

**42 IAC 1-5-14 Post-employment restrictions (IC 4-2-6-11)**

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

**IC 4-2-6-6 Compensation resulting from confidential information**

A FSSA employee sought advice regarding a post-employment opportunity working as a Senior Data Scientist with an entity with whom FSSA contracts. SEC determined that the post-employment rules did not apply to the employee, as the employee did not have contracting responsibilities nor did he make regulatory or licensing decisions in his position as FSSA.

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2019-FAO-015

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 for the Indiana Family and Social Services Administration (FSSA) is requesting an advisory opinion on behalf of the employee, a Data Scientist in the Data & Analytics subdivision in FSSA's Division of Healthcare Strategies and Technology.

The employee began working for FSSA in this position in 2018. In this position, he is responsible for planning, architecture, and development of analytic tools and models that serve agency needs as related to various agency populations and policies. In addition, the employee is a member of a larger data science team that now consists of five members, including himself. His role on the team is to train and advise team members, review team members' work, implement best practices and standard operating procedures, and serve as a liaison for the team in agency meetings.

FSSA serves various Hoosier populations in need of social services. The programs and policies related to these populations create significant volumes of data. The employee was hired because of his expertise in data science and engineering to assist FSSA with tools and models that utilize said data to improve population health outcomes, increase population access to care, decrease population costs and provide for any specific need that can be addressed by the skill sets employed within the paradigm of data science and engineering.

The employee is interested in pursuing employment with KSM Consulting, LLC (KSM), a company that currently has a business relationship with FSSA. The employee has not applied for a position at this time; however, he is interested in applying for a posted position titled Senior Data Scientist.

KSM is a consulting firm based in Indianapolis that provides services to various State of Indiana agencies, including FSSA. KSM currently has two active contracts with FSSA. Although one of these contracts (#36132, set to expire March 31, 2020) does not impact work within the Data & Analytics unit, the second contract (#29998) has utilized the employee as a collaborator on the project. This contract is to assist with a technical assistance grant FSSA

was awarded from the National Governors Association (NGA) to expand and enhance data governance to derive more value from the Medicaid and health data maintained by the State. That contract is set to expire December 31, 2019. KSM also provides services to clients in private markets and governments not associated with the State.

As a collaborator on the KSM contract, the employee interacts with KSM to provide technical assistance to the project team, review code and provide feedback on data solutions. Although the employee has served as a collaborator to the project team, he has never been part of the FSSA team that made contract decisions. He does not supervise KSM staff, and he has no direct oversight or influence over the KSM project direction or deliverables.

The employee has never been involved in the negotiation or administration of any past or current contract between KSM and FSSA, nor was he in a position to influence those decisions. Mr. Burgess does not make regulatory or licensing decisions in his role. The primary individual responsible for overseeing the day to day activities of the KSM contract (#29998) is FSSA's Chief Data Officer. The primary individual responsible for overseeing the day to day activities of the other contract (#36132) is FSSA's Chief Information Officer.

Regarding the employment position at issue, the Senior Data Scientist position at KSM would spend the majority of his time developing and applying machine learning and advanced analytics algorithms to solve complex problems. The position would also collaborate with data architects and software developers to plan and construct the architecture for self-service business intelligence and advance analytic solutions. If hired as a Senior Data Scientist, the employee would be primarily responsible for the design, development and implementation of technical solutions for KSM clients.

In the event that FSSA contracts with KSM in any future work, KSM and the employee would ensure that his role was limited to developing and advising on the design, development and deployment of technical solutions that does not include any particular matter subject to restrictions under the Indiana ethics laws.

The employee knows and understands that Indiana's ethics laws will continue to apply to him as a private sector employee. He understands and agrees not to divulge confidential information of FSSA during his post-employment endeavors. Furthermore, the employee understands and agrees to abide by the one-year cooling off restriction regarding registering as an executive branch lobbyist.

FSSA is seeking the Commission's opinion regarding the application of any of the rules in the Code of Ethics to the employee's post-employment opportunity with KSM.

### **ISSUE**

What rules in the Code apply to the employee's post-employment opportunity with KSM?

## RELEVANT 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 4-2-6-9 (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 related 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 no 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 4-2-6-11 (42 IAC 1-5-14)**

#### **One year restriction on certain employment or representation; advisory opinion; exceptions; waivers; disclosure statements; restrictions on inspector general seeking state office**

Sec. 11. (a) As used in this section, "particular matter" means any of the following:

- (1) An application.
- (2) A business transaction.
- (3) A claim.
- (4) A contract.
- (5) A determination.
- (6) An enforcement proceeding.
- (7) An investigation.
- (8) A judicial proceeding.
- (9) A lawsuit.
- (10) A license.
- (11) An economic development project.
- (12) A public works project.

The term does not include the proposal or consideration of a legislative matter or the proposal, consideration, adoption, or implementation of a rule or an administrative policy or practice of general application.

(b) A former state officer, employee, or special state appointee may not accept employment or receive compensation:

- (1) as a lobbyist;
- (2) from an employer if the former state officer, employee, or special state appointee was:
  - (A) engaged in the negotiation or the administration of one (1) or more contracts with that employer on behalf of the state or an agency; and
  - (B) in a position to make a discretionary decision affecting the:
    - (i) outcome of the negotiation; or
    - (ii) nature of the administration; or
- (3) from an employer if the former state officer, employee, or special state appointee made a regulatory or licensing decision that directly applied to the employer or to a parent or subsidiary of the employer;  
before the elapse of at least three hundred sixty-five (365) days after the date on which the former state officer, employee, or special state appointee ceases to be a state officer, employee, or special state appointee.

(c) A former state officer, employee, or special state appointee may not represent or assist a person in a particular matter involving the state if the former state officer, employee, or special

state appointee personally and substantially participated in the matter as a state officer, employee, or special state appointee, even if the former state officer, employee, or special state appointee receives no compensation for the representation or assistance.

(d) A former state officer, employee, or special state appointee may not accept employment or compensation from an employer if the circumstances surrounding the employment or compensation would lead a reasonable person to believe that:

- (1) employment; or
- (2) compensation;

is given or had been offered for the purpose of influencing the former state officer, employee, or special state appointee in the performance of the individual's duties or responsibilities while a state officer, an employee, or a special state appointee.

(e) A written advisory opinion issued by the commission certifying that:

- (1) employment of;
- (2) consultation by;
- (3) representation by; or
- (4) assistance from;

the former state officer, employee, or special state appointee does not violate this section is conclusive proof that a former state officer, employee, or special state appointee is not in violation of this section.

(f) Subsection (b) does not apply to the following:

- (1) A special state appointee who serves only as a member of an advisory body.
- (2) A former state officer, employee, or special state appointee who has:
  - (A) not negotiated or administered any contracts with that employer in the two (2) years before the beginning of employment or consulting negotiations with that employer; and
  - (B) any contract that:
    - (i) the former state officer, employee, or special state appointee may have negotiated or administered before the two (2) years preceding the beginning of employment or consulting negotiations; and
    - (ii) is no longer active.

(g) An employee's or a special state appointee's state officer or appointing authority may waive application of subsection (b) or (c) in individual cases when consistent with the public interest. A waiver must satisfy all of the following:

- (1) The waiver must be signed by an employee's or a special state appointee's:
  - (A) state officer or appointing authority authorizing the waiver; and
  - (B) agency ethics officer attesting to form.
- (2) The waiver must include the following information:
  - (A) Whether the employee's prior job duties involved substantial decision making authority over policies, rules, or contracts.
  - (B) The nature of the duties to be performed by the employee for the prospective employer.
  - (C) Whether the prospective employment is likely to involve substantial contact with the employee's former agency and the extent to which any such contact is likely to involve matters where the agency has the discretion to make decisions based on the work product of the employee.

(D) Whether the prospective employment may be beneficial to the state or the public, specifically stating how the intended employment is consistent with the public interest.

(E) The extent of economic hardship to the employee if the request for a waiver is denied.

(3) The waiver must be filed with and presented to the commission by the state officer or appointing authority authorizing the waiver.

(4) The waiver must be limited to an employee or a special state appointee who obtains the waiver before engaging in the conduct that would give rise to a violation of subsection (b) or (c).

The commission may conduct an administrative review of a waiver and approve a waiver only if the commission is satisfied that the information provided under subdivision (2) is specifically and satisfactorily articulated. The inspector general may adopt rules under IC 4-22-2 to establish criteria for post employment waivers.

(h) Subsection (b) applies, subject to waiver under subsection (g), to a former state officer, employee, or special state appointee who:

(1) made decisions as an administrative law judge; or

(2) presided over information gathering or order drafting proceedings;

that directly applied to the employer or to a parent or subsidiary of the employer in a material manner.

(i) A former state officer, employee, or special state appointee who forms a sole proprietorship or a professional practice and engages in a business relationship with an entity that would otherwise violate this section must file a disclosure statement with the commission not later than one hundred eighty (180) days after separation from state service. The disclosure must:

(1) be signed by the former state officer, employee, or special state appointee;

(2) certify that the former state officer, employee, or special state appointee is not an employee of the entity; and

(3) state in detail the treatment of taxes, insurance, and any other benefits between the entity and the former state officer, employee, or state appointee.

(j) The inspector general may not seek a state elected office before the elapse of at least three hundred sixty-five (365) days after leaving the inspector general position.

## ANALYSIS

### *A. Confidential Information*

IC 4-2-6-6 prohibits the employee from accepting any compensation from any employment, transaction or investment that was entered into or made as a result of material information of a confidential nature. So long as any compensation the employee receives does not result from confidential information, his potential employment with KSM would not violate IC 4-2-6-6.

### *B. Conflict of Interests*

IC 4-2-6-9(a)(1) prohibits the employee from participating in any decision or vote, or matter related to that decision or vote, if he has a financial interest in the outcome of the matter. Similarly, IC 4-2-6-9(a)(4) prohibits him from participating in any decision or vote, or matter related to that decision or vote, in which a person or organization with whom he is negotiating or has an arrangement concerning prospective employment has a financial interest in the outcome of the matter. The definition of financial interest in IC 4-2-6-1(a)(11) includes, “an interest arising from employment or prospective employment for which negotiations have begun.”

Based on the information provided, the employee has not formally applied for the position of Senior Data Scientist at KSM. The employee clarified that he has not been approached by KSM, nor has he had any back and forth communication with them regarding employment opportunities.

Once employment negotiations begin, the employee would be prohibited from participating in any decision or vote, or matter related to a decision or vote, in which he, by virtue of his employment negotiations with KSM, would have a financial interest in the outcome of the matter.

The employee collaborates on one of KSM’s FSSA contracts and interacts with KSM to provide technical assistance to the project team, reviews code and provides feedback on data solutions. The Ethics Officer provides that the employee is not part of the FSSA team that makes contract decisions. He also does not supervise KSM staff nor does he have any direct oversight or influence over the KSM consulting project direction or deliverables.

The Commission determined that the employee’s interactions with KSM are limited to technical matters including analyzing data and he does not participate in any decisions or votes, or related matters, in which KSM would have a financial interest in the outcome. The Ethics Officer provided that should the employee apply for a position with KSM and begin employment negotiations, he would be screened from further collaboration with KSM out of an abundance of caution.

### *C. Post-Employment*

IC 4-2-6-11 consists of two separate limitations: a “cooling off” period and a “particular matter” restriction. The first prohibition, commonly referred to as the cooling off or revolving door period, prevents the employee from accepting employment from an employer for 365 days from the date that he leaves state employment under various circumstances.

First, the employee is prohibited from accepting employment as a lobbyist for the entirety of the cooling off period. A lobbyist is defined as an individual who seeks to influence decision making of an agency and who is registered as an executive branch lobbyist under the rules adopted by the Indiana Department of Administration.

The Ethics Officer provides that the employee understands he is prohibited from engaging in any lobbying activities in his prospective employment with KSM. To the extent that the employee does not engage in executive branch lobbying for one year after leaving state employment, the Commission finds that his intended employment with KSM would not violate this provision of the post-employment rule.

Second, the employee is prohibited from accepting employment for 365 days from the last day of his state employment from an employer with whom 1) he engaged in the negotiation or administration of a contract on behalf of a state agency and 2) was in a position to make a discretionary decision affecting the outcome of the negotiation or nature of the administration of the contract.

The employee's responsibilities at FSSA include collaborating and interacting with KSM on matters related to KSM's FSSA contract. According to the Ethics Officer, the employee has not engaged in the negotiation or administration of any contract between the State and KSM, nor was he in a position to make a discretionary decision affecting the outcome of the negotiation or administration of any contract with KSM.

According to the Ethics Officer, the employee's interactions with KSM involve analysis of data, code and models, and he is not involved in any aspects of their contract with FSSA.

The Commission finds that the employee would not be subject to the cooling off restriction for his role in interacting with KSM as a Data Scientist. He did not administer KSM's contract nor was he in a position to make discretionary decisions affecting the nature of the administration of the contract.

Third, the employee is prohibited from accepting employment for 365 days from the last day of his state employment from an employer for whom he made a regulatory or licensing decision that directly applied to the employer or its parent or subsidiary.

The Ethics Officer provides that the employee does not make any regulatory or licensing decisions in his position with FSSA. Accordingly, the Commission finds that the employee has never made any regulatory or licensing decisions that applied to KSM as a state employee.

Fourth, the employee is prohibited from accepting employment from an employer if the circumstances surrounding the hire suggest the employer's purpose is to influence him in his official capacity as a state employee. The information presented to the Commission does not suggest that KSM has extended an offer of employment to the employee in an attempt to influence him in his capacity as a state employee.

Accordingly, the Commission finds that the employee may accept employment with KSM immediately upon leaving state employment.



Finally, the employee is subject to the post-employment rule's "particular matter" prohibition in his prospective post-employment. This restriction prevents him from representing or assisting a person on any of the following twelve matters if he personally and substantially participated in the matter as a state employee: 1) an application, 2) a business transaction, 3) a claim, 4) a contract, 5) a determination, 6) an enforcement proceeding, 7) an investigation, 8) a judicial proceeding, 9) a lawsuit, 10) a license, 11) an economic development project or 12) a public works project. The particular matter restriction is not limited to 365 days but instead extends for the entire life of the matter at issue, which may be indefinite.

In this instance, the employee would be prohibited from representing or assisting KSM, as well as any other person, in a particular matter in which he personally and substantially participated as a state employee. The Ethics Officer provides that the employee and KSM would ensure that the employee's role was limited to developing and advising on design, development and deployment of technical solutions and that his work will not include any particular matters.

The Commission finds that the employee must ensure compliance with the particular matter restrictions and refrain from assisting or representing any person on any other particular matters, including contract #29998, in which he may have been personally and substantially involved during his state employment.

### **CONCLUSION**

Subject to the foregoing analysis and the application of the one-year restriction regarding executive branch lobbying, the Commission finds that the employee's potential post-employment opportunity with KSM would not violate the post-employment restrictions found in IC 4-2-6-11.

Respectfully Submitted,

Jennifer Cooper  
Ethics Director