State of West Virginia
Office of the Attorney General

Patrick Morrisey
Attorney General

(304) 558-2021
Fax (304) 558-0410

July 3, 2014

The Honorable Lea Anne Hawkins
Prosecuting Attorney
Office of the Prosecuting Attorney of Lewis County, West Virginia
117 Court Ave, Room 201
Weston, WV 26452

Dear Prosecutor Hawkins,

You have asked for an Opinion of the Attorney General about using private, donated funds to digitize and place online property and mineral records in the Lewis County Clerk's Office. This Opinion is being issued pursuant to West Virginia Code § 5-3-2, which provides that the Attorney General "may consult with and advise the several prosecuting attorneys in matters relating to the official duties of their office." To the extent this Opinion relies on facts, it is based solely on the factual assertions set forth in your correspondence with the Office of Attorney General.

Your letter raises the following legal question:

Whether a County Commission may accept funds from a private entity so that an outside vendor, selected through public competitive bidding and subject to the County Clerk's oversight, may digitize and place online property and mineral records held by the County Clerk's Office?

Background

Your request derives from the increased demand for access to property and mineral records held by the Lewis County Clerk's Office. As explained in an attachment to your letter, the Clerk's Office does not possess the facilities and staff to meet current demand for public access, particularly in light of the pending development of the Marcellus Shale in Lewis County. As a result, the West Virginia Oil and Natural Gas Association ("WVONGA") has proposed donating to the County the cost of digitizing the County's property and mineral records and making them publicly accessible via the Internet.

Your letter states that WVONGA has proposed financing digitization of the county's property and mineral records by a contractor that the County would select through public competitive bidding and supervise. Under this proposal, WVONGA would agree to donate to the County and the public the cost of digitizing the County's property records, assuming the total project cost is acceptable to its interested stakeholders. The County would first review its current infrastructure and determine what steps are required to achieve digitization. Next, the County would publicly solicit competitive bids for the digitization of the records pursuant to West Virginia Code § 7-1-11(a) and select the most competitive bid. WVONGA would then contract directly with the winning bidder to perform the digitization services.

Although not itself a party to the underlying contract, the County would control and supervise the winning bidder's scanning process and its creation of online access. The contract would specify that: (1) the winning bidder would scan all property and mineral records on-site in the Lewis County Clerk's Office at times and in locations directed by the County; (2) the winning bidder would report missing record book pages to the County Clerk; (3) the winning bidder would provide Lewis County with digital copies of all loose-leaf and bound records in a digital format that is compatible with the County's existing software; and (4) the finished digital images will be compatible with the County's existing software. The contract would also include quality control measures, means for the County to charge a fee for print copies of records, and measures to avoid disrupting the ordinary business of the Courthouse during the digitization process.

Your letter stresses that WVONGA would not be involved in direct supervision of the performance of the contract. Neither WVONGA nor any of its members would receive or retain an individual copy of these digital records. Nor would they receive any access to the records on terms different from the general public.

As the attachment to your letter notes, these are not entirely new issues. This Office has previously issued an Opinion regarding the private donation of the costs of digitizing a county's property and mineral records. *See* Opinion of the Attorney General's Office Regarding the Use of Private Funds to Increase the Availability of Property and Mineral Records, Office of the West Virginia Attorney General (July 11, 2013) [hereinafter "Opinion"], available at http://www.wvago.gov/publicresource.cfm. Thereafter, WVONGA donated the cost of digitizing Tyler County's property and mineral records through an arrangement similar to that proposed here.

Discussion

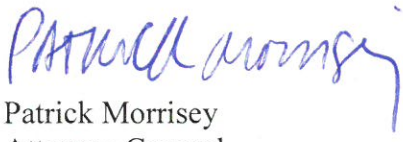
In the Opinion requested by the Prosecuting Attorney of Tyler County last year, this Office previously concluded that a county may accept funds from a private entity to digitize the county clerk's property and mineral records under certain conditions. *First*, under state ethics rules, the donation must be intended to confer a benefit upon the county or county commission as a whole, not upon any individual employee. Opinion at 2-3. *Second*, no private party may retain exclusive or advantageous access to the county

records as a result of the donation. *Id.* at 3. *Third*, all county entities and officials should avoid soliciting such a monetary donation. *Fourth*, under state law, the award of a contract for the digitization of records likely must occur through competitive bidding. *Id.* at 3. In most situations, state law requires counties to award contracts for a project exceeding $15,000 through public competitive bidding, even if an intermediary private party is the nominal contracting party and the donor of funds for the project. *Id.*; *see also* W. Va. Code § 7-1-11.

From the facts you provided, it appears that the proposal satisfies these principles. We understand that WVONGA is interested in providing an unsolicited donation to the County Clerk's Office to digitize and place online property and mineral records held by the Office and it will provide online access to the public on an equal basis. WVONGA would not receive any individual copies of the records or special access to the records. Digitization would also occur through public competitive bidding and contract performance would be subject to direct oversight and control by the County Clerk. As a result, no violations are apparent from the facts your letter presents.

The ultimate lawfulness of any project will depend, however, on facts that we do not have before us. Your letter does not provide a copy of a proposed contract or bid, describe whether the County's initial review stage might require services subject to competitive bidding, or explain whether the County has promulgated any competitive bidding rules that might apply. As such, our Opinion is limited to the facts you have provided us.

Sincerely,



Patrick Morrisey
Attorney General

Elbert Lin
Solicitor General

Julie Marie Blake
Assistant Attorney General