STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 98-F-13

Date Issued: May 12, 1998

Requested by: Johanna Zschomler, Director, Risk Management Division, Office of Management and Budget

- QUESTIONS PRESENTED -

I.

Whether the prohibition in 23 United States Code (U.S.C.) § 409 against discovery, admission, or consideration of certain highway safety records in a federal or state court proceeding or action for damages is an exception to the North Dakota open records law.

II.

Whether, if 23 U.S.C. § 409 is an exception to the open records law, the exception applies to requests for records by persons who have filed claims for damages against the state under N.D.C.C. ch. 32-12.2 but who have not commenced a lawsuit in state or federal court?

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that the North Dakota open records law cannot be used to circumvent the prohibition of 23 U.S.C. § 409 against discovery, admission, or consideration of certain highway safety records. Therefore, it is my further opinion that 23 U.S.C. § 409 is an exception to the open records law as applied to persons requesting the records for use in any federal or state court proceeding or in any court action for damages, including persons acting on behalf of such persons.

II.

It is my opinion that the open records exception in 23 U.S.C. § 409 applies to requests for records by persons who have filed claims for damages against the state under N.D.C.C. ch. 32-12.2, but who have not yet commenced an action in court, because the requesters are engaged in pre-suit discovery.

- ANALYSES -

I.

"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." N.D.C.C. § 44-04-18(1). See also N.D. Const. Art. XI, § 6.

> A three-prong analysis should be used to determine whether a record . . . is subject to the open records . . . law[] and is open to the public. 1996 N.D. Op. Att'y Gen. 38, 39; 1993 N.D. Op. Att'y Gen. L-95. First, is the entity that is maintaining the document . . . subject to the open records . . . laws? Second, is the document a record . . . of that entity? Third, if the answer to both of these questions is yes, is there a specific law providing that the record . . . is confidential or exempt from the open records . . . laws?

1996 N.D. Op. Att'y Gen. 99, 100. In performing this analysis, the open records law must be interpreted broadly in favor of the public's access to information. 1985 N.D. Op. Att'y Gen. 77, 79. See also N.D.C.C. § 1-02-01; City of Grand Forks v. Grand Forks Herald, 307 N.W.2d 572 (N.D. 1981). In contrast to the broad interpretation of the open records law, exceptions must be specific and will not be implied. Hovet v. Hebron Public School District, 419 N.W.2d 189, 191 (N.D. 1988).

The questions presented refer to certain highway safety program documents and data (hereafter highway safety records) described in 23 U.S.C. § 409 and maintained by the State of North Dakota. These highway safety records are "records" of a "public entity" as those terms are used in the open records law. See N.D.C.C. § 44-04-17.1(12)(a), (15). As a result, the first two prongs of the analysis are satisfied, and the answers to the questions presented depend on the third-prong of the analysis: is there a specific exception to the open records law that applies to the requested records?

An exception to the open records law can be found in federal law as well as state statutes. N.D.C.C. § 44-04-17.1(7). See also 1994 N.D. Op. Att'y Gen. 118. Federal law provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying[,] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

23 U.S.C. § 409 (emphasis added). As the above-underlined language indicates, whether this section is an exception to the open records law depends on the meaning of "discovery" in a federal or state court proceeding and "action for damages."

"Discovery" and "action for damages" are not defined in 23 U.S.C. § 409 and therefore should be given their plain, ordinary and commonly-understood meaning. Bailey v. U.S., 116 S.Ct. 501 (1995); U.S. v. Alvarez-Sanchez, 511 U.S. 350 (1994). Cf. N.D.C.C. § 1-02-02. As used in 23 U.S.C. § 409, the term "discovery" could mean either "[t]he act or instance of discovering" or "[d]ata or documents that a party to a legal action is compelled to disclose to another party either prior to or during a proceeding." The American Heritage Dictionary 403 (2d coll. ed. 1991). "Discover" means "[t]o obtain knowledge of through observation, search, or study." Id. "Action" may be interpreted broadly to mean any "act," but "in its usual legal sense means a lawsuit brought in a court." Black's Law Dictionary 28 (6th ed. 1990). "Damages" generally means money ordered by a court to be paid as compensation for injury or loss caused by the acts of another person. The American Heritage Dictionary 364; Black's Law Dictionary 389. See also U.S. v. Balistrieri, 981 F.2d 916, 928 (7th Cir. 1992).

Using the plain meaning of undefined terms in a federal or state statute is not the only applicable rule of statutory construction. Statutory language must also be interpreted in context, and technical terms must be given their appropriate meaning. Bailey, 116 S.Ct. at 506. Cf. N.D.C.C. § 1-02-03. Discovery, admission, and consideration of highway safety records is prohibited by 23 U.S.C. § 409, but only in the context of a court proceeding or "action for

damages." The use of "discovery" in 23 U.S.C. § 409 in conjunction with "Federal or State court proceeding" strongly suggests that "discovery" is intended to have a litigation-related meaning and not to refer simply to the mere act of acquiring information.

Similarly, applying the broader meaning of "action," a person could argue that Congress intended to prohibit consideration of highway safety records when notice of a claim has been filed under the Federal Tort Claims Act or a similar state law such as N.D.C.C. ch. 32-12.2. However, federal cases and the Federal Tort Claims Act itself distinguish between an "action" filed with a court and a "claim" filed with a governmental agency. See 28 U.S.C. § 2401; Eagle-Picher Industries, Inc. v. U.S., 937 F.2d 625, 639 (D.C. Cir. 1991). "Action" as used in some federal statutes has been interpreted in some cases to include administrative actions. See, e.g., Mitten v. Muscogee County School Dist., 877 F.2d 932, 935 (11th Cir. 1989); E.M. v. Milville Bd. of Educ., 849 F.Supp. 312, 315 (D.N.J. 1994). Nevertheless, when interpreted with the term "damages," the term "action" in 23 U.S.C. § 409 appears to refer to a court action and not a notice of claim filed with a government agency.

Examination of the legislative history of the 1987 enactment of 23 U.S.C. § 409 and subsequent amendments is generally uninformative on the meaning of "discovery" and "action for damages." Several courts have observed that there is virtually no pertinent legislative history on the original enactment. Harrison v. Burlington Northern Rail Co., 965 F.2d 155, 156 n.3 (7th Cir. 1992); Southern Pac. Transp. Co. v. Yarnell, 890 P.2d 611, 613 (Ariz. 1995). The 1991 amendments to this section were accompanied by a committee report indicating the amendments were only a clarification to the original act. H.R. Rep. No. 102-171(I), at 88 (1991), reprinted in 1991 U.S.C.C.A.N. 1526, 1614.[1]

[1] It appears the 1991 amendments were prompted by court decisions interpreting the original language of 23 U.S.C. § 409, which prohibited only the admission into evidence of certain records, as not prohibiting the discovery of covered records. Shots v. CSX Transp. Inc., 887 F.Supp. 204, 205 (S.D. Ind. 1995); Hagerty v. Southern Ry. Co., 133 F.R.D. 34, 35-36 (E.D. Mo. 1990). The statute was also amended in 1995, apparently in response to state court decisions interpreting 23 U.S.C. § 409 as allowing the discovery and admission into evidence of raw data that was "collected" but not compiled. H.R. Rep. 104-246, at 59 (1995), reprinted in 1995 U.S.C.C.A.N. 522, 551. See Palacios v. Louisiana and Delta R.R.,

Although the legislative history of the original statute is silent, the Mississippi Supreme Court has articulated the broadly-accepted purpose of 23 U.S.C. § 409:

> A number of years ago, the federal government developed a program for enhancing the safety of railroad crossings across the country. The states were encouraged to participate under federal guidelines and upon compliance would receive ninety percent federal funding for such upgrade projects. Federal law and regulations directed the states to survey their circumstances and prepare data on crossings where safety improvements may be needed. To the end that candor might obtain regarding hazards that exist, the Congress acted to protect information developed in connection with the program from use in any civil litigation arising out of railroad crossing accidents.

Sawyer v. Illinois Central Gulf R.R. Co., 606 So.2d 1069, 1073 (Miss. 1992) (emphasis added). Put another way, the intent of the statute was "to prohibit federally required record-keeping from being used as a tool . . . in private litigation." Robertson, 954 F.2d at 1435 (quotation omitted) (emphasis added).

The growing body of federal and state case law interpreting 23 U.S.C. § 409 is not completely consistent, but is informative on the scope of the statute. Cases have interpreted this section as prohibiting admission of protected highway safety records republished in secondary sources because to allow the admission of the records would circumvent the prohibition in the statute and inhibit the candor sought to be encouraged by 23 U.S.C. § 409. Lusby v. Union Pac. R.R. Co., 4 F.3d 639, 641 (8th Cir. 1993); Robertson v. Union Pac. R.R. Co., 954 F.2d 1433, 1435 (8th Cir. 1992). Similarly, although the statute refers only to documents, it has also been interpreted as prohibiting a witness from testifying regarding the contents of those documents. See Harrison, 965 F.2d at 160; Sawyer, 606 So.2d at 1073 (describing contrary argument as "specious" and unsupported by legal authority). This conclusion has been reached despite the general rule that an expert witness can base an opinion on inadmissible evidence. Robertson, 954 F.2d at 1435. However, in reversing an appellate court decision, the Arizona Supreme Court recently held that the statute did not prohibit discovery from other sources of

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Inc., 682 So.2d 806 (La. Ct. App. 1996), vacated 685 So.2d 132 (La. 1997).

information that was also contained in protected reports. Southern Pac. Transp. Co., 890 P.2d at 615.

In the most closely analogous case to the first question presented in this opinion, a person attempted to use the state public records law to obtain information the person was prohibited from discovering under 23 U.S.C. § 409. Seaton v. Johnson, 898 S.W.2d 232 (Tenn. Ct. App. 1995). The court concluded the federal act effectively superseded or preempted the state public records act with respect to the requested information. Id. at 236-37.[2] It is important to note that the person requesting the information in Seaton was an attorney acting on behalf of two plaintiffs in a pending legal action. Id. at 233.[3]

Just as the prohibition in 23 U.S.C. § 409 against admission of highway safety records into evidence cannot be circumvented by presenting the data from secondary sources or by presenting witness testimony regarding the data, it is my opinion that the prohibition in that section against discovery or consideration of these records cannot be similarly circumvented by using the North Dakota open records law. To allow the prohibitions in 23 U.S.C. § 409 to be so easily circumvented by persons attempting to use the information in a court proceeding or court action for damages would make the prohibitions empty provisions. Therefore, I conclude that 23 U.S.C. § 409 is an exception to the North Dakota open records law.

It could be argued that interpreting "action" to refer only to court actions overlooks or renders meaningless the alternative provisions therein prohibiting "discovery or admi[ssion] into evidence in a Federal or State court proceeding" or "consider[ation] for other purposes in any action for damages." However, the cases interpreting the phrase "considered . . . in any action for damages" have noted that the prohibition against discovery and admission into evidence in a court proceeding does not by itself prohibit all uses of highway

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[2] Because federal law can be an exception to the North Dakota open records law, there cannot be a conflict between federal and North Dakota law regarding access to public records and preemption is not an issue in this opinion.

[3] Applying 23 U.S.C. § 409 before it was amended in 1991, an Indiana appellate court concluded that the requested highway safety records were not confidential under 23 U.S.C. § 409 and thus were subject to disclosure under the Indiana public records law. Indiana Dep't of Transp. v. Overton, 555 N.E.2d 510 (Ind. Ct. App. 1990).

safety records. See, e.g., Robertson, 954 F.2d at 1435.[4] For example, expert witnesses generally can base their opinions on inadmissible evidence, but highway safety records protected by 23 U.S.C. § 409 cannot be considered by an expert. Id. Thus, interpreting "action for damages" to mean a court action does not render meaningless the alternative prohibitions in 23 U.S.C. § 409.

The conclusion that 23 U.S.C. § 409 is an exception to the open records law, however, does not authorize the State to close highway safety records to all persons. The statute refers only to discovery, admission, or consideration "in a Federal or State court proceeding" or "action for damages." It would neither violate the terms of 23 U.S.C. § 409, nor thwart the statute's purpose of encouraging candid evaluations of highway safety records without the risk of the evaluation being used as a tool in litigation, to disclose the records to a person who will use the records for purposes unrelated to a court proceeding or court action for damages. Whether the statute is an exception to the open records law, therefore, depends on the identity of the requester and the purpose of the request.[5]

Normally, the identity of the requester and purpose of the request are irrelevant; the right to access to public records belongs to all persons equally. However, because the exception to the open records law in 23 U.S.C. § 409 is based on the purpose of the request and the identity of the requester, it would be appropriate in these limited circumstances to ask whether the person requesting the information is, or is acting on behalf of a person who is, 1) a party in a pending court proceeding or court action for damages arising from any occurrence at a location mentioned or addressed in the requested

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[4] Two state court cases have also interpreted this phrase. See Overton, 555 N.E.2d at 511; Martinolich v. Southern Pac. Transp. Co., 532 So.2d 435, 439 (La. Ct. App. 1988). However, these two cases are largely superseded by the 1991 amendment to 23 U.S.C. § 409 to add the prohibition against "discovery." These cases also appear to limit the meaning of "consideration" to the court itself, but the court in Robertson held that the prohibition against consideration in an action for damages applies to consideration by expert witnesses as well as the court. 954 F.2d at 1435.

[5] This conclusion contrasts with the federal Freedom of Information Act, which specifically extends discovery exceptions to all persons, regardless of identity. 5 U.S.C. § 552(b)(5); U.S. v. Weber Aircraft Corp., 465 U.S. 792 (1984). See also Baldridge v. Shapiro, 455 U.S. 345 (1982). In both these cases, the request for material came from litigants in pending or imminent court proceedings.

records[6] or 2) engaged in discovery related to a court proceeding or court action for damages arising from any occurrence at a location mentioned or addressed in the requested records.

If the answer to either question is yes, the request must be denied. See N.D.C.C. § 44-04-18(5) (request by litigant or agent of litigant must be submitted to attorney representing public entity and is subject to rules of discovery).[7] If the answer to both questions is no, it would also be appropriate to obtain the person's name and require the person to sign an acknowledgment quoting the pertinent provisions of 23 U.S.C. § 409 and reciting that the records are being acquired for purposes unrelated to a court proceeding or court action for damages, are not being sought to evade the provisions of the statute, and will not be used or considered, directly or indirectly, in a court proceeding or court action for damages against any party, including the State, its agencies, employees, or officials.

Upon the requestor's signing the acknowledgment, the request must be granted unless another exception to the open records law applies. A record can be kept of the names of persons who receive highway safety records through an open records request, along with a copy of the acknowledgment. If it is later determined that the disclosed records have been acquired and used by a litigant as if obtained through discovery to locate additional evidence that would otherwise be admissible, the additional evidence could properly be excluded. See Robertson, 954 F.2d at 1435.

In conclusion, the open records law cannot be used to circumvent the prohibition of 23 U.S.C. § 409 against discovery, admission, or consideration of certain highway safety records. Therefore, it is my opinion that 23 U.S.C. § 409 is an exception to the open records law as applied to persons requesting the records for use in any federal or state court proceeding or in any court action for damages, including persons acting on behalf of such persons.

II.

[6] Nothing requires that the litigation involve the State to fall under 23 U.S.C. § 409.

[7] However, it is possible that the protections of 23 U.S.C. § 409 could be waived by the persons or entities in whose benefit the statute has been adopted, which may not necessarily include or be limited to the North Dakota Department of Transportation. If the confidentiality has been waived, the records must be disclosed.

The second question presented involves the application of the open records exception discussed in Issue One to open records requests from a person who is not a "litigant" in the sense that the person has not commenced a lawsuit against the State in federal or state court, but has filed a notice of claim for damages under N.D.C.C. ch. 32-12.2.

As discussed earlier in this opinion, the prohibition in 23 U.S.C. § 409 against the "consideration" of certain highway safety data in any "action for damages" refers to court actions. 23 U.S.C. § 409 does not specify when a court action is commenced. Thus, for actions in federal court, federal law and rules of procedure would dictate whether an "action" has been commenced. For actions in state court, state law would control.

Federal law distinguishes between notice of a claim and an action. See 28 U.S.C. § 2401. In at least one state court case, a party has argued that "because the filing of the claim is the necessary first step before a claimant can bring an action against the state, the claims process is integral to the filing of suit and can only be understood as an 'action' against the state . . . ." Capers v. Lee, 684 A.2d 696, 701 (Conn. 1996) (quotations omitted). The Connecticut Supreme Court disagreed, concluding that the claim was not part of a "court action" because further action on the claim was necessary to bring the action in court. Id.

North Dakota law defines an "action" as a "proceeding in a court of justice." N.D.C.C. § 32-01-02. "A civil action is commenced by the service of a summons." N.D.R. Civ. P. 3. The North Dakota Supreme Court has held that an administrative tax intercept proceeding conducted before a state agency is not an "action" under state law. Guthmiller v. Dep't of Human Services, 421 N.W.2d 469, 471 (N.D. 1988). Although filing a claim under N.D.C.C. ch. 32-12.2 is a necessary prerequisite to bringing a court action for damages against the State, I agree with the Connecticut Supreme Court in Capers that filing a claim under chapter 32-12.2 is not part of a court action under North Dakota law.

As also discussed earlier, the term "discovery" in 23 U.S.C. § 409 has a litigation-related meaning and does not refer to the mere act of acquiring information. However, even within the context of litigation, "discovery" may be both formal and informal and it may occur both before suit is commenced and after. Both practitioners and courts distinguish between formal and informal discovery. See, e.g., Asllani v. Board of Education, 150 F.R.D. 120 (N. D. Ill.

1993); Geibel v. Sears, Roebuck and Co., 1996 W.L. 280065 (9th Cir. 1996) (unpublished opinion) ("We believe the broad term 'discovery' necessarily encompasses both formal and informal discovery means"; "informal discovery is often the most effective component of the overall discovery process") (citing Cotton v. Hinton, 559 F.2d 1326, 1332 (5th Cir. 1977)).

Although much discovery, both formal and informal, occurs after the commencement of a lawsuit, both the North Dakota Rules of Civil Procedure and the Federal Rules of Civil Procedure contemplate that both formal and informal discovery and investigation may, and in a number of cases must, occur prior to the service or filing of a lawsuit. For example, both North Dakota and Federal Rule of Civil Procedure 27 allow for the conducting of formal discovery prior to the commencement of a lawsuit. North Dakota Rule 27 is patterned after Fed. R. Civ. P. 27. Harmon v. Mercy Hospital, 460 N.W.2d 404, 406 (N.D. 1990). The rule permits perpetuation of testimony via the use of pre-suit depositions and "can also be used to obtain pre-complaint production of documents when 'the only thing likely to be lost or concealed is a paper or object that should be subject to inspection, etc., under Rule 34.'" Id. (citing Martin v. Reynolds Metals Corporation, 297 F.2d 49, 56 (9th Cir. 1961)).

Pre-suit discovery is also contemplated by both North Dakota and Federal Rule of Civil Procedure 11. F.R. Civ. P. 11(b) provides as follows:

> **Representations to Court.** By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--
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> **(1)** it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
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> **(2)** the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

> **(3)** the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
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> **(4)** the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(Emphasis supplied.) North Dakota Rule of Civil Procedure 11(b) is identical to the federal rule.

Both North Dakota and Federal Rule 11(b) require that a party submitting a pleading has performed an adequate and reasonable inquiry or investigation. The allegations and other factual contentions must have evidentiary support or be "likely to have evidentiary support after reasonable opportunity for further investigation or discovery." Id. Adequate pre-suit discovery has been recognized by the courts as necessary to comply with Rule 11. See, e.g., Patterson v. Winthrop-Breon Laboratories, 115 F.R.D. 478, 480 (E.D. Wash. 1986); Agristor Leasing v. McIntyre, 150 F.R.D. 150, 152 (S.D. Ind. 1993) ("'The principal function of the 1983 amendment to Rule 11 was to add the requirement of adequate investigation before filing a complaint.'" . . . "It is insufficient under the standards of Rule 11 simply to stake out a position and rely on the results of a post-filing discovery as a form of fishing expedition." . . . "[I]t follows that such evidence should be searched for and required before filing the lawsuit.") (Citation omitted.)

Rule 11 pre-suit discovery is often informal but still involves a fair amount of diligence. In Childs v. State Farm Mut. Auto. Ins. Co., 29 F.3d 1018 (5th Cir. 1994), the court discussed the pre-suit inquiry conducted by plaintiff's counsel and concluded that it was sufficient at that stage for Rule 11 purposes. The attorney had:

> interviewed his client, inspected the vehicle, visited the accident site, interviewed a fireman from the scene, interviewed the reporting officer, obtained the police report and reviewed the medical records. . . . Thus, at that time, [the plaintiff's attorney] could, within the bounds of Rule 11, sign a document certifying to the court that to the best of his knowledge, information and belief,

> formed after a reasonable inquiry, his client's claim was well-grounded in fact.

Id. at 1024-25.

In discussing the 1983 and 1993 amendments to Rule 11, Wright & Miller noted the following:

> The 1983 amendment to Rule 11 required the signer to certify that "to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact. . . ." According to the Advisory Committee Notes, the 1993 amendment recognizes that "sometimes a litigant may have good reason to believe that a fact is true or false but may need discovery, formal or informal, from opposing parties or third persons to gather and confirm the evidentiary basis for the allegation." Thus, new Rule 11(b)(3) states that the signer is certifying that "the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after reasonable opportunity for further investigation and discovery." However, as the Committee points out, "[t]olerance of factual contentions in the initial pleadings by plaintiffs or defendants when specifically so identified as made on information and belief does not relieve litigants from the obligation to conduct an appropriate investigation into the facts that is reasonable under the circumstances."

5(A) Charles Allen Wright and Arthur R. Miller, Federal Practice and Procedure, Section 1335 (2d ed. 1990).

Thus, in considering both the plain meaning of the term "discovery" and giving the term its appropriate technical meaning, I conclude that its use in 23 U.S.C. § 409 includes pre-suit inquiries, investigations, or discovery, whether formal or informal, engaged in under the provisions of the North Dakota or Federal Rules of Civil Procedure.

Pre-suit discovery is not required before a claim is filed under N.D.C.C. ch. 32-12.2. However, once a claim has been filed, which is itself a strong indication that a court action for damages will be commenced, any subsequent request for highway safety records by the person who filed the claim (or someone acting on the person's behalf)

can categorically be described as pre-suit discovery. As a result, it is my opinion that the open records exception in 23 U.S.C. § 409 applies to requests by persons who have filed claims for damages against the state under N.D.C.C. ch. 32-12.2 but who have not yet commenced an action in court.

- EFFECT -

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.

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ATTORNEY GENERAL

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