

**OPINION  
78-124**

September 7, 1978           (OPINION)

Mr. Ronald G. Splitt  
LaMoure County State's Attorney  
Kessel, Splitt and Kessel  
19 1st Avenue North  
LaMoure, ND 58458

Dear Mr. Splitt:

This is in response to your letter of August 19, 1978, concerning microfilming of and access to records of the County Register of Deeds Office In LaMoure County. In your letter you set forth the following facts and questions:

The LaMoure County Commissioners recently approved the microfilming of all of the records of the County Register of Deeds Office and have purchased the necessary equipment for the same. An initial 35 mm master film roll will be made of all previously recorded instruments by the 3M company and will be placed in a local bank vault for safekeeping. The cost of the 35mm master film roll will be \$7,000.00. The local abstract firm has offered to pay for coowner of said master film role with LaMoure County and with the further stipulation that access and use of said master film roll shall be restricted to LaMoure County and the abstract firm unless both parties agree otherwise.

My question is whether or not this joint type of ownership of public records is legal and if so whether or not the restrictive use of said master roll would be illegal as being against public policy. I can find nothing in the Century Code that assists me in this matter and would ask that you please provide me with an opinion on the same for the County Commissioners.

You do not state specifically in your letter what the purpose of the microfilming and creation of the master film roll is, whether any original documents will be destroyed and whether or not original instruments subsequently presented for recording will be microfilmed or copies placed on file, or both. However, for the purposes of this opinion we assume microfilming will be made of all previously made records of the Registrar himself, such as tract indexes, grantor and grantee indexes and reception books, as well as all instruments previously presented to the Registrar for recording and filing. We also assume from your letter that the purpose of the microfilming is for the general preservation of records and that in the event of loss or damage to the original records and instruments, the microfilmed copy would be used as evidence of the transaction.

We believe that this aspect, the purpose for which the microfilmed copies have been made, is important in determining their legal status. Also relevant is the fact that they have been made at the direction or with the approval of the Board of County Commissioners,

wholly or partially at public expense. Important also is the status of the original records and instruments themselves, many, if not all of which, are either required by law to be kept or are required by law to be lodged in the Registrar's office if they are to have an intended legal effect. The purpose of making such original records, in this case to assure ownership of property and to assure the finality and predictability of business transactions, is also relevant.

Based on all of the above considerations, we believe that in most instances, the microfilmed copies of the records of the County Register of Deeds are indeed public records. There is, of course, no single definition of what constitutes a "public record", and not every document constitutes a "public record" simply because it is in the possession of a public officer. "It is the nature and purpose of the document that determines its status." *Linder v. Eckerd*, 152 N.W. 2d 833 (Iowa, 1967).

Thus, while a case-by-case determination of the nature and purpose of both the original records copies and the microfilmed pictures would have to be made to finally determine their status, we believe that it may be said in most cases, under the assumptions made above, that microfilmed copies of records of the County Register of Deeds Office, approved and paid for by the County Commissioners, are public records and are entitled to all the protection of public records and public property under the laws of this state.

While there are no provisions generally prohibiting the sale or ownership interests in public records, we do not believe that merely because the Board of County Commissioners created the microfilmed records, that they are thereby vested with sufficient authority and indicia of ownership themselves to be able to offer the documents for sale. Once copies have been created as a "public record" they are indeed just that, a record belonging to the public and may not be destroyed, given away, or sold without the authority of state law. The very nature of a private interest in these records does violence to the concept of a "public" ownership and benefit.

Moreover, as evidenced by the terms under which the local abstract firm proposes to take part ownership of the microfilm, conflicts between public and private ownership may well arise. In the case of this proposal, the right to control private property, which the local abstract firm would seek to invoke in the form of restricted access to the microfilm, may well be in contradiction to North Dakota Century Code Section 44-04-18, which provides:

44-04-18. ACCESS TO PUBLIC RECORDS - PENALTY.

1. 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.
2. Violations of this section shall be punishable as an

infraction.

Other conflicts between the public's right of inspection and private ownership rights in the master film role may also arise, wholly outside of any agreement executed between the abstract firm and the Board of County Commissioners.

In conclusion and in direct response to your letter, we conclude that the sale of a joint ownership interest in the master microfilm role of the records of the County Register of Deeds is not Authorized by the laws of this state. We trust the foregoing adequately answers your questions.

Sincerely,

ALLEN I. OLSON

Attorney General