

OPINION  
72-343

December 1, 1972 (OPINION)

The Honorable William L. Guy  
Governor  
State Capitol  
Bismarck, ND 58501

Dear Governor Guy:

This is in response to your letter in which you state the following:

"We are in the process of establishing an officer policy toward the records of the Governor's Office that are contained in the files. I do not refer to such records as Industrial Commission hearing tapes, or minutes of the Commission, or ledgers containing House and Senate bills, or ledgers of the State Board of Pardons, or Proclamation ledgers, or Executive Order ledgers, or appointment ledgers, or extradition ledgers, or audit report and examination report ledgers. I refer to those files and correspondence which have been given a six-year or less total retention rating by the Secretary of State.

"Archivists and historians tell me that the best single place to record the ebb and flow of state government is through the voluminous correspondence that comes to and goes from the Governor's Office. This material is invaluable to scholars. Archivists have asked that absolutely nothing be thrown away.

"I have contracted with the University of North Dakota to receive all of the Governor's Office files that have a six-year or less retention rating by the Secretary of State. I have been advised by the Secretary of State that storage at the University of North Dakota does not qualify under the Records Management Act because the University is administered by the Board of Higher Education, which is separate, under the Constitution, from the Executive Branch. It seems to me that this is splitting hairs and does not follow the intent of the law. The intent of the law certainly was to protect these records and to make them available to historians and students.

"The State Historical Society has neither the personnel nor the physical facilities to index and protect these records. I believe it would be a serious mistake to have them sent to the Historical Society.

"I am asking you for your opinion as to whether or not the Governor's Office records can be stored at the University of North Dakota."

Chapter 54-46 of the North Dakota Century Code was enacted by chapter 333 of the 1961 Session Laws and with it came into being a relatively new concept of "record management". It would thus appear that any policies or practices heretofore followed would not necessarily be controlling except as same may be in harmony with the provisions of

chapter 54-46.

One of the crucial statutory provisions is found in section 54-46-07 which provides as follows:

"54-46-07. RECORDS NOT TO BE DAMAGED OR DESTROYED. All records made or received by or under the authority of or coming into the custody, control or possession of public officials of this state in the course of their public duties are the property of the state and shall not be mutilated, destroyed, transferred, removed or otherwise damaged or disposed of, in whole or in part, except as provided by law." (emphasis supplied)

The phrase "except as provided by law" suggests there may be other provisions covering the destruction, transfer or disposition of public records. The only provisions found that specifically pertain to public records are section 46-04-20 which was in effect at the time section 54-46-07 was adopted, but has been repealed by chapter 312 of the 1971 Session Laws and is to a great degree incorporated into what now constitutes section 54-46-08, section 11-13-17 pertaining to county records, and section 44-04-12 pertaining to the delivery of property and records to successor. Other than chapter 54-46, we are not aware of any provisions of law which governs the disposition, destruction or transfer of public records. For that matter, we find no provision governing the transfer of records in chapter 54-46, except possibly under the broad meaning of the term "disposed".

Section 44-04-12 of the North Dakota Century Code provides as follows:

"44-04-12. PUBLIC PROPERTY MUST BE DELIVERED TO SUCCESSOR. Unless otherwise specifically provided by law, every officer elected or appointed under the laws of this state, on going out of office, shall deliver to his successor in office all public moneys, books, records, accounts, papers, documents, and property in his possession belonging or appertaining to such office."

However, we note that section 54-46-01 provides that the administrator shall promulgate such rules and regulations as are necessary or proper to effectuate the purposes of this chapter. The term "except as otherwise provided by law" could have reference to rules and regulations adopted by the administrator, but to our knowledge no rules or regulations have been adopted under this section.

The term "disposed of" has variable meanings. In section 54-46-07 it is used in connection with a number of other terms such as destroyed, transferred or damaged. The same term is used in section 54-46-08, as amended by chapter 512 of the 1971 Session Laws, which provides as follows:

"54-46-08. DISPOSAL OF RECORDS. No type or class of record shall be destroyed or otherwise disposed of by any agent of the state, unless it is determined by the administrator, after

consultation with the official or department head concerned, the attorney general, and a representative of the historical society, that the type or class of record is unnecessary and has no further administrative, legal, fiscal, research, or historical value. The administrator shall annually survey the state agencies and, if he shall find that any agency has failed to dispose of any records which have been determined to have no further value pursuant to the provisions of this section, he shall order the disposal of such records."

In this section it is used in a slightly different context which could leave the impression that it may have a different meaning, but in closer examination it becomes apparent that the term "disposed of" was used in its broad concept in both instances.

We are also inclined to believe that the term "disposed of" also includes transfer because no other provision is found in chapter 54-46 which specifically pertains to transfers. We are not inclined to consider the term "disposed of" to be a synonym of the term "destroyed" as found in section 54-46-08 because of its use in connection with the term.

While no rules or regulations have been adopted specifically for records of state offices, a policy has been developed. Under this policy, the head of the department proposes the disposition or disposal of certain records by enumerating them on a form prepared by the administrator. The suggested list is submitted to the State Historical Society for their approval or disapproval or comments. The list is then submitted to the Attorney General for his approval, disapproval or comments. After the State Historical Society and the Attorney General have designated their approval, disapproval or comments, the administrator either grants or disapproves authority to dispose of the records as set forth in the list.

Apparently this procedure is employed to satisfy the requirements of section 54-46-08.

In examining the provisions of chapter 54-46 and specifically section 54-46-08, it becomes clear that the administrator is vested with the authority to grant permission for the destruction or disposition of public records. This section it is noted, requires the administrator, before reaching a decision, to consult with the Attorney General and with a representative of the Historical Society, the governmental organization. But the final decision rests with the administrator. The consultation with the Attorney General apparently is for the purpose of determining whether there is further legal need for the records. The consultation with the Historical Society is for the obvious purpose of determining whether the records have any further historical value. The ultimate decision, however, rests with the administrator.

If the administrator finds or concludes that the proposed list of records or certain items contained in the list have historical value, he may grant permission to transfer such items to the Historical Society under the implied powers granted to him.

The proposed transfer to the University of North Dakota in the

absence of other authority apparently would be governed by the provisions of section 54-46-08. We are not aware of any other provision of law which would apply to the proposal set out in your letter. The Legislature, however, could provide for transfers from one state agency to another. Under the present existing laws it is contemplated that the records remain with the office except as provided for in section 54-46-08.

Under the existing statutes, it is our opinion that we cannot as a matter of law state that the administrator must agree to transferring the records to the University of North Dakota. It would also appear that a transfer without his approval is not in accordance with the existing statutes.

The records in question we are assuming are those coming within the definition of subsection 1 of section 54-46-02 and as such do not involve any "personal records", which would not be governed by chapter 54-46 of the North Dakota Century Code.

I trust this answers your inquiry.

Sincerely yours,

Helgi Johanneson

Attorney General