



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

August 25, 2010

Mr. Tom McClellan, Deputy Director
Driver and Motor Vehicle Services Division
Oregon Department of Transportation
1905 Lana Avenue, NE
Salem, OR 97314

Re: Opinion Request OP-2010-4

Dear Mr. McClellan:

You requested advice about whether the Driver and Motor Vehicles Services Division (DMV) may sell an exclusive license to the Department of Administrative Services (DAS) to provide electronic access to certain DMV records without violating Article IX, section 3, of the Oregon Constitution. DAS would provide access to those records via an “electronic government portal” as defined by ORS 182.126(2), using a virtual private network (VPN) connection or other secure method of transmission agreed to by DAS and DMV. As requested, we do not address statutory impediments to DAS’s proposal. This advice is limited to whether the proposal would violate Article IX, section 3a.

QUESTION PRESENTED

Does Article IX, section 3a, of the Oregon Constitution, which requires Highway Fund moneys to be spent only on highway purposes, prohibit DMV from selling DAS an exclusive license to provide electronic access to certain DMV records via an “electronic government portal” as defined by ORS 182.126(2)?

SHORT ANSWER

Article IX, section 3a, of the Oregon Constitution does not prohibit DMV from selling that right to DAS as long as DMV receives fair market value for it.

DISCUSSION

A. DMV Records

With certain exceptions, DMV records are public records and are subject to public disclosure. ORS 802.220(1). Ordinarily, public bodies may not make any net income from making public records available; they are limited to recouping their actual costs. ORS 192.440(4)(a). But the legislature has given DMV specific authority to establish and charge “reasonable fee[s]” for “furnishing information” from DMV records. ORS 802.230. “Furnish” means “to provide or supply with[.]” WEBSTER’S THIRD NEW INT’L DICTIONARY at 923 (2002). The plain meaning of “furnishing information” encompasses all methods of providing or supplying information.

The legislature authorized DMV to set fees for furnishing information from different types of records. *See* ORS 802.230(1)-(5) (authorizing DMV to set fees by rule for furnishing information concerning, respectively, vehicle registration, driver licenses and permits, driving abstracts, trip permits and vehicle odometer readings). Some information in DMV records cannot be disclosed to the public, but is confidential “personal information.” ORS 802.177, 802.179. Personal information can be disclosed only to the authorized recipients identified in ORS 802.179. ORS 802.183 authorizes DMV to establish “fees reasonably calculated to reimburse it for its actual cost in making personal information available to authorized recipients.” In sum, DMV may charge the “reasonable fee” that it establishes pursuant to ORS 802.230 for furnishing information from a particular record. In addition to that fee, pursuant to ORS 802.183, DMV may charge a fee to recoup any actual costs it incurs in making personal information available to authorized recipients.

Authorized recipients include persons who are in the business of selling personal information to other authorized recipients, primarily insurance companies. ORS 802.179(13). This opinion refers to those persons as “record providers.” Record providers regularly receive high volumes of records containing personal information, giving rise to the need for an efficient and secure method of access.

In the past, record providers received records on a special type of cartridge that was delivered by courier. That system was slow and the information was subject to potential security breaches if the cartridge was misplaced or misappropriated – a cause of significant concern since one cartridge might contain hundreds of thousands of records. Only a few users still use the cartridge system and DMV wants to phase it out entirely due to the security concerns and the fact that it is becoming difficult to find cartridge manufacturers.

In 2006, DMV created a Real-Time Access to Driver Records program (RADR). Oregon DMV, like the motor vehicle divisions of all other states, is a member of the non-profit American Association of Motor Vehicle Administrators (AAMVA). AAMVA operates and maintains a system called the AAMVANet, which has the capacity to provide secure digital access to state driver and motor vehicle records. In Oregon, most records providers obtain access to DMV

records via a dedicated virtual private network (VPN) through the AAMVANet. DMV currently charges two dollars for furnishing driving records via the RADR system.

Initially, one record provider paid \$120,000 to build the system. DMV then charged each new customer a onetime fee of \$4,500 to connect to DMV systems to access its records electronically via the AAMVANet. AAMVA maintains the secured system and charges users an annual fee of \$2,400 for access. DMV receives its two-dollar-per-record fee for records furnished via the AAMVANet. Since DMV does not incur any ongoing actual costs to make personal information available through the AAMVANet, it does not charge any additional fees to provide the personal information through the AAMVANet.

B. Electronic Government Portal

Oregon Law 2009, chapter 829 (House Bill 2146), gives DAS the authority to establish an “electronic information delivery system accessible by means of the Internet * * * by which * * * state agenc[ies] deliver[] information, products or services.” ORS 182.132(1), 182.126(2). DAS may charge users a convenience fee for access which “must reflect the costs incurred in hosting, operating, maintaining or implementing the electronic government portal.” ORS 182.132(3)(a). DAS may also contract out the development and operation of the portal and, if it does, may authorize the portal provider to charge convenience fees. DAS intends to do that.

DAS would like to replace AAMVA as the sole supplier of real-time digital access to Oregon DMV records pursuant to the authority provided in House Bill 2146. As we understand it, DAS proposes to charge a per-record fee for access, rather than an annual access fee like AAMVA. Given the high volume of records that record providers receive (DMV sells around 140,000 electronic records per month, approximately 75 percent of its total records sales), a per-record fee likely would result in higher fees than record providers currently pay AAMVA. DAS intends the convenience fee to fund the DMV VPN connection or other secure method of records access transmission agreed to by DAS and DMV as well as the creation, transition, ongoing operation and maintenance of current and new Oregon E-Government portal services and potentially to help fund its other electronic government portals and services.

It is the latter intention that raises a constitutional concern. Specifically, if the convenience fee that DAS (or its contractor) charges record providers merely covers the costs of providing them with electronic access to personal information, there is no net income from the charge. The charge would merely recoup actual costs to furnish the personal information to record providers. But if the charge, in addition to covering those costs, also is used to fund the provision of other services, it would yield net “income.” The receipt of net income from a transaction involving a Highway Fund asset and its expenditure on a non-highway purpose implicates Article IX, section 3a.

C. Article IX, Section 3a

Article IX, section 3a, of the Oregon Constitution dedicates “any tax or excise on the ownership, operation or use of motor vehicles” exclusively to highway purposes.¹ The people’s

Mr. Tom McClellan

August 25, 2010

Page 4

intent in adopting that provision was to guarantee that the state would not divert any of the proceeds of those taxes to fund non-highway purposes. *State ex rel Sprague v. Straub*, 240 Or 272, 400 P2d 229, 401 P2d 29 (1965); *Rogers v. Lane County*, 307 Or 534, 771 P2d 254 (1989); *Automobile Club of Oregon v. State of Oregon*, 314 Or 479, 840 P2d 674 (1992). Accordingly, Article IX, section 3a requires the proceeds of those taxes to be spent exclusively for highway purposes. *State ex rel Sprague v. Straub*, 240 Or at 277. If the state diverts income generated by a constitutionally dedicated fund asset to another purpose it must repay the fund with applicable interest. *Cross of Malta Bldg Corp. v. Straub*, 257 Or 376, 476 P2d 921 (1970), 479 P2d 505 (1971).

The Oregon Supreme Court has held that the interest earned on the investment of highway funds must accrue to the Highway Fund. *State ex rel Sprague v. Straub*, 240 Or at 281. Subsequent Attorney General opinions have concluded that the rents and profits received on property purchased with highway funds also must accrue to the Fund, reasoning that rents and profits are analogous to interest earnings, because they, too, are “the fruits of investment of moneys in the Highway Fund.” 37 Op Atty Gen 349, 356 (1975); *see also*, 41 Op Atty Gen 37, 42 (1980).

This office has determined that DMV records are assets of the Highway Fund, because “[a]s part of its costs of administration [DMV] uses moneys from this dedicated Highway Fund to generate records.” Letter of Advice dated June 16, 1989, to Robert N. Bothman, Director of Transportation (OP-6329) at 1. Consequently, net income generated from the sale of those records must accrue to the Highway Fund and cannot lawfully be diverted to other purposes. *Id.* at 2.

As discussed, DAS’s proposal is expected to generate net income from providing electronic access to DMV records and that income may be used to fund other electronic government services. To avoid a constitutional impediment, DAS proposes to enter into a licensing or other agreement whereby DMV authorizes DAS to be the exclusive provider of electronic access to the DMV records in consideration of the receipt of fair market value. You ask whether Article IX, section 3a would prohibit that agreement.

Ordinarily, when a state agency acquires property it does so on behalf of the state and acts as custodian of state property, rather than as the owner. Letter of Advice dated January 5, 1979, to Laurence Sprecher, Manager, Executive Department (OP-4479) at 1. If the state owns the property, there is no need for reimbursement when the custodian agency transfers the asset to another state agency. But when property is acquired with constitutionally dedicated Highway Fund moneys, the property is an asset of that Fund and not of the state generally. Thus the Fund must be reimbursed for the fair market value of the property at the time of the transfer. *Id.*

Accordingly, DMV may transfer the proposed exclusive license to DAS without offending Article IX, section 3a, so long as it receives fair market value for the license. But a court would likely closely scrutinize such a transfer to ensure that the Highway Fund receives the amount to which it is entitled. Accordingly, DMV and DAS should pay close attention to

Mr. Tom McClellan

August 25, 2010

Page 5

determining the correct fair market value and should periodically review that determination if the agreement involves ongoing payments.

Sincerely,

David E. Leith
Associate Attorney General and
Chief General Counsel
General Counsel Division

DEL:naw:clr/DM2203395

¹ Article IX, section 3a, of the Oregon Constitution provides in pertinent part:

(1) Except as provided in subsection (2) of this section, revenue from the following shall be used exclusively for the construction, reconstruction, improvement, repair, maintenance, operation and use of public highways, roads, streets and roadside rest areas in this state:

* * * * *

(b) Any tax or excise levied on the ownership, operation or use of motor vehicles.

(2) Revenues described in subsection (1) of this section:

(a) May also be used for the cost of administration * * *.