

### **IC 4-2-6-15 (42 IAC 1-5-16) Communications by State Officers**

The OAG's General Counsel/Ethics Officer and Communications Director requested advice regarding application of IC 4-2-6-15 to specific types of communications that the OAG staff wished to post on the AG's official state social media accounts and the official OAG website. SEC found that the use of state funds, including state employee salaries and state equipment paid for by appropriations made by the general assembly, to create and/or share an audio or video communication that includes a state officer's name or likeness is prohibited under IC 4-2-6-15. SEC further found that any audio or video communication that is posted on a digital media account that is branded with the state officer's name and/or likeness is not permitted.

April 11, 2019  
2019-FAO-004

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 General Counsel and Ethics Officer for the Office of the Indiana Attorney General (OAG), requests a formal advisory opinion on behalf of the OAG's Communications Director. This formal advisory opinion request is in regards to the application of IC 4-2-6-15 to specific types of video/audio communications that the OAG Communications Division wishes to post on the Attorney General's (AG's) official state social media accounts, including the AG's official Facebook, Instagram, and Twitter accounts and on the official OAG website.<sup>1</sup>

According to the OAG's request, the OAG is the "state's law firm," as the OAG represents the State of Indiana in lawsuits involving the State's interests and provides legal defense to state officials and state agencies in lawsuits. In addition to these duties, the OAG engages in numerous initiatives and other services to the citizens of the State of Indiana, including: numerous endeavors related to consumer protection; the Jail Chemical Addiction Program; the OAG Drug Abuse Taskforce and drug takeback events; a partnership with the Indianapolis Ten Point Coalition; and the work provided to citizens via the OAG's Unclaimed Property Division, a division of the OAG that collects and safeguards unclaimed property on behalf of all citizens of Indiana and distributes these unclaimed funds and property to their rightful owners.

The OAG's request reads that the OAG is continually looking for ways to engage with the citizens of the State of Indiana and raise awareness and familiarity with the services and

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<sup>1</sup> The OAG referred to the AG's official social media accounts and the official website of the OAG as "digital media accounts" throughout their request. They also referred to "social media accounts"; the references to social media accounts should be understood to include the OAG's official website.

initiatives of the OAG. They write that one of the initiatives the OAG has implemented toward achieving this goal is the OAG's Mobile Operation Unit, an office-owned vehicle that allows OAG staff to conduct mobile outreach to Hoosiers on unclaimed property and consumer protection as well as on other initiatives of interest to citizens and consumers. Another way that the OAG strives to increase engagement with Indiana citizens is through effective use of the office's social media accounts. The OAG, like other statewide-elected officials, has an official state Facebook account, Instagram account, and Twitter account. Each of these social media accounts includes the AG's name and title in the handle<sup>2</sup> and includes a picture of the AG as the account's profile picture. As part of the OAG's effort to use social media to more fully engage with the citizens of Indiana, the OAG would like to post various types of video and audio communications to these accounts, as described more fully below.

The OAG would like to use these communications on the OAG's social media accounts because the OAG recognizes that social media use is highly prevalent and that the way individuals engage with social media has evolved. The OAG believes individuals are more likely to engage with social media content that contains a video communication; therefore, the most effective way for the OAG to conduct outreach to Hoosiers on various office initiatives is through the use of video communications posted on social media.

The OAG writes that in August 2018, the OAG removed content from digital media accounts that had been created and posted by either OAG staff or by the OAG's Unclaimed Property marketing vendor after the OAG learned that an Unclaimed Property public service announcement (PSA), which the OAG's Unclaimed Property Division's marketing vendor created as part of its contract, included the AG's name, but not his likeness. The OAG writes that it has refrained from posting certain types of audio/video communications during this six-month period. During this hiatus, the OAG has observed a noticeable decline in the public's engagement with the OAG's Unclaimed Property website, as the number of searches on the Unclaimed Property Division website has significantly declined. The OAG has observed a 41% decrease in the number of searches on its Unclaimed Property website between June/July and Sept/October of 2018. (The metrics from OAG's outside vendor show that the Unclaimed Property Division website had a total of 593,070 searches completed in June/July, which decreased to 352,013 searches in September/October 2018.) The OAG believes that the lack of engaging social media content for Unclaimed Property has contributed to this decline.

In addition to removing content and refraining from posting other similar content on social media, the OAG writes that they conducted an internal review of content posted and then drafted an internal protocol for review and approval of all digital media content to ensure compliance. During this internal review, a number of questions arose about how IC 4-2-6-15 applies to social media usage by statewide elected offices and officials, such as the AG and the OAG, and as other statewide-elected officials use their social media accounts to engage with the public in various ways. As a consequence, on November 29, 2018, the OAG requested an informal advisory opinion from the OIG, which the OAG received on December 7, 2018. The informal advisory opinion raised specific questions about each type of audio/video communication noted in the OAG's November 29 request and recommended that the OAG seek a formal advisory opinion on these questions to obtain a final determination.

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<sup>2</sup> "Handle" refers to the public username on a social media account.

The OAG now seeks a formal advisory opinion on three types of audio/video communications the OAG would like to post on the OAG's official state social media accounts: (1) audio/video communications that are created by OAG Communications Division staff that do contain the AG's name or likeness as part of the communication; (2) audio/video communications created by the OAG's contractor for Unclaimed Property marketing materials that do not contain the AG's name and likeness; and (3) audio/video communications created and paid for by a third party (such as a news outlet) that do contain the AG's name and likeness as part of the communication.

Additional factual background and specific examples of each type of video for the Commission's consideration follow.

**A. Audio/video communications created by OAG Communications Division staff that include the AG's name and likeness for posting on the AG's state digital media accounts.**

The OAG represented that the Communications Division consists of approximately seven employees whose duties include responding to questions from the media and the public, drafting official statements and press releases, engaging in outreach initiatives, documenting activities of the AG and other OAG events (including still photographs and short videos of speeches and other events), publishing an internal office newsletter on a monthly basis, and creating other materials, such as video communications, to illustrate various office initiatives that are of interest to Indiana citizens, such as the OAG's consumer protection and unclaimed property responsibilities.

The OAG Communications Division staff film the video communications on state-issued smartphones or cameras. These video data files are available to be posted to social media immediately after recording or at a later time after a Communications Division staff member edits the video file. The AG or the AG's name may appear in a portion of these staff-created videos. The OAG provided the commission with several examples of videos it would like to post on its social media accounts.

The OAG's request for an informal advisory opinion to the OIG asked the following question on these types of audio and video communications, as summarized below:

*Is an audio/video communication that includes the Attorney General's name or likeness, created by a staff member on an office camera or smartphone and then uploaded to the Attorney General's official social media accounts (Facebook, Twitter, Instagram) or official website considered to be paid for "entirely or in part with appropriations made by the general assembly" and therefore in violation of IC 4-2-6-15?*

**B. Audio/video communications created by the OAG's vendor for Unclaimed Property that do not include the AG's name or likeness for posting on the AG's state digital media accounts.**

The OAG has contracted with a marketing agency that creates various types of marketing materials specifically for the OAG's Unclaimed Property Division. This includes materials intended for social media posts. Some of the materials created for social media are not considered a "communication" under IC 4-2-6-15, but other materials that may be created by the vendor for social media are video communications.

None of the video communications created by this outside vendor under this contract include the AG's name or likeness directly in the communication; however, the OAG would like to post the communications on the AG's social media pages, which, as previously noted, contain the AG's name in the account handle and the AG's photographic likeness in the account profile picture. Therefore, the communications created by this vendor would appear as part of a post where the video communication is directly below and in close proximity to the AG's name and likeness.

The OAG's request for an informal advisory opinion to the OIG posed the following question on these types of audio and video communications, as summarized below:

*Can the OAG post an audio/video communication paid for with state funds that does not contain the AG's name and likeness, but the audio/video communication is then posted on the AG's social media accounts, which do contain the AG's name in the account handle and a picture of the AG as the profile picture?*

**C. Audio/video communications paid for by a third party that include the AG's name and likeness for posting on the AG's state digital media accounts.**

The OAG Communications Division staff, who manage the official state social media accounts for the OAG, also wish to post or "share" links to videos created and paid for by third parties, such as news outlets. These communications include the AG's name or likeness but are not paid for with any state funds; however, as with the previous questions, these videos would be posted on the OAG's social media accounts, which are managed by state employees.

The OAG's request for an informal advisory opinion asked the following question on these types of communications, as summarized below:

*Can the OAG post or share on its official social media accounts a video created and paid for by a third-party (such as a news outlet) that contains the AG's name or likeness?*

Accordingly, the OAG is requesting a formal advisory opinion from the Commission on these questions.

**QUESTIONS PRESENTED**

- 1) Is it permissible under IC 4-2-6-15 to post audio/video communications created by OAG staff using state-issued smartphones and cameras that include the AG's name and likeness on official digital media accounts?
- 2) Is it permissible under IC 4-2-6-15 to post audio/video communications created by an OAG vendor (where the communications would be paid for with state appropriations) that do not contain the AG's name and likeness on the OAG's official digital media accounts that do include the AG's name in the handle (or on the webpage) and the AG's photograph as the profile picture (or on the webpage)?
- 3) Is it permissible under IC 4-2-6-15 for the OAG to post audio/video communications paid for by a third party that contain the AG's name or likeness on the OAG's official digital media accounts?

### **RELEVANT LAW**

#### **IC 4-2-6-15 (42 IAC 1-5-16)**

#### **Communications paid for with appropriations or from securities division enforcement account; use of state officer's name or likeness prohibited; exceptions**

Sec. 15. (a) This section does not apply to the following:

(1) A communication made by the governor concerning the public health or safety.

(2) A communication:

(A) that a compelling public policy reason justifies the state officer to make; and

(B) the expenditure for which is approved by the budget agency after an advisory recommendation from the budget committee.

(b) This section does not prohibit a state officer from using in a communication the title of the office the state officer holds.

(c) As used in this section, "communication" refers only to the following:

(1) An audio communication.

(2) A video communication.

(3) A print communication in a newspaper (as defined in IC 5-3-1-0.4).

(d) A state officer may not use the state officer's name or likeness in a communication paid for entirely or in part with appropriations made by the general assembly, regardless of the source of the money.

(e) A state officer may not use the state officer's name or likeness in a communication paid for entirely or in part with:

(1) money from the securities division enforcement account established under IC 23-19-6-1(f); or

(2) appropriations from the state general fund made under IC 23-19-6-1(f).

## ANALYSIS

IC 4-2-6-15 reads that a state officer may not use the state officer's name or likeness in a "communication" paid for entirely or in part with appropriations made by the General Assembly, regardless of the source of the money.

"State officer" is defined to include the Attorney General (IC 4-2-6-1(a)(19)(F)). The other "state officers" are the Governor, the Lieutenant Governor, the Secretary of State, the Treasurer of State, the Auditor of State, and the Superintendent of Public Instruction. "Communication" for purposes of this rule includes only the following: (1) an audio communication; (2) a video communication; or (3) a print communication in a newspaper (as defined in IC 5-3-1-0.4).

The OAG has submitted three specific questions with regards to the application of IC 4-2-6-15 to social media and other communications efforts overseen by the OAG's Communications Division. Each question is analyzed below.

**1) Is it permissible under IC 4-2-6-15 to post audio/video communications created by OAG staff using state-issued smartphones and cameras that include the AG's name and likeness on official digital media accounts?**

Specifically, the OAG asks whether these types of audio/video communications would be considered to be "paid for entirely or in part with appropriations from the general assembly" or is the use of the state employee's salary, the state funds used to purchase this equipment and digital media hosting costs of the resulting communication too negligible for the communication to be considered paid for entirely or in part with state funds.

Under IC 4-2-6-15(d), the AG is prohibited from creating an audio/visual communication that includes the AG's name and/or likeness if such communication is paid for entirely or in part with appropriations from the General Assembly, regardless of the source of the money.

The Commission determined that there is no de minimis expenditure exception within the statute. IC 4-2-6-15(d) states that "[a] state officer may not use the state officer's name or likeness in a communication paid for entirely or in part with appropriations made by the General Assembly, regardless of the source of the money." [emphasis added]

Under the question raised, an audio/visual communication, which includes the AG's name and likeness, is being paid for in part by appropriations – here the state employees'

time and state equipment used to create the communication. Accordingly, this type of communication is not permitted under IC 4-2-5-15.

- 2) Is it permissible under IC 4-2-6-15 to post audio/video communications created by an OAG vendor (where the communications would be paid for with state appropriations) that do not contain the AG's name and likeness on the OAG's official digital media accounts that do include the AG's name in the handle (or on the webpage) and the AG's photograph as the profile picture (or on the webpage)?**

Standing alone, this type of audio or video communication paid for by state funds is permissible as it does not contain the AG's name or likeness; however, in this case the communication would be posted on a digital media account that is branded with the AG's name and/or likeness.

The Commission determined that this display of the AG's photo and/or the name Curtis T. Hill, Jr. in connection with an audio or video communication that is paid for with state appropriations is not permissible under IC 4-2-6-15.

- 3) Is it permissible under IC 4-2-6-15 for the OAG to post audio/video communications paid for by a third party (such as a news outlet) that contain the AG's name or likeness?**

The OAG Communications Division staff, who manage the official state social media accounts for the OAG, also wish to post or "share" links to videos created and paid for by third parties, such as news outlets. These communications include the AG's name or likeness but are not paid for with any state funds; however, as with the previous questions, these videos would be posted on the OAG's social media accounts, which are managed by state employees.

The Commission finds that this type of audio/video communication is considered a communication that contains the AG's name or likeness and is paid for entirely or in part by appropriations. As in the Commission's determination to the first question, there is no de minimis exception for the "paid for entirely or in part by appropriations..." language in the statute.

Accordingly, because OAG staff, whose salaries are paid for by appropriations from the General Assembly, would make the posting, the posting would be an audio/visual communication that was paid for entirely or in part by appropriations from the General Assembly and is not permissible under IC 4-2-6-15.

The OAG presented public policy reasons for these communications in their request for a formal advisory opinion. The Commission noted that under IC 4-2-6-15(a)(2), the prohibition against communications paid for with appropriations from the General Assembly does not apply to a communication that "a compelling public policy reason justifies the state officer to make; and the

expenditure for which is approved by the budget agency after an advisory recommendation from the budget committee.”

Although the Commission decided that these communications are prohibited under the language in IC 4-2-5-15, the OAG could take this matter before the budget committee and seek approval for this type of expenditure under IC 4-2-6-15(a)(2).

### **CONCLUSION**

The Commission found that all three of the communications described by the OAG are not permissible under IC 4-2-6-15:

It is not permissible under IC 4-2-6-15 to post audio/video communications created by OAG staff using state-issued smartphones and cameras that include the AG's name and likeness on official digital media accounts;

It is not permissible under IC 4-2-6-15 to post audio/video communications created by an OAG vendor (where the communications would be paid for with state appropriations) that do not contain the AG's name or likeness on the OAG's official digital media accounts that include the AG's name in the handle (or on the webpage) and the AG's photograph as the profile picture (or on the webpage); and

It is not permissible under IC 4-2-6-15 for the OAG to post audio/video communications paid for by a third party (such as a news outlet) that contain the AG's name or likeness.

Respectfully Submitted,

Jennifer Cooper  
Ethics Director