LETTER OPINION
2004-L-29

April 20, 2004

Ms. Pam Sharp
Director
Office of Management and Budget
600 E Boulevard Ave Dept 110
Bismarck, ND 58505-0400

Dear Ms. Sharp:

Thank you for your request for my review of your office's conclusions regarding the transferability of monies from certain agencies' special funds to the Information Technology Department (ITD) pursuant to chapter 665 of the 2003 North Dakota Session Laws (Chapter 665). As you know, I asked a member of my staff to meet with budget analysts from your agency to review each of the funds in question. As a result of these discussions it became clear that this office is not in a position to determine the nature or extent of any restrictions on the special funds in question. Your analysts should be able to track the specific monies in those funds back to their source. Once that source is determined, you should be able to ascertain whether the funds may be transferred using the guidelines I provided in my November 20, 2003, letter. See N.D.A.G. 2003-L-54. If only a portion of the total provided in Chapter 665 is available, then that is the amount that should be transferred.

In making the determination, further clarification regarding the availability of special funds for transfer to uses other than the original purpose of the special fund accumulation might be helpful. There are two ways in which the Legislative Assembly could have accessed the special funds held by agencies on June 30, 2003: (1) determine there was a surplus in the special funds and direct that they be diverted to ITD; or (2) retroactively amend the purpose of those special funds to include funding for ITD. As previously stated, special fund monies can be diverted to uses other than the original purpose of the special fund accumulation only if there is a surplus over and above what is needed to accomplish the original purpose. N.D.A.G. 2003-L-54 (citing State ex rel. Sathre v. Hopton, 265 N.W. 395, 405 (N.D. 1936)). There is no indication the Legislative Assembly considered the possibility of a surplus in funds previously accumulated. Further, some funds, like those acquired by Workforce Safety and Insurance (WSI), N.D.C.C. § 65-04-01(2), are statutorily required to be acquired in a manner that accumulates only enough to fulfill the applicable

agency's or fund's purpose. As such, I conclude the Legislative Assembly did not intend to divert a special fund surplus held by the applicable agencies as of June 30, 2003.

The second possible way in which the Legislative Assembly could attempt to access those special fund monies is by the retroactive amendment of the purposes of the special fund accumulations. However, chapter 665 does not contain a retroactivity clause that would retroactively amend the statutes governing those funds to change the purpose of those monies. Further, an attempt to retroactively amend the purpose of a special fund accumulation would most likely be fraught with constitutional implications. Accordingly, I conclude the Legislative Assembly did not intend to divert special fund monies held by state agencies on June 30, 2003.

A prospective change to the applicable statutes modifying the future purpose for the accumulation of those monies is possible. However, Chapter 665 does not contain specific changes to the applicable statutes. The only possible manner in which those statutes were changed to modify the purpose of the special funds to include funding for ITD would be through an "implied amendment." An "implied amendment" is an act that makes a material modification to a statute without specifically amending the statute in question. Tharaldson v. Unsatisfied Judgment Fund, 225 N.W.2d 39, 45 (N.D. 1974). There is a presumption against implied amendments. In order to overcome that presumption, there must be an irreconcilable conflict between the implied amendment and the applicable statute. Id.

In this case, the Legislative Assembly clearly intended to transfer monies from certain special funds to ITD, but did not specifically amend the applicable statutes to provide for the additional purpose of the special fund accumulation. Chapter 665 therefore appears to be an implied amendment of the applicable statutes governing the affected special funds. To determine whether the presumption against implied amendments is overcome, it must be determined whether there is an irreconcilable conflict between the Legislative act and existing law. See id.

None of the provisions creating the special funds at issue list "provide funding for ITD" among their purposes. Since special funds must be used for the purpose for which they were created, there is a direct and irreconcilable conflict between Chapter 665 and existing law. I therefore conclude that Chapter 665 overcomes the presumption against implied amendments. Accordingly, Chapter 665 did impliedly amend the applicable statutes to include ITD funding among the special funds' purposes beginning on July 1, 2003.

However, whether Chapter 665 did so in a manner consistent with constitutional requirements is another matter. See N.D.A.G. 2003-L-54. Several of the special funds are created through the acquisition of monies through taxes. Article X, section 3 of the North Dakota Constitution states that "every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied." "[W]here the Legislature enacts a

law assessing a tax it must designate the disposition to be made of the moneys collected under the taxing statute." Boeing Co. v. Omdahl, 169 N.W.2d 696, 710 (N.D. 1969). Since an implied amendment, by definition, does not actually change the language in a particular statute, there is a question regarding whether a taxing statute to which an implied amendment has been made still "state[s] distinctly the object of the [tax]."

Other states that have addressed the issue have reached different conclusions. In Meierhenry v. City of Huron, the South Dakota Supreme Court considered a legislative act that "clearly state[d] its objective and impliedly amended other statutes authorizing the levy of property taxes." 354 N.W.2d 171, 181 (S.D. 1984). The South Dakota Supreme Court concluded that that act itself complied with the constitutional requirement that a law imposing a tax "shall distinctly state the object of the same," and that requiring the "legislature to amend [the taxing] statutes to address the objective of the Act would be to insist upon a formalistic act carrying with it no corresponding benefit." Id. Thus, an implied amendment of a taxing statute in South Dakota is constitutional. Id.

The Kansas Supreme Court came to the opposite conclusion in State ex rel. Schneider v. City of Topeka, 605 P.2d 556 (Kan. 1980). In that case, the act in question "did not attempt to amend Specific [sic] tax levy statutes to include therein, as an additional object, a contribution toward" the purpose stated in the act. Id. at 560. The act had, instead, impliedly amended those statutes to include the additional purpose. Id. Kansas, like South Dakota, has a provision virtually identical to North Dakota's that requires a taxing statute to "distinctly state the object of the same." See id. at 559. The Kansas Supreme Court determined that the implied amendment of the taxing statutes was unconstitutional as a violation of that provision. Id. at 560.

During the course of the litigation, the Kansas Legislature amended 190 of the taxing statutes to include the Act's purpose as a purpose of those statutes, but missed ten statutes that were also affected by the Act. The Kansas Supreme Court stated that the 190 statutes that were amended to specifically include the additional purpose were effective, but that the ten that were overlooked could not be utilized to levy taxes for the additional purpose. Id.

The clear benefit of following the letter of the constitutional requirement is clear – a constituent who is attempting to determine whether the government is appropriately using the taxes paid by the constituent need only look at the Century Code provision imposing that tax to make that determination. Forcing a citizen to look for a potentially non-existent needle in the haystack of innumerable acts over the course of North Dakota history violates the very premise of the constitutional requirement. Accord V-1 Oil Co. v. Wyoming, 934 P.2d 740, 744 (Wy. 1997) (stating that the constitutional provision is based on the fact a taxpayer has a right to know the purpose for which the taxpayer's monies are appropriated). Thus, the position of the Kansas Supreme Court is the more persuasive of

the two. Accordingly, it is my opinion[1] that Chapter 665's implied amendment changing the purpose of any laws imposing taxes that are required to be deposited in special funds is not consistent with Article X, section 3 of the North Dakota Constitution and is, therefore, ineffective as applied to those funds. If, however, "there is a surplus above what is needed for the purpose for which a tax was levied, excess monies may be diverted to other purposes." N.D.A.G. 2003-L-54 (citing Hopton, 265 N.W. at 405).

In contrast, some of the special funds are specifically subject to further appropriation by the Legislative Assembly. See, e.g., N.D.C.C. §23-16-03 ("[A]ny expenditure from the [health services operating] fund is subject to appropriation by the legislative assembly"). Chapter 665's appropriation of monies in those funds for ITD purposes would therefore be permissible. However, please note that the only funds available for transfer pursuant to section 2 of Chapter 665 are those "resulting from information technology reductions." 2003 N.D. Sess. Laws ch. 665, § 2. Thus, if there are no monies resulting from those reductions, there are no monies to transfer.

I hope this, along with my November 30, 2003, letter, are sufficient to aid in your analysis of the funds listed in the attachment to your letter.

Sincerely,

Wayne Stenehjem
Attorney General

sam/vkk

[1] 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. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).