

**LETTER OPINION
2002-L-55**

October 4, 2002

The Honorable Aaron Krauter
State Senate
HC 1, Box 27
Regent, ND 58650-9721

Dear Senator Krauter:

Thank you for your letter requesting my opinion on two statutes that make certain information relating to the Public Employees Retirement System (PERS) and the state's uniform group insurance program confidential.

Your first question asks whether amendments the 2001 Legislature made to N.D.C.C. § 54-52-26 preclude elected and appointed officials from having access to certain records within their offices.

The 2001 Legislature amended N.D.C.C. § 54-52-26 in part as follows, with the overstruck language removed from the statute and the underscored language added:

54-52-26. Confidentiality of records. All records relating to the retirement benefits of a member or a beneficiary under this chapter, chapter 54-52.2, and chapter 54-52.6 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 . . .

2001 N.D. Sess. Laws ch. 494, § 7.

A major change in the above statute was to remove the language in the beginning paragraph stating "[t]his section does not prohibit any party from obtaining this information from other agencies or governmental sources." The effect of that change was to make records relating to an employee's retirement benefits confidential not only in PERS' possession, but also in the employing agency's possession.

However, nothing in N.D.C.C. § 54-52-26 restricts an agency head from viewing personnel files, including retirement records, of employees in that agency. To the contrary, “[t]he official personnel file on each employee is the file maintained under the supervision of the agency head or the agency head’s designated representative.” N.D.C.C. § 54-06-21. An agency head could not properly supervise the maintenance of an official personnel file under N.D.C.C. § 54-06-21 if the agency head could not view the personnel file. Accordingly, it is my opinion N.D.C.C. § 54-52-26 does not prevent an agency head or his designee from viewing retirement benefit records contained in the personnel file of that agency’s employee.

Your last two questions relate to N.D.C.C. § 54-42.1-11, which makes confidential certain information regarding employees’ participation in the uniform group insurance program.

The 2001 Legislative Assembly made several significant changes to N.D.C.C. § 54-52.1-11. See 2001 N.D. Sess. Laws ch. 496, § 6. Those changes added the following to the list of confidential information: “Information pertaining to . . . employee premium payments made . . . [and] history of any available insurance coverage purchased. . . .”

A 1997 Attorney General’s opinion discussed a prior version of N.D.C.C. § 54-52.1-11 which made much less information confidential than is currently covered. See 1997 N.D. Op. Att’y Gen. F-06. That opinion explained the meaning of “pertaining to” and concluded that “for information to be confidential under N.D.C.C. § 54-52.1-11, . . . the information must have a logical or natural association to” the list of specific information. Id. Thus, the information confidential under N.D.C.C. § 54-52.1-11 includes information that has a logical or natural association to “employee premium payments made, . . . [and] history of any available insurance coverage purchased” N.D.C.C. § 54-52.1-11.

You ask, “[i]s the record concerning whether an individual public employee or official participates in the uniform group insurance program confidential or is it an open record.” Whether a specific employee or official participates in the uniform group insurance program has a logical association to the employee or official’s history of any available insurance coverage purchased, as that phrase is used in N.D.C.C. § 54-52.1-11. When interpreting a statute, “[w]ords used in any statute are to be understood in their ordinary sense.” N.D.C.C. § 1-02-02. The plain meaning of “history” is “[a] narrative of events” or “[a] chronological record of events.” The American Heritage Dictionary 614 (2d coll. ed. 1991). A chronological record of any available insurance coverage purchased by an employee or official would include the fact that the employee is or is not participating in the uniform group insurance program. Accordingly, it is my opinion that whether a specific employee or official is currently participating in the uniform group insurance program is confidential under N.D.C.C. § 54-52.1-11.

You also ask, “[a]re the records reflecting the amount of public funds expended by a public employer to provide uniform group insurance coverage for an individual employee or official confidential or are they open records.” Section 54-52.1-11, N.D.C.C., makes information pertaining to “employee premium payments made” confidential. The fact that an employer is making a premium payment on behalf of a specific employee and the amount of that payment does have a logical and natural association to the “employee premium payments made.” Accordingly, it is my opinion that all records indicating the amount of public funds paid by an employer on behalf of a specific employee as premiums for that employee’s participation in the uniform group insurance program are confidential. There is nothing in the Century Code, however, prohibiting an agency from providing information regarding the total premiums paid by an agency.

Notably, even if state law did not make information on an employee’s participation and the amount paid for that participation confidential, the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified at 42 U.S.C. § 300gg and 29 U.S.C. § 1181 et seq.), and 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 on April 14, 2003.¹ Section 164.502, 45 C.F.R., states that a “covered entity may not use or disclose protected health information” except in certain circumstances not applicable to this opinion. The PERS health insurance plans are “covered entit[jies]” for purposes of 45 C.F.R. § 164.502. See 45 C.F.R. § 160.103. Further, the participation and payment history of an individual is “protected health information” because it relates to the provision of health care to an individual or to the past, present, or future payment for the provision of health care to an individual. See 45 C.F.R. § 164.501. As such, 45 C.F.R. § 164.502, adopted pursuant to HIPAA, makes that information confidential.

Sincerely,

Wayne K. Stenehjem
Attorney General

sam/vkk

¹ The HIPAA provisions and rules preempt contrary state law. 45 C.F.R. § 160.203.