

**January 14, 2019 Advisory Letter — Opinion Request – Use of Funds and
Services Received from Third Parties**

The Honorable Raúl Torrez
District Attorney
Office of the District Attorney
Second Judicial District
5100 Lomas Blvd., NW
Albuquerque, NM 87102

Re: Opinion Request – Use of Funds and Services Received from Third Parties

Dear District Attorney Torrez,

You have requested an Attorney General opinion regarding the ability of the Second Judicial District Attorney’s Office (the “Office”) to accept and use funds and services donated to the Office from outside sources. More specifically, you have asked whether: (1) the Office may treat funds received from third parties as “other state funds” for the purpose of requesting a budget adjustment, as contemplated by House Appropriations and Finance Committee Substitute for House Bill 2 and 3 (the “General Appropriations Act of 2018” or the “Act”), and (2) the Office may be the beneficiary of goods, services or other in-kind benefits provided by private individuals and organizations. As explained in more detail below, we conclude that monetary donations may constitute “other state funds” for the purpose of seeking a budget adjustment authorized by the Act, provided those funds are paid into the state treasury. We further conclude that the Office may accept gifts or donations of goods, services or other in-kind benefits for use in conducting its official duties, provided the Office does so consistent with conflict of interest principles and applicable state laws.

1. Monetary Donations as “Other State Funds”

As a preliminary matter, the Attorney General previously has opined that the legislature has “exclusive powers under the constitution to appropriate money and specify the purpose for which appropriated money is to be spent.” N.M. Att’y Gen. Op. No. 07-06 (2007) (“AG Op. No. 07-06”). Moreover, legislative control over money donated or contributed to the Office is ensured by statutes governing public money, which provide, with certain exceptions, that:

All public money in the custody or under the control of any state official or agency obtained or received by any official or agency from any source . . . shall be paid into the state treasury. It is the duty of every official or person in charge of any state agency receiving any money . . . for or on behalf of the state or any agency thereof from any source . . . to forthwith and before the close of the next succeeding business day after receipt of the money to deliver or remit it to the state treasurer.

NMSA 1978, § 6-10-3 (2011).

Once deposited in the state treasury, money may be paid out “only upon appropriations made by the legislature” that “distinctly specify the sum appropriated and the object to which it is to be applied.” AG Op. No. 07-06 (internal citation omitted). See also *State ex rel. Cisneros v. Martinez*, 2015-NMSC-001, ¶ 43, 340 P.3d 597, 608 (affirming that “money shall be paid out of the treasury of the State only upon appropriations made by the Legislature, and every law making an appropriation shall distinctly specify the sum appropriated and the object to which it is to be applied” (internal citations omitted)); N.M. Att’y Gen. Op. No. 85-02 (1985) (“AG Op. No. 85-02”) (interim legislative committees may spend cash contributions received from private sources only if the contributions are deposited into the state treasury and appropriated by the legislature).

During the 2018 regular session, the legislature appropriated monies to the Office for a data-driven pilot program, case prosecution, and to address case backlog. See H AFC/H 2 and 3, aa at 171-2, § 5 (13), (14) and (15). In addition, the General Appropriation Act of 2018 authorizes certain budget adjustments for fiscal years 2018 and 2019, which allow the Office to request budget increases “up to one million five hundred thousand dollars (\$1,500,000) from internal service funds/interagency transfers and *other state funds from grants* and local governments for case prosecution and related support services.” *Id.* at 201, § 9(H) and 207, § 10 (E)(9) (emphasis added).¹ For purposes of the General Appropriations Act, “other state funds” means:

- (1) nonreverting balances in agency accounts, other than in internal service funds accounts, appropriated by the General Appropriations Act of 2018;
- (2) all revenue available to agencies from sources other than the general fund, internal service funds, interagency transfers and federal funds; and
- (3) all revenue, the use of which is restricted by statute or agreement.

H AFC/H 2 and 3, aa at 2, § 1(I). “Revenue” is defined as: “all money received by an agency from sources external to that agency,” with certain specified exceptions. *Id.* § 1(N).

You ask whether money donated to the Office by third parties would qualify as “other state funds from grants” for the purpose of requesting a budget increase permitted by the Act. Assuming the Office properly pays monetary donations it receives into the state treasury, as required by Section 6-10-3, we believe a reasonable interpretation of the Act’s language authorizing the Office to request budget increases from “other state funds from grants” would encompass those donations.

The Act does not define the term “grants.” Under the rules of statutory construction, absent a definition in the statute being construed, the meaning of a word “is determined by its context, the rules of grammar and common usage.” NMSA 1978, § 2-2A-2 (1997). The dictionary definition of the noun “grant” is “something granted especially : a gift (as of land or money) for a particular purpose.” Merriam-Webster Online Dictionary, www.merriam-webster.com/dictionary. Based on its common usage, the term “grant”

appears to cover monetary donations the Office receives for purposes of carrying out its official duties. As defined by the Act, donations (or grants) of money from third parties would constitute “other state funds,” i.e., “revenue available to [the Office] from sources other than the general fund.” Consequently, monetary donations would qualify as “other state funds from grants” for purposes of the Office’s authority to request budget increases under the Act.²

2. Authority to Accept Non-Monetary Donations

With respect to whether the Office “may receive or be the beneficiary of goods, services and other in-kind benefits” from individuals or private organizations, we found no language in statutes governing district attorneys that addresses their authority to accept goods, services or other in-kind benefits donated by private organizations and individuals. See NMSA 1978, §§ 36-1-1 to -29 (1909, as amended through 2001). Nevertheless, because district attorneys are authorized to purchase goods and services necessary to perform their official duties, we believe it likely that the same authority would extend to the goods and services acquired at no cost.

Unlike monetary donations, which must be deposited in the state treasury and appropriated to the Office by the legislature, goods and services donated by third parties would benefit the Office directly. Consequently, donations of goods, services and other in-kind benefits raise unique conflict of interest concerns. Starting with the premise that a conflict of interest is any practice that threatens to impair a prosecutor’s disinterestedness, we urge you to be mindful that when financially strapped prosecutors accept private financing or donations of goods, services and other in-kind benefits, they run the risk of creating the appearance of a conflict for the sake of economic efficiency. See *also* N.M. Att’y Gen. Op. No. 85-02 (1985) (if an interim legislative committee accepted a gift of staff support services from a nonprofit corporation, “conflict of interest laws would have to be carefully scrutinized”).

Provisions of the Governmental Conduct Act and rules of professional conduct for attorneys address potential conflicts of interest. See, e.g., NMSA 1978, § 10-16-3(D) (public officers and employees who knowingly request or receive “any money [or] thing of value ... that is conditioned upon or given in exchange for the promised performance of an official act” are guilty of a fourth degree felony); Rule 16-108 NMRA (prohibiting a lawyer from accepting compensation from third parties unless “there is no interference with the lawyer’s independence of professional judgment”); Rule 16-504 NMRA (directing lawyers “not to permit a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services”).³ Under these provisions, a state agency such as the Office, may accept donations of goods and services for official purposes if the donations are made voluntarily and unconditionally and do not affect the Office’s independent and unbiased provision of prosecutorial and other legal services.

Although they are donated to rather than purchased by the Office, the goods and services would be subject to applicable state laws and standards that generally apply to

goods and services acquired by state agencies. See, e.g., NMSA 1978, § 13-6-1 (2013) (requirements for the disposition of obsolete, worn-out or unusable personal property belonging to state agencies). To further obviate any potential or perceived conflicts of interest or biases arising from the donations, we recommend that Office adopt, to the extent possible, the same practices for acquiring donated goods and services that it employs when it purchases goods and services.⁴ For example, it would be advisable for the parties to enter into a contract or other agreement that expressly describes the relationship between the Office and the donors and their respective responsibilities.

Sincerely,

Gideon Elliot
Assistant Attorney General

Cc: Tania Maestas, Chief Deputy Attorney General

[1] The reference to “other state funds from ... local governments” in Sections 9(H) and 10(E)(9) of the Act may relate to the authority of district attorneys to receive funds through services rendered to county or municipal governments within their judicial districts. See NMSA 1978, § 36-1-8(C).

[2] Support for our conclusion that monetary donations from third parties may constitute “other state funds from grants” is found in the budget forms state agencies are required to submit each year to the State Budget Division. Among other things, the form requires agencies to provide information about revenue or anticipated revenue for the preceding, current and succeeding fiscal years, including “gifts and grants from private sources.” NMSA 1978, § 6-3-18(A)(2) (1999).

[3] The donations discussed in this advisory letter are not “gifts” to a public officials and employees that are restricted under the Gift Act. NMSA 1978, ch. 10, art. 16B (2007). The Gift Act expressly excepts from its coverage “any gift accepted on behalf of and to be used by the state or a political subdivision of the state....” *Id.* § 10-16B-2(B)(7).

[4] The Procurement Code would not apply to services and goods donated to the Office. See NMSA 1978, § 13-1-30 (2005) (Procurement Code applies “to every *expenditure* by state agencies ... for the procurement of items of tangible personal property, services and construction” (emphasis added)).