

**OPINION
68-525**

November 6, 1968 (OPINION)

Mr. Richard B. Thomas

Ward County State's Attorney

RE: Veterans - Discharge Papers - Not Public Records

This is in reply to your letter of October 14, 1968, in which you request an opinion relative to the accessibility and examination of records of discharge filed with the clerk of the district court.

The following facts and questions have been submitted:

This office has been requested to obtain an opinion regarding the accessibility to records of discharge filed with the Clerk of District Court. In the past the Clerk of District Court has adopted a policy that the records were not public and therefore, refused the public the privilege of examining the records.

It is my understanding, however, that a number of counties have adopted the policy of allowing examination of the discharge record.

I can find nothing in section 11-17-01 insofar as allowing a discretionary power to refuse examination of public records, if this is determined to be a public record.

Therefore, we request an opinion from your office as to the accessibility by the general public as to this particular record."

While not specifically noted in your letter, it is assumed that your reference to "discharge" means discharge papers from one of the branches of military service of the United States.

Provision for the recording of such documents is set forth in section 37-01-34 of the North Dakota Century Code which provides as follows:

RECORDING OF DISCHARGE PAPERS. It is hereby provided that those discharged from the national guard, the army, the marine corps and other branches of the armed forces of the United States may record their discharges from such armed forces, a certificate issued in lieu thereof, duly authenticated and certified copies thereof, or duly certified records of their service and discharge from such armed forces in the office of the clerk of the district court of the county in which they reside, without payment of any fee whatsoever, and such recordings shall have the same force and effect as the recording of other instruments. One certified copy of such discharge shall be furnished, without payment of any fee whatsoever, upon request, to the veteran or to his next of kin." (emphasis supplied)

Section 44-04-18 of the North Dakota Century Code provides for access to public records:

ACCESS TO PUBLIC RECORDS. Except as otherwise specifically provided by law, all records of public or governmental bodies, boards, bureaus, commissions or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records, open and accessible for inspection during reasonable office hours."

In construing section 44-04-18, the Supreme Court of North Dakota stated in *Grand Forks Herald v. Lyons*, 101 N.W.2d. 543 (1960):

We do not believe that any of the designations refer to or include records of county courts. Counsel for the plaintiff and appellant contends that county courts come within the designation 'agencies of the state.' If the legislative assembly had intended that the provisions of this law should be so broad as to include the county courts, it would have been a simple matter to say so. We have examined the legislative proceedings which resulted in passage of this law, and nowhere do we find any indication that the legislature intended 'agencies of the state' to include the courts or to include anything except those departments, agencies, and bureaus of the state which it clearly included, such as 'governmental bodies, boards, bureaus, commissions, * * * or political subdivisions.' The legislature no doubt intended to make information available to the public relative to the spending of public monies and the handling of public business. And that is all that it intended." (emphasis supplied)

The above language would appear to indicate that this provision is not applicable to courts generally. The Supreme Court in this decision also considered the provisions of section 27-07-36 of the North Dakota Century Code providing that records of the county court "shall be open to inspection during office hours by persons having business therewith" did not mean such records were open to public generally.

We must note, with regard to the above case, that the records involved were those concerned with probate and did not involve the matter of documents filed with the clerk of the district court. Therefore, the statement of the Court in the *Lyons* case, *supra*, concerning the public becomes important. The Court stated, with regard to section 44-04-18, page 546:

What the legislature was attempting to accomplish was to provide the public with the right and the means of informing itself of the conduct of the business in which the public has an interest, in order that the citizen and taxpayer might examine public records to determine whether 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."

While section 11-17-01 of the North Dakota Century Code which prescribes the duties of the clerk of court does not specifically state that such officer has discretionary power to refuse examination of records to the public, it does imply that matters filed and deposited in this office shall be kept and preserved according to law:

DUTIES OF THE CLERK OF COURT. The clerk of the district court shall perform the following duties:

1. Take charge of all books, papers, and records, which are filed or deposited in his office, and safely keep and dispose of the same according to law;
2. * * * through 14. * * *
5. Keep such other records and perform such other duties as are prescribed by law." (Emphasis supplied.)

The question then becomes whether a discharge from one of the branches of military service of the United States, upon being filed, creates a record of such nature that it would come within the scope of records which are to be open to public examination. There appears to be no governing statute with regard to the nature of the record of discharge as far as the clerk of the district court is concerned. However, and with regard to the office of veterans' affairs, section 37-18-11 of the North Dakota Century Code, as amended, provides:

RELEASE OF INFORMATION AND RECORDS - CONFIDENTIAL NATURE. All records and papers pertaining or relating to veterans which are transmitted by the United States government to the department of veterans' affairs shall be kept and maintained by said department under the following provisions and conditions:

1. * * * through 12. * * *
3. Separation documents evidencing service in the armed forces of the United States will be considered confidential and privileged, anything contained in subsection 4 through 10, notwithstanding. Examination of such records will be limited to authorized employees of the department and information entered thereon will be disclosed only to interested governmental agencies for the purpose of assisting veterans and their dependents to obtain the rights and benefits to which they may be entitled." (Emphasis supplied.)

It would appear that separation papers would be of a confidential nature and that the recording of same would be for purposes of preserving a record for the individual concerned rather than for the information of the public at large. In this respect and in view of the holding in the Lyons case, supra, it would appear that such records would not, as a matter of law, be available to examination by the public. While section 11-17-01 of the North Dakota Century Code, prescribing the duties of the clerk of court, does not state that such officer has discretionary powers in refusing examination of the records of his office, it does impose the duty of keeping and

preserving matters filed "according to law."

It is also to be noted, however, that section 37-01-34 (supra) provides that discharge papers "may" be recorded. This implies that it is a discretionary matter with the person so discharged from military service and as such does not impose upon him a mandatory recording of such papers. If the person concerned exercises his prerogative and records his discharge papers of his own act, it would appear that the confidential nature of such discharge and information therein contained would then be waived. This must be distinguished, however, from the situation where such discharge records are filed as received from the department of veterans' affairs or other agency of the United States as it would then appear that the provisions of section 37-18-11 (supra) would then make such records confidential.

Obviously the main residual problem is the difficulty of ascertaining whether the discharge records were recorded by the individual or by one of the agencies of the government; a fact which would seem to substantiate a different result. We are not aware that the recording of such discharge papers would of itself reflect the person or agency affecting the recording. For this reason it would appear that if such facts could not be readily ascertained or established by the record itself, all such recordings would be entitled to confidential handling by the clerk of court and not be open to the public.

It is therefore our opinion that the filing of discharges and separation papers from any of the branches of military service of the United States does not create a public record as contemplated by section 44-04-18 of the North Dakota Century Code providing for access to public records. It is our opinion that the clerk of the district court may refuse the public the privilege of examining the record of such discharges and separations from military service of the United States if facts are not readily ascertainable from the record as to the person or agency effecting the recordation.

HELGI JOHANNESON

Attorney General