ADVISORY OPINION NO. 2013-42

Issued On October 3, 2013 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Geographic Information System (GIS) Coordinator** asks if he is permitted to create and manage a GIS database for a municipality in the county by which he is employed.

FACTS RELIED UPON BY THE COMMISSION

A GIS is an "information system that integrates, stores, edits, analyzes, shares and displays geographic information for informing decision making."[1] According to the Requester, "GIS is a mapping technology that allows the user to combine and visualize many layers of data." Essentially, a GIS Coordinator manages a map and integrated database for a government agency, private business, or other unique entity. With this integrated database, officials can compare data points in relation to a quasi-physical layered model. GIS databases are generally customized for a specific business, and are generally considered only moderately compatible with other GIS databases.2

The Requester is employed full-time by the county. The county and municipality have recently entered into an agreement to share data assessment and will use the same maps; however, the county and municipality work with, and are responsible for, different layers of said maps. For example, the county might work with data from voter precincts, district boundaries, and land parcels, while the municipality could be concerned with police patrol zones and sewer pipe placement. Importantly, even if the Requester would notice a problem with the municipality's layers while working on mapping for the county, he states that he would not be able to correct the issue while using the county's database. Instead, he would only make the correction on the municipality's database.

The Requester further explains that he does not have the ability to make any regulatory or policy recommendations or judgments. If the Requester were to do the work for the municipality in question, his work would be done on his own time, with his own software and using software personally licensed to him. The work would be practically identical to the work he does for the county, except with different content. The Requester believes his work for the municipality would take between two and four hours a week.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 68-2-5(b) provides in part that:

[1] http://en.wikipedia.org/wiki/Geographic_information_system
[2] http://www.colorado.edu/geography/gcraft/notes/intro/intro.html

> A public official or public employee may not knowingly or intentionally use his or her office or the prestige of his and her office for his own private gain or that of another person. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in *de minimis* private gain does not constitute use of public office for private gain under this subsection.

W. Va. Code§ 6B-2-5(e) states:

> No present or former public official or employee may knowingly and improperly disclose any confidential information acquired by him or her in the course of his or her official duties nor use such information to further his or her personal interests or the interests of another person.

W. Va. Code § 6B-2-5(h) provides:

> (1) No full-time official or full-time public employee may seek employment with, be employed by, or seek to purchase, sell or lease real or personal property to or from any person who:
> (A) Had a matter on which he or she took, or a subordinate is known to have taken, regulatory action within the preceding twelve months; or
> (B) Has a matter before the agency on which he or she is working or a subordinate is known by him or her to be working….
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> (6) A full-time public official or full-time public employee may not receive private compensation for providing information or services that he or she is required to provide in carrying out his or her public job responsibilities.

W. Va. Code§ 6B-2-5(I)(1) states:

> A public employee may not receive additional compensation from another publicly-funded state, county or municipal office or employment for working the same hours ...

ADVISORY OPINION

The issue presented by this request is whether a county employee without any regulatory or policy-making authority is permitted to do similar work in his spare time for a municipality within the same county.

First, W. Va. Code § 6B-2-S(b) does not permit a public official or public employee to knowingly or intentionally use his or her office for private gain unless it is *de minimis.* If there is any private gain in this case, it will likely be *de minimis.* Although there does not appear to be a significant opportunity for the Requester to derive any significant private

gain, the Requester must remain vigilant to avoid using more than a *de minimis* amount of his county work time to note errors in municipality work.

Next, W. Va. Code § 68-2-5(h)(1)(A) and (8) prohibit full-time public employees from being employed by any person who either has a matter on which the public employee took regulatory action within the last twelve months, or has a matter before the agency on which he or she is working. The Requester does not regulate any municipality within the county. Indeed, there is no indication that the Requester can influence policy or regulation in any way. He is employed in a support capacity, and his job is to make maps and databases. Therefore, he would not violate these provisions if he moonlighted for the municipality.

When the Requester does county work, W. Va. Code § 6B-2-5(h)(6) and § 68-2-5(1) work together to prevent the Requester from collecting pay from the municipality even if it incidentally benefits from said work. The former bars private gain from information he learns or services he performs as part of his county job, and the latter bars gain from doing two jobs at the same time, more commonly known as "double-dipping." Essentially, the Requester cannot be paid for his work product or work time twice. Here, the database information for the county and municipality is notably different and kept explicitly separated from each other. Since the Requester cannot change the maps for the county while working for the municipality, and vice versa, there is no opportunity for him to engage in double-dipping potential, even if the Requester were so inclined.

This question is distinguishable from Advisory Opinion 2012-29, yet similar in substance to Advisory Opinion 2012-30. Those opinions concern a County Director of Emergency Services, responsible for overseeing various county programs, who also served as the 911 Director and the Floodplain Permit Officer. In Advisory Opinion 2012-29, he was barred from privately contracting to manage a federal grant with the county that employed him because he had both authority and control over the contract and there was some overlap with his duties as a public employee. The Commission wrote:

> Given the overlap between the Requester's floodplain duties and the mitigation projects, the Commission hereby finds that the contract with the County is impermissible under the Ethics Act. Specifically, the Commission finds that the Requester has direct authority and control over the contract, and would be receiving compensation for the performance of usual and customary public duties in violation of W.Va. Code§§ 68-2-5(d) and (b).

By contrast, in Advisory Opinion 2012-30, he was permitted to privately contract with a municipality within the county to manage a federal grant for mitigation projects. The Commission noted that even though he would be doing similar work for both public agencies, he did not have control over the contract, and there was no overlap of his county and municipal duties. The same is true of the Requester herein.

Advisory Opinion 2012-36 is also instructive. In that opinion, a state employee working for an agency that houses and preserves state historical documents was approved to

contract with the State to compile the papers of a former governor. The Ethics Commission explained that since she did not exercise control over the contract, and because compiling gubernatorial papers was not part of her regular job duties, she could accept the contract.

In closing, there is nothing in the Ethics Act which prohibits the Requester from contracting with the City to create and manage its GIS database. The Requester must perform the work on his own time, not during his County work hours. He may not use public resources, including subordinate staff, in furtherance of his private business.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 68-1-1, *et seq.,* and does not purport to interpret other laws or rules. In accordance with W. Va. Code§ 68-2-3, this opinion has precedential effect and may be relied upon in good faith by public servants and other persons unless and until it is amended or revoked, or the law is changed.

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