

LETTER OPINION
95-L-1

January 17, 1995

Mr. Robert W. Peterson
State Auditor
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Mr. Peterson:

Thank you for your December 27, 1994, letter asking whether the Protection and Advocacy Project (hereafter P&A) must provide to the State Auditor the unaltered, original billings the P&A received from its attorney.

The State Auditor is doing a performance audit of P&A. P&A generally provides advocacy and protective services for persons with development disabilities and persons with mental illnesses. N.D.C.C. ? 25-01.3-06. One of the goals of the audit is to review the services provided by P&A's attorney under contract. The State Auditor requested that P&A provide to the State Auditor the billings it had received from its attorney. P&A provided copies of the original billings with certain information expunged. P&A indicated that the only information that was expunged was names of the cases the attorney was working on, i.e., names of persons to whom P&A was providing advocacy or protective services. P&A indicated that, after discussing the matter with its attorney, the conclusion was reached that the expunged information was protected under the attorney-client privilege or attorney-client confidentiality.

P&A's records, including the names of persons to whom P&A provides services, are generally confidential. N.D.C.C. ? 25-01.3-10. Despite the confidentiality provided by N.D.C.C. ? 25-01.3-10, however, P&A's records are available to the State Auditor for audit purposes:

Notwithstanding any other specific sections of law, the state auditor and persons employed by him, when necessary in conducting an audit, shall have access to all information relating to operations of all governmental units subject to audit.

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N.D.C.C. ? 54-10-22.1, Letter from Attorney General Heidi Heitkamp to Mr. Gordy L. Smith (Nov. 3, 1994). Thus, P&A's records which indicate to whom its services were provided are available to the State Auditor for performance audit purposes. The State Auditor has been given access by P&A to its records other than the attorney's billings. Therefore, the State Auditor already has access to the names of the persons to whom P&A provides services. State law requires that the State Auditor and his employees must keep such information confidential. N.D.C.C. ?? 54-10-22.1, 25-01.3-10.

Despite the access authorized by N.D.C.C. ? 54-10-22.1 and the requirement that the State Auditor keep the names of persons to whom P&A provides services confidential, P&A contends that the names of such persons on the attorneys' billings may not be provided to the State Auditor based on attorney-client privilege or attorney-client confidentiality.

There is no state law that provides for attorney-client privilege or attorney-client confidentiality. There is one state law that exempts "attorney work product" from the open records law. See N.D.C.C. ? 44-04-19.1. Because even records constituting attorney work product would be available to the State Auditor under N.D.C.C. ? 54-10-22.1, we do not need to address whether an attorney's billing would ever constitute attorney work product under N.D.C.C. ? 44-04-19.1. Certain North Dakota court rules, however, do address the attorney-client privilege and attorney-client confidentiality. These rules are the North Dakota Rules of Evidence and the North Dakota Rules of Professional Conduct.

The North Dakota Rules of Evidence provide for a lawyer-client privilege. Rule 502, N.D.R. Evid. The North Dakota Rules of Evidence, however, are applicable only to proceedings in the courts of North Dakota and other related proceedings. Rules 101, 1101, N.D.R. Evid. Thus, the lawyer-client privilege provided for in the North Dakota Rules of Evidence is not relevant to the matter addressed in this opinion.

P&A has raised the ethical considerations of its attorney in refusing to allow the auditors to view the unaltered attorney billings which it has received from its attorney. The North Dakota Rules of Professional Conduct contain the ethical rules governing attorneys. Rule 1.6 states: "A lawyer shall not reveal . . . information relating to representation of the client unless required or permitted to do so by this rule." This rule governs the activities of the attorney, not the activities of the client. Once the bill has been received by P&A as a client of the attorney, the attorney's ethical

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obligations do not govern the disclosure of the billings to P&A's auditors. The attorney has sent the bill and any further action in this situation is action not of the attorney but of P&A, a state agency governed by state and federal laws.

The records of P&A, including the billings it receives from its attorneys, are confidential under NDCC ? 25-01.3-10. As I stated in my earlier opinion, however, "records declared confidential under NDCC ? 25-01.3-10 are, nonetheless, available under NDCC ? 54-10-22.1 to the State Auditor and the Auditor's employees for audit purposes." Letter from Attorney General Heidi Heitkamp to Mr. Gordy L. Smith (Nov. 3, 1994).

In conclusion, neither the North Dakota Rules of Evidence nor the North Dakota Rules of Professional Conduct are relevant to the release by P&A of its attorney's billings. Therefore, it is my opinion that P&A must provide to the State Auditor the unaltered, original billings P&A received from its attorney. In short, if these billings are available to P&A for its review, the records are also available by law to the State Auditor's office from P&A.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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