ADVISORY OPINION 2014-21

Issued on October 2, 2014, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A State official asks whether the Ethics Act permits an agency to offer a "prize" from public funds to state employees who report and forward "phishing" e-mails to it as part of its initiative to protect the State's computer information system.

FACTS RELIED UPON BY THE COMMISSION

The office is charged with protecting state information systems from data breaches. As part of its mission, the office is concerned with "phishing" e-mails. Phishing is the attempt to acquire sensitive information such as usernames, passwords and other credentials, by masquerading as a trustworthy entity in an e-mail or other electronic communication.

The Requester explains that these e-mails generally either request Personally Identifiable Information (PII) or a user ID or password or redirect the recipient to a "spoof" or fake version of a legitimate website in order to obtain credentials and password information. The Requester further explains that phishing is the "single most pervasive and effective threat against any organization's information systems."

If State employees forward suspicious e-mails to the office, the office can determine if the phishing e-mail is a danger. The office may then block the phishing sender's e-mail address and the destination Internet Protocol (IP) address in order to prevent delivery of malicious e-mails from that address to State employees' e-mail addresses.

The Requester asks whether the office may offer a $100 prize to one state employee who has reported and forwarded a phishing e-mail. The prize winner would be selected randomly either monthly or quarterly. The Requester believes that this would be a highly cost-effective method of preventing breaches, gathering necessary information, and raising awareness about the threat posed by phishing e-mails.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(c)(1) states, in relevant part:

No official or employee may knowingly accept any gift, directly or indirectly, from a lobbyist or from any person whom the official or employee knows or has reason to know:
(A) Is doing or seeking to do business of any kind with his or her agency;
(B) Is engaged in activities which are regulated or controlled by his or her agency; or
(C) Has financial interests which may be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of his or her official duties.

W. Va. Code§ 6B-2-5(1)(1) states, in relevant part:

A public employee may not receive additional compensation from another publicly-funded state, county or municipal office or employment for working the same hours, unless:
(A) The public employee's compensation from one public employer is reduced by the amount of compensation received from the other public employer;
(B) The public employee's compensation from one public employer is reduced on a pro rata basis for any work time missed to perform duties for the other public employer;
(C) The public employee uses earned paid vacation, personal or compensatory time or takes unpaid leave from his or her public employment to perform the duties of another public office or employment; or
(D) A part-time public employee who does not have regularly scheduled work hours or a public employee who is authorized by one public employer to make up, outside of regularly scheduled work hours, time missed to perform the duties of another public office or employment maintains time records, verified by the public employee and his or her immediate supervisor at least once every pay period, showing the hours that the public employee did, in fact, work for each public employer. The public employer shall submit these time records to the Ethics Commission on a quarterly basis.

ADVISORY OPINION

Evaluation of the issue presented requires review of the Ethics Act's provisions and interpretations regarding gifts, public employee rewards and the prohibition against receiving compensation from two agencies.

In first evaluating the issue as potentially constituting a gift under W. Va. Code§ 6B-2-5(c), the Commission finds that the contemplated prize is not governed by W. Va. Code § 6B-2-5(c) or any other gift limitation in the Ethics Act. The office at issue is attempting to address and reduce breaches of the State's information system by offering a chance for a monetary prize in exchange for information.[1] There is an exchange of value between the office and those submitting phishing emails such that the $100 prize at issue is not subject to a gift limitation.

The second step in the analysis of the issue presented is whether limits placed on public employee rewards by *West Virginia Ethics Commission Guideline on Public Employee Recognition Events* (2008) apply. This Guideline provides that: "The expenditure of public funds to recognize public employees serves a public purpose by promoting employee morale through recognizing achievement." Employee recognition events, then, are approved additional compensation for doing one's job well. This definition is buttressed by the Ethics Commission's holding in Advisory Opinion 2010-05 that any decision by an agency to expend up to $100 on a single employee "be based upon objective job-related criteria."

The $100 prize at issue is not for workplace achievement and is not to improve morale. Rather, the prize is awarded to a state employee for completing a specific task outside of his or her regular job requirements. The Commission finds that the $100 prize does not meet the definition of an "employee recognition event" and, accordingly, the Ethics Act's restrictions on employee rewards do not apply.

Finally, the Commission concludes that the issue at hand is best evaluated under W. Va. Code§ 6B-2-5(l) as the time spent to forward a phishing e-mail to the requester's agency may constitute work for another agency. The $100 prize, which is available only to one employee per month or per quarter, is not significant enough, however, to trigger the prohibition against additional compensation from a second public employer at set forth in W. Va. Code§ 6B-2-5(1).

In conclusion, the Commission finds that it is permissible for the office to award a $100 prize through the use of a drawing of persons who have reported phishing e-mails. The drawing must be random, however, and the Requester's office must

[1] As noted in Advisory Opinion 96-36, "a gift [is] something given voluntarily and without compensation - something given without consideration in return. A gift does not involve an exchange of value ... the sale of raffle tickets, which offer a chance at a valuable prize, is not a solicitation of a gift."

ensure that the drawing is conducted fairly. Moreover, no employee at the Requester's office may be eligible to receive the prize.

Out of an abundance of caution, the Commission also recommends that the agency restrict individuals from winning more than once in a calendar year in order to ensure an individual's winnings do not become significant enough to trigger the prohibitions set forth in W. Va. Code § 68-2-5(1).

The Requester's office also must comply with all other relevant state laws, regulations and statutes which may apply.

This advisory opinion is based upon the facts presented. If all material facts have not been provided, or if new facts arise, the Requester should contact the Commission for further advice as this may alter the analysis and render this opinion invalid.

This Advisory Opinion is limited to questions arising under the Ethics Act, W Va. Code § 6B-1-1, et seq., and does not purport to interpret other laws or rules. This opinion is based on the specific facts of this request, and may not be relied in other situations.

/s/ R. Kemp Morton, Chairman
Kemp Morton, Chairman