

**42 IAC 1-5-5 Conflicts of interest; advisory opinion by Commission (IC 4-2-6-5.5)**

**42 IAC 1-5-6 Conflicts of interest; decisions and voting (IC 4-2-6-9)**

**42 IAC 1-5-12 Use of state property**

**42 IAC 1-5-13 Ghost employment**

The IDHS Ethics Officer sought advice on behalf of a special state appointee on the Indiana Emergency Response Commission to determine whether the special state appointee could maintain his outside employment on the Emergency Management Alliance of Indiana's Board of Directors. SEC determined that the special state appointee's service on the board would not create a conflict under IC 4-2-6-5.5 as the special state appointee does not receive compensation for his service on the board nor would he be required to recuse himself from matters that are critical to the performance of his state duties or disclose confidential information. SEC further determined that a potential conflict of interest would arise for the special state appointee under IC 4-2-6-9 if he participates in any decisions or votes in which EMAI has a financial interest in the outcome of the matter and that the screen proposed by IDHS to prevent such a conflict of interest is satisfactory.

February 2015

No. 15-I-1

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**

A state employee is the Ethics Officer for the Indiana Department of Homeland Security ("IDHS"). He requests an advisory opinion from the Commission on behalf of a special state appointee serving as a Commissioner on the Indiana Emergency Response Commission ("IERC"). The special state appointee has been serving in this capacity since 2003.

The IERC has the duties set forth under IC 13-25-1-6 which include encouraging and supporting the development of emergency planning efforts to provide state and local government entities and the public with information concerning potential chemical hazards, assisting the State in complying with the Superfund Amendment and Reauthorization Act ("SARA") requirements, designing and supervising the operation of emergency planning districts, and gathering and distributing information needed for effective emergency response planning.

The special state appointee has recently been appointed to the Board of Directors for the Emergency Management Alliance of Indiana ("EMAI") as a liaison to the IERC. His position with EMAI is entirely uncompensated.

IDHS has identified two issues that present a potential conflict of interest for the special state appointee in his capacity as an IERC Commissioner. The first issue is that on occasion, perhaps once a year, the IERC votes on matters that would impact the financial interests of EMAI such as funding or the awarding of a grant.

The second issue involves an annual conference for emergency personnel and agencies that would be a joint effort between the IERC and EMAI. The IERC and EMAI have put on separate annual conferences for the past five or six years. The goal this year, however, is to return to the

model from years ago that has the IERC and EMAI put on a single joint conference in October, with the costs split between the IERC and EMAI. The IERC would pay money to the EMAI for the IERC's portion of the conference by grant, MOU, or invoice. The EMAI has developed a Planning Committee and a Vendor Committee to facilitate the planning of the conference and the IERC has provided some members and/or staff to sit on these committees, including the special state appointee who has been appointed co-chair of the EMAI's Planning Committee. To the extent it entails functions outside the IERC (i.e. in his role as EMAI board member), this position is also unpaid.

The IDHS is seeking a formal advisory opinion regarding the potential conflicts of interest for the special state appointee under 42 IAC 1-5-6 (IC 4-2-6-9) and to obtain approval of the proposed screening agreement to prevent any conflicts of interest for the special state appointee under the Code.

The IDHS Ethics Officer has drafted a screening agreement to address the potential conflicts of interest and to remove the special state appointee from participating in any IERC discussions, decisions or votes in any matter in which EMAI would have a financial interest. Under the agreement, the special state appointee is required to abstain from participating in any discussions, decisions, or votes with respect to any matter whose outcome might potentially involve, to its benefit or detriment, the financial interests of EMAI that is presented to the IERC. The reason for the abstention will be recorded in the minutes of the IERC meeting at which the matter arose. The screening agreement has been submitted to the Commission for review.

At present, the special state appointee is operating under the general terms of this proposed screening mechanism in accordance with IDHS instructions. The special state appointee would like to like to stay on the EMAI Planning Committee if possible, to help guide the conference and ensure EMAI is spending the money allocated by IERC properly. In this position he would be able to influence how EMAI spends the IERC money, but the decision by IERC to provide the money to EMAI in the first place would have already been made without him in accordance with the proposed screen.

### **ISSUE**

1. Would a conflict of interest arise for the special state appointee under IC 4-2-6-9? If so, would the screening procedure proposed by IDHS be appropriate to prevent a conflict of interest from arising for him?
2. What other ethics issues, if any, arise for the special state appointee given his position as an IERC Commissioner and his participation on EMAI's Board of Directors and Planning Committee?

### **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 shall not knowingly:  
(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; or

(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 or the individual's appointing authority or agency ethics officer granting approval of outside employment is conclusive proof that an individual is not in violation of subsection (a)(1) or (a)(2).

#### **IC 4-2-6-9 (42 IAC 1-5-6) Conflict of economic interests**

Sec. 9. (a) A state officer, an employee, or a special state appointee may not participate in any 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 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 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:

(1) 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

(2) 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.

(c) A written determination under subsection (b)(2) 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)(2) shall be filed with the appointing authority.

#### **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.

#### **42 IAC 1-5-12 Use of state property**

Sec. 12. A state officer, employee, or special state appointee shall not make use of state materials, funds, property, personnel, facilities, or equipment 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.

#### **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.

### **ANALYSIS**

#### *A. Outside employment*

An outside employment or professional activity opportunity creates a conflict of interest under IC 4-2-6-5.5 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 official duties that his 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 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 appointing authority or ethics officer regarding outside employment opportunities since it views them as being in the best position to determine whether a conflict of interest might exist between an employee's state duties and an outside employment opportunity. Based on the information provided by the special state appointee and the IDHS Ethics Officer, it does not appear that the special state appointee's service on the EMAI board would create a conflict under this provision. Specifically, the special state appointee does not receive compensation of substantial value, nor would he be required to recuse

himself from matters that are critical to the performance of his state duties. Moreover, nothing presented suggests that his service on the EMAI board or on EMAI's Conference Planning Committee would require the special state appointee to disclose confidential information that he may have access to by virtue of his state position. Similarly, nothing presented suggests that he would use or attempt to use his state position for any unwarranted privileges or exemptions.

### *B. Conflict of Interests*

IC 4-2-6-9(a)(1) prohibits the Commissioner, as a special state appointee, from participating in any decision or vote if a business organization in which he is serving as an officer, a director, a trustee, a partner, or an employee has a financial interest in the outcome of the matter.

The special state appointee has recently been appointed to the Board of Directors for the EMAI as a liaison to the IERC. The IDHS Ethics Officer has indicated that matters impacting the financial interest of EMAI occasionally come before the IERC for a vote. In addition, the special state appointee is one of the IERC members who have been appointed to serve on the EMAI's Planning Committee, which has been set up for facilitation of the joint conference the IERC and EMAI are hosting in October of 2015. The special state appointee has been appointed as the co-chair of this committee. The EMAI Planning Committee's responsibilities include spending money allocated to the EMAI by the IERC.

Because he is serving on the EMAI Board of Directors, a conflict of interest would arise for the special state appointee if he participates in a decision or vote in which EMAI would have a financial interest in the outcome of the matter. It appears that the special state appointee's responsibilities as an IERC Commissioner, including his responsibilities as the co-chair of the EMAI Conference Planning Committee, may require him to be involved in decisions or votes in matters in which the EMAI would have a financial interest.

IC 4-2-6-9(b) provides that a special state appointee who identifies a potential conflict of interest shall notify the person's appointing authority and 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. IC 4-2-6-9(b)(1) further provides that when a potential conflict of interest arises, the Commission may, with the approval of the appointing authority, assign the particular matter to another person and implement all necessary procedures to screen the state employee seeking an advisory opinion from involvement in the matter.

In this case, the IDHS proposes a procedure that would screen the special state appointee from participating in any discussions, decisions or votes in any matters in which EMAI would have a financial interest. The proposed screen agreement requires that, when any matter whose outcome might potentially involve the financial interests of the EMAI is presented to the IERC, the special state appointee abstain from participating in any discussions, decisions, or votes with respect to that matter. The agreement also requires that the reason for the abstention will be recorded in the minutes of the IERC meeting at which the matter arose.

The proposed screen does not address the special state appointee's activities as an IERC Commissioner serving on the EMAI Conference Planning Committee and more information is needed to determine if an additional screening mechanism would be appropriate to prevent a conflict of interest for the special state appointee should he continue to serve on this committee.

### *C. Confidential information*

The special state appointee 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 special state appointee 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) and the definition of "information of a confidential nature" is set forth in IC 4-2-6-1(a)(12).

To the extent the special state appointee is exposed to or has access to such confidential information in his position as an IERC Commissioner he would be prohibited not only from divulging that information but from ever using it to benefit anyone in any manner, including EMAI.

### *D. Use of state property and Ghost employment*

42 IAC 1-5-12 prohibits the special state appointee 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 special state appointee 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 joint conference being planning by the IERC and the EMAI is official state business and the special state appointee observes these provisions throughout his participation as the co-chair of the conference planning committee, he would not be in violation of these rules.

## **CONCLUSION**

Subject to the foregoing analysis, the special state appointee's continued outside professional activity with EMAI would not be contrary to the Code. The Commission further finds that a potential conflict of interest would arise for the special state appointee under IC 4-2-6-9 if he participates in any decisions or votes in which EMAI has a financial interest in the outcome of the matter and that the screen proposed by IDHS to prevent such a conflict of interest is satisfactory.