

July 30, 2009 TRD E-Portal

The Honorable Carroll H. Leavell
New Mexico State Senator
P.O. Drawer D
Jal, NM 88252

Re: Opinion Request – TRD E-Portal

Dear Senator Leavell:

You requested our opinion regarding the legality of the New Mexico Portal Project Request for Proposals (“RFP”) issued on January 16, 2009 by the New Mexico Taxation and Revenue Department (“TRD”). We understand that TRD maintains a motor vehicle database and both the public and private sector make requests for information contained within it. TRD’s RFP appears to be an effort to select an independent contractor(s) who will pay TRD a royalty in exchange for maintaining this database, subject to relevant privacy protections, and providing the requested information to the public and private sector for a fee. The contractor would provide access to this information through an electronic portal.

Based on our examination of the relevant New Mexico constitutional, statutory and case law authority and on the information available to us at this time, we conclude that TRD may seek contractors pursuant to the Procurement Code to develop and operate a self-funded e-portal project to share in the management of Motor Vehicle Division (“MVD”) information and records as an optional alternative to the MVD’s statutory responsibility to make those same public records available for inspection and copying under the Inspection of Public Records Act (“IPRA”). Nonetheless, we are concerned that both the RFP and the proposed contract terms call into question TRD’s compliance with the State’s constitutional anti-donation provision and with the IPRA.

Procurement Code

The Procurement Code is intended to “provide for the fair and equitable treatment of all persons involved in public procurement” and to “provide safeguards for maintaining a procurement system of quality and integrity.” NMSA 1978, § 13-1-29(C) (1984). In deciding to issue an RFP for a self-funded e-portal project,[1] TRD determined that it lacked the state funds to build and implement the project itself, and that providing MVD public records only through IPRA request letters would “cause havoc to commercial users.” Letter from Secretary Rick Homans to Senator Carroll H. Leavell (February 19, 2009).

The Procurement Code mandates that an RFP to procure professional services shall include the specifications for the services to be procured and “all contractual terms and conditions applicable to the procurement.” NMSA 1978, § 13-1-112(A)(1), (2) (2007). TRD’s RFP required an offeror to build the e-portal at its own expense, to sell MVD

information and public records to third parties, and to pay the state an undetermined royalty amount. RFP, Appendix C, p. 78 of 85. The RFP's provision for a royalty payment evidently stemmed from TRD's authority under the Public Records Act, which grants a state agency authority to provide its computer database to a person in exchange for that person's commitment to properly use the database and pay a royalty to the state agency. See NMSA 1978, § 14-3-15.1(C) (1995). Offerors under the RFP were asked to propose how much they would charge third parties to access MVD records, and how much they would pay MVD for each of these transactions. See id. Neither the RFP nor the proposed contract mandates a specific royalty amount or identifies how that royalty will be transmitted to TRD.

It appears that TRD had sufficient authority to issue the e-portal RFP. See NMSA 1978, § 13-1-111(A) (2007) (procurement of professional services or a design and build project delivery system shall be affected by competitive sealed proposals); NMSA 1978, § 66-2-14 (1995) (TRD secretary may appoint agents to assist MVD with its duties). There are two issues, however, that may need to be resolved or made clear in the final contract in order to limit the contract's exposure to legal challenge.

1. Anti-Donation

The RFP requests offerors to assume that government agencies, schools and nonprofit organizations will be provided MVD information and records through the e-portal without charge. RFP, p. 4 of 85. TRD makes no distinction between public and private schools. This request is problematic under the New Mexico Constitution's anti-donation clause, Article IX, Section 14. The anti-donation clause provides in pertinent part: "Neither the state nor any county, school district or municipality ... shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation..." This prohibition has long been interpreted to apply to private for-profit and nonprofit corporations. See N.M. Attorney General Opinion No. 90-13. This prohibition also applies to private schools.

The New Mexico Supreme Court has interpreted the anti-donation clause's use of the term "donation" as "an allocation or appropriation of something of value, without consideration to a 'person, association or public or private corporation.'" Village of Deming v. Hosdreg Co., 62 N.M. 18, 28 (1956) (emphasis added). This Office has considered whether a state agency could allow a private nonprofit organization to rent its facilities at a substantially reduced cost from its usual rental rate. We concluded that the Department of Public Safety could not rent its facilities to a local Boy Scout troop for a \$3.00 fee instead of the \$25.00 fee normally charged to others because such a reduced fee was a donation or gift in violation of the anti-donation clause. N.M. Attorney General Opinion No. 90-13.

Consequently, the contractor through the e-portal, or MVD through a standard inspection of public records request, may not provide access to public records for free to a nonprofit organization or a private school if the contractor or MVD charges others a fee for access to the same public records. (MVD must also make its public records

available through the e-portal in accordance with equal protection principles, i.e. persons similarly situated are treated the same).

2. Inspection of Public Records Act

TRD intends that the e-portal be an alternative to the IPRA for persons wishing to obtain public records. RFP, pp. 1, 48 of 85. Secretary Homans stated that the e-portal will provide “optional access” to the MVD database, and that the e-portal provides more convenience than the IPRA for individuals and commercial users who want to access public records quickly. See Secretary Homans, March 7, 2009 *Albuquerque Journal* editorial column; Letter from Secretary Homans to Senator Carroll H. Leavell (February 19, 2009). Thus, persons who want to inspect public records may exercise their option to file a standard IPRA request rather than using the e-portal. As with any IPRA request, TRD and MVD must respond within the times specified in the IPRA. See NMSA 1978, § 14-2-8(D) (1993) (a public body must permit inspection of public records “immediately or as soon as is practicable under the circumstances, but not later than fifteen days after receiving a written request”).[2]

Secretary Homans stated that if TRD has to resort to the IPRA to make its public records available, this would negatively impact commercial users. March 7, 2009 *Albuquerque Journal* editorial column. Nevertheless, given that providing persons with public records in accordance with the IPRA is “an essential function of a representative government and *an integral part of the routine duties of public officers and employees,*” we assume that both MVD and TRD will continue to allow persons to access, inspect and copy public records in a timely fashion under the IPRA, regardless of whether or not an e-portal system also allows those persons to access MVD’s public records. See NMSA 1978, § 14-2-5 (1993) (emphasis added).

In conclusion, we believe that TRD has authority under the Public Records Act, Procurement Code and Motor Vehicle Code to contract with a third party to operate an e-portal project that is an optional alternative to providing the general public access to MVD public information and public records. While TRD has such authority, it must ensure that the implementation of the e-portal project does not violate the New Mexico’s constitutional anti-donation provision or the IPRA.

Your request was for an Attorney General’s Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of this letter instead of a formal Attorney General’s Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public. If we may be of further assistance, please let us know.

Very truly yours,

MARY H. SMITH
Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General

[1] According to Secretary Homans, TRD's current contracts, managed through six Database Disclosure and Use Agreements, have expired and cannot be renewed. This left three choices: (1) to provide public records only through the IPRA; (2) to build an e-portal itself, or; (3) to issue an RFP for a contractor to build and operate an e-portal at no cost to the State. See letter from Secretary Rick Homans to Senator Carroll H. Leavell (February 19, 2009).

[2] The RFP requires an e-portal system and associated fees that "manage[s] the sale and delivery of MVD driver and vehicle data records *to appropriate customers* in a manner that meets the requirements of the [IPRA], the New Mexico Public Records Act, and the Federal Driver's Privacy Protection Act." RFP, p. 48 of 85 (emphasis added). We expect that a private contractor will not control or monopolize the dissemination of public records.