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A state employee was interested in selling his real property to DNR. SEC found that going forward the employee was not in a position at DNR to participate in decisions or votes in matters related to the sale of his property as this process was overseen by a different division within the agency. Accordingly, he did not have a potential conflict of interests under IC 4-2-6-9 at this time. SEC advised that the employee and his subordinates still be screened from any involvement in the sale of his property to DNR in order to avoid any appearance of impropriety. SEC further found that the employee would have a financial interest in a state contract if DNR moved forward with the purchase of his real property, but he could avoid having a conflict of interests under IC 4-2-6-10.5 so long as he meets all of the disclosure requirements under IC 4-2-6-10.5, prior to executing the contract.

April 11, 2019
2019-FAO-006

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 a Department of Natural Resources (DNR) employee. The state employee works as the Property Manager at Jasper-Pulaski Fish and Wildlife Area (FWA), which is part of the Division of Fish and Wildlife (Division).

The state employee's main duties as Property Manager at Jasper-Pulaski FWA are to plan, coordinate, implement and direct 1) wildlife management practices and procedures, 2) construction and maintenance of property facilities and 3) purchase and maintenance of all property equipment.

As a condition of the state employee's employment, he and his wife live in a state-owned residence on Jasper-Pulaski FWA. In preparation for retirement and based on the knowledge that they would need a place to live, the state employee and his wife purchased a house and five acres next to the Jasper-Pulaski FWA in 2003. In 2004, the 55 acres of farmland surrounding the original five acres came up for sale, and they purchased the property. The 60 total acres are adjacent to Jasper-Pulaski FWA and border the state property on two sides.

The state employee and his wife are selling 38 of their 60 acres, and he asked the Division if they would be interested in purchasing the property. The Division indicated it would be interested in purchasing the property at appraised value. The Division submitted the request to DNR's Land Acquisition Specialist who suggested the state employee request an ethics opinion, and DNR's Ethics Officer, who referred the state employee to the Office of Inspector General for an informal advisory opinion.

In his request for an informal advisory opinion from the OIG, the state employee provided that he does not have any contracting responsibility for the Jasper-Pulaski FWA or DNR. His only

role as related to contracts is to provide information on Jasper-Pulaski FWA's needs to those who do have this responsibility. The state employee provided the example of the Jasper-Pulaski FWA's trash contract. The state employee would determine the specifications, such as to provide two dumpsters and empty them once per week, and then provide a list of possible vendors in his area. He would submit that information in a Purchase Request to DNR Purchasing, and they would send out the bid packets, receive the vendor bid proposals and execute the contract with the selected vendor. The state employee would then be responsible for ensuring that the terms of the contract were met and that the vendor was paid per terms of the contract.

The state employee also provides that he does not participate in any decisions regarding land acquisition purchases. Jasper-Pulaski FWA has a five year management plan written by his assistant that includes a three tiered land acquisition plan (a copy was included in the supplemental materials the state employee included with his Formal Advisory Opinion request). Since Jasper-Pulaski FWA is primarily forested, the goal is to purchase upland or farmland, which would be Tier 1, the highest priority. Another factor in assigning priorities is proximity to the FWA. Land adjacent to the FWA would also fall into the Tier 1 category. When a parcel becomes available, Division leadership is notified, and they make the decision to proceed based on the acquisition plan and the availability of funds. Leadership will work with the Division of Land Acquisition to hire out an appraisal. Due to federal restrictions, the Division will not offer more than the appraised value. Division leadership will make all decisions, and Land Acquisition will handle all the administrative functions in the land acquisition. Because federal funds will be used, a federal reviewer will also review the appraisal to ensure that he or she agrees with the appraisal. The property the employee intends to sell fits the criteria for Tier 1 since it is both upland and farmland and borders the FWA on two sides.

The informal advisory opinion issued by the OIG on February 27, 2019 recommended that the employee seek a Formal Advisory Opinion from the Commission to ensure he would not violate any of the ethics rules related to conflicts of interests if he were to sell his land to DNR.

ISSUES

What ethics issues, if any, arise for the state employee if he were to sell his land to DNR given his position with DNR and his involvement in land acquisition plans?

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 4-2-6-10.5 (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 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. Conflict of interests-decisions and votes

IC 4-2-6-9 (a)(1) prohibits the state 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. “Financial interest” means an interest in a purchase, sale, lease, contract, option, or other transaction between an agency and any person; or involving property or services. This prohibition extends beyond merely the decision or vote on the matter to encompass any participation in that decision or vote.

In addition, the rule requires a state employee who identifies a potential conflict of interests to notify his agency’s appointing authority and ethics officer in writing and either (1) seek a formal advisory opinion from the State Ethics Commission or (2) file a written disclosure [form](#) with the OIG.

The state employee provides that he does not participate in any final decisions regarding land acquisition. The Ethics Officer confirmed that, moving forward, the state employee’s duties as Property Manager of Jasper-Pulaski FWA would not include participating in any decisions or votes, or matters related to such decisions or votes, involving the purchase of his property or in which he would have a financial interest at this time. The land sale and process would be handled by DNR’s Land Acquisition Division. Accordingly, the Commission finds that the state employee does not have a potential conflict of interests under this rule at this time.

Although the state employee does not have a conflict of interests under this rule at this time, the Commission asks that DNR provide written confirmation that neither the state employee nor his subordinates would be involved in any manner in the sale of his property to DNR in order to avoid any appearance of impropriety.

B. Conflict of interests – contracts

Assuming the land would be purchased via a contract between the state employee and DNR, he would need to ensure that he complies with all of the requirements in IC 4-2-6-10.5. This rule prohibits a state employee from having a financial interest in a contract with a state agency unless (1) he does not participate in or have contracting responsibility for the contracting agency; and (2) he files a disclosure statement with the OIG *before* executing the contract with the state agency.

The Commission finds that the state employee does not have contracting responsibility for DNR, and therefore he would not violate this rule so long as he discloses his financial interest in the land purchase contract with DNR by completing all of the required sections of the Conflict of Interests-Contracts disclosure statement and filing it prior to executing the contract in accordance with IC 4-2-6-10.5(b) and (c).

The Ethics Officer and the state employee confirmed that the employee would be able to file the Conflict of Interests-Contracts disclosure form prior to executing the contract for the sale of his land to DNR. Accordingly, the employee would not have a conflict of interests under this rule.

C. 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. 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).

The Commission finds that to the extent the state employee is exposed to or has access to such confidential information in his position with DNR, he would be prohibited not only from divulging that information but from ever using it to benefit himself or any other person in any manner.

D. Conflict of Interests - Indiana Criminal Code

In addition to the Code of Ethics rules described above, the Indiana Criminal Code also prohibits a state employee from having financial interests in contracts *with the agency that the employee serves*. Based on the information provided, the state employee would likely be entering into a contract for purchase of his property with DNR, the agency that he serves. The criminal statute can be found at IC 35-44.1-1-4. Subsection (c)(5) permits a state employee to obtain approval from the State Ethics Commission that he or she does not have a conflict of interests under the IC 35-44.1-1-4 or the Code of Ethics.

The Commission finds that the state employee would not have a conflict of interests under either IC 4-2-6-10.5 and/or IC 4-2-6-9. The Commission further finds that the state employee would not have a conflict of interests under the criminal statute, IC 35-44.1-1-4.

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.

CONCLUSION

The Commission finds that the state employee would not violate the Code of Ethics if he were to sell his land to DNR. The state employee does not have a conflict of interests under IC 4-2-6 so long as he refrains from any participation in the property sale in his capacity as a DNR employee and he completes the Conflict of Interests-Contracts disclosure form prior to executing any

contracts with DNR. The Commission further finds that he would not have a conflict of interests under IC 35-44.1-1-4.