

Public Records, FDLE contract with software company

Number: INFORMAL

Date: January 31, 2003

Subject:

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Mr. James T. Moore
Executive Director
Florida Department of Law Enforcement
Post Office Box 1489
Tallahassee, Florida 32302

Dear Commissioner Moore:

Thank you for your recent letter requesting comments from this office regarding a proposed agreement between the Florida Department of Law Enforcement (FDLE) and a private computer firm. Under the proposed agreement, the private firm would develop, test, install and license computer software to the department and any other Florida law enforcement agency participating in the Violent Crime Information System at no cost to the department or other agencies.

You have advised this office that FDLE would permit the company to consult with its personnel and make use of FDLE automated data and communications systems incidental to that consultation in order to obtain the benefits of FDLE members knowledge of the specifications that software should meet. However, use of FDLE programs or programming time is not contemplated nor is FDLE expected to write or directly assist in the writing of the source or object code for the software. Rather, FDLE personnel will review and evaluate the results. The department has further advised this office:

The consideration provided by FDLE for the work performed by [the computer company] and for the granting of a non-exclusive license to use the software to FDLE and cooperating law enforcement agencies, including technical updates and enhancements, at no cost, will be the authorization extended to [the company] to make factual representations such as "developed in conjunction with FDLE" or "developed for use by FDLE" in its marketing campaigns in other states.

While I am not aware of any state statute which would prohibit FDLE from entering into such an agreement, there are several matters which the department may wish to consider.

A review of the statutes concerning procurement of goods and services by governmental agencies does not reveal any prohibition against gifts of information technology resources, which include computer software, to a state agency.[1] Nor am I aware of any state statute which would prohibit a private computer firm from making a factual statement that the software was developed for use by FDLE. However, in the event the gift of computer software has a 2-year fair

market value[2] in excess of \$500,000, the acquisition must be reviewed by the Information Technology Resource Procurement Advisory Council for recommendations.

In drafting the terms of this agreement, FDLE should be responsive to the need for preserving public access to the information through use of the computers software. The design and development of the software, therefore, should ensure that the system has the capability of redacting confidential or exempt information when a public records request is made.

In addition, the department should be sensitive to the fact that access to data may be difficult or precluded if the software program is designed for use solely with a particular system. For example, the *St. Petersburg Times* requested a copy of a county government's data base which was contained in a software program which condensed the data such that it could not be read except with that specific software program. The county refused the request to have the program converted into a universally machine-readable form, even though the software contained a program which would allow for such a conversion. While the county sought a declaratory judgment in circuit court to prevent access to the program, it subsequently settled with the newspaper and produced a copy of the software in the form requested.[4]

This office has been advised of proposed legislation which would ensure that when a governmental agency enters into a licensing agreement with a private firm for computer software, such software may not be designed to deny or frustrate access by the public.

According to your letter, FDLE has been approached by one private computer firm to develop, test, install and license the software at no cost to the department. There may be other computer firms which would also be interested in developing such software under a similar arrangement. The department, therefore, may wish to issue a request for proposals to determine if there are other private computer firms which are able to provide the needed computer software under terms which may be more favorable to the department.[5]

The software would appear to be a potentially valuable commodity for which FDLE has provided extensive expertise and resources toward development. The department has consulted with the private company regarding the system's specifications, means of testing, as well as the identification and correction of problems and errors which may arise in the system. In light of the above, it may, therefore, be advisable for FDLE to consider whether such an agreement should contain a provision for royalties to the state.

I trust these informal comments will assist you in making your decision to enter into this agreement. Should you have any further questions, please let me know.

Sincerely,

Robert A. Butterworth
Attorney General

RAB/twd

[1] See s. 287.073(1)(a), F.S. (1992 Supp.), defining "[i]nformation technology resources" to mean "data processing hardware, software, services, supplies, personnel, facility resources, maintenance, and training but does not include those process control devices excluded from such definition by rule of the Information Resource Commission."

[2] Section 287.073, F.S. (1992 Supp.), uses the term "[t]otal cost" which is defined in subsection (1)(b) for purposes of the statute, to include

"all costs associated with the information technology resource, including, but not limited to, value of hardware, software or service, maintenance, incremental personnel, and facilities. Total cost of a loan or gift of information technology resources to an agency includes the fair market value of the resources, except that the total cost of loans or gifts of information technology resources to state universities to be used in instruction or research does not include fair market value."

[3] See s. 287.073(5)(a), F.S. (1992 Supp.). *And see* s. 287.073(5)(b), F.S. (1992 Supp.), providing that the "council shall review the agency's information technology resource needs and shall examine the agency's proposed method of acquisition and the procurement specifications to ensure that such method and specifications are appropriate to meet the agency's needs, support fair and open competition, and are not unduly restrictive."

[4] See "Briefing Paper, Electronic Records Access: Problems and Issues," Joint Committee on Information Technology Resources Public Hearings, September 1993, p. 16.

[5] *Cf.*, s. 287.073(3), F.S., allowing a governmental agency to solicit sealed proposals through a request for proposal, when it is determined that there are alternative means to meet the agency's requirements for information technology resources.