



State of West Virginia  
Office of the Attorney General

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Attorney General

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October 6, 2017

The Honorable Eugene M. Simmons  
Prosecuting Attorney  
Office of the Prosecuting Attorney of Pocahontas County  
900 Tenth Avenue  
Marlinton, WV 24954

Dear Prosecutor Simmons:

You have asked for an Opinion of the Attorney General regarding whether Pocahontas County may use its hotel occupancy tax to pay expenses relating to free public libraries. This Opinion is being issued pursuant to West Virginia Code § 5-3-2, which provides that the Attorney General “may consult with and advise the several prosecuting attorneys in matters relating to the official duties of their office.” To the extent this Opinion relies on facts, it is based solely upon the factual assertions set forth in your correspondence with the Attorney General’s Office.

In your letter, you explain that Pocahontas County imposes and collects a hotel occupancy tax from visitors of the Snowshoe resort. You further explain that the County distributes funds collected from the hotel tax for certain permissible expenditures defined by statute. In particular, the Pocahontas County Commission has been transferring part of its revenue derived from the hotel occupancy tax to the County’s free libraries since 2007. You indicate that the principal basis on which the libraries claim that they are entitled to these funds is that they operate as “tourist information centers,” which are permissible recipients of the hotel occupancy tax. You further explain that the libraries “serve as the principal resource in meeting the informational needs of all citizens of Pocahontas County and its visitors.” You also state that the five libraries in the County “serve as secondary, well-marked tourism offices providing information to visitors.” Specifically, you indicate that the libraries provide free computer service, free Wi-Fi, free maps and flyers, and staff members who provide information to visitors. According to your letter, visitors also participate in yoga classes, story time, author readings, and the local farmer’s market.

Your letter raises the following specific legal question:

*Does a county commission have authority to distribute hotel occupancy tax funds to free libraries?*

We conclude that, under the facts you have provided, the Pocahontas County Commission may provide permissible amounts of the hotel occupancy tax to the Pocahontas County free libraries, as long as the funds are allocated and used for a permissible statutory purpose. Specifically, the libraries may permissibly spend the appropriated money for the “construction, operation or maintenance” of “recreation facilities” and “tourist information centers,” as well as for the “promotion of the arts.” W. Va. Code §§ 7-18-14(c)(4), (5).

In general, the West Virginia Code authorizes any county or municipality to “impose and collect a privilege tax upon the occupancy of hotel rooms located within its taxing jurisdiction.” W. Va. Code § 7-18-1(a). The Code provides that the proceeds of the tax “shall be deposited into the General Revenue Fund of such municipality or county commission” and expended only as provided by statute. *Id.* § 7-18-14.

The statute provides for both mandatory and permissible expenditures for the hotel occupancy tax. In the case of a county, at least fifty percent of the net revenue received during the fiscal year must be allocated to a convention and visitor’s bureau if one is located in the county or region. *Id.* § 7-18-14(b)(2). If more than one is located in the county, the county commission may allocate the funds between them as it determines in its sole discretion. *Id.* § 7-18-14(b)(2)(B). If there are no convention and visitors’ bureaus in the county or region, “any hotel located in [the] county or region may apply to such county for an appropriation . . . for uses directly related to the promotion of tourism and travel, including advertising, salaries, travel, office expenses, publications and similar expenses.” *Id.* § 7-18-14(b)(2)(A). Any such allocation cannot exceed seventy-five percent of the portion of the tax collected from the hotel making the application. *Id.* The balance of the net revenue allocated by the county for this purpose (i.e., at least fifty percent total) must be provided to “the regional travel council serving the area in which the county is located.” *Id.* § 7-18-14(b)(2)(C).

After these required expenditures are made, the county may allocate the remainder (if any) to certain specified “permissible expenditures.” *Id.* § 7-18-14(c). The Code provides that this remainder “may be expended for one or more of the purposes set forth in this subsection, but for no other purpose.” *Id.* § 7-18-14(c). Those permissible purposes include:

- (1) The planning, construction, reconstruction, establishment, acquisition, improvement, renovation, extension, enlargement, equipment, maintenance, repair and operation of publicly owned convention facilities, including, but not limited to, arenas, auditoriums, civic centers and convention centers;
- (2) The payment of principal or interest or both on revenue bonds issued to finance such convention facilities;
- (3) The promotion of conventions;
- (4) The construction, operation or maintenance of public parks, tourist information centers and recreation facilities, including land acquisition;
- (5) The promotion of the arts;
- (6) Historic sites;
- (7) Beautification projects;
- (8) Passenger air service incentives and subsidies directly related to increasing passenger air service availability to tourism destinations in this state; [and]
- (9) Medical care and emergency services . . . directly related to tourism

*Id.*

Based on these statutory provisions, we conclude that Pocahontas free libraries qualify for hotel occupancy tax funds, as long as those funds are appropriately used for the “construction, operation or maintenance of . . . tourist information centers and recreation facilities,” or for the “promotion of the arts.” While the statute does not define all these terms with specificity, we believe that certain activities performed by the libraries—as reflected in your letter and in publicly-available sources—qualify for permissible expenditures under the statute’s plain language and structure.

*First*, the statute’s text and structure make clear that counties can award permissible expenditures to facilities that, like public libraries, have primary purposes *other than* the promotion of tourism and travel.

Here, the distinction between required and permissible expenditures is instructive. Specifically, the Code provisions ensure that a county spends at least fifty percent of its hotel occupancy tax receipts on certain specified entities that “work[] *exclusively* to promote tourism and to attract conventions, conferences and visitors to the . . . county.” *Id.* § 7-18-14(d)(1) (defining “[c]onvention and visitor’s bureau”) (emphasis added); *see also id.* § 7-18-14(d)(8) (defining “[r]egional travel council” as “a nonstock, nonprofit corporation, with a full-time staff working *exclusively* to promote tourism and to attract conventions, conferences and visitors to the region” (emphasis added)).

In contrast to these mandatory expenditures, permissible expenditures may be made to support facilities that engage in activities *other than* tourism or travel. For example, funds may be spent to support “[m]edical care and emergency services,” even though hospitals and similar facilities do not exist solely or even primarily to facilitate tourism. *Id.* § 7-18-14(c)(9). Similarly, permissible expenditures may be spent on a variety of “activit[ies] to promote public appreciation and interest in one or more of the arts[,] . . . includ[ing] the promotion of music for all types, the dramatic arts, dancing, painting and the creative arts through shows, exhibits, festivals, concerts, musicals and plays.” *Id.* § 7-18-14(d)(6). “[R]ecreational facilities,” similarly, broadly extend to include “any public park, parkway, playground, public recreation center, athletic field, sports arena, stadium, skating rink or arena, golf course, tennis courts and other park and recreation facilities, whether of a like or different nature, that are owned by a county or municipality.” *Id.* § 7-18-14(d)(6) (emphasis added). While all of these facilities may assist or facilitate tourism in a given county, they also exist to provide goods and services to local residents.

It stands to reason that the term “tourist information center,” which is not defined in the statute but appears next to “recreation facilities” in the list of permissible expenditures, is not limited to facilities that exclusively promote travel and tourism. Thus, to the extent that a public library is acting as a “tourist information center,” it matters not that the library also exists for a separate purpose—that is, to lend books to residents.

One could argue, contrary to this analysis, that the West Virginia Code elsewhere specifically refers to “public librar[ies]” and makes separate provisions for funding them. Specifically, the Code provides that “[a] governing authority either by itself or in cooperation with one or more other such governing authorities, shall have the power to establish, equip and maintain

a public library, or to take over, maintain or support any public library already established.” *Id.* § 10-1-2. (The statute defines “governing authorit[ies]” to include “the governing body of any municipality,” such as a county commission. *See id.* § 10-1-1.) Such libraries, the Code continues, “may be financed either (1) by the appropriation from the general funds of the governing authority of a sum sufficient for the purpose, or (2) by the imposition of an excess levy for library purposes.” *Id.* § 10-1-2. This separate funding provision for public libraries could suggest that the Legislature understood libraries, recreation facilities, and tourist information centers to be distinct entities and to preclude public libraries from receiving funds from any other source.

On balance, however, it does not appear that the Legislature intended these provisions to be the *exclusive* funding mechanism for public libraries. To the contrary, the hotel occupancy tax provisions plainly allow expenditures to be made to support entities that receive state funding from other sources—such as entities that provide emergency medical services. *Compare* W. Va. Code § 7-18-14(c) (providing that hotel occupancy tax may be used for “[m]edical care and emergency services” under certain defined conditions), *with id.* § 7-15-4 (authorizing county commissions to impose special service fee for emergency ambulance services). Moreover, while West Virginia Code § 10-1-2 provides a means to fund one particular type of *facility*—public libraries—the hotel occupancy tax may be used (with respect to permissible expenditures) for a number of statutorily defined *purposes*, regardless of the precise nature of the facility receiving the funds.

In short, there is no reason to suspect that public libraries are categorically prohibited from receiving funds from hotel occupancy taxes merely because they also exist for a purpose other than the promotion of tourism, such as lending books to residents. There is also no reason to believe that public libraries are categorically excluded from receiving funds for authorized purposes merely because they are not explicitly listed as “public libraries” in the relevant statutory provisions.

*Second*, as gleaned from your letter and publicly-available information, it appears that Pocahontas free libraries engage in activities done for permissible “purposes” under the statute. According to their website, the Pocahontas free libraries “serve as the principal resource in meeting the informational needs of all the citizens of Pocahontas County and its visitors.”<sup>1</sup> They also, according to your letter, provide “free computer service, free Wi-Fi service, free maps and flyers—plus friendly, knowledgeable staff to assist visitors.” Accordingly, it appears that at least one purpose of the free public libraries is to facilitate tourism by providing information to tourists. Accordingly, the county could provide the libraries with funds for the purpose of maintaining or operating such “tourist information centers” within the libraries.

Based on available information, the Pocahontas free libraries also appear to promote and engage in covered recreational activities. As noted above, the term “recreation facilities” refers not only to places that might commonly be understood as recreational, like sports arenas or public parks, but also any “*other park and recreation facilities, whether of a like or different nature, that are owned by a county or municipality.*” W. Va. Code § 7-18-14(d)(5) (emphasis added). The

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<sup>1</sup> Pocahontas County Free Libraries, <http://www.pocahontaslibrary.org/index-1.html>. The free libraries’ website also provides a link to the county’s tourism website and other travel resources. *See id.*

phrase “whether of a like or different nature” indicates that the Legislature intended that the term “recreation facilities” be given its broadest possible construction. Your letter explains that the Pocahontas free libraries provide recreational and leisure activities such as listening to author readings, shopping at a farmer’s market, or browsing the internet. On their website, the stated goals of the Pocahontas County free libraries include “intellectual stimulation, lifelong learning, cultural enrichment, and recreational reading, by providing inviting environments in our libraries and then reaching into the communities to expand the library beyond its physical boundaries.”<sup>2</sup> Based on a combination of the facts presented in your letter and the stated goals of the libraries, it appears that the hotel occupancy tax could be used to support the “operation” or “maintenance” of Pocahontas public libraries to the extent they operate as recreation facilities.

It is also possible that some of the libraries’ activities could qualify to receive hotel occupancy tax funds for activities involving the “promotion of the arts.” The statute defines “promotion of the arts” as “activity to promote public appreciation and interest in one or more of the arts. It includes the promotion of music for all types, the dramatic arts, dancing, painting and the creative arts through shows, exhibits, festivals, concerts, musicals and plays.” W. Va. Code § 7-18-14(d)(5). If a library offers activities or events for the promotion of the arts, those activities would appear to qualify for hotel occupancy tax funds for that reason as well.

In short, Pocahontas public libraries appear to engage in a range of activities that would qualify for permissible expenditures under the statute.

*Third*, to the extent there is any doubt as to whether the statute applies on its face, the legislative findings confirm that it should be applied broadly to accomplish its goal of promoting tourism in the State. The Legislature found that “in order to attract new business and industry to this state and to retain existing business and industry all to provide the citizens of the state with economic security, and to advance the business prosperity and economic welfare of this state, it is necessary to enhance recreational and tourism opportunities.” W. Va. Code § 7-18-14(b)(3). The Legislature further found that “public financial support should be provided for constructing, equipping, improving and maintaining projects, agencies and facilities which promote recreation and tourism.” *Id.* § 7-18-14(b)(3). Although these findings are placed in the required expenditures portion of the statute, the Legislature plainly intended the permissible expenditures provisions to further the same objectives. Providing funds from hotel occupancy taxes to the Pocahontas free libraries furthers these statutory purposes because the libraries promote tourism and travel by providing visitors with internet access, maps, flyers, and other information services. Also, as noted above, the libraries provide recreational opportunities for visitors in various forms, including story times, author readings, and the farmer’s market. In light of the statutory findings, any ambiguity should be resolved in favor of permitting public libraries to use funds derived from hotel occupancy taxes for authorized purposes.

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Of course, whether a particular permissible expenditure is appropriate will depend on the particular facts, including whether the county commission, in coordination with the public library,

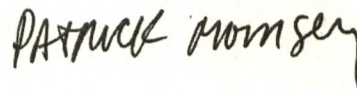
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<sup>2</sup> Pocahontas County Free Libraries, <http://www.pocahontaslibrary.org/index-1.html>.

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in fact uses the hotel occupancy tax for a covered purpose. How such individual cases would be resolved is beyond the scope of this letter. We simply conclude that the Pocahontas County Commission may, under West Virginia Code § 7-18-14, make permissible expenditures from the hotel occupancy tax to Pocahontas free libraries as long as those expenditures are made for purposes covered by the statute.

Sincerely,

A handwritten signature in black ink that reads "Patrick Morrissey". The signature is written in a cursive style with a long, sweeping tail on the "y".

Patrick Morrissey  
Attorney General

Thomas M. Johnson, Jr.  
Deputy Solicitor General

Erica N. Peterson  
Assistant Attorney General