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82-00089

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NOV 19 1981

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Colleges & Universities -
Data Processing -
Competition with Private
Industry

State Technical College may
sell computer software to
out-of-state schools without
violating Constitution § 93
prohibiting State from
engaging in private
enterprise.

Dear Dr. Teague:

We have received your request for an Attorney General's opinion regarding the development of computer programs by the Muscle Shoals State Technical College (MSSTC). I understand that MSSTC has developed computer programs, or software, for the use in maintaining student records and performing accounting functions at the school. I understand that no federal funds have been involved in the development of these programs, and a number of out-of-state schools have expressed interest in the purchase of these programs for use in maintaining their own records and accounting. You have also informed me that these inquiries have not been solicited by Muscle Shoals State Technical College.

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Your question is

May MSSTC sell its computer software, either through licensing or sale, to out-of-state schools without violating the Constitution or laws of the State of Alabama?

Constitution of Alabama 1901, § 93 provides as follows:

"The state shall not engage in works of internal improvement, nor lend money or its credit in aid of such; nor shall the state be interested in any private or corporate enterprise, or lend money or its credit to any individual, association, or corporation."
(Emphasis added).

Very few cases exist which in any way refer to the private enterprise provision of Section 93. It has been held, however, that the purpose of the private enterprise prohibition is to prevent the State from competing with private individuals or corporations. See Knight v. West Ala. Environmental Imp. Auth., 287 Ala. 15, 246 So.2d 903 (1971). Also, Corning v. Patton, 236 Ala. 354, 182 So. 39 (1938) held that a county was not engaging in private enterprise where the county had rented the site of a former courthouse under a fifty year lease which, in addition to providing for a fixed rental, provided for a percentage to the county of the volume of business conducted by the lessee.¹

¹Although it was later held in Edmonson v. State Indus. Development Auth., 279 Ala. 206, 184 So.2d 115 (1966) that Section 93 did not apply to political subdivisions such as counties, the Alabama Supreme Court in Corning v. Patton overlooked this distinction and treated the case as if the "private enterprise" provision applied.

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Despite the distinctions between the present case and Corning v. Patton, there are two respects in which the case is instructive. First, like the sale or lease of computer software being contemplated here, Corning involved a lease made for pecuniary gain. It is clear, therefore, that the fact that MSSTC leases its program to out-of-state schools at a profit is not by itself enough to invoke the constitutional prohibition. Second, it is equally clear as a result of Corning that the constitutional prohibition against competition with private enterprise does not mean that all acts or transactions which in any way compete with private enterprise are barred. The constitutional prohibition apparently contemplates something more than the rental of a single piece of property, as was the case in Corning, or the occasional sale of a computer program as is the case here.

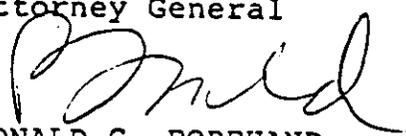
I conclude, therefore, that unless MSSTC were to actually engage in developing programs for the purpose of sale or lease, the prohibition against engaging in private enterprise would not apply. The constitutional prohibition would not be implicated as long as these programs are developed only incidentally to the school's teaching program and their sale or lease does not arise out of actual soliciting by the school.

It is therefore my opinion that there is no statutory provision which prohibits the sale or lease of such software, and such sale or lease is permissible.

I hope this answers your question. If I or this office can be of further assistance, please call on us.

Sincerely,

CHARLES A. GRADDICK
Attorney General



RONALD C. FOREHAND
Assistant Attorney General

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