

**OPINION  
61-116**

December 28, 1961            (OPINION)

GOVERNOR

RE: Insurance Commissioner - Report

Your letter of December 21, 1961, requests an opinion from this office on the following set of facts:

On August 21, 1961, you applied for out of state travel authorization from Bismarck to Las Vegas, Los Angeles, San Francisco and Seattle, from September 18, 1961 to October 14, 1961. This trip was for the purpose of investigating unauthorized insurance companies. While on this trip, you attended the meeting of the National Association of Fire Chiefs at Las Vegas, an association of which you are a member by virtue of being State Fire Marshal. You also met with the Insurance Commissioner of another state on a matter of reciprocity and contacted our examiners working in California. You also called on a number of insurance commissioners in regard to unauthorized insurance companies.

The Governor has demanded a detailed written report on your trip. You wish to know if you must comply with this request.

It would not appear that the Governor can compel you to give him a written statement setting forth the names of persons you visited and a full text of the conversations you had with these individuals.

It might be contended that subsection 1 of section 54-07-01 of the North Dakota Century Code grants the Governor such powers. This subsection states the Governor "shall supervise the official conduct of all executive and ministerial officers." We believe this subsection means that the Governor shall superintend or oversee with power of direction those acts a person does to discharge the functions of a particular office. While your trip was an act constituting official conduct, the Governor's inquiry regarding the trip could not be considered supervision of official conduct. It is obvious that while present or future conduct can be supervised, acts previously completed are inherently incapable of supervision.

Section 54-06-10 of the North Dakota Century Code states no expenditure for out of state travel shall be allowed to state employees unless the Governor shall give advance authority in writing.

Being that the Governor has the authority to approve travel outside the State, he may make any reasonable demand consistent with good government as a condition precedent. As to the conditions precedent, or for that matter supervising official conduct, we must recognize the distinction between constitutional elective officers and others, even though section 54-07-01 and 54-06-10 make no such distinction. The former are elected directly by the people and are answerable to the people every two years and are subject to removal only by

impeachment. (Art. VIV, N.D. Const. and Chp. 44-09), whereas, the latter are not elected or directly responsible to the people and are removable generally by action initiated by the Governor or judicial proceedings.

It would thus follow and be more logical and reasonable under our form of government that official acts of constitutional elective officers involving discretion be given greater latitude and weight.

However, after authority has been given for such travel by the Governor, any additional checking into the nature of the trip would be done by and at the discretion of the State Auditing Board. We note in section 54-14-03 that "The Board (State Auditing Board) in its discretion, may require the filing of any additional information which it may deem necessary to the proper understanding and audit of any claims, account, bill or demand against the state."

We note also that section 31-01-06(4) provides: "A public officer cannot be examined as to communications made to him in official confidence when the public interests would suffer by the disclosure." Consequently, you would not only be justified in withholding the text of any such discussions you may have had on your trip from the Governor, but it could amount to a breach of your official duty not to do so. You must use your official judgment to determine exactly what communications constitute confidential communications from which the public interests would suffer by disclosure until such time as a court might pass on the material.

You, of course, might as a matter of courtesy, give the Governor any information he wishes as long as you do not disclose communications made to you in official confidence when the public interest would suffer by the disclosure.

It is our opinion that the Governor has no right to demand from you a written statement containing the names of the persons you talked to and a full report of the discussions you had with those people. These confidential communications should also be excluded in the written report you must furnish the Governor on or before the fifteenth day of November each year, according to section 26-01-02(7).

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Attorney General