

**OPINION
62-118**

January 12, 1962 (OPINION)

GOVERNOR

RE: Insurance Commissioner - Report

Your letter of January 3, 1962, together with attached letters, has been received and the contents thereof duly noted. You make certain comments on our opinion issued to the State Insurance Commissioner on December 28, 1961, and also request further clarification of that opinion by asking several specific questions with regard thereto.

We shall not comment on your observations concerning our recent opinion to the Insurance Commissioner, but shall proceed directly to the questions you have posed which you wish to have answered.

- 1) Can I legally demand a report from Insurance Commissioner A. J. Jensen on his September 18, 1961 - October 14, 1961 trip made after authorization by me and for which his travel expenses have been reimbursed to him by the State?
- 2) Can I legally demand that such a report show the unauthorized insurance companies visited, or examined, the addresses of such insurance companies, the personnel contacted in such insurance companies, and the subject matter of discussion with personnel of such companies?"

We assume that when you ask if you can "legally demand a report" that you wish to know if the commissioner is under a legal duty to give you such a report. There is a vast difference between what one can demand and what one is entitled to receive.

For an answer to these two questions, please refer to our opinion issued to the State Insurance Commissioner on December 28, 1961. As stated therein, you can establish any reasonable condition precedent for determining the necessity of out of state travel. You state future travel requests will be supervised by you on the facts learned of the trip in question. If you believe this information is reasonable and would be helpful to you in determining the validity of future travel requests by the Commissioner, you might make such a report a condition precedent to the granting of future requests. You might have requested, as a condition precedent, that the commissioner give you a complete report on his return. The commissioner would then have been obligated to supply you with such a report. However, the commissioner would still have been under no duty to divulge confidential information which would be privileged by statute.

In your letter you state that we "neglected to point out that this section of the law (31-04-06) deals with testimony by witnesses in a court trial." We did not think it was necessary to elaborate on this point as we deemed it elementary that where a witness cannot be compelled to testify on such matters in court, neither could an administrative or executive officer compel such person to testify or disclose the information. It is our conclusion on matters of this

kind that administrative and executive officers do not have greater powers than the judiciary.

We believe a public officer cannot be examined by anybody as to confidential communications which the public officer in his sound discretion believes to fall within the privilege allowed by statute, except as a court might rule otherwise. You now say that you do not wish to know the text of his discussions, but only the subject of such discussions. You do know the general subject of such discussions. You do know the general subject of such discussions because this information was on the application for out of state travel which you approved. It is entirely possible that to further narrow down the subject of discussion might be just as harmful as disclosing the full conversations.

Section 31-01-06 was a part of the 1877 Code of Civil Procedure of the Dakota Territory and to this date remains substantially unchanged. There was some streamlining of the section by the various code revisors. A portion which was dropped is just as true today as it was then. Section 499 at Page 563 of this 1877 Code begins, "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases" Subsection 4 was exactly the same then as it is now.

You wish to know if Section 26-01-02(5) of the North Dakota Century Code would require that a record be made of Mr. Jensen's proceedings and a concise statement of each unauthorized insurance company or agency visited or examined by him on his trip. This portion of the law provides that it shall be the duty of the commissioner of insurance to preserve in permanent form a full record of his proceedings and a concise statement of each company or agency visited or examined. We believe, naturally, that the commissioner must comply with this subsection. However, it would be a question of fact as to what constitutes compliance. In any event, we do not see how this would affect his duty to transmit a written report on the subject to your office.

Of course, the records of the Insurance Commissioner are public records and as such are open to public inspection by virtue of section 44-04-18 of the N.D.C.C. The Legislature by this statute provided the public with the right and means of informing itself of the business in which it has an interest, in order that the citizen and taxpayer might examine public records to determine whether the public money is being properly spent, or for the purpose of bringing to the attention of the public irregularities in the handling of public matters. However, records which contain material made confidential by statute would not be open to public inspection.

You state that you are concerned by the extreme precedent which our opinion to the Insurance Commissioner sets forth, and as a consequence you ask the following questions:

- (1) Is there any information in state government operation which is privileged and confidential from the governor of our state?
- (2) If so, under what circumstances and in what departments might confidential information arise which is

legally unavailable to the governor of our state? (3) If certain state officials have the legal right to declare information confidential and unavailable to the governor of our state, who are these state officials and what laws set their offices above that of the Chief Executive in the framework of constitutional government? (4) What laws restrict the people's right to know? (5) What officers in state government have the final power to determine what information can be released to the public and what information can be concealed from the public?"

Since these questions are academic, at this time we will refrain from giving full answers as the questions are so broad and general in nature that they could best be handled by a treatise on the subject.

However, we do note that the Constitution of North Dakota, Section 83, provides that the duties of the Commissioner of Insurance and other constitutional elected officers "shall be prescribed by law." This means by the Legislature, the direct representatives of the people. We also note that the Governor in this respect, "shall take care that the laws be faithfully executed." (Constitution of North Dakota, Section 75.)

This brings us to the ultimate conclusion that the Legislature prescribes the duties of the constitutional elected officers and the Governor takes care that they are faithfully executed. As to the report in question, we are unable to find and statute imposing such duty. It necessarily follows that the Governor may not impose such duty in the absence of a statute. "Under the American system of government the chief executive has no prerogative powers, but is confined to the exercise of those powers conferred upon him by the constitution and statutes." (See 12 Corpus Juris, Section 402, P. 898.)

At this time, we will only say that as a general rule public records are open to the public. Also, we do not believe the term "public records" includes every scrap of written material possessed by a public official. There are, however, numerous statutes which limit the accessibility of some records in varying degrees. Most types of welfare aid records are available to only certain persons; records of the county court are available only to persons having business therewith; records which contain confidential communications are not open to public inspection. Of course, statutory authority must be present before this information can be withheld. Also, for some persons to have greater rights than any other member of the public, there must also be statutory or constitutional authority.

Confidential communications might be made to almost any public official in official confidence whereby a disclosure of such would result in injury to the public interests. Of necessity, each public official must be his own judge as to what confidential communications should not be divulged. Disclosure to another public official would tend to destroy the confidential nature of the communication. As we have said previously, we believe a competent court might pass on the public official's judgment in this regard.

We must be careful not to place undue emphasis on this subject of

confidential communications, for it might be misunderstood in some quarters and appear that the Insurance Commissioner is attempting to cover up some illegal activity. We take note of the fact that, except for the material he believes to be confidential communications, the Insurance Commissioner has stated to the press what he did on his trip. Most of the things he did are recited in our opinion to the Commissioner. We also note from the commissioner's letter to you that the Insurance Commissioner has always offered to discuss this entire matter with you in his office at any time. While we are not commending the Commissioner on his decision in this regard, we are also not going to advise him that he must do something which we believe he is not required by statute to do.

You state that you regard our opinion as establishing an extremely dangerous precedent by permitting the concealment of information. We believe that a truly dangerous precedent would be established if we permitted any state official to exercise powers that were not given to him by law. If you are dissatisfied, we note that under your powers and duties listed in section 54-07-01(2) that you shall acquaint the Legislature with any imperfect remedy so as they may change the laws if they see fit.

We trust the foregoing information will be useful to you in discharging your duties as governor.

LESLIE R. BURGUM

Attorney General