

Opinion No. 60-181

September 30, 1960

BY: OPINION of HILTON A. DICKSON, JR., Attorney General

TO: Mr. Joseph F. Halpin State Records Administrator State Records Center 404 Montezuma Street Santa Fe, New Mexico

QUESTION

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1. Are counties and municipalities included in the term "agency" as that term is defined in the public records act?
2. Are county and municipal records included in the term "public records" as that term is defined in the public records act?

CONCLUSIONS

1. No.
2. No.

OPINION

{*575} ANALYSIS

The public records act, Chapter 245, Laws of 1959, compiled as N.M.S.A., 1953 Comp., §§ 71-6-1 to 71-6-17 (P.S.), defines the term "agency" in § 71-6-2 thusly:

"D. 'Agency' means any state agency, department, bureau, board, commission, institution, or other organization of the state government."

This enumeration includes only portions of the state government, or other bodies that are under the direct supervision of, or are branches of, a portion of the state government. We are of the opinion that counties and municipalities are not included in the term "agency", as it is defined in the public records act.

Our holding that counties and municipalities are not agencies under the public records act does not necessarily mean that the records of such political subdivisions are not "public records," as that term is used in the act. "Public records" is defined in § 71-6-2 as:

"C. 'Public records' means all books, papers, maps, photographs or other documentary materials, regardless of physical form or characteristics, made or received by **any governmental agency** in pursuance of law or in connection with the transaction of public business and preserved or appropriate for preservation by the agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the government, or because of the informational and historical value of data contained therein. Library or museum material made or acquired solely for reference, circulation or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents are not included."

On first reading, this definition seems broad enough to include all public records, whether filed with state agencies, or with municipalities or counties. Other portions of the act, and other statutes, however, lead us to the conclusion that municipal and county records are not included in the term "public records."

"Public records" are those made or received by any "governmental agency." To begin with, the section defining "agency" clearly includes only state agencies. If the term "governmental agency" is read in conjunction with the definition of "agency", it is reasonable to conclude that "governmental agency" means "state governmental agency."

Further corroboration of this {576} view is found in § 71-6-2, in the definition of "records center":

"E. 'Records center' means the central records depository which is the principal state facility for the storage, disposal, allocation or use of non-current records of **governmental agencies**, or materials obtained from other sources."

Here, again, the term "governmental agency" is used. Keeping that in mind, we now turn to the section dealing with the state records center, § 71-6-8, which provides, among other things:

"The center, in accordance with the regulations established by the administrator and the commission, shall be the facility for the receipt, storage or disposition of all inactive and infrequently used records of **present or former state agencies or former territorial agencies** which at or after the effective date of this act (71-6-1 to 71-6-17) may be in custody of any state agency or instrumentality, . . ."

Thus, the section defining "records center" uses the term "governmental agencies," and the section establishing the records center says that it is only for the receipt and storage of records of state agencies or former territorial agencies. This seems to indicate that the two terms, "governmental agency" and "agency" are used interchangeably in the act, and that both refer only to agencies of the state government.

There is still further corroboration. If we refer to the title of the act, Chapter 245, Laws of 1959, we find that it is an act relating to the care, custody, preservation, and disposition of public records. If it were intended that the act be the sole authority on the subject of public records, and that it should include all public records, even the records of counties and municipalities, we should not expect to find any other statutes relating to the same subject. Yet, §§ 71-4-10 and 71-4-11 deal specifically with the destruction of certain county records, prescribing the period of time they must be retained, and providing that they must be offered to the librarian of the University of New Mexico before they may be destroyed. The legislature, in enacting the public records act, was certainly aware of these sections, and could have repealed them if it saw fit, for by Section 19 of Chapter 245, Laws of 1959, the legislature did in fact repeal § 71-4-9 dealing with disposal of public records after they have been microfilmed. Having retained §§ 71-4-10 and 71-4-11, the legislature has indicated its intention to maintain a separate method for the disposal of county records.

Moreover, the whole tenor of the public records act seems to be directed toward records of state agencies. Section 71-6-4 gives the state records commission power to decide, by majority vote, disagreements between the administrator and any **state officer**, but does not mention any other officer. Section 71-6-7 gives the state records administrator power to inspect and survey the records, and the records management and disposal practices, of **agencies**. We have already mentioned that § 71-6-8 establishes the state records center as the facility for the receipt and storage of **state and former territorial agencies**. Section 71-6-9 and § 71-6-11 both speak of determinations to be made by the administrator, the attorney general, and the head of an **agency**. Section 71-6-12 deals with the disposition of records on the termination of a **state agency**. Finally, § 71-6-17 provides that the destruction, sale, or other disposition of a public record belonging to a state agency without prior approval of the administrator, shall be a misdemeanor, and prescribes a punishment.

This is not to say that certain sections of the act are not also applicable to all public records, even those held by counties and municipalities. But in every such case, the language of the section is made to specifically include **all** {*577} public records. Thus, § 71-6-6 makes the state records administrator the official custodian of public records transferred to him from **any public office of the state or from any other source**. This only gives the administrator the authority to accept such records, and imposes on him the duties of custodian and trustee of them. Section 71-6-10 prescribes what is to be done in case of disagreement as to the legal, administrative, or historical value of **any records in the custody of a public officer**. This section must be read in the light of § 71-6-15, which specifically grants to all public officers the right to avail themselves of the state records disposal system after the public officer has microfilmed the records in his custody. In other words, when, and if, a public officer sees fit to offer his records to the state records administrator, then § 71-6-10 comes into play to determine what shall be done with those records in case of disagreement among the administrator, the attorney general, and the public officer involved. We cannot read this section, or any other section, as giving the state records administrator the power to compel the surrender of

records, or otherwise to regulate the records management and disposal practices of county and municipal officers.

One other statute deals specifically with all public records. Section 71-6-16 permits the attorney general to replevy all public records or files of any public office, which the state still has title to, or an interest in, and which may have passed out of the official custody of the state, its agencies or instrumentalities.

We are not unaware that the state once had a public records system that embraced every record of every public office in the state. See N.M.S.A., 1953 Comp., §§ 4-12-15 to 4-12-18. Those statutes were repealed by Section 19, Chapter 245, Laws of 1959, the present public records act. After reviewing all the relevant statutes that our research has disclosed, and after careful examination of the specific provisions of the public records act, we feel constrained to hold that county and municipal records are not "public records" within the meaning of the public records act.

By: Norman S. Thayer

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