

The Hon. Harold C. Heinze  
Commissioner, Department of Natural  
Resources

April 17, 1991

663-91-0366

465-3600

Public access to  
recording information

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You have asked whether the state, under AS 40.17.040 regarding indexing of recorded documents, and AS 09.25.115(h) and AS 09.25.220(1) regarding public access to electronic services and products, may offer a contractor exclusive on-line access to electronic data in exchange for the contractor's developing and maintaining an indexing system on a privately owned computer. You have further asked if the state may house its index to publicly recorded and filed documents on a privately owned computer, and if so whether a contract for this may include exclusive on-line access to the data by the contractor. Finally, regardless of whether the state may house its index on a private computer and whether there may be exclusive access, you have asked if the state has discretion to offer on-line access to electronic data for "different terms and conditions, such as for the provision of a service instead of for cash."

To provide us with more background information about your request, we have spoken with personnel in the Department of Natural Resources ("department"), and with the contractor currently providing the department with the statutorily required index of property grantors and grantees (the "grantor-grantee index"). See AS 40.17.040. We have also reviewed information about ch. 200, SLA 1990 (SCS CSHB 405(Fin)), which clarified public record requirements for electronic data.

As your opinion request noted, the department has contracted with a private corporation to provide it with the grantor-grantee index. When an individual records documents at recorders' offices around the state, the information is entered into the contractor's computer. The information is then manipulated into the index. Every weekday evening a backup tape of the data is delivered to the Anchorage State Data Center for archiving and for generating paper reports. There is access to the information through a public terminal in the Anchorage recorder's office and there is access to the original information as it is filed by individuals in each recorder's office. 3/

3/ Your request stated that there was public access through 11 terminals. At this date, although there are 11 terminals, there

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Thus, anyone may get access to the information the contractor has by either getting a copy of the original documents from the recorder, by using the Anchorage recorder's office terminal, or by receiving a copy of the tape that is provided every weekday evening to the state.

Your request states that the contractor is the only private company with on-line access to the digital data. While the contractor is the only company receiving the information directly onto computer, the public has on-line access to the same information through the terminal in the Anchorage recorder's office and through the raw data in any recorder's office. Furthermore, the contractor in this circumstance is acting basically as an arm of the state in preparing the required grantor-grantee index. The state does not currently have the capability to produce the index, so it has contracted for this service. Information is provided to the contractor so that the index can be produced, which is done every weekday evening. Throughout the process the public has access to the same information that the contractor does. The only difference is that the information is entered directly onto the contractor's computer so that he may perform his contractual obligation to provide the state with its statutorily required index.

With the above facts as background, the answers to your specific questions (with comments about how they relate to your current situation) follow. First, there must be public access to all public records (which the records in this case clearly are). See AS 40.17.010 et seq.; see also AS 09.25.120. However, there is no requirement in statute that the access be absolutely simultaneous for everyone. In fact, under 6 AAC 95.070, an agency has ten days within which to respond to a request for public records. Even though there is no requirement for simultaneous access, access itself is clearly required. Under AS 09.25.115(f), "When offering on-line access to an electronic file or data base, a public agency also shall provide without charge on-line access to the electronic file or data base through one or more public terminals." The department is meeting this requirement in this case by providing free access at the terminal in the Anchorage recorder's office. Furthermore, the department is required to make electronic services and products equally available to all members of the public. AS 09.25.115(h). The

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is only one terminal, in Anchorage, that provides public access. This terminal provides public access to the information at the same time it is entered into the contractor's computer.

department is doing this through its terminal, and the department can also do this by providing anyone who requests it with a copy of the tape it receives from the contractor. 4/ Given the fact that access must be provided, the answer to your question of whether the state may offer the contractor exclusive on-line access to electronic data in exchange for the contractor's developing and maintaining an indexing system on a privately owned computer, the answer is no, there may not be "exclusive" access to data. However, the state may, as is the case here, contract with a company and enter data into a private computer, as long as it is clearly understood that the data is public information. 5/ As we have previously noted, "where a contractor is essentially performing a state function, all records produced as a result of that performance are public documents." 1990 Inf. Op. Att'y Gen. at 3 (Jan. 10; 663-90-0214). This does not mean that all the contractor's records are public; furthermore, the contractor may manipulate the records into a particular form for further use, and that particular form may not be a public record. Id., and see cases cited therein. The contractor's proprietary software programs are not public records. AS 09.25.200(6).

In answer to your second question, the state may house its index to publicly recorded and filed documents on a privately owned computer, but it may not allow "exclusive" access to the data (as described above). Again, the key is access to the data, not where the data is located.

Finally, you have asked if the state has discretion to offer on-line access to electronic data for "different terms and conditions such as for the provision of a service instead of for cash." We know of no prohibition on "bartering" for service. Therefore, we think that the state may barter. Although there is no prohibition on "bartering", state procurement code

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4/ The department may charge an appropriate fee for this service, as described in AS 09.25.115.

5/ We have spoken with the contractor and he understands that all information provided to him is public information. Furthermore, the contract in this case states that "all index information is public record and the vendor will not interfere with information availability to the public from [departmental] offices." Request for Alternative Procurement Method from Department of Natural Resources to the Department of Administration (Feb. 24, 1986).

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requirements must be met. AS 36.30.005 et seq.; 2 AAC 12.010 et seq. The procurement code was enacted to (among other things) ensure fair treatment and foster competition. See sec. 1, ch. 106, SLA 1986 (HCS CSSB 341 (Fin)). If bartering was not subject to procurement code requirements, the intent of the code could be completely subverted.

AS 36.30.850(b) states that the procurement code "applies to every expenditure of state money by the state, acting through an agency, under contract." Although the procurement code mentions the expenditure of money, the procurement code must be read to cover cases where instead of money some other type of valuable consideration is provided by the state in exchange for a good or service. In this case the consideration is the information being provided to the contractor along with the cost of providing the information to him. Lending further weight to the analysis that the procurement code applies to such exchanges is the fact that AS 36.30.990(15) defines "procurement" as including "buying, purchasing, renting, leasing, or otherwise acquiring . . . services" (emphasis added). Furthermore, AS 45.02.304 states that, when goods are transferred as a payment, "each party is a seller of the goods which the party is to transfer." This is consistent with the Uniform Commercial Code (upon which AS 45.02 was based) which recognizes an exchange of goods as a "sale." U.C.C. • 2-304 (1982). Under AS 36.30.860, this provision of the Uniform Commercial Code supplements the procurement code. See also Territory v. Tuppela, 6 Alaska 578, 582 (D. Alaska 1922) (bartering was noted to be equivalent to a sale, especially when "one thing is received in payment of the price of the other"); 9 Barter C.J.S. 1550-52 (1938). Since bartering is analagous to a sale in these types of situations, the procurement code applies. Therefore, in answer to your question, the department may offer on-line access to electronic data for the provision of a service instead of cash, but the department must comply with the procurement code if it does so.

We hope that this answers your questions. Your office has been most helpful in providing us with information necessary to answer this request. Please contact us if you have further questions.

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