

**42 IAC 1-5-6 Conflict of economic interests (IC 4-2-6-9)**  
**42 IAC 1-5-7 Prohibition against financial interest in contract (IC 4-2-6-10.5)**  
**42 IAC 1-5-10 Benefiting from confidential information**  
**42 IAC 1-5-11 Divulging confidential information**  
**IC 4-2-6-6 Compensation resulting from confidential information**  
**IC 4-2-6-17 Use of state property for other than official business**  
**42 IAC 1-5-13 Ghost employment**  
**IC 35-44.1-1-4 Conflict of interest**

An ISDH employee sought advice regarding a part-time employment opportunity working as a contractor for the Marion County Public Health Department. SEC determined that the employee's outside employment with MCPHD would not violate rules regarding conflicts of interest, outside employment, divulging or compensating from confidential information, or use of state property.

July 11, 2019  
2019-FAO-012

The Indiana State Ethics Commission (Commission) issues the following advisory opinion concerning the State Code of Ethics (Code) pursuant to IC 4-2-6-4(b)(1). The following opinion is based exclusively on sworn testimony and documents presented by the requestor.

### **BACKGROUND**

An employee with the Indiana State Department of Health (ISDH). The ISDH's Ethics Officer has submitted a Formal Advisory Opinion request on behalf of the employee.

The ISDH employee is seeking part-time employment as a contractor for the Marion County Public Health Department (MCPHD). The opportunity is a position as a part-time computer programming contractor for MCPHD with work hours outside of his normal ISDH work hours. The funding for the contract position is from a Centers for Disease Control (CDC) grant that is not in any way affiliated with ISDH.

The employee is the Informatics Director for ISDH's Epidemiology Resource Center. His job is to ensure that ISDH is getting the patient information that it needs from emergency departments, labs and local health departments. He is also responsible for overseeing drug and opioid use disorder surveillance being performed by his team. He has no authority to make significant decisions that will benefit MCPHD.

In March, the employee was involved in a recent grant awarded to MCPHD. His involvement was limited to receiving and forwarding MCPHD's proposed budgets and associated activities to the grant's Project Director for ISDH, and incorporating those associated MCPHD activities into the grant application. From there, the ISDH Project Director and an ISDH Project Manager decided which MCPHD budget option was accepted. The employee did not have any influence or authority over the grant award.

Based on the information presented, ISDH believes that the employee's part-time employment is not incompatible with his duties at ISDH nor does it require recusal from his official responsibilities. Furthermore, in his role as the Informatics Director, he is not in a position to

participate in any decisions or votes or other matters related to a decision or vote where MCPHD would have a financial interest.

The employee knows and understands that if permitted to pursue this outside part-time employment opportunity, the Code still applies. He understands and agrees to abide by the Code, specifically the rules governing conflicts of interest, ghost employment, use of state property and confidential information.

The employee received an informal advisory opinion from the Office of Inspector General in August 2018. The informal advisory opinion included an advisement to study the applicability of the screening and disclosure requirements in IC 4-2-6-9(b). Because the ethics officer determined that the employee does not have any influence or authority over the award of grants, ISDH and the employee did not pursue that process.

Given that the employee's potential part-time employer, MCPHD, has a business relationship with ISDH, the ethics officer, on behalf of the employee, seeks a formal advisory opinion regarding whether he may accept the part-time employment opportunity without violating IC 4-2-6-10.5 and its prohibitions against an employee knowingly having a financial interest in a contract made by a state agency. ISDH also seeks a formal advisory opinion regarding the applicability of IC 4-2-6-5.5, 4-2-6-9, and the criminal conflict of interest statute set forth in IC 35-44.1-1-4.

### **ISSUES**

- 1) Would the employee's part-time outside employment with MCPHD create any conflicts of interests for him under the Code of Ethics?
- 2) What other ethics issues, if any, arise for the employee given his position with ISDH and his simultaneous employment with MCPHD?

### **RELEVANT LAW**

#### **IC 4-2-6-5.5 (42 IAC 1-5-5)**

#### **Conflict of interest; advisory opinion by commission**

Sec. 5.5. (a) A current state officer, employee, or special state appointee may not knowingly do any of the following:

- (1) Accept other employment involving compensation of substantial value if the responsibilities of that employment are inherently incompatible with the responsibilities of public office or require the individual's recusal from matters so central or critical to the performance of the individual's official duties that the individual's ability to perform those duties would be materially impaired.

(2) Accept employment or engage in business or professional activity that would require the individual to disclose confidential information that was gained in the course of state employment.

(3) Use or attempt to use the individual's official position to secure unwarranted privileges or exemptions that are:

(A) of substantial value; and

(B) not properly available to similarly situated individuals outside state government.

(b) A written advisory opinion issued by the commission stating that an individual's outside employment does not violate subsection (a)(1) or (a)(2) is conclusive proof that the individual's outside employment does not violate subsection (a)(1) or (a)(2).

#### **IC 4-2-6-9 (42 IAC 1-5-6)**

#### **Conflict of economic interests; commission advisory opinions; disclosure statement; written determinations**

Sec. 9. (a) A state officer, an employee, or a special state appointee may not participate in any decision or vote, or matter relating to that decision or vote, if the state officer, employee, or special state appointee has knowledge that any of the following has a financial interest in the outcome of the matter:

(1) The state officer, employee, or special state appointee.

(2) A member of the immediate family of the state officer, employee, or special state appointee.

(3) A business organization in which the state officer, employee, or special state appointee is serving as an officer, a director, a member, a trustee, a partner, or an employee.

(4) Any person or organization with whom the state officer, employee, or special state appointee is negotiating or has an arrangement concerning prospective employment.

(b) A state officer, an employee, or a special state appointee who identifies a potential conflict of interest shall notify the person's appointing authority and ethics officer in writing and do either of the following:

(1) Seek an advisory opinion from the commission by filing a written description detailing the nature and circumstances of the particular matter and making full disclosure of any related financial interest in the matter. The commission shall:

(A) with the approval of the appointing authority, assign the particular matter to another person and implement all necessary procedures to screen the state officer, employee, or special state appointee seeking an advisory opinion from involvement in the matter; or

(B) make a written determination that the interest is not so substantial that the commission considers it likely to affect the integrity of the services that the state expects from the state officer, employee, or special state appointee.

(2) File a written disclosure statement with the commission that:

(A) details the conflict of interest;

(B) describes and affirms the implementation of a screen established by the ethics officer;

(C) is signed by both:

(i) the state officer, employee, or special state appointee who identifies the potential conflict of interest; and

- (ii) the agency ethics officer;
- (D) includes a copy of the disclosure provided to the appointing authority; and
- (E) is filed not later than seven (7) days after the conduct that gives rise to the conflict.

A written disclosure filed under this subdivision shall be posted on the inspector general's Internet web site.

(c) A written determination under subsection (b)(1)(B) constitutes conclusive proof that it is not a violation for the state officer, employee, or special state appointee who sought an advisory opinion under this section to participate in the particular matter. A written determination under subsection (b)(1)(B) shall be filed with the appointing authority.

#### **IC 4-2-6-10.5 (42 IAC 1-5-7)**

#### **Prohibition against financial interest in contract; exceptions; disclosure statement; penalty for failure to file statement**

Sec. 10.5. (a) Subject to subsection (b), a state officer, an employee, or a special state appointee may not knowingly have a financial interest in a contract made by an agency.

(b) The prohibition in subsection (a) does not apply to a state officer, an employee, or a special state appointee who:

- (1) does not participate in or have contracting responsibility for the contracting agency; and
- (2) files a written statement with the inspector general before the state officer, employee, or special state appointee executes the contract with the state agency.

(c) A statement filed under subsection (b)(2) must include the following for each contract:

- (1) An affirmation that the state officer, employee, or special state appointee does not participate in or have contracting responsibility for the contracting agency.
- (2) An affirmation that the contract:
  - (A) was made after public notice and, if applicable, through competitive bidding; or
  - (B) was not subject to notice and bidding requirements and the basis for that conclusion.

(3) A statement making full disclosure of all related financial interests in the contract.

(4) A statement indicating that the contract can be performed without compromising the performance of the official duties and responsibilities of the state officer, employee, or special state appointee.

(5) In the case of a contract for professional services, an affirmation by the appointing authority of the contracting agency that no other state officer, employee, or special state appointee of that agency is available to perform those services as part of the regular duties of the state officer, employee, or special state appointee. A state officer, employee, or special state appointee may file an amended statement upon discovery of additional information required to be reported.

(d) A state officer, employee, or special state appointee who:

- (1) fails to file a statement required by rule or this section; or
- (2) files a deficient statement; before the contract start date is, upon a majority vote of the commission, subject to a civil penalty of not more than ten dollars (\$10) for each day the statement remains delinquent or deficient. The maximum penalty under this subsection is one thousand dollars (\$1,000).

#### **42 IAC 1-5-10**

##### **Benefiting from confidential information**

Sec. 10. A state officer, employee, or special state appointee shall not benefit from, or permit any other person to benefit from, information of a confidential nature except as permitted or required by law.

#### **42 IAC 1-5-11**

##### **Divulging confidential information**

Sec. 11. A state officer, employee, or special state appointee shall not divulge information of a confidential nature except as permitted by law.

#### **IC 4-2-6-6**

##### **Present or former state officers, employees, and special state appointees; compensation resulting from confidential information**

Sec. 6. No state officer or employee, former state officer or employee, special state appointee, or former special state appointee shall accept any compensation from any employment, transaction, or investment which was entered into or made as a result of material information of a confidential nature.

#### **IC 4-2-6-17**

##### **Use of state property for other than official business; exceptions; Violations**

Sec. 17. (a) Subject to IC 4-2-7-5, a state officer, an employee, or a special state appointee may not use state materials, funds, property, personnel, facilities, or equipment for purposes other than official state business unless the use is expressly permitted by a general written agency, departmental, or institutional policy or regulation that has been approved by the commission. The commission may withhold approval of a policy or rule that violates the intent of Indiana law or the code of ethics, even if Indiana law or the code of ethics does not explicitly prohibit that policy or rule.

(b) An individual who violates this section is subject to action under section 12 of this chapter.

#### **42 IAC 1-5-13**

##### **Ghost employment**

Sec. 13. A state officer, employee, or special state appointee shall not engage in, or direct others to engage in, work other than the performance of official duties during working hours, except as permitted by general written agency, departmental, or institutional policy or regulation.

#### **IC 35-44.1-1-4**

##### **Conflict of interest**

Sec. 4. (a) The following definitions apply throughout this section:

(1) "Dependent" means any of the following:

(A) The spouse of a public servant.

(B) A child, stepchild, or adoptee (as defined in IC 31-9-2-2) of a public servant who is:

(i) unemancipated; and

(ii) less than eighteen (18) years of age.

(C) An individual more than one-half (1/2) of whose support is provided during a year by the public servant.

(2) "Governmental entity served by the public servant" means the immediate governmental entity being served by a public servant.

(3) "Pecuniary interest" means an interest in a contract or purchase if the contract or purchase will result or is intended to result in an ascertainable increase in the income or net worth of:

(A) the public servant; or

(B) a dependent of the public servant who:

(i) is under the direct or indirect administrative control of the public servant; or

(ii) receives a contract or purchase order that is reviewed, approved, or directly or indirectly administered by the public servant.

(b) A public servant who knowingly or intentionally:

(1) has a pecuniary interest in; or

(2) derives a profit from;

a contract or purchase connected with an action by the governmental entity served by the public servant commits conflict of interest, a Level 6 felony.

(c) It is not an offense under this section if any of the following apply:

(1) The public servant or the public servant's dependent receives compensation through salary or an employment contract for:

(A) services provided as a public servant; or

(B) expenses incurred by the public servant as provided by law.

(2) The public servant's interest in the contract or purchase and all other contracts and purchases made by the governmental entity during the twelve (12) months before the date of the contract or purchase was two hundred fifty dollars (\$250) or less.

(3) The contract or purchase involves utility services from a utility whose rate structure is regulated by the state or federal government.

(4) The public servant:

(A) acts in only an advisory capacity for a state supported college or university; and

(B) does not have authority to act on behalf of the college or university in a matter involving a contract or purchase.

(5) A public servant under the jurisdiction of the state ethics commission (as provided in IC 4-2-6-2.5) obtains from the state ethics commission, following full and truthful disclosure, written approval that the public servant will not or does not have a conflict of interest in connection with the contract or purchase under IC 4-2-6 and this section. The approval required under this subdivision must be:

(A) granted to the public servant before action is taken in connection with the contract or purchase by the governmental entity served; or

(B) sought by the public servant as soon as possible after the contract is executed or the purchase is made and the public servant becomes aware of the facts that give rise to a question of conflict of interest.

(6) A public servant makes a disclosure that meets the requirements of subsection (d) or (e) and is:

- (A) not a member or on the staff of the governing body empowered to contract or purchase on behalf of the governmental entity, and functions and performs duties for the governmental entity unrelated to the contract or purchase;
- (B) appointed by an elected public servant;
- (C) employed by the governing body of a school corporation and the contract or purchase involves the employment of a dependent or the payment of fees to a dependent;
- (D) elected; or
- (E) a member of, or a person appointed by, the board of trustees of a state supported college or university.

(7) The public servant is a member of the governing board of, or is a physician employed or contracted by, a hospital organized or operated under IC 16-22-1 through IC 16-22-5 or IC 16-23-1.

(d) A disclosure must:

- (1) be in writing;
- (2) describe the contract or purchase to be made by the governmental entity;
- (3) describe the pecuniary interest that the public servant has in the contract or purchase;
- (4) be affirmed under penalty of perjury;
- (5) be submitted to the governmental entity and be accepted by the governmental entity in a public meeting of the governmental entity before final action on the contract or purchase;
- (6) be filed within fifteen (15) days after final action on the contract or purchase with:
  - (A) the state board of accounts; and
  - (B) if the governmental entity is a governmental entity other than the state or a state supported college or university, the clerk of the circuit court in the county where the governmental entity takes final action on the contract or purchase; and
- (7) contain, if the public servant is appointed, the written approval of the elected public servant (if any) or the board of trustees of a state supported college or university (if any) that appointed the public servant.

(e) This subsection applies only to a person who is a member of, or a person appointed by, the board of trustees of a state supported college or university. A person to whom this subsection applies complies with the disclosure requirements of this chapter with respect to the person's pecuniary interest in a particular type of contract or purchase which is made on a regular basis from a particular vendor if the individual files with the state board of accounts and the board of trustees a statement of pecuniary interest in that particular type of contract or purchase made with that particular vendor. The statement required by this subsection must be made on an annual basis.

## ANALYSIS

### *A. Outside employment*

An outside employment or professional activity opportunity creates a conflict of interests under IC 4-2-6-5.5(a) if it results in the employee: 1) receiving compensation of

substantial value when the responsibilities of the employment are inherently incompatible with the responsibilities of public office or require the employee's recusal from matters so central or critical to the performance of his or her official duties that his or her ability to perform them would be materially impaired; 2) disclosing confidential information that was gained in the course of state employment; or 3) using or attempting to use his or her official position to secure unwarranted privileges or exemptions of substantial value that are not properly available to similarly situated individuals outside state government.

The Commission generally defers to an agency's Ethics Officer regarding outside employment opportunities since it views them as being in the best position to determine whether a conflict of interests might exist between an employee's state duties and an outside employment opportunity.

ISDH's Ethics Officer provides that the employee's part-time employment with MCPHD is not incompatible with his ISDH duties, nor does it require recusal from any of his official responsibilities. Besides the employee's recent limited involvement in a grant awarded to MCPHD, he is not involved in any matters in which MCPHD would have a financial interest.

The Commission confirmed that the employee understands that he is prohibited from disclosing confidential information he gained from ISDH in his position with MCPHD and that he must not use or attempt to use his official position to secure unwarranted privileges or exemptions of substantial value that are not properly available to similarly situated individuals outside state government.

Accordingly, the Commission finds that the employee's outside employment with MCPHD would not violate IC 4-2-6-5.5.

*B. Conflict of interests-decisions and votes*

IC 4-2-6-9 (a)(1) prohibits the employee from participating in any decision or vote, or matter relating to that decision or vote, if he has a financial interest in the outcome of the matter. Similarly, IC 4-2-6-9(a)(3) prohibits the employee from participating in any decision or vote, or matter relating to that decision or vote, if a business organization in which he is serving as an employee has a financial interest in the matter. The definition of "financial interest" in IC 4-2-6-1(a)(11) includes, in part, "an interest arising from employment".

The employee currently works as the Informatics Director for ISDH's Epidemiology Resource Center and is seeking to work part-time as a computer programming contractor for MCPHD. Accordingly, he would be prohibited from participating in any decisions or votes, or matter relating to those decisions or votes, in which MCPHD would have a financial interest in the outcome.



The ethics officer provides that the employee's ISDH responsibilities do not include having any influence or authority over the award of grants or other matters in which MCPHD would have a financial interest in the outcome.

Accordingly, the Commission finds that a potential conflict of interests has not been identified at this time. If, however, the employee's circumstances change and a potential conflict of interests is identified in the future, he must follow the disclosure requirements in IC 4-2-6-9(b), including notifying ISDH's appointing authority and seeking an advisory opinion from or filing a written disclosure statement with the Commission.

*C. Conflict of interests – contracts*

Pursuant to IC 4-2-6-10.5, a state employee may not knowingly have a financial interest in a contract made by any state agency. The Code defines "financial interest" to include an interest arising from employment. The Commission has interpreted this rule to apply when a state employee derives compensation from a contract between a state agency and a third party. This prohibition however does not apply to an employee that does not participate in or have official responsibility for any of the activities of the contracting agency, provided certain statutory criteria are met.

The employee's part-time outside employer, MCPHD, has a business relationship with ISDH through which MCPHD has a grant agreement with ISDH; however, the ethics officer provides that the employee's compensation is not related to this agreement. The funding source for his contract position is from a CDC grant that is not in any way affiliated with ISDH.

Accordingly, the Commission finds that the employee does not have a financial interest in a state contract at this time through his position at MCPHD and would not be in violation of this rule.

*D. Criminal conflict of interests statute*

In the Formal Advisory Opinion request, the ethics officer also asked whether IC 35-44.1-1-4, which prohibits certain public servants from having a pecuniary interest in or deriving a profit from a contract with the public servant's agency, would apply to the employee's circumstances.

IC 35-44.1-1-4 is the criminal statute that prohibits any public servant from knowingly or intentionally having a pecuniary interest in or deriving a profit from a contract/purchase connected with an action by the agency served by the public servant. The statute contains certain exceptions in subsection (c). One of these exceptions applies to an individual who obtains written approval from the Commission that the individual will not or does not have a conflict of interests in connection with a contract or purchase under IC 4-2-6 and IC 35-44.1-1-4.

The Commission confirmed with the ethics officer that the employee does not have a pecuniary interest in any contract with the agency he serves (ISDH), as the salary he will receive for his part-time employment at MCPHD is not derived from any ISDH or other state contracts.

Accordingly, this opinion serves as written approval from the Commission that the employee does not have a conflict of interests in connection with a contract or purchase under IC 4-2-6 and IC 35-44.1-1-4.

*E. Confidential information*

The employee is prohibited under 42 IAC 1-5-10 and 42 IAC 1-5-11 from benefitting from, permitting any other person to benefit from, or divulging information of a confidential nature except as permitted or required by law. Similarly, IC 4-2-6-6 prohibits the employee from accepting any compensation from any employment, transaction or investment which is entered into or made as a result of material information of a confidential nature. The term “person” is defined in IC 4-2-6-1(a)(13) to encompass both an individual and a corporation. In addition, the definition of “information of a confidential nature” is set forth in IC 4-2-6-1(a)(12).

To the extent the employee is exposed to or has access to such confidential information in his position with ISDH, he would be prohibited not only from divulging that information but from ever using it to benefit any person, including his outside employer, in any manner.

*F. Use of state property and Ghost employment*

IC 4-2-6-17 prohibits the employee from using state property for any purpose other than for official state business unless the use is expressly permitted by a general written agency, departmental or institutional policy or regulation. Likewise, 42 IAC 1-5-13 prohibits the employee from engaging in, or directing others to engage in, work other than the performance of official duties during working hours, except as permitted by general written agency, departmental or institutional policy or regulation.

To the extent that the employee observes these provisions in his employment with MCPHD, such outside professional activity would not violate these ethics laws.

**CONCLUSION**

Subject to the foregoing analysis, the Commission finds that the employee’s outside employment would not be contrary to the Code of Ethics.

Respectfully Submitted,

Jennifer Cooper  
Ethics Director