



Collaborating Through Open Source Software
Legal concerns affecting contracting entities

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Foreword

Carelink members – county councils, municipalities, and private care providers – use a wide range of computer programs that have been created with public resources. This software has been developed either internally by information technology (IT) departments or externally by vendors. Several of the programs have received attention from other health and social service entities, e.g. other county councils. Our members would like to be able to share this software, without charge.

Sharing software in this manner could lead to a more uniform standard of IT support in the care sector since a program developed by one county council would be accessible to others without cost. We would also expect this to accelerate the distribution of software.

To assess whether it would be legally feasible to share software, Carelink asked Torsten Rehn of Stockholm County Council, in the autumn of 2003, to investigate the legal implications of such a move.

This document examines the relevant issues and identifies possible solutions. Carelink will continue this work by supporting the distribution of software in accordance with the principles that have been proposed.



Mats Larsson
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Carelink is a national association in Sweden comprised of members representing county councils, regions, municipalities, and private healthcare organisations. We promote the advancement of information technology (IT) as a means to support and enhance efficiency in care for patients and providers alike.

Carelink was formed in 2000 by the Swedish Federation of County Councils, the Swedish Association of Local Authorities, the Association of Private Care Providers and Apoteket, the Swedish Pharmacy chain. Carelink currently has 67 members.

Summary

Computer software that has been developed with tax revenues should be used to benefit as many citizens as possible. Those responsible for developing this software should also participate in distributing the benefits to others. Promote co-ordination and diffusion of computer programs among public authorities by making this software “open source”!

This report focuses on the software that has been *developed* with public resources and on the conditions related to its distribution. The report does *not* focus on the general advantages or disadvantages of *using* open source software.

Our investigation did not uncover any insurmountable barriers that would prevent publicly financed organisations or authorities from disseminating their own programs as open source software – through an open source license or other means – under the condition that they hold the proper rights.

The licensing terms for open source software allow it to be used without charge, modified, and distributed by anyone. The terms also allow access to the source code so the program can be studied in detail – a prerequisite for adapting and improving it.

The employer holds the copyright to software developed by employees, assuming that the employee created the program as part of a work assignment or directive from the employer, and if no other agreements have been made.

If a public authority intends to engage a vendor to develop open source software it is important to procure this service in the appropriate way. All contracts should be based on provisions in the Act on Public Procurement. The conditions for purchasing and contracting should specify that the buyer shall hold all rights to the software, and that the software is intended to be open source and will be shared with multiple users.

The same requirements on procurement apply if a public authority does not want the software to be open, but simply wants to share it with another public authority or “neighbour”. However, in this case, use of the software cannot be subject to any requirement for compensation, e.g. sharing the maintenance costs. Any terms related to compensation having monetary value would require the “neighbour” to procure the program in accordance with the Act on Public Procurement.

It is not necessary to issue a special license for open source software developed by a public authority. The GNU General Public License (GPL) is recommended if one intends to combine the program only with other open source programs, and if all future versions shall also be open source. The Lesser General Public License (LGPL) can be used if the intent is to combine the program with programs that are not open source. The Berkley Software Distribution (BSD) and the Academic Free License (AFL) are recommended in cases where one want to allow future versions of an open source program not to be open source.

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1. Background

The use of *open source software (OSS)* has become an increasingly common alternative to the program options offered by large information technology (IT) corporations because of their quest to “lock in” customers to their own products. The use of open source software has also become an increasingly attractive option due to cost.

Public institutions and agencies invest large sums of tax revenue in developing their own software. Surprisingly, the results are not routinely shared with others. Various software solutions have been developed, perhaps unnecessarily, to address similar problems. The diffusion of good solutions would lower investment costs and increase uniformity, which in turn would facilitate collaboration and co-operation among IT systems.

It is unfortunate if uncertainty about what is, or is not, allowed has resulted in insufficient sharing of useful software. Hence, it is important to study the legal situation and offer guidance to facilitate *production* of open source software by public authorities, not simply discuss the advantages and disadvantages of *using* open source software.

Carelink believes that wider distribution of open source software that has been developed internally by health and social services has the potential to enhance the effectiveness of IT in health services and would achieve faster diffusion of common solutions in health care.

2. This Document

This document is based on, and includes excerpts from, legislation and internal investigations of legal issues, as authorised by Carelink, concerning licensing of open source software and the release of software to other agencies. Additional sources include reports from the IT Commission, IT Law Observatory. (See reference list).

The author would like to express sincere appreciation to colleagues and others who contributed viewpoints, and for contributions by Mikael Pawlo and other attorneys from the Lindahl law office, to Anders Hesse from the Boman and Hesse law office, and to Mats Östling from the Swedish Association of Local Authorities for reviewing the manuscript.

3. Introduction

An overriding value reflected in this document is that tax-financed software development should, in principle, yield open source software unless there are special reasons against it. Open source offers the best conditions for assuring that the software will yield the greatest benefits since many will have the opportunity to use the programs. Computer software, unlike most other products, can be easily copied as often as desired at little cost. (You can have cake and eat it too!) The aim of our investigation is to offer guidance in doing this in the proper way. The report

summarises the applicable regulations and the practical aspects of sharing programs as open source software or in other ways. It is important for such actions to be legally correct.

By disseminating results from software development projects as open source software, commercial bodies also have access to the program code. Thereby, they have the opportunity to improve it and offer services that may provide greater choice and competition. This effect has become apparent in several areas where open source software has gained ground. This also lowers the risk of being “locked in” and dependent on particular suppliers and the poor bargaining conditions that this creates.

Information managed by computer programs can be confidential, sensitive, and secret. However, this does not imply that information on the design and function of the computer program needs to be secret. To the contrary, it is necessary to assess how secure a program is, to identify any weak spots or hidden entries. Openness becomes an advantage since many have the opportunity to assess security. Passwords and secret encryption keys must, however, always remain protected to shield sensitive data.

4 Concepts

4.1 Source code

Creating a computer program involves using a programming language to write instructions to the computer. The text containing the instructions is called the source code. A computer program may be composed of a very large number of instructions, many lines of text. The source code instructions indicate how the program should function and, in principle, it can be modified using a common word processor.

To run the program in a computer, the source code must be transformed into a much more detailed language adapted to the computer, expressed as “zeros and ones”, that is unreadable for humans. This process is called compiling. The results are called executable code, or simply the program. It is in this unreadable form that all common programs exist in our computers.

The source code of a program is the form of the program that is best suited to modification. Changing a computer program requires access to the source code. An open source program always has an accessible source code. The executable code is understandable only to the computer and therefore not suitable for entering changes.

4.2 Free software and open source software

Free software is defined by the Free Software Foundation, FSF, (www.fsf.org). Software is free if “the four freedoms” are met. These are defined as:

- freedom to run the program for any purpose
- freedom to study the program – access to the source code is a precondition
- free to redistribute copies of the program
- freedom to improve the program and release these improvements to the public.

Open source software is defined by the Open Source Initiative, OSI, (www.opensource.org). OSI has established ten criteria, similar in content to those defined by FSF, that a license must fulfil for a program to be certified as open source. The criteria are presented in the Open Source Definition, OSD. Only software licensed in accordance with an OSD certified license may be called Open Source Software, OSS. Around 40 licenses have been certified by OSI and are permitted to use the OSI certification mark. Only programs certified under one of these licences, in the strictest sense, are Open Source Software.

The definition of free software by FSF and the definition of open source software by OSI convey “essentially the same thing”, although some people might disagree. In the context of this report we do not need to focus on the differences. Hence, in the following report we make no differentiation between open source software and free software. We consider an open program to be free and a free program to be open, even if this is not entirely correct. Here, we primarily use the terms *open source software* and its antonym, *closed software*.

Much of the development of open source software is on a voluntarily basis. However, several large suppliers (vendors) including IBM, Hewlett Packard (HP) and Sun also make substantial contributions from their own resources in developing open source software, using open source programs in their own system solutions and supporting open source software.

The utilisation of open source software is not subject to a fee. However, it is fully accepted to earn money, e.g. on distribution, adaptation, further development, and also deliver support of open source software.

4.3 Copyleft

Open source/free software can be classified into two categories, programs that are under a copyleft license and those that are not.

Copyleft is a mechanism created by the FSF founder, Richard Stallman, to assure that free software and all modified and extended versions of the software will remain free.

FSF believes that developers of non-free/closed/proprietary software use copyright to take away the freedom of users. FSF uses copyright in the opposite sense, i.e. to guarantee the freedom of users – hence, the name “copyleft”. Copyright is thereby used to assure that software remains free. (“Upphovsrätt” is the Swedish equivalent of the term “copyright”.)

To copyleft a program, the software is first protected by copyright. Then the terms of distribution are established through an open source license, i.e. a contract between the copyright holder and the user.

FSF recommends the GNU General Public License (GNU, GPL). The conditions in the GPL state that everyone has the right to use, modify, and redistribute the source code or any program derived from it, but only if the distribution terms are unchanged, i.e. *GPL shall continue to apply even for all future modified and extended versions of the program!* This is copyleft. GNU GPL is the most commonly used copyleft license.

4.4 Proprietary software

The term proprietary software (non-open/non-free software) is often used as the antonym of open/free software. In a strict sense, this use of the term is not entirely correct. “Proprietary” stems from the word “property” and basically means *has an owner*. It is important to emphasise that even open/free programs have owners and are protected by copyright laws. Hence, the antonym of “proprietary” software should be (or so one would think) “public domain” software since it is not protected by copyright. However, the word is not used this way.

Proprietary software usually involves licensing agreements with limitations on utilisation rights. Utilisation is subject to a fee. The license allows only a certain number of users, may be used on only a single computer, etc. Source code is normally not available.

In programs certified under an open source license, the source code is accessible, and the user has unlimited rights of utilisation.

5 Can a Public Authority Make Software Open?

This section reviews the legal issues that may be encountered when a contracting entity intends to license or in some other way redistribute software. Relevant legislation includes the Swedish Public Procurement Act, the Copyright Act, the Contracts Act, the Administrative Procedure Act, the Local Government Act, the Competition Act, the Principle of Public Access in the Freedom of Press Act, and the Secrecy Act.

5.1 Public Procurement Act

The Public Procurement Act (“LOU” is the Swedish acronym) concerns purchasing by the state, local governments, county councils, and other entities. The Act covers provisions concerning public procurement of goods and services. It is based on several European Union (EU) directives on public procurement, which are binding on Sweden as a member of EU.

Public procurement concerns the awarding of public contracts, i.e. procurement contracts. According to the EU directive on public procurement, a procurement contract is a written contract including economic terms between a supplier and a contracting entity.

Article 4 of the Act states:

“The award of public contracts should be so arranged as to take advantage of existing competition and should also in other respects accord with the conventions of good business practice. No unwarranted considerations should affect the treatment of tenderers, candidates, or tenders”.

5.1.1 Who is the contracting entity?

The term *contracting entity* includes those undertakings, associations, societies, and foundations that have been established to meet needs in the general interest, provided that these needs are not of an industrial or commercial nature and their capital has in the main been supplied by the state, a local authority, a county council, or some other contracting entity.

Among the group including public interest undertakings, associations, societies, and foundations there may be uncertainty concerning whether or not they are contracting entities. In principle, the organisation itself shall make this determination. The purpose of an organisation, i.e. why it was formed, is a key factor in determining whether or not it is a contracting entity. If an organisation was formed to meet needs in the public interest it is probably a contracting entity. According to Chapter 2, Article 7 of the Local Government Act, municipalities and county councils may only be engaged in undertakings having no profit motive, which should imply that undertakings of this type are always contracting entities.

Carelink, both as an association and a limited company, should be viewed as a contracting entity in the context of the Public Procurement Act, and therefore the Act is applicable.

5.1.2 When should the Public Procurement Act be applied?

The Public Procurement Act should be applied by all contracting entities for all procurement. Direct procurement can be used in purchasing goods and services below a specified threshold limit. However, even here, the Public Procurement Act regulations shall apply. The Public Procurement Act defines procurement as “the purchase, leasing, rental, or hire-purchase of supplies, public works or services.” Procurement implies the acquisition of something. The contracting entity receives goods or services and pays for them.

Procurement leads to a public contract, i.e. a written agreement, that a contracting entity enters into regarding procurement as defined by this Act and that is manually signed by the parties or signed by them using an electronic signature.

The Public Procurement Act does not need to be applied by a contracting entity when it, with its own staff, produces the services needed for its own activities. For example, it is not considered inappropriate if an entity itself chooses to manage and maintain a computer program.

5.1.3 Compensating gifts

If a contracting entity disposes of a resource this transaction is not viewed as procurement. A purely non-profit transfer, i.e. a gift, uncompensated transfer, is not covered by the Public Procurement Act since it does not regulate the reception of gifts. If, however, the transfer requires compensation of any significance, then the opposite would apply. If a gift, e.g. computer software, involves an agreement to take on or share future operational management and maintenance costs, this exchange would be viewed as compensation, and the software would need to be procured in accordance with provisions in the Public Procurement Act. This would apply even if Carelink were the recipient. However, if the recipient *voluntarily* agrees to manage and maintain the software without any demands from the giver, this is another matter.

Then, since maintenance would not be a condition for transfer, the transaction is non-profit and not regulated under the Public Procurement Act.

Regardless of licensor, it is permissible to enter a licensing agreement to use computer software, without procurement, under the condition that the licensor does not require compensation.

5.1.4 Inappropriate procurement

A contract may be contested if a contracting entity provides incomplete or erroneous information. The opportunity to contest is up to 10 days after the decision to award a contract, i.e. the decision in the procurement process by which a supplier is selected. After a contract with the supplier has been signed, the procurement can no longer be contested. However, it is possible to raise the issue of damages. This opportunity is limited to one year following the award of a contract. In practice, it is difficult to define injury, and therefore the opportunity to raise the issue of damages is limited. The adjustment provisions in the Public Procurement Act also enable the supplier to return after the one-year limit to request adjustments in reimbursement, or other terms of the contract.

5.2 Contracts Act

The Contracts Act from 1915 contains the provisions for entering and modifying contracts.

If, for example, a county council wants to transfer a computer program to another user – in conflict with, or without support of, a contract – this could constitute an infringement on the contract and copyright, and could result in a claim for damages from those holding the rights to the software. There is also a risk that improper transfer could result in a claim for damages from those to whom the program was transferred!

5.2.1 Supporting documents and procurement contracts

Goods and services may not be procured under certain terms and later be used in conflict with these terms or in ways other than that specified in the agreement. Hence, both the supporting documents and the procurement contract must show that the results of software development that has been procured will be distributed as open source software, or will be distributed in another way to other users.

Chapter 3 of the Contracts Act addresses “annulment of legal agreements” and Article 30 prohibits concealing items of importance to the contract. If others besides those who actually procured the contract will have access to the goods or services, this shall be included in the supporting documents presented in the procurement process. The procurement contract must also specify that others have the right to use the results.

5.3 Copyright Act

The Copyright Act protects the originator of the work. The Copyright Act covers the copyright to literary and artistic works. The term proprietorship is used to address things not works.

Chapter 1 of the Copyright Act addresses the subject matter and scope of the copyright, including:

Article 1: "The originator of a literary or artistic work has the copyright to the work regardless of whether it is a 1. literary or descriptive composition in writing or speech, 2. computer programs..."

This means that computer programs are protected as literary works. Special regulations also address computer programs:

Article 26 g. "Anyone who has acquired the right to use a computer program is entitled to make such copies of the program and to make such adaptations which are necessary in order for him to use the program for its intended purpose. This also applies to corrections of errors. Anyone who has the right to use a computer program is entitled to make back-up copies of the program, if this is necessary for the intended use of the program."

This protection involves only the concrete form and thereby not the underlying idea, i.e. algorithm. A copyright is not awarded for an idea, but for an individually designed presentation of the idea. A patent, however, may protect the idea upon which an invention is based.

The copyright is given to the originator. A copyright is in force for 70 years following the year of death of the originator. There are, however, exceptions.

The Copyright Act states the following about computer programs created under the conditions of employment:

Article 40 a. "The copyright of a computer program created by an employee as a part of his tasks or following instructions by the employer is transferred to the employer unless otherwise agreed in contract."

The transfer of the copyright covers rights of disposition and the economic and non-economic rights."

If someone modifies a work protected by copyright, a separate copyright can be given for the modification. Of course, such rights belong to those who have modified the work, but they do not control the copyright if it is in "conflict with the copyright of the original work".

The protection granted to the originator is usually separated into economic rights and non-economic rights. The economic rights include the exclusive right for the originator to produce and distribute copies of the work. The non-economic rights include the right to be named in conjunction with the work. This means that the originator's name shall be stated to the extent and in the manner required by proper usage. Included here is the right to respect the integrity of the work, i.e. it may not be altered or made available to the general public in a manner that is prejudicial to the originator's literary or artistic reputation or individuality.

It is important to observe the so-called *specification principle* in transferring or relinquishing rights. This means that only those parts of the copyright that are expressly mentioned in a contract are transferred or relinquished. Those rights that are not included in the specification remain with the originator. Hence, it is important to specify what a purchasing agreement or a license is intended to cover with regard to the copyright.

The Copyright Act presumes that works will not be transferred further from a licensee unless specifically agreed upon. However, if from the outset it was specified, e.g. that a county council procured all of the copyright to a program and that the intent is that the county council would receive not only user rights but also the copyright, then no copyright-related obstacles would stand in the way of further transfer.

5.4 Administrative Procedure Act

The Administrative Procedure Act addresses how public authorities deal with work, decisions, conflict of interest, service responsibilities, etc. County councils and municipalities are covered by the Administrative Procedure Act.

When a public authority renders a decision on a particular case it must primarily apply the relevant regulations. The work of public authorities must be objective. They cannot allow themselves to be swayed by interests other than those they are appointed to fulfil. Likewise, they may not base their decisions on considerations of circumstances other than those which, according to applicable regulations, should be addressed in dealing with a case. Hence, county councils shall not favour or disfavour particular interests, nor are they permitted to make allowances for irrelevant circumstances.

From a standpoint of administrative law, in principle no obstacles would prevent a county council from licensing open source software or transferring software to another county council or municipality.

Regarding collaboration among authorities, the Administrative Procedure Act states the following:

Section 6: "Every authority shall assist other authorities within the framework of its own activities."

One should be able to interpret this section as supporting the idea of collaboration by disseminating in-house-developed software to other public authorities!

5.5 Local Government Act

The Local Government Act is framework legislation that lays down the democratic rules for municipalities and county councils as regards authority, organisation, types of activity, decision making, elections, resource management, etc.

Chapter 2, Article 1 of the Local Government Act (General powers) states:

"Municipalities and county councils may themselves attend to

matters of general concern which are connected with the area of the municipality or county council or with their members and which are not to be attended to solely by the state, another municipality, another county council or some other body.”

The Act allows local government to decide what it should be working with, and at what level, but its activities must serve the community and be of general concern. Local authorities are not allowed to support individual enterprises, but may collaborate with the business sector.

Local governments are prohibited from entering into speculative activities for the purpose of making a profit. Local government enterprises shall be motivated by a general public interest. Furthermore, local government should maintain good economic management.

The basic legal principles underlying local government apply to all activities administered within the municipalities, municipal enterprises, or in collaboration with several municipalities and county councils. Carelink shall also adhere to these principles.

There is no specific law that prohibits municipalities and county councils from giving away property. However, giving away property may be in conflict with the general principles that municipalities and county councils must follow. Giving away property could be viewed as being in conflict with the Local Government Act (Chapter 8, Articles 1 and 2) where it is stated that “municipalities and county councils shall have good economic management in their activities” and that they “shall administer their funds in such a way that requirements of a good return and adequate security can be catered for”.

However, this should not prevent the transfer of software among county councils or licensing of software according to an open source license. Licensing of software based on an open source license is not a matter of a gift or transfer in the usual sense. The giver still has the program and the rights to it! What is forfeited is the potential business opportunity to license the program in a commercial sense.

It is uncertain whether it would be possible to acquire greater value from the software through commercial sales. Furthermore, selling the program is not allowed to be the original purpose for developing the program. It can be difficult to market software profitably, and also the seller is expected to be responsible for the product. It must be determined from case to case whether or not a product would be commercially viable, and if sales would be more profitable than open source licensing in the long term.

Open source licensing is intended to increase the benefits for local citizens without exposure to economic risk. If the program is freely accessible, the chances are greater that more people will use it. This can provide the conditions for collaboration and cost sharing in further development of the program. It is also beneficial to limit the number of programs that perform the same functions. The idea of open source also includes sharing software products and advancements made by others. Obviously, this is of general interest for members of local government. If only a single county council does this, it is more difficult to motivate. However, if several, or all, do it, then obviously

the conditions exist for freely using software that another county council has developed – and of course this is in the interest of the members.

If the local government presents a gift to a particular member this conflicts with the *ban to favour an individual* and the *equity principle*. It is not allowed to treat one “member” differently than any other member. The equity principle, however, applies only to one’s own members and therefore does not prohibit gifts to separate legal entities that are not local government members.

The *localisation principle* requires that local government activities shall be tied to the municipality or county council. However, this does not prevent a local government from making contributions to separate organisations that encompass regional or national activities if the contribution is proportional to the interest of the local government member.

The “*at cost*” principle, which also applies to non-members, prohibits municipalities and county councils from charging too much for the services or goods they offer, i.e. local government is not allowed to generate a profit. However, the principle does not require local government to charge a fee that recovers their cost. In other words, municipalities and county councils are not prohibited from offering services at a loss. Again, the requirement is that these activities are in the interest of local government members.

In summary, the legal principles of local government, considering the public interest and interest for their own members, shall not create barriers to licensing computer software based on the open source license or disseminating them in other ways.

5.6 Competition Act

The Competition Act, Article 1:

“The purpose of this act is to eliminate and overcome obstacles to effective competition in the production of, and trade in, goods, services and other products.”

According to Article 6 on *anti-competitive co-operation*, agreements between companies shall be prohibited if they are intended to prevent, restrict or distort competition in the market to an appreciable extent. (A company or “undertaking” is defined in the Act as a natural or legal person engaged in activities of an economic or commercial nature.) In the context of the Competition Act, even state and municipal bodies qualify as companies, although not in implementing their authority as empowered by the government.

If the companies in question have a combined maximum market share of 10% in the *relevant market*, the criterion “to an appreciable extent” in Article 6 is not applicable, and thereby the practice is not prohibited.

The relevant market consists of the relevant geographical market and the relevant product market. Determining the composition of the relevant geographic market is usually not a major problem, however, determining the composition of the relevant product market may be.

Products that are interchangeable – in terms of characteristics, price, use, etc – to any appreciable extent belong to the same relevant product market.

According to Article 19, any abuse of a dominant position on the market by one or more company shall be prohibited. Price dumping is a typical abuse of a dominant position. In practice, a market share of at least 40% must be held for a company to be viewed as having a dominant position on the market.

Consider, for example, a county council that is found to have a relevant market share below 30% and works alone, and there is no anti-competitive co-operation according to Article 6 of the Competition Act. In this case, there should not be any problem concerning the legal aspects of competition. From the perspective of the Competition Act the county council does not hold a dominant position on the market.

Even a purchaser may, in principle, have a dominant position that can be abused. However, this is rare in practice.

The Competition Act safeguards free competition. Special conditions apply in areas where a party acquires a dominant position as a result of legislation.

It is unlikely that the Competition Act would present any problems related to the issues discussed here, particularly as regards the actions of individual county councils. However, the concepts of anti-competitive co-operation and joint undertakings, e.g. within the framework of Carelink, may have importance – in part, because co-operation under a common organisation comprises a typical example of anti-competitive co-operation that can be judged according to Article 6 of the Competition Act and partly because Article 19, e.g. can be applied if the companies jointly hold a dominant position (joint dominance). It remains to be seen whether or not this will have any practical importance.

5.7 Principle of Public Access

Chapter 2 of the Freedom of Press Act addresses access to public documents, and states the Principle of Public Access. A document is public if it is held by a public authority and is received or drawn up by that authority. Every Swedish citizen has the right to read public documents. An authority has the same right as an individual as regards access to information.

Computer programs are considered to be documents under Chapter 2, Article 3 of the Freedom of Press Act. Computer programs in a public authority are thereby, as a rule, subject to transparency according to the Act. (Woodcock and Holm, 2003). However, views vary on the consequences that this may have in practice.

The copyright does not prevent the release of information. Article 26b of the Copyright Act states that official documents shall be made available to the public as prescribed in the Freedom of Press Act without interference from the copyright. This allows an individual to access a computer program as a public document, but not to use the program. Chapter 1, Article 1 of the Copyright Act provides copyright protection for computer programs. The copyright includes an exclusive right to the

work for the originator, which means that the public authority's permission or license is required to use and copy the program. New copies of the program may not be produced, even when intended for private use.

According to the Freedom of Press Act (2:13) public authorities are not required to release computer programs in a format other than a printout, i.e. not in machine-readable form. Currently, there are no rules that expressly delegate the right to obtain public documents in electronic form. The public should thereby have the right to a printout copy of a public authority's computer program. If a person would use such a printout to develop a computer program, he/she would infringe on the copyright when using the program. The principle of public access does not mean that computer programs owned by public authorities become open source programs, since they may not be used.

5.8 Secrecy Act

Secrecy Act, Article 1:

“This act contains provisions on secrecy in public activities and about prohibition of disclosing official documents. As regards the latter, secrecy entails a restriction on the right of the public to obtain an official document. “

According to Chapter 6 of the Secrecy Act, dealing with secrecy regarding the economic interest of the public, Article 1 states:

“Secrecy applies to the business affairs of public authorities in regard to information about business or operational conditions if it can be assumed that someone engaged in similar activities will be favoured at the cost of the public authority if the information is disclosed.”

Chapter 8 of the Secrecy Act addresses protection for the economic situation of the individual, and Article 10 protects business partners of public authorities from injury due to disclosure of information.

The release of a computer program developed in-house could be denied since it could harm the authority and unjustly favour others at a cost to the authority or injure a business partner of the authority. Even if a computer program was considered a public document, the program could be protected from release by the Secrecy Act. In summary, the principle of public access may be limited in some cases by the Secrecy Act.

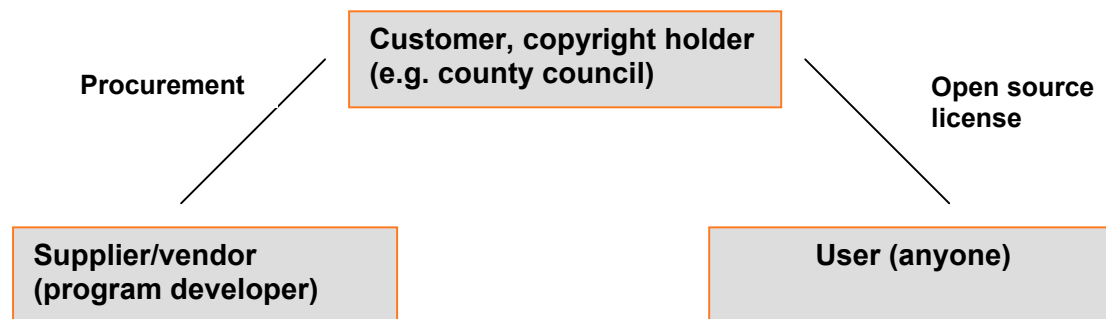
5.9 Summary

The act of licensing computer programs, developed in-house by a public authority, as open source software has probably not been tested in the Swedish courts. Our investigation has not identified any barriers that would prevent publicly financed organisations or authorities from publishing programs as open source software under an open source license, provided that the appropriate rights are held.

Article 6 of the Administrative Procedure Act can be interpreted to support the concept of collaboration by disseminating software developed in-house to other authorities: *“Every public authority shall assist other public authorities within the framework of its own activity.”*

6 Creating Open Source Software

Three parties are involved in the following scenario to create open source software. A customer, e.g. a county council department, hires a supplier (vendor) to develop a computer program. The county council is the buyer and a customer of the supplier. The county council department intends to allow other users to share in the outcome of the supplier’s work by licensing the program as open source software.



6.1 Customer – supplier relationship

1. Software development shall be procured in accordance with provisions in the Public Procurement Act.
2. The contract documentation shall specify that the results produced by the supplier should be accessible as open source software in compliance with an open source license or other means. It shall also be stated that the supplier, to be considered in the procurement process, shall guarantee that the results can be delivered as open source and are not encumbered with restrictions, e.g. part of the results are proprietary/closed programs.
3. The procurement contract with the supplier shall specify that the customer will hold all copyrights, economic and non-economic, for an unlimited period, and that the customer is free to use the results and disseminate them via an open source license or other means. The procurement contract shall also specify that the supplier guarantees that the results can be delivered as open source and are not encumbered with restrictions, e.g. part of the results are proprietary/closed programs.

6.2 Customer – user relationship

The licensor wants the user to adhere to the terms of the license, the contract. Hence, clarity is of utmost importance.

1. Customers must be certain that they hold the copyrights to that which is licensed.
2. Users shall be informed about the license *before* the contract is signed, shall be made aware that they must comply with the provisions in the contract, and shall accept this.
3. If a program shall be downloaded from a website, it is necessary to use a method that displays the text of the license, and asks the user to read it, prior to downloading. Ask the question “Do you accept the conditions of the license?”, and permit downloading only if the response is “Yes”.
4. The license text, the terms of the contract, shall always accompany the program and be downloaded along with it.

6.3 Suppliers

Suppliers (vendors) must assure that they have adequate rights to software that they themselves do not hold the copyright to, and which is integrated with the software delivered to the customer. If the end product as a whole shall be open source software, then parts of it cannot be closed.

6.4 Users

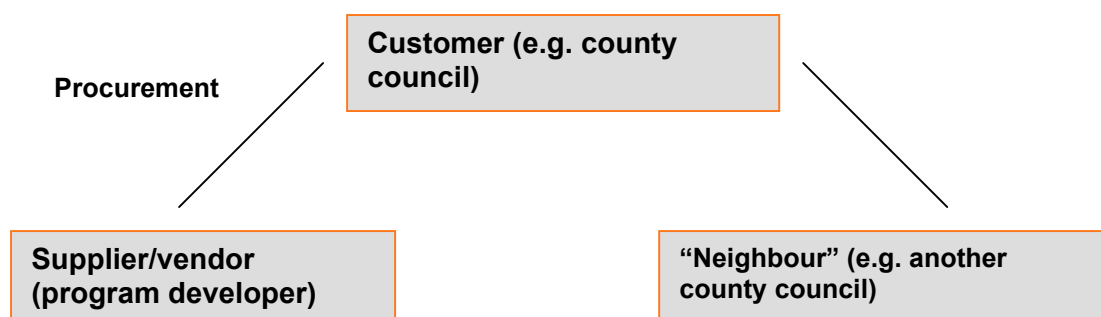
Users must adhere to the conditions provided under the terms of the licence.

6.5 Legal status

1. Copyrights to the program shall remain with the licensor. The licensor is the copyright holder.
2. The license contract is irreversible. This means that the licensor cannot reclaim a computer program that has been made open. If so, the licensor would commit a breach of contract and could, in principle, be sued for damages.
3. The licensor can license a computer program under more than one license. The licensor may concurrently license a closed/proprietary version of an open software program. For example, a corporation may charge for a closed version of a program with a program license that grants rights to limited use and offers support and maintenance for this version while concurrently licensing another, open source, version of the program.

7 Transferring Software to a “Neighbour”

Assume that a county council department has procured the development of computer software from a supplier. Now, the department would like to share this program with a “neighbour”, e.g. another county council.



For the supplier, the customer, and the relationship between them, exactly the same conditions apply as in open source licensing. Here too, it is necessary for the customer to obtain the full copyright to the software and serve as the copyright holder vis-à-vis the neighbour.

In the case of the neighbour, the Public Procurement Act may apply if transfer of the software is associated with some form of return compensation that can be perceived as payment, even if it does not involve money. For example, if a condition of transfer requires the neighbour to share the costs for further development or administration of the software then the transfer is not compensation-free. This situation involves a kind of compensation that can be valued in monetary terms. Hence, the entire transaction must be handled as procurement and subject to the provisions of the Public Procurement Act.

Contracts should be signed between the copyright holder and the neighbour, and should specify the terms for using the software. Reasonable specifications might include clauses to release the copyright holder from guarantees and liability, or to prohibit the neighbour from redistributing the program.

In summary, the same legal considerations apply when transferring software to a neighbour as when licensing software through an open source license. The difference, however, is that the neighbour may need to acquire the software according to the Public Procurement Act if the transfer involves compensation.

8 Which Open Source Software License Should We Use?

The open source license is the contract between those who provide the software and those who use it.

The copyleft feature differentiates the General Public License (GPL) from most other licenses. Copyleft means that the GPL shall apply even to all modified and extended versions of the program! GPL conditions are interpreted in a way that does not allow GPL software to be combined with non-free/closed/proprietary software. However, this has resulted in non-desirable consequences, when trying to make program libraries into de facto standards. Hence, it would not be possible to use these in all situations where they could be useful, but only together with programs with GPL-compatible licenses. Therefore, FSF has created a less restrictive license, the Lesser General Public License (LGPL). Even this license has copyleft features, but in contrast to GPL, users have the right to combine LGPL programs with closed/proprietary programs.

In some instances, when software has been developed with public resources and licensed as open software, it may be reasonable to always keep it open, i.e. copyleft, and not allow it to be converted into closed software. GPL is the recommended approach in such a situation.

However, we also recognise the need to include an open source program component in both open and closed/proprietary programs. This is the situation with standard components. If we want a license with copyleft features, but want to allow it to be combined with other approved software, even closed, then LGPL is an option. However, the Open Source Initiative (OSI) does not recommend LGPL. The view is that use of LGPL leads to uncertainty, and a non-copyleft license should be chosen instead.

Non-copyleft, open/free program software licenses include the Berkley Software Distribution (BSD) license or the Academic Free License, AFL. These licenses allow the programs and modifications of the programs to be combined with other programs to form a new program that becomes closed, and possibly distributed only in binary form. AFL is recommended by OSI. The BSD license is very brief and not very detailed. AFL is more specific and states, among other things, that disputes shall be resolved in the home county of the licensor.

Those who license software as open source may hope that someone else will find the program interesting and develop it further on their own without cost to the licensor. Perhaps those who make modifications may, in most instances, give the modifications back to the licensor or someone taking the licensors place as administrator of the program, acting in accordance with good practice. But this is not required.

However if the modified program is *distributed*, and the license involves copyleft, the original distribution conditions must apply even for the modified program, i.e. it must remain open and thereby accessible to the original licensor. Those who modify a program are not required to send the modified version to the licensor, or in any way notify the licensor. If licensors want the rights to modified versions of programs they

have licensed as open source software, then copyleft must apply, e.g. according to the GPL license.

The figure below briefly summarises the characteristics of different licenses

	GPL	LGPL	BSD& ALF
Right to use, modify, distribute	Yes	Yes	Yes
Right to combine with closed programs	No	Yes	Yes
Right to close and distribute only in binary code	No	No	Yes

In selecting an open source license it is interesting to know whether or not a particular license is compatible with GPL. It is compatible with GPL if it does not contain conditions that oppose GPL. Likewise, it may not contain conditions other than those supported by GPL. The website www.fsf.org presents most of the licenses classified with regard to copyleft and GPL compatibility.

Legal considerations in choosing among open source licenses may include more components than those presented here. The information presented here should be viewed as a general guide. A more detailed description can be found in “Licensing How To” by Eric Raymond, www.catb.org/~esr/Licensing-HOWTO.html

8.1 Public Authority License, or not?

Should we develop a special license for open source software developed by public authorities in Sweden?

Adding to or otherwise changing existing licenses, e.g. GPL, is not permitted. Modifying a GPL requires making a new license.

The advantage of a public authority license is that we can control its content. We would be able to require that all additional code shall be returned to the licensor. We would also be able to limit the use of a particular program to specific users, e.g. other county councils and local authorities. None of the existing open source software licenses address these situations.

The counter-argument is that it is difficult to find good reasons to limit utilisation. It may be difficult to verify user identity and nearly impossible to verify that only the correct users are using the programs.

Another advantage would be the opportunity to include a jurisdiction clause in a public authority license. Such a clause would specify the country of jurisdiction in case of possible legal proceedings. Most licenses, including GPL and BSD, do not include a jurisdiction clause, but the ones that do include a jurisdiction clause do not place jurisdiction in Sweden. AFL provides that any disputes shall be settled in the country of the licensor. There are considerable limits on liability, e.g. in GPL and BSD. Nevertheless, it would be good if any legal proceedings concerning liability for errors in Swedish software could be handled under Swedish law by a Swedish court or arbitration board. In practice, the disadvantage of not having jurisdiction in Sweden must be considered as minor.

Having a new license on the market involves some disadvantages. Initially, many program developers will not be aware of it. Furthermore, the more licenses available, the more difficult it will become to determine which licenses can be used together and the rules that apply to combined software under several licenses. Licensing terms that are very specific can easily be contradictory. Software comprised of several programs could potentially be under several different jurisdictions!

At present, it does not appear to be necessary to develop a special public authority license for open software. It seems more reasonable to choose an existing license that has broad acceptance on the market. There will always be an opportunity to develop a special public authority license later.

The recommendation, initially at least, is to use one of the well-established licenses mentioned above. GNU, GPL, and possibly LGPL are recommended for situations where copyleft is desirable. BSD and AFL are recommended in situations where future versions of the software do not necessarily need to be open source.

9 Notes

It is acceptable to use closed development tools to produce open source software.

Licenses specify how library routines and standard components should be used in program development environments. There may be limitations.

The rights of utilisation and disposition are nearly the same from a copyright perspective. Disposition rights include utilisation rights, but not visa versa.