

MEMORANDUM

State of Alaska Department of Law

TO: George Smith, Deputy Director
Libraries, Archives & Museums
Department of Education

DATE: October 9, 1996

FILE NO: 663-97-0046

TELEPHONE NO: 465-3600

SUBJECT: Library Fees

FROM: Assistant Attorney General
Human Services Section - Juneau

Janice Gregg Levy

You informed us that the state library receives frequent requests for copies of photographs in the library collection. Under current practice, the library arranges to have the photographs copied by professional providers, and the requestor pays the cost. You sent our office a draft form that would require requestors to pay a \$25 fee for each photograph requested if the reproduced image would be used for commercial purposes. You asked whether the department has statutory and regulatory authority to use such a form.

If the photographs in the library are public records, copies must be made available under the procedures set out in AS 09.25.110 and the regulations adopted thereunder. A fee to search for and duplicate a public record may reflect actual copying costs (such as the costs charged by the professional provider) and salary and benefits costs for the employees who spend time complying with the request. 6 AAC 360(b). However, a public agency may not ask a requestor to what purpose or use a public record will be put (except that the agency may inquire whether the requestor is involved in litigation with the state to which the record is relevant). 6 AAC 96.220. Thus, if a photograph is a public record, the library could not ask if the intended use is commercial.

Public records are

books, papers, files, accounts, writings, including drafts and memorializations of conversations, and other items, regardless of format or physical characteristics, that are developed or received by a public agency, or by a private contractor for a public agency, and that are preserved for their informational value or as evidence of the organization or operation of the public agency[.]

AS 09.25.220(6). While there may be instances where a photograph is a public record, in our view the photographs collected and preserved by the library are not public records within this definition. They are more in the nature of a museum collection of artifacts, acquired and

preserved to reflect culture and history. Whether they are collected and preserved is based not on a records retention schedule, but upon the expertise and advice of the librarians, who serve as curators of the collection.

If the photographs are not public records, then providing copies of the photographs is a service provided by the library, rather than compliance with the public records laws. The Department of Education has a statutory duty to •undertake state library functions that will benefit the state and its citizens, including . . . establishing and charging fees for reproduction, printing, and handling costs, for mailing and distributing state publications and research data, and for other services authorized by this chapter. AS 14.56.030. Thus, the department has statutory authority to charge for the service of arranging for copies of photographs in the library collection.

Because the fee is not set by statute, however, the fee or charge must be set forth in regulation. AS 37.10.050(a). It cannot be set and periodically adjusted within the office. Additionally, the charge •may not exceed the estimated actual costs of the state agency in administering the activity or providing the service unless otherwise provided by the statute under which the regulation is adopted[.]• Id. The Drafting Manual for Administrative Regulations, chapter 13, provides additional information in setting fees and determining what the costs are to the agency in providing the service. A copy of chapter 13 is attached for your convenience.

We would advise the library to set a fee that is in addition to the vendor's cost of providing the duplicate photograph. This would eliminate the need for the department to amend its regulation every time the vendor's costs of duplicating photographs increases. The fee could be the \$25.00 suggested in your draft form, provided that \$25.00 does not exceed the agency's actual costs. Additionally, rather than try to define and determine in each case whether a use is •commercial,• we would advise that the regulation be drafted so that the fee applies, unless the fee is waived for reasons stated in the regulation. Waivers of the fee could be for purely personal use, educational use, or if the library determines that waiver would be in the public interest.

I hope this information is sufficient for you to move forward with your fee-setting project. Please do not hesitate to contact our office if we can be of additional assistance.

JGL:prm

Attachment

cc: Rick Cross, Deputy Commissioner
Department of Education