



STATE OF NORTH DAKOTA
OFFICE OF ATTORNEY GENERAL

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Wayne Stenehjem
ATTORNEY GENERAL

December 7, 2007

John Walstad
ND Legislative Council
600 E. Boulevard Ave
Bismarck ND 58505

DEC 7 2007

Dear Mr. Walstad:

This letter is in response to your request for information relating to the activities of the Office of Attorney General and its divisions as they relate to exemption from the Administrative Agencies Practices Act (AAPA).

The Attorney General requires exemption from both the rulemaking provisions and the adjudicative proceeding provisions of N.D.C.C. Chapter 28-32 with respect to the Sex Offender Risk Assessment Committee, guidelines for the risk assessment of offenders, risk level review process, public disclosure of information regarding certain offenders, the State Toxicologist and the State Crime Laboratory, as is more fully explained below.

Sex Offenders

The guidelines and review proceedings do not have a general statewide application, but rather are specific to sex offenders. Review hearings are governed by the Attorney General's guidelines, which were prepared pursuant to N.D.C.C. § 12.1-32-15.

With respect to the Sex Offender Risk Assessment Committee, guidelines for the risk assessment of offenders, risk level review process, and public disclosure of information regarding certain offenders, the exemption should continue unchanged because:

- (a) The Attorney General's Sex Offender Risk Assessment Committee (SORAC) assigns risk levels to all registered offenders as required by N.D.C.C. § 12.1-32-15. Each month between three and six offenders contest their risk level. Without the exemption from the AAPA, anywhere from 75 to 150 appeals per biennium would have to be heard in front of an administrative hearing officer, which could affect our ability to provide timely information about high risk sex offenders to both law enforcement and the public.
- (b) SORAC operates under guidelines prepared by the Attorney General, and also required by N.D.C.C. § 12.1-32-15. The original drafting and adoption of the guidelines was not conducted pursuant to a public notice and hearing process, which might be required if the exemption is lost. Any subsequent minor amendment to the guidelines would require public hearing and notice.

- (c) The Bureau of Criminal Investigation (BCI) maintains an operational manual for administration of North Dakota's sex offender registration program. This manual covers such topics as what responsibilities each agency has in the registration and notification process, what information an offender is required to provide as part of registration, and at what intervals an offender is required to verify information. This manual is updated at least every biennium, and a public notice and hearing process would be required for even minor changes.
- (d) Congress has passed a number of acts in the past thirteen years that have required legislative amendments and changes to BCI's operational manual to bring North Dakota into compliance with specific federal requirements. Some of the congressional acts have calendar deadlines for compliance. The loss of the administrative agency exemption would place an additional burden on our ability to timely comply with federal deadlines that we have been up against in avoiding the loss of federal grant money.

State Crime Laboratory/ State Toxicologist

The exceptions from administrative rulemaking for the State Toxicologist and the Crime Laboratory occurred in separate legislative sessions. Originally, only the State Toxicologist was exempt from rulemaking under N.D.C.C. ch. 28-32., allowing the Toxicologist to update equipment, technology, and techniques used for blood alcohol testing as soon as necessary without going through the time-consuming procedures for promulgation of rules. This exemption should remain unchanged because it is necessary for the Toxicologist to be able to change the rules immediately in response to court decisions or scientific advances, in order to insure accurate and admissible evidence in DUI cases.

In 2003, the Crime Laboratory, including the State Toxicologist, was moved from the Health Department to the Attorney General. No change was made to the exception from rulemaking except to note the transfer from the Health Department to the Attorney General. Existing administrative rules concerning the Crime Laboratory were transferred from the Health Department to the Attorney General within the Administrative Code. The Crime Laboratory still operates under those administrative rules, which govern the collection, analysis, and storage of convicted offender samples. These rules affect the rights or duties of the agencies required to collect the samples. The laboratory does not currently hold hearings to act on complaints, applications, or appeals. In 2005, an exception from rulemaking requirements for the Crime Laboratory was added to the existing exception for the State Toxicologist.

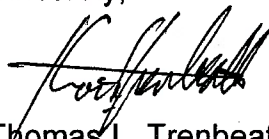
The DNA testing chapter was created in 1995, when the Crime Lab was in the Health Department. At that time, the Crime Lab was required to use the Administrative Agencies Practice Act except for the State Toxicologist. When the Crime Lab was transferred to the Attorney General, 2003, SB 2151 amended and retained the preexisting requirement for rules to be adopted under ch. 28-32 for the DNA database as found in N.D.C.C. § 31-13-08. The separate requirement for rules promulgation concerning the Crime Lab's DNA database was not altered when the Crime Lab was

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exempted from the AAPA. We believe, therefore, that with regard to rulemaking concerning the DNA database, the crime lab is not exempt from the AAPA.

The foregoing is a brief summary of the exempt status of certain activities of the Office of Attorney General with respect to compliance with the AAPA. I trust it is an adequate response to the inquiry made and sufficient to allow the continuation of the exemptions described.

Sincerely,

A handwritten signature in black ink, appearing to read "Trenbeath", written over a horizontal line.

Thomas L. Trenbeath
Chief Deputy Attorney General