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ATTORNEY GENERAL OPINION NO. 85-6

TO: Mr. Tom D. McEldowney, Director
State Department of Finance

STATEHOUSE MAIL

Per Request for Attorney General Opinion

QUESTIONS PRESENTED

1. We have records for two banks which were liquidated by the FDIC in 1955 and whose records were returned to us by FDIC. We also have records for a bank closed in 1923 as well as files containing charters, articles of incorporation, and other documents for institutions that were closed, bought-out or converted to federal charters. We would like to get rid of these records. Are these records subject only to Idaho Code § 67-5751, and the regulations of Central Records Management or are we required to retain these records indefinitely?

2. In connection with the closure of a savings and loan association, the Director was ordered by the Fifth District Court in 1970 to destroy ledgers and other records of the association in 1975. The Department failed to destroy the

records at that time. Should the records be destroyed now pursuant to the court order or must destruction be pursuant to rules of the Department of Administration?

3. In connection with this same closure in 1970, the court ordered unclaimed funds to be transferred to the State Treasurer pursuant to Idaho Code § 26-919, now superseded. This transfer was made. The Auditor said that this money must now be sent to the Tax Commission under the Unclaimed Property Law (ch. 5, title 14). Must that money be transferred to the Tax Commission? If so, is it the responsibility of this Department or the Treasurer to make that transfer? If so, is the transfer to be made under the current or prior Unclaimed Property Law?

4. What is the relationship between the Unclaimed Property Law and liquidation procedures in the Bank Act (ch. 10, title 26)? Is the Bank Act procedure superseded by the Unclaimed Property Law? To what extent does the new Unclaimed Property Law supersede the time limits of the prior Unclaimed Property Law?

CONCLUSION

1. With the exception of records ordered destroyed by court order, bank records which the Department of Finance no longer needs may be destroyed or transferred to the State Historical Society pursuant to the procedures provided by Idaho Code §§ 67-5751 through 67-5753.

2. Records previously ordered destroyed by court order should be destroyed pursuant to that order.

3. The Unclaimed Property Act applies to unclaimed funds transferred to the State Treasurer. The responsibility for compliance is on the holder of the funds, which is the State Treasurer in this instance. The current Unclaimed Property Act governs the procedure to be followed.

4. The Bank Act is in effect and governs treatment of unclaimed funds during liquidation. Upon completion of liquidation and transfer of unclaimed property to the State Treasurer pursuant to the Bank Act, the State Treasurer should file an unclaimed property report and transfer funds to the

unclaimed property account as provided in the Unclaimed Property Act.

ANALYSIS

Question No. 1

The bank records described in question 1 may be destroyed pursuant to the provisions of Idaho Code §§ 67-5751 through 67-5753. These statutes empower the Director of the Department of Administration to provide rules and procedures for the retention of state records and the destruction of state records. Idaho Code § 67-5751 defines state records as:

> Any document, book, paper ... or other material regardless of physical form or characteristics, made or received pursuant to law or in connection with the transaction of official state business.

It appears from the question presented that the records were received pursuant to law and in connection with the transaction of official state business. Therefore, the general provisions of Idaho Code § 67-5751 apply unless statutes specifically relating to bank records provide a different result.

Our research discloses no such specific banking statutes which govern destruction or retention of bank records by the Department of Finance. Therefore, the general statutes, Idaho Code §§ 67-5751 through 67-5753 apply.

Question No. 2

The records previously ordered destroyed by the district court should be destroyed pursuant to the court's order. Idaho Code §§ 67-5751 through 67-5753 discussed above, which govern destruction of records, were adopted in 1974 and 1975. Prior to this time there were no laws governing retention or destruction of general records held by state agencies. Accordingly, prior to adopting the records destruction statutes, control, retention and destruction of bank records would have been left to the discretion of the Department of Finance after consideration of administrative, regulatory and public needs.

However, in this instance, the matter was submitted to the district court and the resulting orders of the court must be obeyed. The State Constitution vests judicial power in the courts. Idaho Constitution, art. 5. The judicial power includes the power to finally determine controversies and provide an adequate remedy. See, e. g., Electors of Big Butte Area v. St. Bd. of Educ., 78 Idaho 602, 308 P.2d 225 (1957).

When the Director of the Department submitted the closure of the savings and loan to a court, he became subject to the orders of the court in that matter. Id. As the court ordered destruction of the records, they should be destroyed -- regardless of the fact that destruction is now some 10 years later than ordered.

Question No. 3

The third question addresses the status of unclaimed funds transferred to the State Treasurer after liquidation of a savings and loan association. The transferred funds are unquestionably unclaimed property. Idaho's Unclaimed Property Act is found at Idaho Code §§ 14-501 et seq. Idaho Code § 14-502 is the basic statute in Idaho's Unclaimed Property Act. That section provides in pertinent part:

> Property presumed abandoned -- General rule. -- (1) Except as otherwise provided by this chapter, all intangible property, including any income or increment derived therefrom, less any lawful charges, that is held, issued, or owing in the ordinary course of a holder's business and has remained unclaimed by the owner for more than seven years after it became payable or distributable is presumed abandoned.

Idaho Code § 14-511 makes the Unclaimed Property Act applicable to properties distributable in liquidation of business associations. That statute provides:

> Property of business associations held in course of dissolution. -- Intangible property distributable in the course of a dissolution of a business association which

> remains unclaimed by the owner for more than one year after the date specified for final distribution is presumed abandoned.

Idaho Code § 14-513 makes the Unclaimed Property Act applicable to government agencies, including the State Treasurer, providing:

> Intangible property held for the owner by a court, state or other government, governmental subdivision or agency, public corporation, or public authority which remains unclaimed by the owner for more than one year after becoming payable or distributable is presumed abandoned.

The burden of compliance with Idaho's Unclaimed Property Law falls on the holder of the property in question pursuant to Idaho Code § 14-517. "Holder" is defined in Idaho Code § 14-501 as the person in possession of the unclaimed property. The burden of compliance with the Unclaimed Property Law in this case then is on the State Treasurer. Pursuant to Idaho Code § 14-538, the current Unclaimed Property Law is the proper law of application to this problem. However, the prior law's enforcement and penalty provisions are specifically preserved.

Question No. 4

The fourth question requests clarification of the relation between the Bank Act, Idaho Code § 26-1001 et seq., and the Unclaimed Property Act, Idaho Code 14-501 et seq. The two Acts do not appear to conflict as to property which is reportable by the bank to the Unclaimed Property Administrator. The Idaho Unclaimed Property Administrator ["Administrator"] becomes a creditor of the bank and succeeds to the priority and status of the true owners of the unclaimed funds. In Epstein, McThenia & Forslund, Unclaimed Prop. L. and Rept. Forms, § 3.02, pp. 3-5 (Matthew Bender 1984), there is a discussion of this issue as follows:

> The right of the states to escheat or take custody of unclaimed property is generally considered to be derivative. In other

> words, the state takes the interest of the unknown or absentee owner.

Thus, the Administrator should be notified of bank insolvency pursuant to Idaho Code § 26-1016. The Administrator's claims for such unclaimed property should be treated as all other claims under Idaho Code §§ 26-1017 et seq.

We read Idaho Code § 26-1023 (which deals with distribution of unclaimed property after the liquidation is completed) as being consistent with Idaho's Unclaimed Property Act. There is no express conflict between the statutes. A transfer of the unclaimed property should be made to the State Treasurer pursuant to Idaho Code § 26-1023. The Treasurer then has a duty to comply with the Unclaimed Property Act. The State Treasurer should report the unclaimed property to the Administrator. This report should be made pursuant to Idaho Code § 14-517 in the report due next after the one-year holding period specified in Idaho Code § 14-513 has run. The Treasurer has six months afer filing the report to transfer physical possession of the unclaimed property to the Administrator pursuant to Idaho Code § 14-519.

AUTHORITIES CONSIDERED:

Idaho Constitution art. 4, § 2

Idaho Code §§ 14-501, 14-502, 14-511, 14-513, 14-517, 14-519, 14-538 (Unclaimed Property Act, ch. 5, title 14)

Idaho Code § 26-919

Idaho Code §§ 26-1001, 26-1016, 26-1017, 26-1023 (Bank Act, ch. 10, title 26)

Idaho Code §§ 67-5751 through 67-5753

Epstein, McThenia & Forslund, Unclaimed Prop. L. and Rept. Forms, § 3.02, pp. 3-5 (Matthew Bender 1984)

DATED this 19th day of November, 1985.

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