

Opinion No. 87-33

July 21, 1987

OPINION OF: HAL STRATTON, Attorney General

BY: Jeff Foster McElroy, Assistant Attorney General

TO: Paul N. Lazarus, III, Director, New Mexico Film Commission, 1050 Old Pecos Trail, Santa Fe, New Mexico 87503

QUESTIONS

Whether the New Mexico Film Commission can provide the Santa Fe Film Festival the use of its offices and telephone without charge?

CONCLUSIONS

No.

ANALYSIS

You have requested an opinion from this office whether the New Mexico Film Commission can provide free of charge the Santa Fe Film Festival office space, equipment, and use of telephones, including your "800" line. You believe that the state receives consideration for the use of state resources, because the Santa Fe Film Festival promotes the state within the film industry and that this promotion is consistent with the New Mexico Film Commission's functions. It is our opinion, however, that such consideration is inadequate under state law and that the New Mexico Film Commission may permit the Santa Fe Film Festival to use state facilities only if the Commission receives reasonable rent and reimbursement for all actual expenses. Cf. 1963-64 Opinion of the Attorney General No. 64-92 ("[I]t is incumbent upon any public agency or Commission to obtain reimbursement for any actual expenses occasioned by reason of such permitted private use of public facilities.").

Article IX, section 14 of the New Mexico Constitution, commonly known as the anti-donation clause, prohibits the state from making "any donation to ... any person, association or public or private corporation." The term "donation" as found in this provision has been applied in this ordinary sense and meaning to denote a "gift", i.e., an allocation or appropriation of something of value without consideration. *Village of Deming v. Hosdreg*, 62 N.M. 18, 303 P.2d 920 (1956). There is no public benefit or public purpose exception to the anti-donation clause. The Supreme Court of New Mexico specifically rejected such exception in *State ex rel Sena v. Trujillo*, 46 N.M. 361, 129 P.2d 329 (1942), where Chief Justice Bruce wrote: "The constitution makes no distinction as between 'donations', whether they be for a good cause or a questionable one. It prohibits them all." 46 N.M. at 369, 129 P.2d at 333. See also *State ex rel*

Mecham v. Hannah, 63 N.M. 110, 314 P.2d 714 (1957). We state this position fully mindful of 1979-81 Opinions of the Attorney General Number 81-5, which expressly overruled two prior opinions of this office and found a "public benefit" exception. We do not find the reasoning therein persuasive. We do not agree that there is a difference of constitutional significance between spending for a public purpose, which the Court specifically rejected in Trujillo, and spending for a public benefit, which No. 81-5 recognized.

The use of state facilities by the Santa Fe Film Festival, a private corporation, without payment, constitutes a donation under the definition in Village of Deming, supra. The Santa Fe Film Festival's incidental promotion of New Mexico within the film industry is not consideration to the State of New Mexico for use of State facilities. While the State of New Mexico may spend its funds to promote New Mexico within the film industry, it cannot donate its funds to a private corporation that may be performing the same function. In 1961-62 Opinions of the Attorney General Number 61-2, this office found that a county juvenile recreation fund could not donate money to a 4H program even though the program came within the spirit of the statute that created the fund. We find that opinion's reasoning persuasive for deciding the question presented here.

ATTORNEY GENERAL

HAL STRATTON Attorney General