

Executive Branch Ethics Commission
ADVISORY OPINION 07-20
October 19, 2007

RE: May employee develop and market software program and services similar to program developed for agency?

DECISION: Yes, within limitations.

This opinion is issued in response to your May 29, 2007 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the June 29, August 24, and October 19, 2007 meetings of the Commission and the following opinion is issued.

You provide the relevant facts as follows. An employee of the Office of the Auditor of Public Accounts ("APA"), Division of Examination and Information Technology, seeks to develop a computer program that automates the process of performing computer security analysis and reporting. He plans to copyright the program and make it available to the private sector and the public at large under a general public license where the program would be free for anyone to use, modify and/or distribute. The employee would offer other private services to clients for a fee such as customization and enhancements, program updates and supporting data, training, and other support options.

As part of the employee's official duties for the APA, he develops programs which scan the Commonwealth's computer systems for security vulnerabilities. The employee has accessed multiple "freeware" products available on the web in order to develop a software program for the APA to assess security vulnerabilities in state government. The security package that he has created for the APA is specific for the office with certain reports and information they need.

In developing his private computer program the employee does not plan to use or copy any scan software code developed and used by the APA. The freeware programs are software programs that are available for public use. The software product that he envisions developing and intends to provide to entities as free is a general software not customized for a specific agency or entity, and he does not intend to market it to any entity that is audited or could be audited by the APA.

**EXECUTIVE BRANCH ETHICS COMMISSION
ADVISORY OPINION 07-20**

October 19, 2007

Page Two

You state that no state resources will be used by the employee to develop the program; and although the program is similar to the security scan software he developed as part of his job duties for the APA it does not have the specific reports and output developed for the APA. The APA and he are both aware that he may not use any information that is only available to him because of his position. This employee is a very valuable employee to the APA and contributes much skill and knowledge to the state. The APA has approved his outside venture, but would like the Commission's opinion as to whether any potential conflict exists for this employee and his proposal to develop and market this program as well as the additional services.

KRS 11A.020(1)(a), (c), and (d) provide:

- (1) No public servant, by himself or through others, shall knowingly:
 - (a) Use or attempt to use his influence in any matter which involves a substantial conflict between his personal or private interest and his duties in the public interest;
 - ...
 - (c) Use his official position or office to obtain financial gain for himself or any members of the public servant's family; or
 - (d) Use or attempt to use his official position to secure or create privileges, exemptions, advantages, or treatment for himself or others in derogation of the public interest at large.

As stated in several previously issued advisory opinions, employees are not prohibited from using general knowledge gained from their state positions for private outside ventures so long as they are not compensated privately for providing information or services that should be provided as part of their official duties, and they are not using proprietary information only available because of their positions.

From the information provided, it does not appear that the employee will be using proprietary information in developing the software program he intends to market privately. All the software he will be using is available on the web for public use, although it is the same software that he used for developing a similar program for the APA.

EXECUTIVE BRANCH ETHICS COMMISSION
ADVISORY OPINION 07-20

October 19, 2007

Page Three

Consequently, as long as it is not a part of the employee's job duties to provide the computer program and other services he intends to market privately, he may develop the program, even if similar to what he has developed for the APA, and offer optional services for a fee. However, as provided in Advisory Opinion 04-33 (a copy of which is enclosed), the employee should not include in any marketing or promoting of his program or services that he is employed by the APA. He should refrain from giving any appearance that he is using his state position to benefit himself privately. Moreover, he should take great care not to use state time, equipment, resources, or his position to benefit his private endeavor. In addition to not marketing his program or services to entities that may be audited by the APA, he also should not market his program or services to vendors of, or persons or businesses that seek to influence the actions of the APA, as well.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

By Chair: John A. Webb

Enclosures: Advisory Opinion 04-33