



STATE OF NORTH DAKOTA  
**OFFICE OF ATTORNEY GENERAL**

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**Drew H. Wrigley**  
ATTORNEY GENERAL

**LETTER OPINION**  
**2026-L-01**

Mr. Joshua C. Gallion  
State Auditor  
Office of the State Auditor  
600 E. Boulevard Ave. Dept. 117  
Bismarck, ND 58505

State Auditor Gallion:

Thank you for your letter asking whether North Dakota Century Code, N.D.C.C. § 54-10-22.1, authorizes the State Auditor and the Auditor's employees to conduct an audit of the North Dakota Protection and Advocacy Project (P&A) even when the agency has records in its possession that are made confidential by state or federal law. It is my understanding that you plan to conduct a performance audit of P&A to test its internal controls, compliance, and financial transactions. One objective of this audit is to review whether reports of suspected abuse, neglect, or exploitation are being investigated according to P&A policy, and it may be necessary to access certain records that contain confidential information to complete this objective. P&A believes it cannot participate in an audit because it was created by federal law and possesses records that are confidential under state and federal laws. P&A also expressed concern that Rule 1.6 of the North Dakota Rules of Professional Conduct for licensed attorneys and the National Association of Social Workers Code of Ethics<sup>1</sup> prohibit them from disclosing the contents of client files to the Auditor's office. The Auditor's office and P&A have met to discuss the audit and P&A objected to allowing an audit.

**ANALYSIS**

P&A is a state agency, in accordance with the Developmental Disabilities and Bill of Rights Act (DD Act), the Protection and Advocacy for Mentally Ill Individuals Act of 1986 (PAIMI Act), and the Protection and Advocacy of Individuals Rights Act (PAIR Act), to establish an effective protection and advocacy system to respond to allegations of abuse and neglect and generally protect the rights of individuals with disabilities.<sup>2</sup> "The core requirement of the federal P&A statutes is that, in order to receive federal funding, each state must establish an effective protection and advocacy

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<sup>1</sup> The application of the National Association of Social Workers is outside the scope of this opinion and will not be addressed.

<sup>2</sup> 42 U.S.C. §§ 15001–115; 42 U.S.C. § 10801–851; 29 U.S.C § 794e.

system” to fulfill those responsibilities.<sup>3</sup> In North Dakota, P&A serves this function and is governed by the Committee on Protection and Advocacy which “operate[s] independently of the governor and any state agency that provides treatment, services or habilitation to persons with disabilities or mental illnesses.”<sup>4</sup> Federal statutes give P&A investigative power and the ability to ““have access to all records of any individual’ with disabilities or mental illness” who is a client of the system P&A is authorized to investigate.<sup>5</sup> This means that P&A may have records in its possession that are confidential under state and federal law.<sup>6</sup>

Although federal law mandated that states create independent agencies to protect the rights of individuals with disabilities, P&A is also created by state statute and is a state agency.<sup>7</sup> The State Auditor is authorized by law to perform audits, including performance audits, of state agencies.<sup>8</sup> To facilitate the audits, state law authorizes the Auditor to receive otherwise confidential records, in order to complete an audit of a state agency.<sup>9</sup> N.D.C.C. § 54-10-22.1, states:

Notwithstanding any other specific sections of law, the state auditor and persons employed by the state auditor, when necessary in conducting an audit, shall have access to all information relating to operations of all governmental units or component units subject to audit . . . . [T]he state auditor may inspect any state agency’s books, papers, accounts, or records that may be relevant to an ongoing audit of any other state agency or computer system audit. The state auditor and persons employed by the state auditor examining any information, which is confidential by law, shall guard the secrecy of such information except when otherwise directed by judicial order or as is otherwise provided by law.<sup>10</sup>

In 1994, this office analyzed this section and found that the phrase “notwithstanding any other specific sections of law” used in N.D.C.C. § 54-10-22.1 meant that, in spite of and without prevention by other sections of state law that may make records confidential, records of audited entities “are available to the State Auditor and the Auditor’s employees for audit purposes.”<sup>11</sup> The

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<sup>3</sup> *Disabilities Rts. Wis., Inc. v. State of Wis. Dep’t of Pub. Instruction*, 463 F.3d 719, 724 (2006) citing 42 U.S.C. § 15043(a)(2)(A)(i); 42 U.S.C. § 10805(a)(1); 29 U.S.C. § 794e(f)(3).

<sup>4</sup> N.D.C.C. § 25-01.3-02.

<sup>5</sup> *Disabilities Rts. Wis., Inc. v. State of Wis. Dep’t of Pub. Instruction*, 463 F.3d 719, 726 (2006) citing 42 U.S.C. § 15043(a)(2)(I)(i); 42 U.S.C. § 10805(a)(4)(A); 29 U.S.C. § 794e(f)(2).

<sup>6</sup> See generally, N.D.C.C. ch. 25-01.3; 42 U.S.C. § 15043(a)(2)(A)(i); 42 U.S.C. § 10805(a)(1); 29 U.S.C. § 794e(c)(f)(3).

<sup>7</sup> See N.D.C.C. ch. 25-01.3.

<sup>8</sup> N.D.C.C. § 54-10-01.

<sup>9</sup> N.D.C.C. § 54-10-22.1.

<sup>10</sup> *Id.*

<sup>11</sup> N.D.A.G. 94-L-305. The opinion further explained that there is a presumption that all laws are enacted with knowledge of those already in existence. Thus, when N.D.C.C. § 25-01.3-10 was

1994 opinion, issued to P&A, further found that disclosure of confidential information for a state audit was consistent with federal law and rules.<sup>12</sup> The opinion said that federal rules “[did] not preempt state law nor prohibit limited disclosure of such records for state performance audit purposes.”<sup>13</sup> In fact, the opinion that found that language in the DD Act that allowed P&A to protect the identity of clients from the Secretary of Health and Human Services, did not foreclose P&A from disclosing the same information to the State Auditor.<sup>14</sup> The federal acts that regulate P&A anticipate state and federal audits with access to P&A records.<sup>15</sup> For example, with regard to audits of P&A programs, the federal PAIMI Act states:

For purposes of any periodic audit, report, or evaluation of the performance of the P&A system, the Secretary shall not require the P&A system to disclose the identity, or any other personally identifiable information, of any individual requesting assistance under a program. *This requirement does not restrict access by the Department or other authorized Federal or State officials to client records or other records of the P&A system when deemed necessary for audit purposes and for monitoring P&A system compliance with applicable Federal or State laws and regulations.* The purpose of obtaining such information is solely to determine that P&A systems are spending their grant funds awarded under the Act on serving individuals with mental illness. Officials that have access to such information must keep it confidential to the maximum extent permitted by law and regulations. If photostatic copies of materials are provided, then the destruction of such evidence is required once such reviews have been completed.<sup>16</sup>

Accordingly, it is my opinion that federal law does not prevent the state from auditing P&A and even though P&A possesses confidential records, N.D.C.C. § 54-10-22.1 and 42 C.F.R. § 51.45(c) authorize the state auditor and the employees of the auditor’s office, to review the records without detriment to P&A.

You also ask whether Rule 1.6 of the North Dakota Rules of Professional Conduct for licensed attorneys prohibits P&A from disclosing to the State Auditor the contents of a client file for the

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enacted in 1989, it is regarded to have been adopted in light of N.D.C.C. § 54-10-22.1, which was enacted in 1977. 1989 N.D. Sess. Laws ch. 333, § 10; 1977 N.D. Sess. Laws ch. 485, § 1; *Laplant v. Stearns*, 54 N.W.2d 748, 753 (N.D. 1952). *See also U.S. v. Lester*, 92 F.4<sup>th</sup> 740, 742 (8th Cir. 2024)(“‘Notwithstanding’ means ‘in spite of’”) (internal citations omitted).

<sup>12</sup> N.D.A.G. 94-L-305.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *See* 29 U.S.C.A. § 794(e) (PAIR Act); 42 U.S.C.A. §§ 15001-115 (DD Act); 42 U.S.C. § 10801-851 (PAIMI Act).

<sup>16</sup> 42 C.F.R. § 51.45(c) (emphasis added).

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purpose of conducting a non-financial performance audit under N.D.C.C. ch. 54-10 when the requested file includes information about individuals and businesses in the private sector who chose to contact P&A.

This issue was already addressed in a 1995 opinion of this office regarding P&A. The 1995 opinion highlighted that P&A has authority to contract with private attorneys to represent private individuals.<sup>17</sup> During that performance audit, auditors asked to see billings from the contracted attorneys.<sup>18</sup> P&A redacted the names of the individuals represented by the contract attorneys under the rules for attorney-client privilege or attorney-client confidentiality.<sup>19</sup> The names of individuals seeking services of P&A are protected under N.D.C.C. § 25-01.3. The opinion stated:

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.<sup>20</sup>

Here, P&A has not identified a specific record. Given that, I rely on the past opinions<sup>21</sup> declaring that records made confidential by N.D.C.C. § 25-01.3-10 are available under N.D.C.C. § 54-10-22 to the State Auditor and the Auditor's employees for audit purposes.

With regards,



Drew H. Wrigley  
Attorney General

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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.<sup>22</sup>

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<sup>17</sup> See N.D.C.C. § 25-01.3-06; N.D.A.G. 95-L-01.

<sup>18</sup> N.D.A.G. 95-L-01.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> N.D.A.G. 95-L-01; N.D.A.G. 94-L-305.

<sup>22</sup> See *State ex rel. Johnson v. Baker*, 21 N.W.2d 355 (N.D. 1946).