PATRICK MORRISEY
ATTORNEY GENERAL

July 11, 2013

The Honorable D. Luke Furbee
Prosecuting Attorney
Office of the Prosecuting Attorney of Tyler County, West Virginia
225½ Main Street
P.O. Box 125
Middlebourne, WV 26149

Dear Prosecutor Furbee,

You have asked for an Opinion of the Attorney General pertaining to the use of private funds to increase the availability of property and mineral records in the Tyler 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 letter to the Attorney General's Office.

You state that the Tyler County Commission ("Commission"), County Clerk, and interested County officials have been meeting to try and address the logistical problems arising from the increased demand for property and mineral records in the Clerk's Office. According to your letter, Marcellus Shale drilling and production has led to greater desire for access to these public records, and the present facilities and accommodations at the County Courthouse are "grossly inadequate." You further explain that County officials have discussed several ideas "aimed at alleviating the problem and increasing the viability of the county's facilities," including the potential digitization of County records and extended Courthouse hours.

Your letter raises a number of legal questions, each addressed in turn below:

(1) Is it permissible for the Commission to accept funds from a private entity for the actual cost of providing extended hours of operation for the Courthouse and record room, or for the digitization of County records? (2) Is it ever permissible for the Commission or County Clerk to grant a private individual or entity exclusive access to County records? (3) Is it permissible for the Commission to contract with and furnish payment to a third party to digitize County records, without resorting to competitive bidding procedures?

Question One: Is it permissible for the Commission to accept funds from a private entity for the actual cost of providing extended hours of operation for the Courthouse and record room, or for the digitization of County records?

As a threshold matter, it is clear that the Commission may accept a monetary donation from private entities for the extended operation of the Courthouse and/or for the digitization of County records, so long as the donation is given to the Commission or County *as a whole* and not to any *individual* County official or employee. West Virginia Code § 6B-2-5(c) prohibits any County official or employee from accepting any monies or gifts from an interested person or entity to the County. *See* W. Va. Code § 6B-2-5(c). Based upon the facts you have presented, the private entities that would donate the funds would appear to constitute interested parties, as they are likely to be parties "doing or seeking to do business of any kind with" the County or parties "engaged in activities which are regulated or controlled by" the County. *Id.* § 6B-2-5(c)(1)(A)-(B). Accordingly, no individual County official or employee could accept the sort of private donation that your letter contemplates.

The prohibition on accepting money or gifts, however, extends only to *individual* public servants and not to the Commission or County *as a whole*. The West Virginia Ethics Commission ("Ethics Commission") has determined that "[a] governmental agency may accept gifts as an entity if the acceptance of such gifts inures to the benefit of the public generally or is in furtherance of the operation of the office." West Virginia Ethics Commission Advisory Opinion 90-175 (supplemental opinion), at 2 (A.O. 90-175 (supp.)). In A.O. 90-175 (supp.), the Ethics Commission determined that a county clerk's office could lawfully accept a coffee pot or toaster from an area law firm for use by all of the employees in the office. The Ethics Commission concluded that West Virginia Code § 6B-2-5(c) "pertains to *individual* public officials and public employees receiving gifts," and that "[t]here is no prohibition against a governmental entity accepting a gift." A.O. 90-175 (supp.), at 2.

One further restriction is that any monetary donation should probably not be solicited. West Virginia Code § 6B-2-5(c) also prohibits public officials or employees from "solicit[ing] any gift unless the solicitation is for a charitable purpose with no resulting direct pecuniary benefit conferred upon the official or employee or his or her immediate family." W. Va. Code § 6B-2-5(c). The Ethics Commission has interpreted that prohibition to generally extend to governmental agencies, *see* Ethics Commission Advisory Opinion 2012-08, at 3 (A.O. 2012-08) ("As a general rule, the Commission is hesitant to approve a governmental agency's solicitation for its own operational needs."), and it has construed narrowly the exception for charitable solicitations, *see* Ethics Commission Advisory Opinion 2005-02 ("[T]he overriding purpose of the solicitation must be to provide a benefit to the public as opposed to defraying the internal administrative costs of the [Agency]."). In the view of the Ethics Commission, efforts by public agencies to seek outside monetary assistance "raise the potential for a coercive solicitation." A.O. 2012-08, at 4.

In sum, the Commission may accept an unsolicited monetary donation from a private entity to digitize records or extend office hours, if that donation is intended to benefit the

Commission or County as a whole. According to the representations in your letter, it appears that the contemplated donations would benefit the County as a whole. And while not referenced in your letter, we understand that the proposed donation was not solicited by any public servant or entity.

Question Two: Is it ever permissible for the Commission or County Clerk to grant a private individual or entity exclusive access to County records?

Under the facts you have presented, neither the Commission nor the County Clerk may lawfully grant a private individual or entity *exclusive* access to County records. If the exclusive access were tied to the payment of a donation, the access would clearly constitute a prohibited *quid pro quo*. *See* W. Va. Code § 6B-2-5(b) (prohibiting "[a] public official or public employee [from] knowingly and intentionally use his or her office ... for his or her own private gain"). But even if the exclusive access were not connected to a donation, the granting of that sort of special beneficial right to public resources would itself be (unless otherwise authorized by law) a violation of the Ethics Act. *See id.* (additionally prohibiting the use of public office or resources for the private gain "of another"). Thus, if the Commission or County Clerk establishes longer office hours and/or makes records available after typical public hours, the County should allow the public at large to have equal access during the extended availability.

Question Three: Is it permissible for the Commission to contract with and furnish payment to a third party to digitize County records, without resorting to competitive bidding procedures?

Applicable state law requires that the Commission use competitive bidding to enter into any contract that exceeds $15,000 for the purpose of digitizing County records. Specifically, West Virginia Code § 7-1-11(a) provides: "County commissions may make a purchase of commodities and printing of fifteen thousand dollars or less in amount in the open market, but a purchase of and contract for commodities and printing over fifteen thousand dollars shall be based on competitive bids, except in the case of emergency." W. Va. Code § 7-1-11(a). For purposes of the statute, "commodities" means "supplies, material, equipment, contractual services, and any other articles or things used by or furnished to a department, agency or institution of state government," and "printing" means "printing, binding, ruling, lithographing, engraving and other similar services." *Id.* § 5A-1-1; *see also id.* § 7-1-11(c). The statute also authorizes "[t]he county commission of any county ... to promulgate rules governing the procedure of competitive bids[.]" *Id.* § 7-1-11(b).

The existence of an intermediate private party would likely not change this requirement. Your other questions suggest that the Commission may be contemplating an arrangement in which one private party contracts with another private party and then donates the completed digitization to the County. But this scenario could constitute a *de facto* contracting for service by the County, as the County still would be an integral part in the process directing the service and digitization. The County must provide the records to be digitized, make sure the selected digitization is compatible with existing software, and ensure timely completion of the project. This involvement is akin to a public contract.

Ultimately, the lawfulness of any contract will depend on facts that we do not have before us. Your letter does not provide the estimated cost of the contemplated project, discuss whether and how an intermediate private party would be involved, or explain whether the County has promulgated any competitive bidding rules that might apply. If and when additional facts become known, please feel free to contact our Office for a specific review of the proposed conduct.

Sincerely,

PATRICK MORRISEY

Patrick Morrisey
Attorney General

Martin J. Wright
Deputy Attorney General