



OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

ATTORNEY GENERAL OPINION
2012-4

The Honorable Leslie Osborn
State Representative, District 47
State Capitol, Room 303B
Oklahoma City, Oklahoma 73105

April 11, 2012

Dear Representative Osborn:

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following questions:

A county does not make its electronic real property records available in a viewable format on its website. Instead, the county has contracted to provide the county assessor's electronic records to a company that puts the records in a viewable format on its website and makes the records available to the public for a subscription fee.

- 1. May the county provide copies of the records and have a link on its website to the company's web site without violating the constitutional prohibitions against using public resources to promote a private business if it receives a portion of the subscription fee in return?**
- 2. Does a county have the authority to be compensated for providing the county assessor's electronic records and maintaining an internet link to the company's website by receiving a portion of the subscription fee charged by the company?**

I.
INTRODUCTION

Your first question references prohibitions against using public resources to benefit a private company. In the scenario set forth in your first question the public resources involved would be the time and effort of county staff to produce the records and a link on the county's website. When analyzing whether a use of government resources unlawfully benefits a private entity Oklahoma courts have focused on two issues, whether the government action accomplishes a public purpose as mandated by Section 14 of Article X of the Oklahoma Constitution and whether the action constitutes a gift as prohibited by Article X, Section 17 with regard to

counties and Article X, Section 15, with regard to the State.¹ Accordingly, we will analyze whether, under the scenario presented in your first question, the county's actions satisfy these constitutional requirements. With regard to your second question, we will analyze the general authority of counties to charge fees for production of records of the assessor's office and generate income from a link on its website.

II. CONSTITUTIONAL RESTRICTIONS ON THE USE OF COUNTY RESOURCES

Subsection A of Article X, Section 14 of the Oklahoma Constitution provides in relevant part that taxes levied and collected by general laws shall be used for public purposes only:

Except as otherwise provided by this section, taxes shall be levied and collected by general laws, and for public purposes only, except that taxes may be levied when necessary to carry into effect Section thirty-one of the Bill of Rights.

Id.

In addition, Section 17 of Article X of the Oklahoma Constitution restricts the use of county resources:

The Legislature shall not authorize any county or subdivision thereof, city, town, or incorporated district, to become a stockholder in any company, association, or corporation, or to obtain or appropriate money for, or levy any tax for, or to loan its credit to any corporation, association, or individual.

Id. While Section 17 applies to counties, it has been recognized as being so similar in nature to Section 15, which applies to the State, that it has been referred to as a "version" of Section 15. *See In re Univ. Hosp. Auth.*, 953 P.2d 314, 320 (Okla. 1997). Accordingly, we will look to case law interpreting both constitutional provisions in analyzing the issues presented in your question. Subsection A of Article X, Section 15, which is the similar provision, restricts the use of funds by the State:

Except as provided by this section, the credit of the State shall not be given, pledged, or loaned to any individual, company, corporation, or association, municipality, or political subdivision of the State, nor shall the State become an

¹ With regard to the internet link issue, while your question did not specify the internet domain name associated with the county it is relevant to your inquiry in one respect. If the county web site is registered under the Internet GOV domain or ".gov," there are restrictions on private advertising which may be implicated by having a link to a private web site. The United States General Services Administration ("GSA") is the registrar for all .gov domain names in the United States. *See* 41 C.F.R. § 102-173.10 (2012). The general conditions currently posted at www.dotgov.gov expressly prohibit any .gov site from advertising for private entities. *See* <https://www.dotgov.gov/portal/web/dotgov/program-guidelines>. Therefore, any county web site with a .gov domain name could lose the .gov name if the link to a private company, association, corporation or individual is seen by the GSA as an advertisement or endorsement.

owner or stockholder in, nor make donation by gift, subscription to stock, by tax, or otherwise, to any company, association, or corporation.

Id.

A. Public Purpose

The test for determining whether the “public purpose” requirement in Section 14 has been met was established by several cases decided by the Oklahoma Supreme Court. One of the most prominent cases is *Way v. Grand Lake Ass’n*, 635 P.2d 1010 (Okla. 1981). “The meaning of ‘public purposes’ for which governmental exaction of money may be had is not within a narrow and restricted sense.” *Id.* at 1016 (quoting *Helm v. Childers*, 75 P.2d 398, 399 (Okla. 1938)). Additionally, *Way* stated, “the term ‘public purpose’ as used in constitutional provisions that taxes shall be levied for public purposes only, is synonymous with ‘governmental purposes,’ and means a purpose affecting the inhabitants of the state or taxing district as a community, and not merely as individuals.” *Id.* at 1015. *Way* also found that the constitutional definition of “public purpose” required that “the purpose must be performed by the state in the exercise of its governmental functions.” *Id.* at 1016.

The factual scenario in *Way* involved an appropriation of state funds to the Oklahoma Tourism and Recreation Department for the purpose of providing funding to private corporations to cooperate with the department in the promotion of tourism in Oklahoma. *See id.* at 1013-14. David Way, the Director of State Finance at the time, refused payment on claims submitted by the private corporations, and the corporations sought and obtained a writ of mandamus in district court directing Way to make payment on the claims. *See id.* at 1012. Way appealed and the Oklahoma Supreme Court applied Sections 14 and 15 of Article X to the subject appropriations. With regard to the issue of serving a public purpose the court noted the legislation’s clear statement of intent, which was to encourage the promotion of tourism by the corporations in cooperation with the Tourism and Recreation Department’s statewide program. *See id.* at 1013.

The legislation, under examination in *Way*, also required the corporations to submit appropriate plans and budgets for the expenditure of the funds to be approved by the Tourism and Recreation Department. *See id.* In fact, *Way* found that the detailed requirements and qualifications of the legislation along with the governmental controls and safeguards, were so integral to the plan under which the private corporations could receive the funding that the appropriations were in the nature of a unilateral contract between the State and the corporations. *See id.* at 1018. Given these detailed expressions of the legislative purposes and the restrictions and safeguards on how the funds could be spent by the corporations in furtherance of those purposes, *Way* concluded that the appropriations were for public purposes within the meaning of Section 14. *See id.*

Accordingly, when determining whether Section 14’s public purpose requirements are satisfied the Oklahoma Supreme Court has looked to elements such as the expression of a public purpose and whether that purpose is synonymous with a governmental purpose, the existence of controls and safeguards on how the private corporation will use the public resources to achieve the public

purpose, and the direct object of the appropriation or expenditure. The court has also held that the meaning of public purpose is not narrow and restrictive. *See id.* at 1015-16.

We now apply these standards to the scenario presented by your first question. One of the duties of a county assessor is to assess the value of real property in the county and maintain permanent records containing information about the property, the classification thereof, the assessed value of the property, and any improvements thereon. *See* 68 O.S.2011, §§ 2840, 2841. County assessors are also obliged to make paper copies of the real property records available to the public for certain prescribed fees. *See* 28 O.S.2011, § 60. In addition, the office of a county assessor falls within the definition of “public body” under the Oklahoma Open Records Act, which includes the following pertinent language:

[A]ny office, department, board, bureau, commission, agency, trusteeship, authority, council, committee, trust or any entity created by a trust, county, . . . or any subdivision thereof, supported in whole or in part by public funds or entrusted with the expenditure of public funds or administering or operating public property, and all committees, or subcommittees thereof.

51 O.S.2011, § 24A.3(2). The real property records maintained by a county assessor are within the definition of a “record” for purposes of the Oklahoma Open Records Act:

“Record” means all documents, including, but not limited to, any book, paper, photograph, microfilm, *data files created by or used with computer software, computer tape, disk*, record, sound recording, film recording, video record or other material regardless of physical form or characteristic, created by, received by, under the authority of, or coming into the custody, control or possession of public officials, public bodies, or their representatives in connection with the transaction of public business, the expenditure of public funds or the administering of public property.

Id. § 24A.3(1) (emphasis added). Therefore, one governmental purpose of a county assessor is to maintain real property records, including electronic records, and make those records available to the public. Accordingly, in a county where the assessor’s office itself does not make those records available in a viewable format on the county’s website, the production of copies of electronic records and having a link on the county’s website to make the public aware of the website of a company that makes the records available in a viewable format would satisfy a public purpose.²

² We concluded in a previous Opinion that a contract by a county assessor for the sale of public records, which are already regularly kept in computer-readable format to a company for a mere resale to the public, would be unlawful. *See* A.G. Opin. 96-26, at 83. The facts in your question are distinguishable in that the county is producing electronic copies of records, which it does not keep in computer-readable format on its website, to a company that will make the records available in an accessible internet format.

B. The Prohibitions on Gifts by Government

The test for determining whether a use of public resources constitutes a gift or loan of credit as prohibited by Sections 15 and 17 turns on the presence of consideration. “A gift within the meaning of this section [15] is a gratuitous transfer of the property of the state voluntarily without consideration.” *Hawks v. Bland*, 9 P.2d 720, 722 (Okla. 1932).

In *Burkhardt v. City of Enid*, 771 P.2d 608 (Okla. 1989), where Article X, Section 17 was applied, the court also found the presence of consideration in the private university’s agreement to remain operating and to accept restrictions on the expenditure of the funds received from the city in exchange for the campus property. “Although a municipality may be flexible in structuring its plans for economic development, it must obtain adequate consideration and accountability from a private actor in exchange for the expenditure of public funds.” *Id.* at 614. Therefore, with respect to the scenario presented in your questions, as long as the county receives adequate consideration in return for providing the electronic records and having a link on its website there is no violation of Article X, Section 17. In the scenario presented in your first question, the particular form of consideration is a portion of the subscription fee charged by the private company. We now address the issue raised in your second question; whether a county has the authority to receive this form of consideration, first for the production of electronic records, and second for the internet link.

III.

COUNTY AUTHORITY TO RECEIVE A PORTION OF THE SUBSCRIPTION FEE

Each county in the State of Oklahoma is a body politic and corporate. OKLA. CONST. art. XVII, § 1. With regard to the general authority of counties, Oklahoma has adopted the principles of Dillon’s rule³ rather than home rule. Under Dillon’s rule, local government:

[P]ossesses and can exercise the following powers, and no other: First, those granted in [a statute’s] express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the [local government],-not simply convenient, but indispensable.

In re Gribben, 47 P. 1074, 1075 (Okla. 1897). Furthermore, any fair and reasonable doubt concerning the existence of power is resolved by the court against the local government, and the power is denied. *Id.* See also *Shipp v Se. Okla. Indus. Auth.*, 498 P.2d 1395, 1398 (Okla. 1972) (stating counties have no inherent authority but possess only those powers granted in express words or necessarily implied therefrom).

Applying this rule to the facts presented in your question, we analyze the express authority a county has to receive fees from its assessor’s office records and its web site. With regard to the

³ Named after John Forrest Dillon, Judge, U.S. Circuit Courts for the Eighth Circuit, 1869 – 1879.

records of the county assessor's office, counties are expressly authorized to charge fees by two statutes. First, when providing records in paper form to parties other than the individual property owner, counties may charge the fees specifically authorized by 28 O.S.2011, § 60.

For furnishing all records available for copying; in paper form and in a size 8 1/2" x 14" or smaller, and in one color on white paper, per page the fee shall be as provided in the Oklahoma Open Records Act, Section 24A.1 et seq. of Title 51 of the Oklahoma Statutes; For furnishing standard maps; in paper form and in one color on white paper or blue line, per map and in the following standard sizes when available:

- | | | | |
|----|-------------------------------------|-------|---------|
| 1. | 'A' size approximately 8 1/2" x 11" | | \$5.00 |
| 2. | 'B' size approximately 11" x 17" | | |
| | 'C' size approximately 17" x 22" | | |
| | 'D' size approximately 22" x 34" | | \$7.00 |
| 3. | 'E' size approximately 34" x 44" | | \$10.00 |

Individual property owners obtaining records for their own records shall be exempt from the provisions of this section.

Id. Second, the relevant provisions of the Oklahoma Open Records Act to which Section 60 refers for paper copies smaller than 8 1/2" x 14" allow a copying fee of up to twenty-five cents (.25¢) per page, or one dollar (\$1.00) per page for certified copies. *See* 51 O.S.2011, § 24A.5(3). If the open records request is for a commercial purpose or causes excessive disruption, the Open Records Act allows the county assessor to charge a "reasonable" fee to cover the direct cost of the search and copying. *Id.* Specifically, the search and copying fees allowed by the Open Records Act that can be charged by a county assessor for the production of electronic and/or digital records are set by the State Board of Equalization.

- F. The Board shall set a fee or schedule of fees to be used by county assessors for the search, production and copying in electronic and/or digital format of property data, administration files, sketches and pictures for the real property maintained within the county assessors' computer systems for commercial purposes. Such fee or schedule of fees shall be uniform across the state to the extent possible with variances between the counties permitted to allow for the ability of various counties to produce data based on available technology, personnel and budget resources. The fee or schedule of fees shall not apply or be charged to individual property owners obtaining information on the owner's property for the owner's use. After establishing the fee or schedule of fees each year at its December 1 meeting, the Board shall review the fee or schedule of fees and make adjustments necessary to ensure uniform application to the extent possible across all counties and to take into account technological changes that may occur over time.

68 O.S.2011, § 2864. On December 1, 2011, the State Board of Equalization approved a rate of fifty dollars per hour for record productions in which the county provides the records in a format customized for the requesting party and a flat fifty dollar (\$50.00) fee for providing a copy of the electronic or digital records in the format in which they are normally kept.⁴

Where the language of a statute is clear it will not be subjected to judicial construction, but will receive the effect its language dictates. *Rogers v. Quiktrip Corp.*, 230 P. 3d 853, 859 (Okla. 2010). The language regarding a county's authority to charge fees for the production of electronic records of the assessor's office is clearly established by the express language of the statutes, and does not support an implication of additional authority to receive additional fees in the form of a portion of the subscription fee charged by the company. Nor is the receipt of a portion of the subscription fee in addition to the statutory fees an essential or indispensable exercise of authority to further the public purpose of the county assessor's office. Therefore, with regard to the act of producing the assessor's electronic records to a private company, a county does not have the authority, express or implied, to receive additional compensation in the form of a portion of the subscription fee charged by the company. We now address the separate action by the county of providing a link on its website to the company's website.

With regard to a county receiving a portion of the company's subscription fee for having a link to the company's website on the county website, we could find no express statutory language pertaining to a county's use of its website in general. In fact, we could find no express statutory language authorizing a county to have a website. However, we conclude that a county's authority to operate a website, like a county's authority to operate a telephone system accessible to the public (which also has no express statutory authorization) is necessarily and reasonably implied from the language of 19 O.S.2011, § 1.

Each organized county within the state shall be a body corporate and politic and as such shall be empowered for the following purposes:

....

5. *To make all contracts and do all other acts in relation to the property and concerns of the county necessary to the exercise of corporate or administrative power[.]*

Id. (emphasis added). In fact, in today's internet and wireless world of rapid information exchange, a county's authority to operate a website is an indispensable tool to facilitate public access to county information and services. We also conclude that a county's implied authority to operate a website includes the authority to provide a link directing the public to a private company, which provides a service that is consistent with the county's public purpose. Furthermore, pursuant to Article X, Section 17 of the Oklahoma Constitution, when a county

⁴ See Report on Determination of Reasonable Fees for County Assessors regarding for Search and Production Costs Associated with Public Requests for Electronic Data Used for Commercial Purposes pt. B, (Dec. 1, 2011) (on file with the Oklahoma State Board of Equalization).

uses a portion of its website as a link to the website of a private company that may benefit financially as a result, the county must receive adequate consideration. What constitutes adequate consideration in any particular situation is a question of fact, and must be determined by the county. Whether it is a portion of the subscription fee charged by the company, another form of financial payment, or a type of non-financial benefit, it is the county that must determine the adequacy of the consideration in relation to the value of the link.⁵

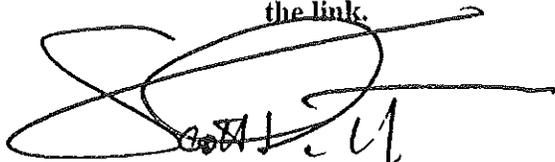
It is, therefore, the official Opinion of the Attorney General that:

When a county does not make its electronic real property records available in a viewable format on its website but has contracted to provide the county assessor's electronic records to a company that puts the records in a viewable format on its website, and makes the records available to the public for a subscription fee:

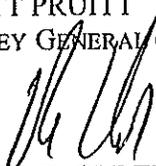
- 1. A. The county may provide copies of the records and have a link on its website to the company's web site without violating OKLA. CONST. art. X, § 14(A) that requires public funds to be used for a public purpose, because it satisfies the public purpose of the county assessor's office of making its records available to the public.**
- B. The county may provide copies of the records and have a link on its website to the company's web site without violating OKLA. CONST. art. X, § 17, which prohibits gifts by a county, provided the county receives adequate consideration.**
- 2. With regard to the act of producing electronic or digital records:**
 - A. The only express authority a county has to be compensated for providing the assessor's electronic records to a private company for commercial purposes is to charge the fees authorized by the Oklahoma Open Records Act, 25 O.S.2011, §§ 24A.1 – 24A.29, and established by the State Board of Equalization pursuant to 68 O.S.2011, § 2864(F).**
 - B. A county does not have implied authority to supplement the expressly authorized statutory fees for producing electronic and/or digital records of its assessor's office by receiving consideration in the form of a portion of fees charged by a private company that makes the records available to the public on its website.**

⁵ We do not address the question of whether a county's decision to provide a link to one private company verses another is a violation of equal protection rights. Whether it is or not depends on a county's criteria for the decision and that is a question of fact and beyond the scope of an Official Attorney General Opinion. 74 O.S. 2011, § 18(b)(A)(5).

3. A county has implied authority to operate a website under its express authority to make all contracts and do all other acts in relation to the property and concerns of the county necessary to the exercise of corporate or administrative power. 19 O.S.2011, § 1(5).
4. With regard to providing a link on a county website:
 - A. A county has implied authority to include a link on its website directing the public to a private company which provides a service that is consistent with the county's public purpose under its express authority to make all contracts and do all other acts in relation to the property and concerns of the county necessary to the exercise of corporate or administrative power. 19 O.S.2011, § 1(5).
 - B. Pursuant to OKLA. CONST. art. X § 17, which prohibits gifts by a county, when a county uses of a portion of its website as a link to the website of a private company that may benefit financially as a result, the county must receive adequate consideration. What constitutes adequate consideration in any particular situation is a question of fact. Whether the consideration is in the form of a portion of the subscription fee charged by the company, another form of financial payment or a type of non-financial benefit, it is the county that must determine the adequacy of the consideration in relation to the value of the link.



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