



Rob McKenna

ATTORNEY GENERAL OF WASHINGTON

1125 Washington Street SE • PO Box 40100 • Olympia WA 98504-0100

March 26, 2009

The Honorable Kevin Van De Wege
State Representative, 24th District
P. O. Box 40424
Olympia, WA 98504-0424

The Honorable Bill Hinkle
State Representative, 13th District
P. O. Box 40413
Olympia, WA 98504-0413

Dear Representatives Van De Wege and Hinkle:

This is to acknowledge your recent letter in which you jointly requested an informal written opinion concerning proposed legislation. Since you have not referenced any specific bill language, I will analyze the law with respect to the general proposal described in your letter.

BACKGROUND

RCW 46.16.076 allows citizens to donate money to the State Parks and Recreation Commission (State Parks) when registering or re-registering a vehicle. Donations are used to financially support parks. The statute provides:

The department [of licensing] shall provide an opportunity for owners of vehicles registered under RCW 46.16.0621 and vehicles licensed under RCW 46.16.070 with a declared gross weight of ten thousand pounds or less, to make a voluntary donation of five dollars at the time of initial or renewal registration. The donation must be deposited in the state parks renewal and stewardship account established in RCW 79A.05.215 to be used for the operation and maintenance of state parks.

RCW 46.16.076(1). Under this statute, the registration form includes an extra line in which an applicant may indicate a desire to add a donation and check a box, or fill in a blank, showing the amount. The amount indicated is added to the registration, collected along with the "regular" registration fees, and allocated to State Parks, if received. If the applicant does not fill in the line or affirmatively add a donation, only the "regular" fee is collected. The applicant must "opt in" to make the donation.

ATTORNEY GENERAL OF WASHINGTON

Honorable Kevin Van De Wege
Honorable Bill Hinkle
March 26, 2009
Page 2

Your question concerns a proposal to convert this system from an “opt in” to an “opt out” system. Under the “opt out” system, the “standard” amount collected would include the donation, as well as the “regular” fees. The applicant could “opt out” of the donation by checking a box or otherwise indicating a desire not to make the donation. The amount collected would then be reduced by the amount of the donation that would otherwise have applied. The vehicle registration or re-registration would be processed with or without payment of the donation, just as in the “opt in” system currently used.

Based on the general proposal, you have asked a question that I have paraphrased as follows:

If the “opt out” system were adopted, would the donation become a fee for the purposes of applying the provisions of RCW 43.135.031, a portion of Initiative 960 that requires fiscal impact statements for certain fee increases?

ANSWER

In my opinion, the answer is no. As long as the amount involved remains a donation—that is, a completely voluntary payment which the applicant has no legal obligation to make—the amount is not a “fee” for purposes of Initiative 960. However, as noted earlier, I have not reviewed any specific bill language, and the details of a bill could affect the answer to your question. This answer is supplied on an expedited schedule at your request, so we have not had occasion to analyze the details of any specific proposal.

RCW 43.135.031 requires the Office of Financial Management to calculate and publish certain information about any bill introduced in the Legislature which raises taxes or increases fees. This statute derives from Laws of 2008, ch. 1, § 2, a portion of Initiative 960, adopted by the voters in November of 2007.¹ It applies, as noted, to increases in “taxes” or “fees.” The term “fee” is not specifically defined in the statute, so it presumably has its ordinary meaning. *State v. Watson*, 146 Wn.2d 947, 956, 51 P.3d 66 (2002) (courts may resort to dictionaries to determine the plain meaning of terms not defined in statute). The relevant dictionary definitions are “a fixed charge” and “a charge for a professional service.” *Webster’s II New College Dictionary* 410 (2001). A “charge,” in turn, is “the price set or asked . . . a financial burden, as a tax or lien.” *Webster’s II New College Dictionary* 188 (2001). The clear implication of these definitions is that a fee is an amount which must be paid for a service, a charge imposed in law either on all citizens, or at least on those wishing to obtain the service in question (a license, perhaps, or a course of training, or the opportunity to use a public facility). *See also Black’s Law*

¹ Another statute, RCW 43.135.035, requires a two-thirds vote of the Legislature for bills that raise taxes, as defined. For reasons similar to those discussed in the main text, there is no serious argument that any voluntary donation could be defined as a “tax.”

ATTORNEY GENERAL OF WASHINGTON

Honorable Kevin Van De Wege
Honorable Bill Hinkle
March 26, 2009
Page 3

Dictionary 940 (8th ed. 2004) (defining “license fee” to mean, in relevant part, “A monetary charge imposed by a governmental authority for the privilege of pursuing a particular occupation, business, or activity”).

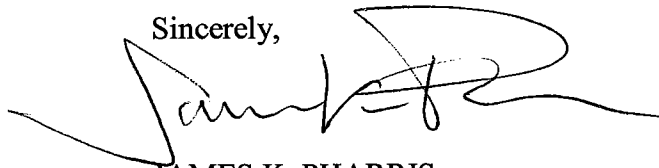
This is consistent with the Supreme Court’s explanation of what constitutes a fee. A fee has three primary characteristics. First, with a fee, “the primary purpose is regulatory[.]” *Franks & Son, Inc. v. State*, 136 Wn.2d 737, 750, 966 P.2d 1232 (1998). Second, “the proceeds of the regulatory fee [can] be used only to offset the costs of regulation.” *Id.* at 751. Third, with a fee, “there is a direct relationship between the fee charged and the service received by those who pay the fee or between the fee charged and the burden produced by the fee payer.” *Id.*

By contrast, your proposal describes a voluntary donation and not a mandatory requirement that must be met in order to register a vehicle. The donation is not a fee, because it is not a “charge” (a financial burden) imposed on any person. The donation is not “imposed,” because paying it is not a prerequisite to obtaining a license or pursuing an activity. Furthermore, the donation does not “purchase” any specific service or pay for the cost of regulation. It is merely a voluntary financial contribution to the state park system. So long as the donation remains voluntary, it does not become a fee for the purposes of RCW 43.135.031. The fact that there is a change in the way that a citizen elects to make the donation from “opt in” to “opt out” does not convert a donation into a fee.

As noted above, the details of any specific proposals would be important. Creative drafting could convert a voluntary donation into an actual fee, depending on the way it is structured and collected. This might be true, for instance, if the donation were automatically included in the vehicle registration charge but subject to a later refund (perhaps at considerable trouble or expense).

I hope this information proves helpful. This is an informal opinion, provided on an expedited basis, and will not be published as an official opinion of the Attorney General’s Office.

Sincerely,



JAMES K. PHARRIS
Deputy Solicitor General
(360) 664-3027

:pmd