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The Ethics Officer for the Indiana Department of Health (IDOH) sought advice on behalf of the State Health Commissioner regarding certain outside employment/professional activities while employed by IDOH. The Commission finds that the employment/professional activities would not be contrary to the Code of Ethics.

February 10, 2022
2022-FAO-003

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

The Ethics Officer (Ethics Officer) for the Indiana Department of Health (IDOH) is requesting an advisory opinion on behalf of the State Health Commissioner (Commissioner).

The Ethics Officer asks whether it would be a conflict of interests for the Commissioner or any other state employee in their official capacity to hold a voting position as a member of the Executive Board (Board) of the Indiana Health Information Exchange (IHIE). IHIE is an Indiana non-profit organization that facilitates the sharing of patient medical records between medical providers. IHIE created a seat on its Board for the Commissioner to advise and contribute to the Board. Although IHIE initially created this seat for the Commissioner as a non-voting position, IHIE wishes to modify its Board to provide voting power to the IDOH representative, open the eligibility of the seat to any IDOH employee and create a new seat for an employee of the Indiana Family and Social Services Administration (FSSA).

The Ethics Officer explains that IHIE has active contracts with IDOH, FSSA, the Indiana Department of Homeland Security and the Indiana Department of Correction. IHIE also expects to have contracts with state agencies in the future. The exchange of patients' medical records between providers is governed by the Indiana Network for Patient Care (INPC). Eligible members may become INPC members by signing a Joinder Agreement with IHIE and the Regenstrief Institute. Most INPC members are both Data Providers and Data Recipients. Data Providers store data in the INPC, and Data Recipients have access to INPC data under INPC Terms and Conditions and Reasonable Rules. There are some INPC non-members who are otherwise permitted to use, access, exchange or disclose INPC data only as specifically permitted by approved rules. INPC data, when permitted, is exchanged through products made available by IHIE under Subscription/Service Agreements or through other means identified in Third Party Data Use Agreements. IHIE is a business associate to any Data Providers who are covered

entities under HIPAA. IHIE must comply with state and federal data privacy laws in addition to the INPC Terms and Conditions.

IHIE is a 509(a)(9) non-profit supporting organization, which is a subcategory of 501(c)(3). IHIE currently receives funding through its Subscription Agreements, Service Agreements and other data sharing arrangements and grants. IHIE's Board is a governing Board with the power to manage, control and conduct the affairs of IHIE as required for 509(a)(9) Type 1 supporting organizations. The majority of the Board's directors must be appointed or elected by IHIE supported organizations, and those directors must operate and control IHIE. The IHIE Board is pursuing restructuring activities that will result in a change to the supported organizations and the number of Community directors and National Subject Matter Expert directors on the Board.

IDOH is currently a supported organization, but the Commissioner, who serves as a director, is an ex-officio and non-voting member of the Board. IHIE hopes to add FSSA as a supported organization. To ensure IHIE is operated and controlled by its supported organizations, IDOH and FSSA will need to appoint directors to the Board, and the directors will need to be given voting rights. Any director is permitted to recuse himself or herself from Board activities and voting if there is a conflict of interests regarding a particular matter.

The Ethics Officer writes that IDOH does not believe that the Commissioner or any other state employee's position as a voting member of the Board would be incompatible with their duties at IDOH. Rather, IDOH believes that a position on the Board will help fulfill the mission of IDOH and benefit public policy. Further, the employees sitting on the Board will be able to maintain and build upon their professional skills, such that they may better be able to perform the essential functions of their positions as state employees. The Ethics Officer also confirmed that an IDOH employee participating on the Board will not receive compensation from IHIE, including reimbursement for any expenses.

The Ethics Officer seeks a formal advisory opinion on behalf of the Commissioner on this matter to ensure full compliance with the Code and to avoid any appearance of impropriety that may arise.

ISSUE

What ethics issues, if any, arise for the Commissioner or other IDOH employees if they were to serve as voting members of the Board?

RELEVANT LAW

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 4-2-6-5.5 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 4-2-6-10.5 (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 1-5-1 Gifts; travel expenses; waivers

Sec. 1. (a) A state employee or special state appointee, or the spouse or unemancipated child of a state employee or special state appointee, shall not knowingly solicit, accept, or receive any:

- (1) gift;
- (2) favor;
- (3) service;
- (4) entertainment;
- (5) food;
- (6) drink;
- (7) travel expenses; or
- (8) registration fees;

from a person who has a business relationship with the employee's or special state appointee's agency or is seeking to influence an action by the employee or special state appointee in his or her official capacity.

(b) The following shall not be subject to this rule:

- (1) Gifts, favors, services, entertainment, food, drink, travel expenses, or registration fees from public agencies or public institutions.
- (2) Food or drink consumed at a public meeting to which at least twenty-five (25) individuals are invited. A meeting will be considered public if:
 - (A) the event is a reception or other gathering for public officials that is not arranged to solicit government procurement of goods or services;
 - (B) the employee is giving a speech or participating in a presentation in the employee's official capacity; or
 - (C) the meeting has a formal educational program that the employee is attending to assist him or her in performing official duties.
- (3) Mementos or souvenirs of nominal value.
- (4) Food or drink consumed by an employee during negotiations or other activities related to an Indiana economic development corporation economic development project.
- (5) Gifts, favors, services, entertainment, food, or drinks from relatives, or a person with whom the employee or special state appointee has an ongoing social relationship, so long as:
 - (A) the gifts or other items of value are not deducted as a business expense; and
 - (B) the gift giver is not seeking to influence an action by an employee or special state appointee in that person's official capacity.
- (6) Political contributions subject to IC 3-9-2 that are reported in accordance with applicable law.
- (7) Nominal refreshments offered to a state employee or a special state appointee conducting official state business while the employee or special state appointee is at a workplace of a person who:
 - (A) has a business relationship; or
 - (B) seeks to influence official action;with the employee's or special state appointee's agency.

(8) Discount and other promotional programs approved and made available to state employees and special state appointees through the state personnel department or the Indiana department of administration.

(c) An employee's or special state appointee's state officer or appointing authority may waive application of subsection (a) of this rule in individual cases when consistent with the public interest. The waiver shall:

(1) be in writing; and

(2) identify the following:

(A) The employee or special state appointee.

(B) The nature and value of the gift.

(C) The donor of the gift.

(D) Why acceptance of the gift is consistent with the public interest.

(d) Written waivers must be filed with the commission within thirty (30) days of receipt of the gift. The commission may review the written waivers. An appointing authority or state officer may designate authority to the agency's ethics officer to waive application of this rule on behalf of the appointing authority or state officer. The designation shall be in writing and filed with the commission.

(e) If a person wishes to reimburse the state for any part or all of the expenses incurred by the state for appearances of a state officer, employee, or special state appointee or their official representatives on behalf of the state, the person shall remit to the treasurer of state any such amounts. The treasurer of the state shall quietus the funds into the general fund.

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.

ANALYSIS

The Ethics Officer's request for a formal advisory opinion invokes consideration of the provisions of the Code pertaining to conflicts of interests, gifts and confidential information. The application of each provision to the Commissioner or other IDOH representatives on the Board is analyzed below.

A. Conflict of interests - decisions and votes

IC 4-2-6-9 (a)(1) prohibits the Commissioner or any other IDOH employee from participating in any decision or vote, or matter relating to that decision or vote, if they have a financial interest in the outcome of the matter. Similarly, IC 4-2-6-9(a)(3) prohibits IDOH employees from participating in any decision or vote, or matter relating

to that decision or vote, if they or a business organization in which they serve as a director or a member has a financial interest in the outcome. In addition, the rule requires state employees who recognize a potential conflict of interests to notify their agency's appointing authority and ethics officer in writing and either (1) seek a formal advisory opinion from the Commission or (2) file a written disclosure form with the Commission.

If the Commissioner or another IDOH employee were to serve as a voting member of the Board, they would be a director or member of IHIE. Thus, IC 4-2-6-9 would prohibit the IDOH representative on the Board from participating in any decision or vote, or matter related to a decision or vote, in which IHIE would have a financial interest. Also, it would trigger the disclosure requirements in IC 4-2-6-9(b) if the Commissioner or the participating IDOH employee identifies a potential conflict of interests.

The Ethics Officer provides that IDOH has contracts with IHIE; therefore, IDOH has a financial interest in matters that come before IDOH. As the agency head and appointing authority for IDOH, the Commissioner is in a position to participate in decisions or votes, or matters related to those decisions or votes, in which IHIE would have a financial interest in the outcome, such as matters related to IHIE's contract with IDOH.

Accordingly, in addition to seeking this formal advisory opinion, the Commissioner would need to notify her agency's appointing authority and IDOH's Ethics Officer in writing. Likewise, if another IDOH employee serves on the Board and is in a position to participate in decisions or votes in which IHIE would have a financial interest, that employee will need to notify his or her appointing authority and Ethics Officer in writing and either seek a formal advisory opinion or file a written disclosure statement with the Commission.

The Commission finds that IDOH should execute an appropriate screen that prohibits the Commissioner or any other IDOH employee who sits as a voting member of the Board from participating in any decisions or votes, or matters related to decisions or votes, at IDOH in which IHIE would have a financial interest. So long as IDOH executes an appropriate screen, the Commission finds that the Commissioner or any other participating IDOH employee would not be in violation of IC 4-2-6-9.

B. Outside Employment/Professional Activity

An outside employment or professional activity opportunity creates a conflict of interests under IC 4-2-6-5.5 if it results in the employee: 1) receiving compensation of substantial value if 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 her official duties that 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 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 or professional activity opportunities since these individuals are in a better position to determine whether a conflict of interests might exist between an employee's state duties and an outside employment or professional activity opportunity.

Based on the information provided by the Ethics Officer, the Commissioner or the participating IDOH employee would be serving on the Board in their official capacity; therefore, subsections (1) and (2) would not prohibit them from serving on the Board. Regarding subsection (3), the Commissioner or the participating IDOH employee is prohibited from using her IDOH position to secure unwarranted privileges or exemptions for IHIE or anyone else that subsection (3) prohibits.

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 an agency. This prohibition, however, does not apply to an employee that does not participate in or have contracting responsibility for any of the activities of the contracting agency, provided certain statutory criteria are met.

The Ethics Officer confirmed that no IDOH employee would receive compensation, including reimbursement for expenses, from IHIE for serving on the Board. Thus, this rule will not apply.

D. Gifts

The Commissioner or the participating IDOH employee also should be aware of 42 IAC 1-5-1, which is the gift rule. The gift rule states, in part, that a state employee shall not knowingly solicit, accept or receive any gift, favor, service, entertainment, food, drink, travel expenses or registration fees from: (1) a person who has a business relationship with the employee's agency; or (2) a person who is seeking to influence an action by the employee in his or her official capacity.

"Business relationship" is defined in IC 4-2-6-1(a)(5) to include the dealings of a person with an agency seeking, obtaining, establishing, maintaining or implementing (i) a pecuniary interest in a contract or purchase with an agency; (ii) a license or permit requiring the exercise of an agency's judgment or discretion; or (iii) a lobbyist.

The general prohibition on gifts is subject to the eight exceptions outlined in subsection (b) of 42 IAC 1-5-1, or the agency's appointing authority may waive its application in certain circumstances as provided for in subsections (c) and (d).

The Ethics Officer provides that IDOH has a contract with IHIE. As such, IHIE has a business relationship with IDOH, and an IDOH employee is prohibited from accepting any gifts from IHIE, unless an exception applies or the IDOH employee obtains a gift waiver.

E. Confidential information

The Commissioner or the participating IDOH 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. To the extent that the participating IDOH employees will possess information of a confidential nature by virtue of their position with IDOH that could be used to benefit the Board, IHIE or any other person or entity, the participating IDOH employees must ensure that they comply with these rules.

CONCLUSION

Subject to the foregoing analysis, the Commission finds that the Commissioner or the participating IDOH employee would have a potential conflict of interests under IC 4-2-6-9 if they were to participate in decisions or votes, or matters related to such decisions and votes for IDOH in which IHIE would have a direct financial interest in the outcome of the matter. The Commission further finds that IDOH should implement a screening mechanism to ensure the participating IDOH employee does not participate in any decisions or votes, or matters relating to such decisions and votes, in which IHIE has a financial interest.

Respectfully Submitted,



David Cook

Inspector General

On behalf of the State Ethics Director (position is currently vacant)