect the health and safety of both specific individuals and the general public. The Department takes this obligation extremely seriously. Every request for information is evaluated carefully and often times in consultation with legal counsel.

...

When disclosing information contained in disease control records and PHI, the Department makes every effort to limit the information disclosed to that which is the "minimum necessary" to accomplish the purpose for the release.

...

The Department carefully evaluated Forum's request for information and made the determination that the need to protect the confidentiality of the information contained in the disease control records and PHI outweighs the benefits of the disclosure. . . . The Department is of the opinion the decision to deny the request for records is entirely within its statutory

¹⁸ 45 C.F.R. § 164.512 (2016).

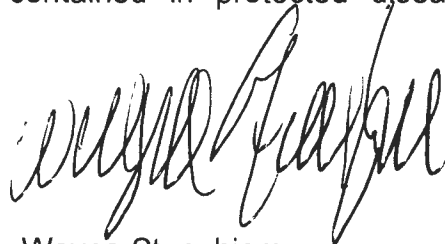
authority and as such, stands by its decision to protect the confidentiality of the disease control records.¹⁹

The information requested by the Forum is contained in records that are confidential and therefore the Department may deny the request. The law allows the Department, in its discretion, to release information in limited circumstances, such as those enumerated above. When an entity has discretion to release information, it is not a violation of open records law when the entity uses its discretion to deny the release of the requested information.²⁰

Based on the foregoing, it is my opinion that the Department had the authority to deny the records request for disease control records and therefore did not violate open records law.²¹

CONCLUSION

It is my opinion that the Department of Health did not violate open records law when it declined to provide requested information contained in protected disease control records.



Wayne Stenehjem
Attorney General

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cc: Jeremy Turley (via email only)

¹⁹ Letter from Dirk Wilke, Chief Operating Officer, Dep't of Health, to Att'y Gen.'s Office (May 21, 2020).

²⁰ N.D.A.G. 2014-O-16 (a criminal justice agency withholding exempt "active criminal intelligence information" did not violate open records law); N.D.A.G. 2005-O-13 (the decision to disclose an evidence log lies within the discretion of criminal justice agency and it did not violate open records law when the agency refused to disclose the record).

²¹ Opinions issued pursuant to N.D.C.C. § 44-04-21.1 review whether there is a violation of open records *law* based on the facts of the public entity. When an entity has the discretion to disclose the record, it is not a violation of the law when it declines to disclose. This office therefore does not have the authority under N.D.C.C. § 44-04-21.1 to issue opinions on, or questions the reason for, such discretionary decision and whether they are "arbitrary."