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October 10, 2011

Mr. Dean Dawson
State Archivist
Division of Libraries, Archives, and Museums
Department of Education and Early Development
POB 110525
141 Willoughby Ave.
Juneau, AK 99811-1720

Re: Storage of Permanent Digital Records at the
Washington State Digital Archives
AGO File No. AN2011103297

Dear Mr. Dawson:

You asked whether permanent digital records of the Alaska State Archives (which is in the Division of Libraries, Archives, and Museums of the Alaska Department of Education and Early Development) may be stored on servers at the facilities of the Washington State Digital Archives (Digital Archives) in Cheney, Washington. The Digital Archives is a branch of the Archives and Records Management Division of the State of Washington, Office of the Secretary of State.

In brief, the state archivist may store permanent digital State of Alaska records at the Digital Archives as long as the requirements of the State Records Management Act, AS 40.21.010 – 40.21.150, will be met. The Act governs the State Archives and sets out the state archivist's responsibilities.

I. BACKGROUND

The storage of permanent digital records presents substantial challenges for the State Archives. This is because of the extraordinary number of such records; the expense of purchasing, maintaining, and operating the equipment and software

needed to store them; the expertise needed to operate the equipment and software; and the frequency with which the equipment and software must be upgraded so that the records remain accessible.

To address the challenges presented by the need to store permanent digital records, the state archivist is considering storing those records at the Digital Archives's facilities on the Eastern Washington University campus in Cheney, Washington. The Digital Archives is a state-of-the-art data center with system and power redundancies. It was designed to archive and make available online state and local agencies' digital records that have permanent value. The Digital Archives's facilities are available to partnering states. Currently, six states are working in partnership with the Digital Archives: Colorado, Idaho, Indiana, Montana, Nevada, and Tennessee.

The state archivist expects that, by partnering and storing permanent digital records with the Digital Archives, the State of Alaska will realize substantial cost savings. The State will incur far fewer costs by storing records at the Digital Archives than by building, maintaining, operating, and upgrading its own facilities and systems for archiving permanent digital records. Consistent with the goal of minimizing costs, the state archivist does not intend to maintain duplicates of these records in Alaska.

II. ANALYSIS

The State Records Management Act does not expressly require the state archivist, as "the official custodian of the archival resources of the state," AS 40.21.020, to retain physical custody of permanent state records or to store those records in Alaska. Nor is there a basis to infer that the legislature intended to require the state archivist to do so.¹ In fact, because the Act does not require the retention of such records within the State, the regulations implementing the Act specifically allow the removal of permanent records from the physical custody of the State Archives.²

¹ A review of the legislative history revealed no such intent.

² See 4 AAC 59.045(b) ("Records in legal custody of the state archives may not be removed from the physical custody of the state archivist, without the written permission of the state archivist."); cf. 4 AAC 59.035 ("A storage facility for agency records other than the state agency office, the state records center, or a state-approved contract facility must be approved by the state archivist.").

In the absence of such statutory requirements, the permanent digital records of the State may be stored at the Digital Archives, as long as doing so will not prevent the state archivist from meeting the Act's requirements. Regarding the storage of permanent digital records, the Act requires that the state archivist undertake the following: (1) "establish and operate a state archival depository that shall provide for the preservation . . . and exhibition of permanent public records"; (2) transfer records with "permanent value to the state archives"; (3) "ensure the maintenance and security" of those records; and (4) make available to the public those records that are not protected from disclosure.³

By contracting with the Digital Archives to store permanent State of Alaska digital records, the state archivist would not violate the requirement to establish and operate an archival depository.⁴ The Act does not require the storage of all permanent records in the State Archives's archival depository. Nor would contracting with the Digital Archives violate the requirement to transfer permanent records to the State Archives: as noted below, only physical custody of the records would be transferred to the Digital Archives.

Additionally, the State's permanent digital records may be stored at the Digital Archives—or at any other out-of-state facility that is not owned or controlled by the State of Alaska—if the state archivist determines and ensures, (through a thorough evaluation of its capabilities and workings, and upon entering into an enforceable agreement with it) that the requirements of the State Records Management Act will be met. First, the state archivist must determine that the Digital Archives's facilities and operation are adequate to preserve and secure the records and promptly make them available.⁵ Second, the Digital Archives must agree that the records will remain the exclusive property of the State Archives, that the state archivist alone will decide to whom they are disclosed, and that, upon

³ AS 40.21.030(a)(2), (b)(5), (b)(2), and (a)(4). Meeting these requirements will enable the state archivist to comply with the Alaska Public Records Act's requirement to make available for inspection and copying "public records," as defined under AS 40.25.220(3). *See* AS 40.25.110(a); AS 40.25.120(a).

⁴ *See* AS 40.21.030(a)(2).

⁵ *See* AS 40.21.030(a)(2), (a)(4); AS 40.21.030(b)(2).

request, they will promptly be made available or returned to the State Archives in a useable electronic form.⁶

III. CONCLUSION

The state archivist may use the Digital Archives for the storage of permanent records upon determining and ensuring, through an enforceable agreement, that the requirements of the State Records Management Act will be met. Accordingly, if you determine that state records should be stored there, the next step is to negotiate the agreement with the Digital Archives.

Please let us know if you have any questions regarding this opinion and want us to work with the State Archives on an agreement with the Digital Archives for the storage of permanent digital records.

Sincerely,

John J. Burns
ATTORNEY GENERAL

By: _____
Alan Birnbaum
Chief Assistant Attorney General
Information and Project Support Section

⁶ See AS 40.21.030(b)(5); AS 40.21.030(a)(2), (a)(4).