

**OPINION
74-606**

April 8, 1974 (OPINION)

The Honorable Ben Meier
Secretary of State
State Capitol
Bismarck, ND 58501

Dear Mr. Meier:

This is in reply to your request of date March 22, 1974, for our opinion regarding the disposition of the Financing Statements for the Uniform Commercial Code.

You state that under section 41-09-42, section 2 (except as provided under subsection 6) North Dakota Century Code, it is stated that a Financing Statement is effective for five years from the date of filing. The effectiveness of a filed Financing Statement lapses on the expiration of the first year unless a Continuation Statement is filed prior to the lapse, and that thereafter, it is still good for 60 days after the expiration date.

You ask that if there is no Continuation Statement filed, then one year after the expiration date could be the Financing Statement be pulled from the files and destroyed, except for the ones provided for in subsection 6?

You ask whether the same applies to the Termination Statement. You state that referring to section 41-09-43 of the North Dakota Century Code, it is your conclusion that one year after a termination is filed, you can remove the Financing Statement from the file and destroy it. You ask whether this is correct in our opinion.

You indicate that the reason you are requesting this opinion is because of the lack of space for filing in your office.

We disagree with your statement in the last sentence of paragraph 2 of you letter to us, that "Thereafter it is still good for 60 days after the expiration date", on filings made after January 1, 1974. While this statement would be correct under the old law shown in the basic volume of the North Dakota Century Code, same has since been amended and under the new law as shown in section 41-09-42 of the 1973 Supplement to the North Dakota Century Code, the 60 day period applies only to insolvency proceedings.

The language of the statute as to removal of lapsed filings has also changed since the printing of the basic volume of the Code. The current language of section 41-09-42 of the 1973 Supplement to the North Dakota Century Code in this regard is:

"Unless a statute on disposition of public records provides otherwise, the filing officer may remove a lapsed statement from the files and destroy it immediately if he has retained a microfilm or other photographic record, or in other cases after one year after the lapse."

The language of the statute as to removals on basis of termination statements has also changed since the printing of the basic volume of the Code. The current language of section 41-09-43 of the 1973 Supplement to the North Dakota Century Code in this regard is:

"If the filing officer has a microfilm or other photographic record of the financing statement, and of any related continuation statement, statement of assignment, and statement of release, he may remove the originals from the files at any time after receipt of the termination statement, or if he has no such record, he may remove them from the files at any time after one year after receipt of the termination statement."

Looking to the statute on disposition of public records we note that sections 54-46-07 and 54-46-08 of the 1973 Supplement to the North Dakota Century Code provide:

"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."

"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 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."

There may be some question as to the applicability of chapter 54-46 of the 1973 Supplement to the North Dakota Century Code, to Uniform Commercial Code Filings, (see definition of "record" in subsection 1 of section 54-46-02), however, there would appear to be no substantial problem in complying with the quoted provisions of this chapter. Compliance with the quoted provisions of sections 41-09-42 and 41-09-43 of the 1973 Supplement to the North Dakota Century Code, would be in accordance with section 54-46-07 destroying same "as provided by law". This opinion constitutes the determination of the Attorney General that the type or class of record here concerned (after lapse plus one year) is unnecessary and has no further administrative, legal, fiscal, research or historical value.

Thus, in response to your specific questions it is our opinion that, if no continuation statement is filed, then one year after the expiration date the Financing Statement could be pulled from the files and destroyed, (except for the ones provided for in subsection 6 of section 41-09-42) as to filings made subsequent to January 1,

1974. As to prior filings, we would note that both period of expiration and time for destruction varies. Thus, under chapter 389 of the 1969 Session Laws, a filed financing statement stating a maturity date of five years or less, is effective until such maturity date and a period of sixty days thereafter, others are effective for a period of five years from filing, and may be removed upon lapse and destroyed. You might also check the Session Laws for 1965 and for 1967 as to lapse and removal dates for documents filed after those dates and before the next amendment. It is at least arguable that the legislative changes in the period, filings are effective, and period before destruction, were not intended to and do not change period of effectiveness, and period before destruction, of documents filed prior to change in statute. Five years from filing plus sixty days, would be the maximum period of effectiveness of any uncontinued filing, under any of these laws. Likewise, one year after the expiration date (or expiration date plus 60 days) would be the maximum period between expiration date and pulling from the files and destroying the filed document. We would thus suggest that any uncontinued filing could be destroyed six years and sixty days after the initial filing, without any questions as to date of filing (except for subsection 6 filings) in the absence of retention of microfilm records. Maximum period in the event of retention of microfilm records would be five years and 60 days. See also in this regard section 37, chapter 343, 1973 Session Laws quoted below. If your current records management program would require removal of more documents than can be removed under this ruling, we would suggest your asking our opinion as to filings made between each period of changes in the law.

In response to your second specific question, referring to section 41-09-43 of the North Dakota Century Code, as amended by chapter 343 of the 1973 Session Laws, in the absence of microfilming, the filing officer may remove filing statements from the files at any time after one year after receipt of the termination statement. We note, however, that unlike the heretofore considered provisions of section 41-09-42, subsection 2 of section 41-09-43 under the current amendment merely provides for removal from the files, it makes no specific provision for destruction or other disposition of the removed document. We would note further that under the provisions of the prior act, as shown in the basic code volume and the 1965 Session Laws, specific provision is made for sending or delivering the financing statement, and any continuation statement, statement of assignment or statement of release pertaining thereto, back to the secured party. Thus, neither the new amendment nor the old statutory provision in specific terms authorize destruction of the removed documents. While section 37 of chapter 343 of the 1973 Session Laws, (the current amendment of the act) does provide:

"Section 37. GENERAL RULE OF TRANSITION. Transactions validly entered into after the effective date of Title 41 and before the effective date of this Act and the rights, duties, and interests flowing from those transactions remain valid after the effective date of this Act and may be terminated, completed, consummated, or enforced as required or permitted by this Act. Security interests arising out of those transactions which are perfected on the effective date of this Act remain perfected until they lapse as provided in this Act, and may be

continued as permitted by this Act, except as stated in section 40 of this Act."

There is no provision in the 1973 Act specifically depriving the person previously entitled to the return of documents of such right. On such basis while termination statement plus one year would permit removal of the financial statement, etc., from the files, as to documents filed prior to January 1, 1974, there are no provisions made for destruction of same, and we would conclude that in the absence of agreement by the secured party, same should not be destroyed. As to filings and terminations made after January 1, 1974, while there is no provision for return of the documents, there also is no provision for destruction, and we would assume, in the absence of agreement from the secured party same also could not be destroyed, immediately after the one year period.

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

Sincerely yours,

Allen I. Olson

Attorney General