

**OPINION
73-352**

June 21, 1973 (OPINION)

The Honorable Ben Meier

Secretary of State

State Capitol

Bismarck, ND 58501

Dear Mr. Meier:

This is in response to your letter of May 23, 1973, with regard to depositing of official state papers with the North Dakota State Historical Society.

You inform us that as Records Management Administrator for the State of North Dakota, you have designated the State Historical Society as the repository for all state official papers. You state that all of the official state papers are to be deposited with the Historical Society as a central gathering place for them.

You state that as an ex officio member of the Historical Society you would like our opinion as to whether the Historical Society can send or loan these original papers to any university for indexing and cataloging.

You inform us that the Legislative Assembly of 1973 passed Senate Bill No. 2079, which will become law July 1, 1973. Said bill creates and enacts section 54-46-08.1 of the North Dakota Century Code to provide as follows:

"54-46-08.1. PRESERVATION OF RECORDS. The administrator shall transfer any records subject to disposal pursuant tot he provisions of this chapter to the state historical society. Should any college or university library within this state request such records, duplicate copies of specified record will be made available under such terms mutually agreed upon."

We note with some interest that Senate Bill No. 2079 as originally introduced provided:

"54-46-08.1. PRESERVATION OF RECORDS. The administrator may transfer any records subject to disposal pursuant to the provisions of this chapter to the state historical society or to any college or university library within this state where adequate facilities exist for the preservation of such records."

We note that the current language of the bill was introduced as an amendment to the bill shown at page 217 of the 1973 Senate Journal.

You inform us that it is your conclusion that no original records can be transferred to any university or college, and that they shall

remain the property of the Historical Society and only copies can be transferred.

You ask our opinion on the matter.

Section 54-12-01 of the North Dakota Century Code does not authorize this office to issue opinions to members of the State Historical Society as such, noting, however, that section 55-01-01 of the North Dakota Century Code makes the Secretary of State an ex officio member of the State Historical Board required to "take care that the interests of the state are protected", it is possible that in a proper case you would be entitled to an official opinion of this office as such ex officio member of the State Historical Board. However, from the context of chapter 54-46 of the North Dakota Century Code as amended to date, as a whole we would assume that you are entitled to an official opinion on the entire matter as Records Management Administrator.

Senate Bill No. 2079 does not create an entirely separate new section, for example, a section 54-46-14 of the North Dakota Century Code. Rather, it adds a first decimal to a preexisting code number. On such basis, we think it necessary to consider the provisions of section 54-46-08 of the 1971 Supplement to the North Dakota Century Code in construing what will be section 54-46j08.1 of the 1973 Supplement to the North Dakota Century Code. Said section 54-46-08 provides:

"54-46-08. DISPOSAL OF RECORDS. No type or class of record shall be destroyed or otherwise disposed of by any agency 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 an 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."

The term "disposal" is defined in Black's Law Dictionary, Revised Fourth Edition, page 557 as:

"Sale, pledge, giving away, use, consumption or any other disposition of a thing. C. B. Norton Jewelry Company v. Maddock, 115 Kan. 108, 222 p. 113, 114. To exercise control over; to direct or assign for a use; to pass over into the control of someone else; to alienate, bestow or part with. Popp v. Munger, 131 Okl. 282, 268 p. 1100, 1102."

Webster's New Twentieth Century Dictionary Unabridged, Second Edition, gives even broader definitions, but we note that they include such things as:

- ** * * 4. a giving away, transfer; bestowal
- 5. a disposing of; getting rid of * * * ."

We note that the reference in the new statute is to "records subject to disposal pursuant to the provisions of this chapter". While the chapter contains many provisions with regard to the handling of records, and in the broadest sense of the term disposition of same, the only specific reference therein to "disposal" of records is the heretofore quoted section 54-46-08. Under the terms of that provision "records" become so "subject to disposal" only after you, as administrator after consultation with the official or department head concerned, this office, and a representative of the Historical Society, determine that the type or class of record is unnecessary and has no further administrative, legal, fiscal, research or historical value. We would note that said section 54-46-08 indicates that your determination, after such consultation, is in effect the same as if no "further value".

We would thus agree with that part of your conclusion to the effect that the material so determined to be subject to "disposal" and so "transferred" to the State Historical Society would become in effect the property of the Historical Society and that same would be entitled to such incidents of ownership thereof, as the right to custody, possession and control of such "records". We would agree also with the implications to the effect that the Historical Society must make duplicate copies of specified records upon request and appropriate terms. In view of the legislative amendment to the new bill we think it obvious that the State Historical Society would have the basic right to such incidents of ownership, as right to custody, possession and control of same, rather than any college or university library.

We find no basis in the terms of the new act, or its legislative history, to conclude that same could not be sent or loaned to any University for indexing and cataloging or other purposes for short periods of time, through obviously, where the historical society did not wish to temporarily part with possession and custody, they would be required to furnish duplicates.

To this point herein we have just considered papers "subject to disposal" pursuant to section 54-46-08 of the 1971 Supplement to the North Dakota Century Code, and "transferred" to the State Historical Society pursuant to section 54-46-08.1 of what will be the 1973 Supplement to the North Dakota Century Code.

We note, however, the very broad powers given to you as "State Records Administrator" pursuant to sections 54-46-03, 54-46-04, and 54-46-05 of the 1971 Supplement to the North Dakota Century Code. We note also that the opening statement of your letter is that as Records Management Administrator for the State of North Dakota, you have designated the State Historical Society as the official repository for all state official papers. You state also that all of the official state papers are to be deposited with the Historical Society as a central gathering place for them. We would thus assume that most of the papers that the Historical Society will receive will be papers and documents other than those "subject to disposal" pursuant to section 54-46-08 of the North Dakota Century Code, and other than those papers "subject to disposal transferred" to the State Historical Society pursuant to section 54-46-08.1 of what will

be the 1973 Supplement to the North Dakota Century Code. Such papers not so "subject to disposal" pursuant to section 54-46-08 and not "transferred" pursuant to the new bill would necessarily be governed by the provisions of section 54-46-07 of the 1971 Supplement to the North Dakota Century Code. Said section 54-46-07 provides:

"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." (underlining ours)

In conclusion, it is our opinion that papers, documents, etc., deposited with the State Historical Society pursuant to your direction as Records Management Administrator for the State of North Dakota, under the authority granted to you by sections 54-46-03, 54-46-04, and 54-46-05 of the 1971 Supplement to the North Dakota Century Code, may not be sent or loaned to any University for indexing or cataloging, by virtue of your original directions for deposit with the State Historical Society. It is further our opinion that papers, documents, etc., determined to be "subject to disposal" pursuant to section 54-46-08 of the 1971 Supplement to the North Dakota Century Code, and that will, after the effective date of Senate Bill No. 2079, be "transferred" to the State Historical Society pursuant to said Senate Bill, may, at the discretion of the State Historical Society, in the absence of contrary directions from the Records Management Administrator, be sent or loaned to any University for indexing and cataloging.

We hope the within and foregoing will be sufficient for your purposes.

Sincerely yours,

Allen I. Olson

Attorney General