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OPEN RECORDS AND MEETINGS OPINION
2026-O-04

DATE ISSUED: January 30, 2026

ISSUED TO: Department of Health and Human Services

CITIZEN'S REQUEST FOR OPINION

Sheri McMahon requested an opinion from this office under N.D.C.C. § 44-04-21.1 asking whether the Department of Health and Human Services failed to provide records transmitted from the Department of Health and Human Services to the Centers for Medicare & Medicaid Services, in violation of N.D.C.C. § 44-04-18.

FACTS PRESENTED

Ms. McMahon emailed the Department of Health and Human Services (DHHS) to obtain records relating to a complaint that she had filed against Sanford Hospital.¹ The complaint involved treatment that her adult son received and which she claimed violated the Emergency Medical Treatment and Labor Act (EMTALA).² The complaint was then forwarded to the Centers for Medicare & Medicaid Services (CMS).³ DHHS is required to use CMS's software system, called ASPEN Complaints/Incidents Tracking System (ACTS).⁴ No action was taken on the complaint, and Ms. McMahon believed DHHS did not forward the full complaint, leading to CMS failing to act.⁵ Ms. McMahon's son submitted a Freedom of Information Act⁶ request for the complaint transmitted by DHHS to CMS, and CMS responded to the request by providing "records regarding this case and were still working with the McMahon family at the time of this open records request."⁷ However, CMS the two attachments sent by DHHS were "not releasable."⁸

¹ Email from Sheri McMahon to Dep't of Health & Hum. Servs. (Mar. 24, 2023, 2:25 PM).

² *Id.* See 42 U.S.C. § 1395dd.

³ Email from Sheri McMahon to Dep't of Health & Hum. Servs. (Mar. 24, 2023, 2:25 PM).

⁴ Letter from Allyson M. Hicks, Assistant Att'y Gen., Gen. Couns., Pub. Health Div. – Health Facilities, Dep't of Health & Hum. Servs., to Annique M. Lockard, Assistant Att'y Gen., Off. of Att'y Gen. (Nov. 15, 2023).

⁵ Email from Sheri McMahon to Dep't of Health & Hum. Servs. (Mar. 24, 2023, 2:25 PM).

⁶ 5 U.S.C. § 552.

⁷ Letter from Allyson M. Hicks, Assistant Att'y Gen., Gen. Couns., Pub. Health Div. – Health Facilities, Dep't of Health & Hum. Servs., to Annique M. Lockard, Assistant Att'y Gen., Off. of Att'y Gen. (Nov. 15, 2023). *Accord* Email from Sheri McMahon to Dep't of Health & Hum. Servs. (Mar. 24, 2023, 2:25 PM).

⁸ Letter from Allyson M. Hicks, Assistant Att'y Gen., Gen. Couns., Pub. Health Div. – Health Facilities, Dep't of Health & Hum. Servs., to Annique M. Lockard, Assistant Att'y Gen., Off. of Att'y Gen. (Nov. 15, 2023).

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Unsatisfied with the DHHS records disclosed by CMS, Ms. McMahon submitted an open records request to DHHS for the records that it submitted to CMS.⁹ DHHS denied the records request on May 9, 2023, arguing that the records could not be disclosed because the records were federal records that CMS had directed DHHS not to disclose.¹⁰ Ms. McMahon timely requested an opinion from this Office on May 26, 2023.¹¹

ISSUE

Whether DHHS violated N.D.C.C. § 44-04-18 by failing to provide the EMTALA complaint records sent to CMS.

ANALYSIS

DHHS is a public entity that is subject to the open record law.¹² “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.”¹³ Laws that may exempt a record from being open “includes federal statutes, applicable federal regulations, and state statutes.”¹⁴ Confidential records are “prohibited from being open to the public.”¹⁵ When records are deemed confidential under federal law, “that confidentiality is . . . incorporated into North Dakota’s Open Records Law.”¹⁶ When providing an open record opinion, this office must “base the opinion on the facts given by the public entity.”¹⁷

⁹ Email from Sheri McMahon to Dep’t of Health & Hum. Servs. (Mar. 24, 2023, 2:25 PM); Letter from Allyson M. Hicks, Assistant Att’y Gen., Gen. Couns., Pub. Health Div. – Health Facilities, Dep’t of Health & Hum. Servs., to Annique M. Lockard, Assistant Att’y Gen., Off. of Att’y Gen. (Nov. 15, 2023).

¹⁰ Email from David A. Becker, Compliance Officer, Dep’t of Health & Hum. Servs., to Sheri McMahon (May 9, 2023, 5:56 AM). Although this office has not obtained a copy of the CMS directive, “the attorney general shall base the opinion on the facts given by the public entity.” N.D.C.C. § 44-04-21.1(1).

¹¹ Letter from Sheri McMahon to Drew Wrigley, Att’y Gen., Off. of Att’y Gen. (May 23, 2023). See N.D.C.C. § 44-04-21.1(1).

¹² N.D.C.C. § 44-04-17.1(13)(a); N.D.C.C. ch. 50-06.

¹³ N.D.C.C. § 44-04-18(1).

¹⁴ N.D.C.C. § 44-04-17.1(8). Additionally, the laws of the United States made pursuant to the Constitution “shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const., art. VI, cl. 2.

¹⁵ N.D.C.C. § 44-04-17.1(3).

¹⁶ N.D.A.G. 81-130. *Accord* N.D.A.G. 2013-O-08; N.D.A.G. 2008-O-27; N.D.A.G. 98-F-13. See also N.D.A.G. 2003-O-15 (analyzing impact of federal law on whether records were exempt or confidential to justify executive session).

¹⁷ N.D.C.C. § 44-04-21.1(1).

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The EMTALA was created as part of the larger Medicare program,¹⁸ and a failure to comply with it can result in a provider being terminated from Medicare.¹⁹ To implement the Medicare program, the United States Secretary of Health and Human Services is authorized to make agreements with States to ensure that providers comply with the Medicare statutes and regulations.²⁰ The agreement must provide a process for the state to receive and address complaints.²¹ North Dakota executed its agreement in 1985.²² That agreement says, “[t]he State shall adopt policies and procedures to ensure that information contained in its records and obtained from the Secretary or from any provider or supplier of services will be disclosed only as provided in the Act or regulations”²³

The agreement also explicitly requires DHHS to comply with The Privacy Act of 1974, 5 U.S.C. § 552a,²⁴ which governs the conditions under which federal records on individuals may be disclosed. CMS has instructed DHHS to never release certain classifications of documents, even if the records are requested by the patient or by a complainant.²⁵ These instructions apply ACTS documents, which were the records that Ms. McMahon has requested, and DHHS has been directed to forward all records to CMS for final processing of freedom of information requests.²⁶

Ms. McMahon requested records that were filed with DHHS pursuant to the EMTALA. Those records are subject to the agreement that DHHS has signed with the U.S. Department of Health and Human Services that requires the records to remain confidential unless CMS determines that the records should be released. It is my opinion that DHHS complied with N.D.C.C. § 44-04-18 by not disclosing confidential information.

¹⁸ Social Security Act, 42 U.S.C. §§ 1395–1395lll.

¹⁹ 42 C.F.R. § 489.53(a)(1).

²⁰ 42 U.S.C. § 1395aa(a).

²¹ *Id.*

²² Letter from Allyson M. Hicks, Assistant Att'y Gen., Gen. Couns., Pub. Health Div. – Health Facilities, Dep't of Health & Hum. Servs., to Annique M. Lockard, Assistant Att'y Gen., Off. of Att'y Gen. (Nov. 15, 2023).

²³ Agreement Between The Sec'y of Health & Hum. Servs. & The State of N.D., art. XIII, §A (Mar. 13, 1985). Under the agreement, “Act” means Title XVIII of the Social Security Act, as amended.” Agreement Between The Sec'y of Health & Hum. Servs. & The State of N.D., art. I, §A(2) (Mar. 13, 1985).

²⁴ Agreement Between The Sec'y of Health & Hum. Servs. & The State of N.D., art. XIII, §B, art. XV, §A(11) (Mar. 13, 1985).

²⁵ Exhibit 3 to Letter from Allyson M. Hicks, Assistant Att'y Gen., Gen. Couns., Pub. Health Div. – Health Facilities, Dep't of Health & Hum. Servs., to Annique M. Lockard, Assistant Att'y Gen., Off. of Att'y Gen. (Nov. 15, 2023); (“Requests for information that fall outside of the information that the states have been authorized to release directly should be sent to the appropriate CMS location.”).

²⁶ Letter from Allyson M. Hicks, Assistant Att'y Gen., Gen. Couns., Pub. Health Div. – Health Facilities, Dep't of Health & Hum. Servs., to Annique M. Lockard, Assistant Att'y Gen., Off. of Att'y Gen. (Nov. 15, 2023).

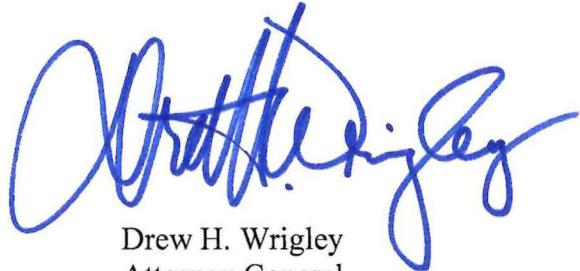
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CONCLUSIONS

DHHS substantially complied with N.D.C.C. § 44-04-18 when it denied Ms. McMahon's request for the records that DHHS transmitted to CMS relating to the EMTALA complaint, as North Dakota's agreement with the United States Department of Health and Human Services prohibits disclosure of the requested records.



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cc: Sheri McMahon