

Opinion No. 69-139

December 4, 1969

BY: OPINION OF JAMES A. MALONEY, Attorney General James C. Compton, Jr.,
Assistant Attorney General

TO: Mr. Joseph F. Halpin, Records Administrator, State Records Center & Archives,
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QUESTIONS

1. Are the records accumulated by an elected State Official during his term of office public records as defined by the New Mexico Public Records Act?
2. May an elected State Official, after his term has expired, dispose of his official records in any manner other than that prescribed by the New Mexico Commission of Public Records?

CONCLUSIONS

1. See analysis.
2. See analysis.

OPINION

{*223} ANALYSIS

The term "public records" as it is used in the Public Records Act, Sections 71-6-1 et seq., N.M.S.A., 1953 Comp., is defined at Section 71-6-2, N.M.S.A., 1953 Comp. (1969 P.S.) as follows:

"C. 'Public records' means all books, papers, maps, photographs or other documentary materials, regardless of physical form or characteristics, made or received by any 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 of the state library, state institution and state museums, extra copies of documents preserved only for convenience of reference, and stocks of publications and processed documents are not included;"

The term "agency" as it is used in this section is defined at Section 71-6-2, supra, as follows:

"D. 'Agency' means any state agency, department, bureau, board, commission, institution or other organization of the state government, the territorial government and the Spanish and Mexican governments in New Mexico;"

It should be noted that the definition of "agency" does not specifically refer to elected state officials. Compare Section 71-7-2 (A), N.M.S.A., 1953 Comp. (1969 P.S.). This office, however, has consistently concluded that the term "public records" does include {*224} the records of various public officials as that term is used in the Inspection of Public Records Act, Sections 71-5-1 to 71-5-3, N.M.S.A., 1953 Compilation. See Opinions of the Attorney General, No. 68-110, issued October 31, 1968; No. 67-57, issued April 6, 1967; No. 63-55, issued May 20, 1963; No. 61-137, issued December 27, 1961; No. 61-7, issued January 12, 1961. The conclusion of these opinions is that "public records" are those records which are necessary or incidental to fulfilling the public officer's duties which are imposed upon his office by operation of law.

While the definition of "public records" in Section 71-6-2, supra, does not specifically include records of elected state officials, it seems unlikely that the Legislature intended that the records of such elected officials would not be considered as public. Since it has been the opinion of this office that records of such elected state official would be available for inspection by the public, it is consistent to conclude at this time that the records of elected state officials are "public records" within the meaning and scope of the Public Records Act. Policy reasons also dictate that records of elected state officials should be considered as public records both for the purposes of inspection by the public and for the informational and historical value of such data as may be contained in those records.

Not every record kept by an elected state official, however, is a public record. Papers and memoranda in the possession of such officials which are not required by law to be kept by such officials as an official record would not be categorized as public records. Generally, reports of private individuals to government officials, correspondence of public officials to private individuals and memoranda of public officials made for their own convenience are not public records. See Opinion of the Attorney General, No. 67-57, supra. Whether a record is or is not a public record, therefore, depends upon the type of record in question and the reason for its existence.

The answer to the second question depends upon the type of record in question. If the record is deemed to have been personal and actually made but unnecessary to fulfilling the elected state official's duties which are imposed upon his office by operation of law, then the elected state official may dispose of such records which are not public. Section 71-6-8, N.M.S.A., 1953 Compilation, provides that the State Records Center shall be the facility for storage and disposition of all public records and that records which are not required by law, and would not be considered public under the above analysis, may be kept elsewhere. It is not unusual for official records to contain personal matters. But insertion of private matters does not transform public records into private documents. Opinion of the Attorney General, No. 61-7, supra. Records which contain both official

and personal matters are still public records and should be in the custody of the State Records Commission at the State Records Center.

After the term of office for an elected state official has expired, he may dispose of those records which are not public under the above analysis in any manner that he may elect. The State Records Center is authorized to accept and store such non-public records as may be donated to it by a former elected state official, subject, of course, to any reasonable restrictions or requirements concerning their use by other persons. Section 71-6-24, N.M.S.A., 1953 Compilation (1969 P.S.). As to public records, however, their disposition is controlled by the Public Records Act. Section 71-6-9, N.M.S.A., 1953 Compilation Disposition of public records without the prior written approval of the State Records Administrator subjects a person who has so disposed of such records to criminal prosecution. Section 71-6-17, N.M.S.A., 1953 { *225 } Compilation. After his term of office has expired, therefore, an elected state official may not dispose of his official public records in any manner other than that prescribed by the New Mexico Commission of Public Records.