

**OPINION
74-348**

December 4, 1974 (OPINION)

Mr. Ben Meier
Secretary of State
State Capitol
Bismarck, ND 58505

Dear Mr. Meier:

This is in response to your request for an opinion pertaining to the length of time certain corporate records must be kept under various conditions and on the following questions:

1. Can domestic business corporations, after they have remained inactive or have been dissolved for a certain number of years, be destroyed without microfilming or copying? Note: I am aware that annual reports may be disposed of after they have remained on file for six years.
 - a. The same question regarding nonprofit corporations?
 - b. The same question regarding professional corporations?
 - c. The same question regarding cooperative associations?
 - d. The same question regarding foreign corporations and foreign cooperatives of all types?
2. If the answer to any of the above questions is "yes" what would be the recommended time period(s)?
3. If we converted to microfilm or data processing methods for all corporate and cooperative records would it be necessary to keep the original documents?
4. If the answer to question 2 is "no" could we microfilm inactive or dissolved corporate records after they had remained in that character for a certain length of time and thereafter destroy the originals? If the answer to this question is "yes" what would be the recommended time period(s)?
5. If the answer to questions 2 and 3 is "no" due to the language of the corporation acts would there be any problems in your opinion with asking the legislature to change the language so that microfilmed or other copies could be filed in lieu of the original?

You call our attention to numerous provisions in title 10 pertaining to records that should be filed with the Secretary of State's office, which substantially provide as follows: "file one of such duplicate originals in his office", or "file one of such certificate in his office", or "he shall file such statement in his office."

The North Dakota legislature enacted chapter 54-46.1 which authorizes the establishment of a central microfilm unit. The Secretary of State was designated as the administrator of the microfilm program. The provisions of chapter 54-46.1 do not specifically authorize any state agency to microfilm certain records as does section 11-10-19 which authorizes the microfilming of county records whenever the board of county commissioners determines it expedient to do so. The North Dakota Supreme Court in Rausch v. Nelson, 144 N.W.2d., 519 held that if the county commissioners use the authority in section 11-10-19, the register of deeds was permitted to microfilm records in his office. We do not find a similar specific provision in the microfilming program under chapter 54-46.1 nor are we aware of any general authority granted to state agencies to microfilm their records except by implication. We believe the implication in chapter 54-46.1 is sufficiently strong enough to warrant the conclusion that state departments may microfilm their official records. Significantly the legislature in 1961 enacted chapter 54-46 which is known as the Records Management Act. This act was passed 10 years before the microfilming act and in section 54-46-03 it provides as follows:

"State records administrator. The secretary of state is hereby designated the "state records administrator", hereinafter called the "administrator". The administrator shall establish and administer in the executive branch of state government a records management program, which will apply efficient and economical management methods to the creation, utilization, maintenance, retention, preservation and disposal of state records."

The foregoing provision read in context with the other provisions of chapter 54-46 and chapter 54-46.1 suggests that the Secretary of State develop a program which would pertain to the management of records including the retention, preservation and disposal of state records. It also suggests that the record management program cover, amongst other things, the microfilming of state records.

In this regard it is further observed that sections 31-01-01.1 and 54-46.1-03 both provide for the admissibility of microfilm records in judicial or administrative proceedings. Section 31-08-01.1, amongst other things, provides that the "original may be destroyed in the regular course of business unless its preservation is required by law." The underscored language seems to imply that microfilming may be accomplished and the original destroyed unless the law specifically provides that original records shall be maintained. Section 31-08-01.1 applies to state government.

It appears to us that the legislature in enacting chapters 54-46 and 54-46.1 recognized that storage and other related items could become very critical with the passage of time and increase in the number of records, and endeavored to provide a general plan, system or program to meet the anticipated problems.

In view of the provisions of the central microfilm unit and the records management act, we necessarily conclude that the head of the department must determine the time, circumstances and when records should be microfilmed, unless or until the state records

administrator has adopted rules and regulations to properly effectuate the records management act which would specify otherwise.

The legislature having provided that microfilm be admissible as evidence on the same basis as the original would have been admissible, we do not believe that the retention of the original for any specific period of time as being significant before it is microfilmed. The retention of original records before same are microfilmed under this concept becomes a decision of the head of the department except in instances where the law specifically provides that the original be retained for a specific number of years or indefinitely.

In view of the conclusions it is not necessary to answer each question specifically, except as to question no. 1 to which our reply is "no".

It is our opinion that corporate records of which either the original or duplicate must be filed with the Secretary of State, may be microfilmed, and the original or duplicate original may be destroyed.

We cannot, as a matter of law, state that the originals may not be microfilmed and then destroyed before the passage of a specific number of years. Once the conclusion is reached that a record may be microfilmed, it makes little difference when it is accomplished. The decision as to when the originals should be microfilmed necessarily would take into account administrative matters and matters which are not necessarily legal in nature.

In addition to the foregoing, we wish to further observe that the provisions of chapter 54-46 coupled with the provisions of chapter 54-46.1 may have the inescapable conclusion that the Secretary of State, as the state records administrator, is expected to promulgate rules and regulations necessary to properly effectuate the records management program which out of necessity would include microfilming of records.

If there are any unresolved questions as to the retention of original records, we believe that same should be resolved by legislation because other than legal questions are involved.

Sincerely,

Allen I. Olson

Attorney General