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LETTER OPINION
2022-L-03

Dr. Nizar Wehbi
State Health Officer
Department of Health
600 E. Boulevard Ave., Dept. 301
Bismarck, ND 58505

Dear Dr. Wehbi:

Thank you for your letter requesting an opinion on the meaning of the phrase “electronic machine-readable code” as utilized in N.D.C.C. § 23-01-05.3. In my opinion, “electronic machine-readable code,” as utilized in N.D.C.C. § 23-01-05.3, refers to an electronic quick response code (“QR code”) related to vaccination records, but does not prohibit the use of QR codes in the normal, everyday activities of the Department.

ANALYSIS

Subsection 4 of N.D.C.C. § 23-01-05.3, added during the 67th Legislative Assembly Special Session in November of 2021 by House Bill 1511, states the following: “[t]he state department of health may not create, administer, provide, or contract for electronic machine-readable code or a vaccine passport.”¹

General rules of statutory construction assist with the answer to your inquiry.

Our primary goal in statutory construction is to ascertain the intent of the Legislature. In ascertaining the Legislature's intent, we first look to the plain language of the statute and give each word of the statute its ordinary meaning. We construe the statute as a whole and give effect to each of its provisions if possible. If the language of the statute is clear and unambiguous when read as a whole, we cannot ignore that language under the pretext of pursuing its spirit because the legislative intent is presumed clear from the face of the statute. If, however, the statute is ambiguous or if adherence to the strict letter of the statute would lead to an absurd or ludicrous result, a court may resort to extrinsic aids, such as legislative history, to interpret the statute. A statute is ambiguous if it is susceptible to meanings that are different, but rational.²

¹ N.D.C.C. § 23-01-05.3(4).

² *State ex rel. Workforce Safety and Insurance v. Avila*, 942 N.W.2d 811, 814 (N.D. 2020) quoting *Shiek v. N.D. Workers Comp. Bureau*, 643 N.W.2d 721 (N.D. 2002).

The first step in this analysis is determining whether N.D.C.C. § 23-01-05.3 is susceptible to different but rational meanings and is therefore ambiguous. If the phrase “electronic machine-readable code” or “vaccine passport” is a technical phrase with a particular meaning in law or a statutory definition, the phrase must be construed according to that meaning or definition.³ Where terms are defined without ambiguity, none should be inferred. However, “electronic machine readable code,” nor “vaccine passport” is defined in law, so the meanings of the phrases must be gleaned from their context and rules of grammar, according to the principles of statutory construction.

Section 23-01-05.3, N.D.C.C., generally relates to the creation of the immunization information system and immunization data. The term “vaccine passports” is utilized within N.D.C.C. § 23-01-05.3(4) but is not defined. The word “passport” is defined in a legal dictionary as a “formal document certifying a person’s identity and citizenship so that the person may travel to and from a foreign country.”⁴ Therefore, it is reasonable to infer a “vaccine passport” is a formal document certifying a person’s vaccination or immunization status or record. Looking at the context of both N.D.C.C. § 23-01-05.3, generally, and the specific language utilized in N.D.C.C. § 23-01-05.3(4), it also is reasonable to interpret “electronic machine-readable code” in a similar manner as relating to the verification of vaccination or immunization status or data.

Arguably, the phrase “electronic machine-readable code” could be interpreted to universally encompass all electronic machine-readable codes regardless of the purpose or use. The Department of Health (“Department”) currently utilizes bar codes and QR codes for several day-to-day activities, such as tracking samples in labs, performing large testing and vaccination events, and connecting people to information on the Department’s website.⁵ This interpretation would then create a wide-ranging legislative prohibition that would discard an array of customary record-keeping practices. Because there are at least two possible interpretations of terms included in N.D.C.C. § 23-01-05.3(4), extrinsic aids may be used to interpret the meaning of the statute intended by the Legislature.⁶ One of these extrinsic aids is the legislative history of the statutory language.⁷

As previously indicated, subsection 4 of N.D.C.C. § 23-01-05.3 was added during the 67th Legislative Assembly Special Session in November 2021 by Section 1 of 2021 House Bill 1511. This section was introduced by Representative Rick Becker who, in introducing the amendment,⁸

³ N.D.C.C. § 1-02-03.

⁴ Black’s Law Dictionary (11th ed. 2019).

⁵ Letter from Dr. Nizar Wehbi, State Health Officer, N.D. Dept. of Health, to Wayne Stenehjem, Att’y Gen.

⁶ N.D.C.C. § 1-02-39; *Kim-Go v. J.P. Furlong Enters., Inc.*, 460 N.W.2d 694, 696 (N.D. 1990); N.D.A.G. 2013-L-04.

⁷ N.D.C.C. § 1-02-39(3).

⁸ H. B. 1511, 2021 N.D. Leg., Amendment 21.1105.01017.

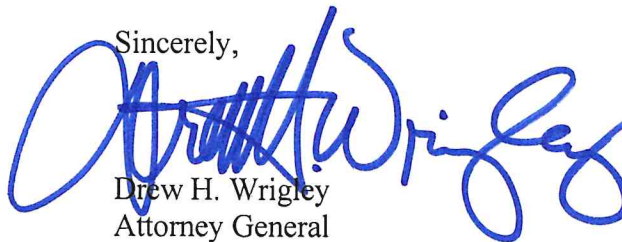
stated the following: “What this is addressing is, uh, QR codes, effectively.”⁹ He then clarified that the amendment was responsive to a Department of Health request for proposals for QR codes for immunization certificates and the goal of his amendment was to prohibit the state from creating a “vaccine passport.”¹⁰ His testimony is supported by the language of the original amendment, which stated: “The state department of health may not create, administer, provide, or contract for an immunization certificate, such as a vaccine passport or an electronic-machine readable code.” The House of Representatives engaged in a thorough discussion of the amendment, but the discussion centered on electronic machine-readable code only as it related to “vaccine passports.” It was, in essence, a precisely focused intent.

The Senate amended the language adopted by the House of Representatives¹¹ to the current statutory language. While the language was amended to remove the specific reference to immunization certificates, the Senators’ discussions were unambiguous that this section sought to prohibit the Department from creating a “vaccine passport.” Again, there was no mention of a wide-ranging prohibition on the use of current technology tools in the healthcare setting. The legislative history clearly indicates the prohibition of the use of electronic machine-readable code was limited to using such code as a “vaccine passport,” not the use of bar codes and QR codes in the everyday activities of the Department.

CONCLUSION

Based on the foregoing, it is my opinion that “electronic machine-readable code,” as utilized in N.D.C.C. § 23-01-05.3, is limited to a QR code related to vaccination records, but does not prohibit the use of QR codes in the normal, everyday activities of the Department.

Sincerely,



Drew H. Wrigley
Attorney General

AMH/

⁹ Video, Hearing on H.B. 1511 Before the Joint Tech. Corr. Comm., 2021 N.D. Leg. (Nov. 11; 11:02:10 a.m.) (Statement of Rick Becker).

¹⁰ *Id.*

¹¹ The language was amended due to noncompliance with the HIPAA Privacy rule, which requires a covered entity, the Department of Health in this instance, to provide an individual with access to their health information held by the covered entity in the manner requested.

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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.¹²

¹² See *State ex rel. Johnson v. Baker*, 21 N.W.2d 355 (N.D. 1946).