Opinion No. 2012-107

November 2, 2012

The Honorable Jake Files
State Senator
300 Free Ferry Landing
Fort Smith, Arkansas 72903

Dear Senator Files:

I am writing in response to your request for my opinion on the following questions:

1. What is a county official allowed to do under Act 569 of 2009?

2. Under Act 569 of 2009, can a county treasurer/collector download [to] discs, install or move printers and reset passwords? Are there any limits to administrative rights under this Act?

You have provided the following background information:

> Act 569 of 2009 gave elected county officials administrative rights to county electronic information and records. A county treasurer/collector would like to be able to download [to] discs, install or move printers and reset passwords if need be. The county official would like to know if these activities are includ[ed] in the meaning of the Act.

RESPONSE

With respect to your first question, the legislation generally allows a county official to exercise "administrative rights," certain of which are enumerated in the statute, in order to ensure the official's "complete access" to "public records" in

his or her charge. With respect to the specific activities recited in your second question, a county treasurer/collector, as the official custodian of records, is authorized under the statute to engage in any activities, including those expressly recited, so long as doing so marks an exercise of "administrative rights" as defined.

Question 1: What is a county official allowed to do under Act 569 of 2009?

As codified, Act 569 of 2009 provides as follows:

> (a)(1) County governments in Arkansas are the repository for vast numbers of ***public records*** necessary for the regulation of commerce and vital to the health, safety, and welfare of the citizens of the state.
>
> (2) These records ***are routinely kept in electronic format by the county officials who are the custodians of the records***.
>
> (3) ***It is the intent of this section to***:
>
> (A) ***Ensure that all public records kept by county officials are under the complete care, custody, and control of the county officials responsible for the records; and***
>
> (B) ***Prevent a computer or software provider*** doing business with a county from obtaining complete care and control of county records and ***from becoming the de facto custodian of the records***.
>
> (b) As used in this section:
>
> (1) ***"Administrative rights" means permissions and powers, including without limitation the permissions and powers to access, alter, copy, download, read, record, upload, write, or otherwise manipulate and maintain records kept by a county official***;
>
> (2) "Electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means; and

> (3)(A) "Public records" means writings, recorded sounds, films, tapes, electronic or computer-based information, or data compilations in any medium required by law to be kept or otherwise kept and that constitute a record of the performance or lack of performance of official functions that are or should be carried out by a public official or employee, a governmental agency, or other agency wholly or partially supported by public funds or expending public funds. All records maintained in county offices or by county employees within the scope of employment are public records.
>
> (B) "Public records" does not mean software acquired by purchase, lease, or license.
>
> (c)(1) ***A county official required by law to maintain public records and who in the normal performance of official duties chooses to keep and maintain the records in an electronic record retains administrative rights and complete access to all the records.***
>
> (2) A contract between a county and an electronic record provider shall include the information under subdivision (c)(1) of this section.[1]

In interpreting this statute, I am guided by the fundamental principle that "[w]e must . . . give effect to the legislature's intent, making use of common sense and giving words their usual and ordinary meaning."[2]

As reflected in the passages highlighted above, this statute clearly reflects the legislature's intent to ensure that county officials be and remain the custodians of the public records they are required to maintain. In pursuit of this end, subsection (c)(1) expressly invests the official custodian of records maintained electronically with "administrative rights and complete access" to all such records. This subsection permits a county official to exercise the "administrative rights" referenced in subsection (b)(1) of the statute to ensure such "complete access" to "public records" in his or her charge. The rights specifically enumerated in this

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[1] A.C.A. § 14-14-111 (Supp. 2011) (emphases added).

[2] *Bunch v. State*, 344 Ark. 730, 736, 43 S.W.3d 132 (2001), citing *Kyle v. State*, 312 Ark. 274, 849 S.W.2d 935 (1993).

subsection are set forth "without limitation" – i.e., as merely illustrative, not exhaustive. In my opinion, such "administrative rights" include any otherwise lawful power whose exercise might reasonably be required to ensure the official's maintenance of custodial power over and complete access to the records in his or her charge. In this regard, I note that the legislation in subsection (a)(3)(b) expressly identifies as a hazard to be avoided the "de facto" transfer of custody to a computer or software provider doing business with the county. The legislation thus precludes any arrangement, whether contractual or otherwise, that would afford a computer or software provider exclusive access to and control over public records.

Question 2: Under Act 569 of 2009, can a county treasurer/collector download [to] discs, install or move printers and reset passwords? Are there any limits to administrative rights under this Act?

In my opinion, in accordance with my response to your previous question, a county treasurer/collector, as the official custodian of records committed to his or her charge, is authorized under the statute to engage in any of the activities recited in your question so long as doing so marks an exercise of "administrative rights" as defined in the statute.

You indicate in your statement of background facts that a particular county treasurer/collector wishes to undertake the activities listed in your question. It is not clear whether he or she has recited these specific activities because one or more might potentially conflict with the term of a contract with a computer or software provider. With regard to any such conflict, however, I will merely repeat that the statute is intended to ensure that the official custodian always maintain access to the records placed in his charge. To the extent, then, that any contractual provision might be read as restricting such access, a reviewing court would almost certainly deem that provision invalid and uphold as consistent with the statute the official's action in ensuring access to records.[3]

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[3] *See Woodend v. Southland Racing Corp.*, 337 Ark. 380, 384, 989 S.W.2d 505 (1999), citing *Mahurin v. Oaklawn Jockey Club*, 299 Ark. 13, 771 S.W.2d 19 (1989) ("It is . . . well settled that the law in effect at the time a contract is made forms a part of the contract as if it had been expressed in the contract.").

Specifically, with regard to the activity of downloading public records to disc, subsection (b)(1) of the statute expressly includes the power to "download" public records within its grant of "administrative rights." The installation or relocation of printers and the resetting of passwords, although not expressly mentioned in the statute, would appear to fall within its ambit to the extent such activities might be deemed reasonably necessary to ensure the official custodian's access to and control over his or her office's public records.

With regard to your inquiry regarding what, if any, "limits" apply to "administrative rights under this Act," subsection (b)(1) defines such rights "without limitation" as including "the permissions and powers" recited therein. In my opinion, the term "without limitation" in this subsection must be read in light of the statute's overarching intent, set forth in subsection (a)(3)(A), to "[e]nsure that all public records kept by county officials are under the complete care, custody, and control of the county officials responsible for the records." In my opinion, then, the term "administrative rights" should be read as comprising any powers reasonably necessary to afford the official custodian unfettered control over public records both for his or her own official purposes and for purposes of providing ready access to any citizen seeking to review such records pursuant to the Arkansas Freedom of Information Act[4] or any other pertinent law.

Assistant Attorney General Jack Druff prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN McDANIEL
Attorney General

DM/JHD:cyh

[4] A.C.A. §§ 25-19-105 through -110 (Repl. 2002 & Supp. 2011).