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Operator's Signature

Yubereca d. Lee

Date

10-16-03

2003 SENATE JUDICIARY

SB 2141

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10-16-03
Date

2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2141

Senate Judiciary Committee

☐ Conference Committee

Hearing Date 01/29/03

Tape Number	Side A	Side B	Meter #
1	X		.0 - 29.5
Committee Clerk Signature <i>Maria L. Solberg</i>			

Minutes: Senator John T. Traynor, Chairman, called the meeting to order. Roll call was taken and all committee members present. Sen. Traynor requested meeting starts with testimony on bill.

Testimony Support of SB

Ed Nagel Jr. Director of the office of the State Auditor (meter .5) read attachment #1a.

Senator Stanley W. Lyson, Vice Chairman discussed the aspect of this department becoming a "police" officer not an auditing department. Discussed "mini" audits.

Senator Thomas L. Trenbeath wondered if the information gathered in this manner could be used in a court case if not properly obtained. How do they manage to staff this?

Sen. Lyson asked if they have suspicions why they did not tell the Attorney General's office or the State Attorney's office. Mr. Nagel wanted to have better information before going to these departments.

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Page 2
Senate Judiciary Committee
Bill/Resolution Number SB 2141
Hearing Date 01/29/03

Senator John T. Traynor, Chairman discussed the term alleged (meter 8.8) Discussion on there present access to tax returns and the "Confidentiality" of tax returns. The audit department publishes there reports but would not publish confidential information. If it goes up a level then the confidentiality no longer applies and the information can become public access.

Senator Stanley W. Lyson, discussed allegations (meter 11.0) further.

Senator Dick Dever and Senator Dennis Bercier asked if this is a "Whistle Blower" bill? Yes.

Do you not think your prior investigation would put out a "red flag" to whom you were investigating before a true investigation would begin?

General discussion on the functions of different departments (meter 13.4)

Senator Carolyn Nelson asked who audited his department? Mr. Nagel stated a private CPA firm did. (meter 17.4)

Robert R. Peterson - State Auditor (Attachment #1b) Read Testimony (meter 19.1)

Testimony in opposition of SB

none

Testimony Neutral to SB

Rick Clayburgh - Tax Commissioner Testimony (meter 20.7)

Section 2 of bill has some issues. Discussion on the confidentiality of department and our liability if we breach this it is a class A misdemeanor. We are a voluntary tax system. A system like this would can and will be used against them, violates the 5th Amendment. We are forbidden to give Federal Tax information with out specific legislative and IRS authority, this bill is to broad for our agreements with the IRS.

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Page 3
Senate Judiciary Committee
Bill/Resolution Number SB 2141
Hearing Date 01/29/03

Senator Thomas L. Trenbeath asked about the present process to release information (meter 23.2)

Discussed confidentiality of department (meter 24.0)

Senator John T. Traynor, Chairman asked if Mr Nagel would be willing to work with

Mr. Clayburgh on putting together an amendment? No (meter 28.1)

Senator John T. Traynor, Chairman Closed the hearing on SB 2141

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10-16-03
Date

2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2141

Senate Judiciary Committee

☐ Conference Committee

Hearing Date 02/04/03

Tape Number	Side A	Side B	Meter #
3	X		2.2 - 4.0
Committee Clerk Signature <i>Maria L. Solberg</i>			

Minutes: Senator John T. Traynor, Chairman, called the meeting to order. Roll call was taken and all committee members present. Sen. Traynor requested meeting starts with committee work on bill.

Senator John T. Traynor, Chairman (meter 1.9) handed out Attachment #1 Letter of Opinion from the Attorney Generals office and a memo, Attachment #2, from Ed Nagel in response to meeting with the Tax Commissioner.

Made to **DO NOT PASS SB 2141** by Senator Dick Dever and seconded by Senator Thomas L. Trenbeath

Roll Call Vote: 6 Yes. 0 No. 0 Absent

Motion Passed

Floor Assignment Senator Thomas L. Trenbeath

Senator John T. Traynor, Chairman closed the hearing

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10-16-03
Date

Date: February 4, 2003
Roll Call Vote #: 1

2003 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2141

Senate JUDICIARY Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken DO NOT PASS

Motion Made By Sen. Dever Seconded By Senator Thomas L. Trenbeath

Senators	Yes	No	Senators	Yes	No
Sen. John T. Traynor - Chairman	X		Sen. Dennis Bercier	X	
Sen. Stanley Lyson - Vice Chair	X		Sen. Carolyn Nelson	X	
Sen. Dick Dever	X				
Sen. Thomas L. Trenbeath	X				

Total (Yes) SIX (6) No ZERO (0)

Absent Zero (0)

Floor Assignment Senator Thomas L. Trenbeath

If the vote is on an amendment, briefly indicate intent:

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Operator's Signature

10-16-03
Date

REPORT OF STANDING COMMITTEE (410)
February 5, 2003 12:52 p.m.

Module No: SR-22-1711
Carrier: Trenbeath
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2141: Judiciary Committee (Sen. Traynor, Chairman) recommends DO NOT PASS
(6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2141 was placed on the
Eleventh order on the calendar.

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2003 TESTIMONY

SB 2141

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Operator's Signature

10-16-03
Date

STATE AUDITOR
ROBERT R. PETERSON



STATE OF NORTH DAKOTA
OFFICE OF THE STATE AUDITOR
STATE CAPITOL
600 E. BOULEVARD AVE. - DEPT. 117
BISMARCK, ND 58505

AH #1a

PHONE
(701) 328-2241
FAX
(701) 328-1406

**TESTIMONY BEFORE THE SENATE
JUDICIARY COMMITTEE**
January 29, 2003

Senate Bill No. 2141

Testimony Presented by Ed Nagel, Jr.
Director

Chairman Traynor, members of the committee, my name is Ed Nagel. I am here to testify in support of Senate Bill No. 2141.

This bill creates a new subsection in section 54-10-01, and amends section 54-10-24 of the North Dakota Century Code. The new subsection is on page 2, lines 14 through 20. This new language will give the State Auditor specific authority to investigate alleged acts of improper use of state or federal funds, without conducting a complete audit of the state agency or political subdivision. This authority would allow the State Auditor to investigate allegations of improprieties in a more timely manner, and only to the extent necessary.

The amendment to section 54-10-24 is on page 3, lines 7 through 11. This amendment will allow the State Auditor to examine records in the possession of the Tax Commissioner, during the course of any audit or investigation. The current language in section 54-10-24 provides the State Auditor with access to records maintained by the Tax Commissioner only during an audit of the Tax Commissioner. There may be times during an investigation or audit of another state agency when information in the possession of the Tax Commissioner needs to be reviewed. This bill does not change what information at the Tax Commissioner's office can be examined, but only when it may be examined.

I urge your favorable consideration of this bill and I will answer any questions you have regarding this bill.

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Yubereca d. Lee

Date

10-16-03

STATE AUDITOR
ROBERT R. PETERSON



STATE OF NORTH DAKOTA
OFFICE OF THE STATE AUDITOR
STATE CAPITOL
600 E. BOULEVARD AVE. • DEPT. 117
BISMARCK, ND 58505

2141
Attachment
#1/b.

PHONE
(701) 308-2241
FAX
(701) 28-1406

August 14, 2001

The Honorable Wayne Stenehjem
Attorney General
Attorney General's Office

Dear Mr. Stenehjem:

I'm writing to request a formal Attorney General's Opinion regarding sections 54-10-22.1 and 54-10-02 and any other pertinent sections of the North Dakota Century Code (NDCC) or prior Attorney Generals' Opinions relating to the following issue. The State Tax Commissioner's office has refused my auditor's access to individual tax returns. The performance auditors are conducting an audit of the Service Payments for the Elderly and Disabled (SPED) and Expanded SPED programs. They are attempting to verify the accuracy of financial information included by program recipients on their applications for services. The Tax Department's refusal is surprising because access was granted during our performance audit of the Child Support Enforcement Program (CSEF). The CSEP audit was unrelated to any audit of the State Tax Department.

Tax Department representatives have cited NDCC section 54-10-24, stating that it provides access to the State Auditor's Office when "...conducting an audit and examination of the books and records of the tax commissioner...". However this law was written before performance audits became part of the responsibilities of the North Dakota State Auditor's Office under state law. In addition, the language set forth in NDCC section 54-10-22.1 ("Notwithstanding any other specific sections of law...") appears to provide us access to all information relating to operations of all governmental units "...when necessary in conducting an audit".

NDCC section 54-10-22.1 was used in an Attorney General's Opinion issued on November 3, 1994 relating to a similar issue of access to confidential information maintained by the Protection and Advocacy agency. This opinion stated that the phrase "notwithstanding any other specific sections of law" used in statute means that in spite of and without prevention by other sections of state law that may make records confidential, those records are available to the State Auditor and the Auditor's employees for audit purposes."

The questions I have relating to this issue are:

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- 1) Do sections 54-10-22.1 or 54-10-02 or any other section(s) of North Dakota Century Code or prior Attorney General's Opinions provide the State Auditor's Office with the authority to review financial information contained in tax returns, as it pertains to any audit?
- 2) If no section of the North Dakota Century Code or prior Attorney General's Opinion provide the State Auditor's Office with this authority, what specific wording would you advise that we use in language for legislation we would plan to introduce during the next legislative session to grant us this authority?

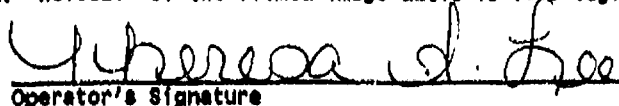
I appreciate your immediate cooperation in resolving this matter. I'm sure you can understand that time is of the essence since this materially impacts an ongoing audit. Thank you for your assistance and if you have any questions relating to this matter, please contact Gordy Smith of my staff at 328-2241.

Sincerely,



Robert R. Peterson
State Auditor

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10-16-03
Date



Wayne Stenahjem
ATTORNEY GENERAL

STATE OF NORTH DAKOTA
OFFICE OF ATTORNEY GENERAL

STATE CAPITOL
601 E BOULEVARD AVE DEPT 125
BISMARCK, ND 58505-0040
(701) 326-2210 FAX (701) 328-2228

HH #1

LETTER OPINION
2001-L-36

September 14, 2001

Honorable Robert R. Peterson
State Auditor
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Mr. Peterson:

Thank you for your letter regarding the effect of income tax confidentiality provisions upon your attempt to conduct a performance audit on the Department of Human Service's Service Payments for the Elderly and Disabled (SPED) and Expanded SPED programs.

It is my understanding from your letter that the performance audit is being conducted in an attempt to verify the accuracy of financial information provided by program recipients when applying for services. As part of this audit, you requested access to selected program recipients' income tax returns on file with the Tax Commissioner in your effort to verify the accuracy of the financial information provided by the applicants for the SPED program. The Tax Commissioner denied your request for access to these returns on the basis that there is no statutory exception to the confidentiality provisions of N.D.C.C. § 57-38-57 that would authorize the State Auditor access to this information for the reasons stated in your request. You noted that in a previously conducted audit of the Child Support Enforcement Program (CSEP), access to return information was granted by the Tax Commissioner.

Your question is whether there is any statutory exception to the confidentiality provisions of N.D.C.C. § 57-38-57 that would authorize access by the State Auditor to income tax return information of SPED program recipients held by the Tax Commissioner as part of a performance audit conducted to verify the accuracy of the financial information provided by program recipients when applying for services with the Department of Human Services.

Section 57-38-57(1), N.D.C.C., provides, in pertinent part:

The secrecy of returns must be guarded except as follows:

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10-16-03
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LETTER OPINION 2001-L-36

September 14, 2001

Page 2

1. Except when otherwise directed by judicial order, or as is otherwise provided by law, the tax commissioner, the tax commissioner's deputies, agents, clerks, and other officers and employees, may not divulge nor make known, in any manner, whether or not any report or return required under this chapter has been filed, the amount of income, or any particulars set forth or disclosed in any report or return required under this chapter, including the copy or any portion thereof or information reflected in the taxpayer's federal income tax return that the tax commissioner may require to be attached to, furnished with, or included in the taxpayer's state income tax return.

(Emphasis supplied.)

A violation of this provision can constitute a class C felony. N.D.C.C. § 12.1-13-01.

It is for common policy considerations that states imposing an income tax enact confidentiality statutes similar to N.D.C.C. § 57-38-57:

[T]he purpose in enacting state statutes prohibiting tax or other government officials from divulging information contained in income tax returns has been not only to protect the individual taxpayer's privacy or his privilege against self-incrimination, but also to facilitate tax enforcement by encouraging the taxpayer to make full and truthful declarations in his returns, without fear that his statements will be revealed or used against him for other purposes. The statutes under consideration here typically contain exceptions to nondisclosure, for example, upon a proper judicial order or where the returns or information contained therein are sought in connection with an investigation or prosecution of tax law violations.

Joel E. Smith, Annotation, Confidentiality of Income Tax Returns, 1 A.L.R.4th 959 (1980).

See also N.Y. State Dept. of Tax. v. N.Y. Dept of Law, 406 N.Y.S.2d 747 (N.Y. 1978); Wales v. Tax Commission, 412 P.2d 472 (Ariz. 1966); In re Hampers, 651 F.2d 19 (1st Cir. 1981) (North Dakota appeared on an amicus curiae brief in support of the Massachusetts Commissioner of Revenue).

The North Dakota Supreme Court has held that filing an income tax return upon which a tax liability can be determined is mandatory. Dorgan v. Kouba, 274 N.W.2d 167 (N.D. 1979). The confidentiality provisions of N.D.C.C. § 57-38-57 facilitate this mandate.

LETTER OPINION 2001-L-36
September 14, 2001
Page 3

An examination of N.D.C.C. § 57-38-57 reveals no exception to its confidentiality provisions that would authorize access by the State Auditor to tax returns of SPED recipients for the reasons stated in your request. Therefore, it is necessary to examine the provisions of N.D.C.C. §§ 54-10-24 and 54-10-22.1 to determine if there is additional statutory language granting you the necessary authority.

Section 54-10-24, N.D.C.C., was enacted in 1969 and amended and reenacted in 1977. 1969 N.D. Sess. Laws ch. 435, § 1; 1977 N.D. Sess. Laws ch. 486, § 1. It provides in pertinent part:

The state auditor and persons employed by him, when necessary in conducting an audit and examination of the books and records of the tax commissioner as authorized by law, may examine any return, report, or other information filed with the tax commissioner, and confirm the authenticity of such return, report, or other information with the taxpayer who filed it.

This section relates only to an audit of the Office of the Tax Commissioner as required by N.D.C.C. § 54-10-01. In your letter you made reference to an audit you conducted of the CSEP wherein you were given access to income tax return information. This program is the child support refund program in which the Tax Commissioner offsets income tax refunds with debt owed under the CSEP. This offset program is authorized under N.D.C.C. ch. 57-38.3 and is administered by the Tax Commissioner. Because the Tax Commissioner administers it, the State Auditor had access to income tax returns under N.D.C.C. § 54-10-24. However, this section does not authorize the State Auditor to examine income tax returns of SPED recipients as requested since this program is not administered by the Tax Commissioner.

Section 54-10-22.1, N.D.C.C., was enacted in 1977. 1977 N.D. Sess. Laws ch. 485, § 1. It provides as follows:

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. The state auditor and persons employed by him 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.

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To the extent that a statute is ambiguous, legislative history may be considered. N.D.C.C. § 1-02-39(3). This ambiguity can be created when two statutes are read together. Bland v. Com'n On Medical Competency, 557 N.W.2d 379, 382 (N.D. 1996).

Legislative history reveals that N.D.C.C. § 54-10-22.1 was introduced in 1977 on behalf of the State Auditor as Senate Bill 2281. Hearing on S.B. 2281, 1977 N.D. Leg. (Jan. 24) (Testimony of Sen. Thane). A representative of the State Auditor gave pertinent testimony on January 24, 1977:

Mike Schwindt, Chief Auditor, State Auditor's Office, stated that the current state law provides that their office shall have access to information in stated agencies subject to audit by their department. A number of departments have laws or regulations that information should be restricted. A specific statute over-rides a general statute, which means that they would be excluded in some cases. For instance, Workmen's Compensation can keep information from them and at times they might have need for some of this information. The Social Service Board restricts the information to a very few people. Sometimes they need this to see that the payments are made to the proper people. At institutions, to determine appropriate rates, you must be able to find out when people were born or die, so birth and death certificates should be available for their office to use. These vital statistics should be available.

Hearing on S.B. 2281, 1977 N.D. Leg. (Jan. 24) (Statement of Mike Schwindt). The testimony was limited to the State Auditor getting access to information while auditing a state agency "notwithstanding" the fact that the agency being audited was bound to keep certain information confidential under a specific statute. There was no suggestion that this statute be read to provide access to tax return information in the possession of the Tax Commissioner as part of the audit of another agency.

In 1977, N.D.C.C. § 54-10-24 was amended and reenacted in Senate Bill 2509. It related to the report that the State Auditor was required to make to the Legislative Review Committee regarding audits of the Office of the Tax Commissioner. On February 2, 1977, Chief Auditor Mike Schwindt also testified at the hearing on this legislation. He did not express a need to increase the State Auditor's access to tax return information filed with the Tax Commissioner. Hearing on S.B. 2509, 1977 N.D. Leg. (Feb. 2) (Statement of Mike Schwindt).

I am aware of 1994 N.D. Op. Att'y Gen. L-305, relating to N.D.C.C. § 54-10-22.1 and to its application to an audit of the Committee on Protection and Advocacy, which held certain records confidential under N.D.C.C. § 25-01.3-10. The opinion considered the

LETTER OPINION 2001-L-36

September 14, 2001

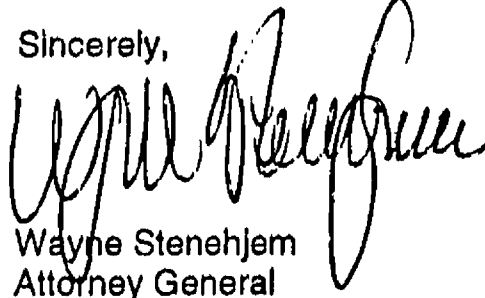
Page 5

definition of "notwithstanding" and concluded that your office had access to the otherwise confidential information for the purpose of auditing the Protection and Advocacy Project. It was further determined that this conclusion was consistent with federal law which also protected these records. The opinion did not address the issue whether the State Auditor had access to confidential information held by one state agency, such as income tax returns on file with the Tax Commissioner, for the purpose of auditing another unrelated agency.

Based upon this analysis, it is my opinion that there is no statutory exception to the confidentiality provisions of N.D.C.C. § 57-38-57 that would authorize the State Auditor to access income tax return information of SPED program recipients held by the Tax Commissioner as part of a performance audit on the Department of Human Services conducted to verify the accuracy of the financial information provided by program recipients when applying for services.

You wish to know what language could be drafted for legislation to be introduced in the next legislative session, which would grant you the authority to request tax return information in a case of this kind. The technical aspects of drafting appropriate language for legislation would not be difficult. I invite you to review this policy matter with the Tax Commissioner and me if you wish to proceed with legislation.

Sincerely,

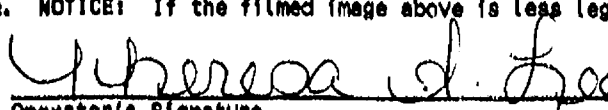


Wayne Stenehjem
Attorney General

rww/pg

cc: Rick Clayburgh, Tax Commissioner

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STATE AUDITOR
ROBERT D. PETERSON



STATE OF NORTH DAKOTA
OFFICE OF THE STATE AUDITOR
STATE CAPITOL
600 E. BOULEVARD AVE., DEPT. 117
BISMARCK, ND 58505

P-ONE
701-328-3341
FAX
701-328-1408

HH #2

To: Senator Traynor & Committee Members of the Senate Judiciary Committee
From: Ed Nagel, Director *E. N.*
Re: Proposed Amendments to SB No. 2141
Date: Feb. 3, 2003

At your request, our office met with a representative of the Tax Commissioner's Office in an effort to draft amendments to SB No. 2141 that would be acceptable to both parties. We were not successful in that effort.

Attached are our proposed amendments to SB No. 2141. These amendments were shared with the Tax Commissioner's Office, however these amendments do not address their concerns. The Tax Commissioner's Office may propose additional amendments for your consideration.

Please contact me at 328-4782 if you have any questions or need additional information.

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STATE AUDITOR
ROBERT A. PETERSON



STATE OF NORTH DAKOTA
OFFICE OF THE STATE AUDITOR
STATE CAPITOL
600 E. BOULEVARD AVE. - DEPT. 117
BISMARCK ND 58505

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PROPOSED AMENDMENTS TO SENATE BILL NO. 2141
February 3, 2003

Page 2, line 14, replace "investigate" with "audit"

Page 2, line 20, replace "investigations" with "audits"

Page 2, line 30, remove "or investigation"

Page 3, line 8, remove "or investigation"

Page 3, line 11, remove "or investigation"

Renumber accordingly

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