

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

November 22, 2019

Representative Susan K. Herrera
New Mexico House of Representatives
P. O. Box 189
Embudo, NM 87531

Re: Opinion Request – Nonprofit Public Libraries and the Anti-donation Clause

Dear Representative Herrera:

You requested our opinion with respect to government funding for nonprofit public libraries. Specifically, you inquired whether such libraries are exempt from the provisions of Article IX, Section 14 of the New Mexico Constitution (the “Anti-donation Clause”).¹ As explained below, we conclude nonprofit public libraries are not exempt from the Anti-donation Clause.

Background

As a preliminary matter, we first recognize the applicability of the recently enacted Rural Libraries Endowment Fund Act (the “Act”), NMSA 1978, Section 18-18-1 et seq. (2019), which provides a scheme for government funding to be disbursed to nonprofit public libraries. The Act establishes a rural libraries endowment fund in the state treasury to support the preservation, development and establishment of rural libraries, and provides for their operational and capital needs and funding for the delivery of specialized services to rural libraries. *See* NMSA 1978, Section 18-18-1. Such endowment fund consists of appropriations and donations to the fund and all income from investment of the fund. *Id.* The Act creates a rural libraries grant program whereby the state librarian is charged with annually disbursing money from the rural libraries program fund, in the form of grants directly benefiting developing rural libraries and established rural libraries and grants for the establishment of developing rural libraries in cities, towns and villages without libraries. *See* NMSA 1978, Section 18-18-2. The rural libraries program fund consists of distributions from the rural libraries endowment fund that are designated for the rural libraries

¹ Your opinion request also inquired as to whether such libraries *should* be exempt from the provisions of Article IX, Section 14. As what should or should not be subject to the Anti-donation Clause, we decline to answer that question, as it is one of policy and our review is limited by statute to questions of law. *See* NMSA 1978, § 8-5-2(D) (providing that the Attorney General shall “give his opinion in writing upon any question of law submitted to him by the legislature or any branch thereof, any state official, elective or appointive, or any district attorney”); *see also* N.M. Att’y Gen. Op. 58-76 (1958) (noting that the issue presented for review was “a policy matter upon which this office is not entitled to express itself”).

grant program and appropriations, gifts, interest and other money attributed to the fund. *See* NMSA 1978, Section 18-18-2. Under the Act, a “rural library” includes a library that is established as a corporation with tax-exempt status pursuant to Section 501(c)(3) of the United States Internal Revenue Code of 1986 and is in a municipality with a population at the time of the library's establishment of three thousand or less or is located in an unincorporated area of the state. *See* NMSA 1978, Section 18-18-4.

We further recognize that in addition to the Anti-donation Clause, the New Mexico Constitution contains additional limitations on government funding for nonprofit public libraries. Most relevant to this opinion is Article IV, Section 31, which states, “No appropriation shall be made for charitable, educational or other benevolent purposes to any person, corporation, association, institution or community, not under the absolute control of the state.” Interpreting this constitutional provision, our Supreme Court has observed that, “Article IV, Section 31 imposes limits on the Legislature’s authority to appropriate money.” *Moses v. Ruskowski*, 2019-NMSC-003, ¶ 48. Here, this constitutional provision effectively prohibits the Legislature from appropriating money directly to nonprofit libraries that are not under the absolute control of the state. In order to receive state funding, nonprofit public libraries must obtain it through a governmental entity or subdivision outside of the Legislature (for example, a county or the State Library Division).

The Anti-donation Clause

Article IX, Section 14 of the New Mexico Constitution provides, in relevant part, that “[n]either the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation.” Although the Anti-donation Clause also contains a number of specific exceptions, it generally operates as a bar to government funding or aid that operates as a gift to private entities. *See* N.M. Atty. Gen. Advisory Letter to Honorable Mary Kay Papen, New Mexico State Senate (Mar. 30, 2011) (explaining that, “By its terms, the clause prohibits the state, counties, school districts and municipalities from giving public money or property to a private party without adequate consideration in exchange.”).

Both New Mexico courts and this Office have consistently stated that, “There is no public benefit or public purpose exception to the anti-donation clause.” N.M. Att’y Gen. Op. No. 87-33 (1987). This line of reasoning appears to stem from *Harrington v. Atteberry*, 1915-NMSC-058, ¶ 5, wherein the Supreme Court recognized the challenged project’s benefit to the public but then stated that, “if this were the criterion by which the validity of an appropriation of public funds is to be measured, there would be hardly any limit upon the right of the state, county, city, or school districts to appropriate money to a private corporation.” *Id.* Although the Supreme Court later cast some doubt as to whether this language was controlling, see *Hutcheson v. Atherton*, 1940-NMSC-001, ¶ 27, it subsequently articulated virtually the same premise years later. *See State ex rel. Mechem v. Hannah*, 1957-NMSC-065, ¶ 39 (recognizing that state aid “was a wonderful thing for the livestock industry ... thus benefitting the economy of the state, but if the appropriation now before us be upheld where will it stop?”). Thus, it appears to be well-settled that, for the purposes of the Anti-donation Clause, “it is immaterial that the donation is made to an individual or corporation serving a public purpose.” N.M. Att’y Gen. Op. No. 89-22 (1989).

That being said, our Supreme Court previously has held that Article IX, Section 14 is implicated only in cases where, “by reason of its nature and the circumstances surrounding it,” government funding or aid takes on the character of a donation in substance and effect. *Village of Deming v. Hosdreg Co.*, 1956-NMSC-111, ¶ 37. Similarly, we have observed that the government “may not confer something of value to a private entity or individual without receiving something of value in return.” N.M. Att’y Gen. Op. No. 12-01 (2012). Consideration, or value in return, is perhaps the definitive factor in determining whether a violation of the Anti-donation Clause has occurred. *See State ex rel. Office of State Eng’r v. Lewis*, 2007-NMCA-008, ¶ 49 (stating that, “Consideration for the allocation can be a defining element.”).

Nonprofit Public Libraries

In applying these principles to the question of nonprofit public libraries, we must emphasize our Supreme Court’s holding in *Village of Deming*, which focused on the “nature” of government aid and “the circumstances surrounding it.” *Village of Deming*, 1956-NMSC-111, ¶ 37. As that language makes clear, the applicability of the Anti-donation Clause depends largely on the circumstances and facts surrounding each instance of government aid. In those potentially varying circumstances, one factor stands out as pivotal: whether the state receives value or consideration in exchange for its funding.

In light of this authority, a nonprofit public library may, without violating the Anti-donation Clause, receive government funding so long as the funding government entity receives adequate consideration in exchange. Accordingly, a nonprofit public library could enter into a personal services contract with a county or municipality, whereby the library’s provision of certain services could serve as adequate consideration for receipt of the government funding. *See* N.M. Atty. Gen. Advisory Letter to Shawn Lerch, Miners’ Colfax Medical Center (June 22, 2015) (concluding that, consistent with the Anti-Donaton Clause, where physician’s agreement to remain in community and provide services constitutes adequate consideration, the Miners Colfax Medical Center could pay a physician a “longevity bonus” specified by contract).

It therefore is our opinion that a nonprofit public library may receive state funding without violating the Anti-donation Clause, so long as the library provides the state adequate consideration in return. While administrative rules to implement the Rural Libraries Endowment Fund Act have yet to be promulgated, the grants program as contemplated by that Act must be implemented in such a way as to provide for adequate consideration to the state and therefore comply with the Anti-Donation Clause.

Lastly, several of the Anti-donation Clause’s own exceptions may allow for nonprofit public libraries to receive state aid in other limited circumstances. Programs designed to serve the elderly or the indigent, for example, would likely be exempt from the general prohibition of the Anti-donation Clause pursuant to its exception for “provision for the care and maintenance of sick and indigent persons.” As with all other state funding for private entities, the applicability of the Anti-donation Clause’s exceptions would depend on the specific project at issue.

You requested a formal opinion on the matters discussed above. This opinion is a public document, not subject to the attorney-client privilege. Therefore, we may provide this letter to the public. If this office may be of further assistance, or if you have questions regarding this opinion, please contact our office.

Sincerely,



John F. Kreienkamp



Karla Soloria

Assistant Attorneys General

cc: Senator Gerald Ortiz y Pino
Shel Neymark, NM Rural Library Initiative