PUBLIC RECORDS

TITLE AND CUSTODY – STATE RETAINS TITLE UNTIL DISPOSITION IS AUTHORIZED BY STATUTE – HALL OF RECORDS COMMISSION IS RESIDUARY CUSTODIAN.

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This is in response to your request for our opinion concerning the jurisdiction of the Hall of Records Commission over public records of this State, regardless of where they are found. As discussed below, it is our view that public records of this State remain public property until their disposition is authorized by statute. Public records that have been disposed of without such authorization remain the property of the State, regardless of their location.[1] Moreover, except for those public records that have been lawfully disposed of or that have been lawfully retained by other public custodians, the Hall of Records Commission is the lawful custodian of the State's public records. In the absence of express statutory authority, we think that the Commission lacks the authority to purchase or otherwise pay for the return of records to which the State retains title. However, to facilitate the return of public records held by others, the Commission may wish to seek authority from the General Assembly to pay a finder's fee for their return or, where appropriate, to reimburse these others for the storage and protection of the records.

I

Ownership and Disposition of Public Records

A public record may be defined as a permanent, written memorial of something said or done that a public official is authorized or required to make or keep. *See* 76 C.J.S. *Records* §1 (1952); 66 Am. Jur. 2d *Records and Recording Laws* §1 (1973). The making or keeping of such records may be expressly provided for by the Constitution [*see, e.g.*, Article II, §23 (Secretary of State to keep record of official acts) and Article XII, §1 (Board of Public Works to keep journal of proceedings)] or by statute [*see, e.g.*, Courts and Judicial Pro-

ceedings Article §2–201 (Clerk of Court to make permanent record of court proceedings and to record papers filed with office and subject to recordation requirements)].

Even in the absence of a constitutional or statutory provision, a public officer may have the authority and, indeed, the duty to make or keep, as public records, documents pertaining to his or her office. This principle was recognized in *Coleman v. Commonwealth*, 25 Grattan (66 Va.) 865 (1874), in which the Supreme Court of Appeals of Virginia said:

> "Whenever a written record of the transactions of a public officer in his office, is a convenient and appropriate mode of discharging the duties of his office, it is not only his right but his duty to keep that memorial, whether expressly required so to do or not; and when kept it becomes a public document – a public record belonging to the office and not the officer is the property of the state and not of the citizen, and is in no sense a private memorandum." *Coleman* at 881.

As the *Coleman* case indicates, once a record acquires a public character, it becomes public property. *See also In re Molineux*, 69 N.E. 727, 728 (N.Y. 1904); *People v. Mills*, 70 N.E. 786, 789 (N.Y. 1904). Thus, public records made or kept under the authority of the State are the property of the State.

Moreover, even in the absence of a statutory provision, the general rule is that public records must be maintained by their official custodian and may not be removed from the custodian's office. *Evans v. Horan*, 52 Md. 602, 606–607 (1879). Accordingly, this office has said repeatedly that public records may not be destroyed without express statutory authority. 60 *Opinions of the Attorney General* 626, 629–30 (1975); 55 *Opinions of the Attorney General* 49, 50–51 (1970); 50 *Opinions of the Attorney General* 289, 290–91 (1965); 39 *Opinions of the Attorney General* 218 (1954); 35 *Opinions of the Attorney General* 251, 253 (1950); 31 *Opinions of the Attorney General* 124, 125 (1946); 25 *Opinions of the Attorney General* 713, 714 (1940). Similarly, these records may not otherwise be disposed of, as by sale, without express statutory authority. *See, generally*, 76 C.J.S. *Records* §34 (1952); 66 Am. Jur. 2d *Records and Recording Laws* §10 (1973).

The law clearly favors the preservation of public records, *see, e.g.*, Article 27, §45A (recently enacted criminal penalty for destruction of public records); consequently, authority to dispose of them cannot be implied, but must be express. Moreover, those who deal with public offices are charged with knowledge of the extent and limitations of their power, *Inter-City Land Co. v. Baltimore County*, 218 Md. 80, 85 (1958); it follows that those who have acquired public records that were disposed of without express statutory authority can be charged with this knowledge. As the public character of these records is ordinarily apparent on their face, persons acquiring them may also be said to have actual knowledge of their origin. Under these circumstances, such persons cannot acquire good title to public records that have not been lawfully disposed of, and neither can subsequent purchasers or donees. *See Lemp Brewing Co. v. Mantz*, 120 Md. 176, 181 (1913).

Our conclusion that the State remains the owner of public records not lawfully disposed of applies not only to public records made or kept under the authority of the State but, also, to public records made or kept by colonial officials. Although the Court of Appeals has not had occasion to address this matter, it was the subject of a case recently decided by the Supreme Court of North Carolina, *State v. West*, 235 S.E.2d 150 (N.C. 1977), in which the court reviewed the law governing the ownership and subsequent disposition of public records. In that case, the State of North Carolina sought to recover two bills of indictment from the colonial era, which were in the possession of a private party. The court concluded that these indictments had become part of the public records owned by the Crown, that the State of North Carolina was the successor to this property interest, and that there was no showing that the Crown or State ever intended to dispose of these documents; consequently, the court permitted the State to recover these documents, even though the possessor had given valuable consideration for them to a manuscript dealer.

In its decision, the court noted that these documents, on their face, gave notice to all the world that they were part of the court records of the colony and, therefore, the property of the state. The court also concluded that only the state's legislature could provide for reimbursement to the possessor for

the expenses he incurred in acquiring and maintaining the documents.[2]

II

Custody of Public Records

Custody over the State's public records, unless lawfully disposed of or retained by other public custodians, is vested in the Hall of Records Commission. Article 54, §§1 through 13 of the Maryland Code.

The Hall of Records was established in 1931 by Chapter 487, Laws of Maryland 1931, as part of the commemoration of the 300th anniversary of the founding of Maryland. *See Magruder v. Hall of Records Commission*, 221 Md. 1, 3 (1959). The Commission itself was created in 1935. Chapter 18, Laws of Maryland 1935. Under Article VII, §5 of the Constitution, as adopted in 1867, the Commissioner of the Land Office was made the residuary custodian of historical records not belonging to any other office, 20 *Opinions of the Attorney General* 271, 273 (1935), and retained certain ancient records for a time after the creation of the Hall of Records, *Magruder*, 221 Md. at 4. However, the position of Commissioner of the Land Office was abolished in 1966 by Chapter 489, Laws of Maryland 1966 (ratified November 8, 1966), and references to it were removed from the Constitution in 1978 by Chapter 681, Laws of Maryland 1977 (ratified November 7, 1978).

Article 54, the current law relating to the Hall of Records Commission, broadly declares that "[a]ll papers, records, relics and other memorials connected with the history of Maryland not required for the necessary operations of any other office shall be under the supervision of and belong to said Commission" [§3(a)]. This provision clearly makes the Commission the residuary custodian of the State's public records. The statute also gives the Commission authority to collect and maintain old public and private records [§3(a)]; requires the transfer to the Commission of court house records made before April 28, 1788, certain records formerly in the custody of the Commissioner of the Land Office, and the records of defunct State agencies [§§5 and 6]; and permits State and local officials to transfer public records and other items not in current use to the Commission [§7]. With certain ex-

ceptions, public records that the Commission declines to accept may be destroyed on the written approval of the Commission [§8].

Although the Commission has authority to "purchase . . . any records . . . it may deem worthy of preservation" [§4], it is our view that this authority does not include the authority to "purchase" property that the State already owns. However, to facilitate the return of public records that have inadvertently, improperly, or unlawfully passed into the possession of private parties, the Commission certainly can seek additional authority from the General Assembly to permit it to pay a finder's fee or other reimbursement, where appropriate, for the recovery of such records.[3]

III

Conclusion

In summary, it is our opinion that once records become public records of the State they remain public property until they are disposed of in accordance with express statutory authority. This applies equally to records that became public property as a result of being made or kept by colonial officials as it does to records made or kept under the authority of the State. Thus, parties who acquire public records that have not been lawfully disposed of do not acquire good title to these records and neither do subsequent purchasers or donees. Moreover, custody over records that remain public property is vested in the Hall of Records Commission, except for those lawfully retained by other public custodians.

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[3] Thus, with respect to the court records that were the subject of a 1971 replevin proceeding brought by the Clerk of the Circuit Court for Frederick County against a manuscript dealer in the Superior Court in Baltimore, it would be improper to return these records to the dealer in the absence of a statute expressly providing for the disposition of these records.

[2] Similarly, with respect to the court records for Frederick County, referred to in note 1 above, which included records from the colonial era, we advise you against returning them to the dealer unless you determine that they were disposed of in accordance with statutory authorization. Although the replevin proceeding in that case was dismissed for want of prosecution after the writ had been granted, it is our understanding that the dealer does not claim to be the rightful possessor and simply wishes to be indemnified by the State for the expenses he incurred. As to the last, *see* note 3 below and accompanying text.

[3] We recognize that the ability to pay a finder's fee or other reimbursement would assist you greatly in the recovery of missing public records: such payment might well serve to avoid lengthy (and costly) litigation, as well as the possibility that private trading in older, more valuable public records will go "underground". Nevertheless, the issue of whether the State should be authorized to make such payment is a legislative matter that will have to be addressed by more specific legislation than that now existing.