

**42 IAC 1-5-6 Conflicts of Interests (IC 4-2-6-9)**  
**42 IAC 1-5-7 Prohibition against financial interest in contract (IC 4-2-6-10.5)**  
**42 IAC 1-5-1 Gifts**  
**42 IAC 1-5-10 Benefiting from confidential information**  
**42 IAC 1-5-11 Divulging confidential information**

The Ethics Officer for the Indiana Family and Social Services Administration (FSSA) sought advice regarding certain outside employment/professional activities for FSSA employees while employed by FSSA. The Commission finds that the employment/professional activities would not be contrary to the Code of Ethics.

March 10, 2022  
2022-FAO-007

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 FSSA.

The Ethics Officer asks how the Code would apply to an FSSA employee holding a voting position as a member of the Indiana Health Information Exchange (IHIE) Board (Board). IHIE is seeking to add a voting member from FSSA to the Board, through updating their bylaws. FSSA does not currently have a member on the Board; however, IHIE has requested an FSSA voting member be added to the Board due to the needs of FSSA for certain information/data. FSSA also has a unique voice/perspective on issues relating to exchange of health information, which can change what data is used/collected and how it is integrated to improve access to the same. The Ethics Officer writes that there is no known compensation available for the FSSA role on the Board.

The Regenstrief Institute founded IHIE in 2004 as a non-profit organization. IHIE is a 501(c)(3) supporting organization. IHIE facilitates sharing of patient medical records between providers and makes health information available to approximately 50,000 providers in Indiana and surrounding states. IHIE is the main information exchange for patient records, serving all of Indiana. IHIE operates the Indiana Network for Patient Care (INPC), which is the clinical data repository where contracted providers both send and utilize data. Indiana Medicaid is a provider of data to the INPC, along with the hospital systems.

The composition of the IHIE board includes hospital systems, healthcare associations, academia, state representatives and community members. The information sent and received can include data, such as lab results, radiology reports, hospital admissions and hospital discharge.

FSSA has at least three active contracts with IHIE at present. The first requires IHIE to provide a customized clinical data repository and reporting for FSSA's Maternal Opioid Misuse Indiana

Initiative program, including admission, discharge and transfers (ADT) reporting regarding the usage of healthcare resources and reduced healthcare costs, clinical value reporting regarding clinical data from the data repository in consumable format and care manager access to analyze data for a specific segment of the Medicaid population.

The second contract is a two-part contract involving a data use agreement for IHIE to obtain data and provide ADT alerts regarding the usage of healthcare resources and a joinder agreement creating membership in the INPC.

Finally, the third contract requires IHIE to work with FSSA and the Indiana Department of Health (IDOH) to refine the difference between quantitative pregnancy tests and qualitative results and other services related to the OB Navigator Program.

The Ethics Officer writes that FSSA would like to pursue a voting position on the Board to allow for a voice on data exchange and improving information for members and future members of FSSA services. Due to the current, and likely ongoing, contracts between FSSA and IHIE relating to information exchange and data sharing/refining, the FSSA employee who serves as a voting member of the Board could have a conflict of interests due to being a member of the Board, which has a financial interest in FSSA decisions.

The Ethics Officer writes that, to avoid a potential conflict of interests, FSSA could remove any FSSA employee who negotiates, administers or oversees/implements any contracts with IHIE or with decision making/voting authority from consideration for the FSSA position on the Board. She further writes that FSSA is prepared to file a screen for the FSSA employee who would serve on the Board, if approved by the Commission, to screen the employee from participating in decisions, votes or matters relating to decisions or votes in which IHIE would have a financial interest. Furthermore, FSSA will remind any FSSA Board member of the Code rules prohibiting state employees from benefitting from or divulging confidential information learned through state employment.

In February of 2022, the Commission approved allowing the State Health Commissioner or another IDOH employee to serve as a voting member of the Board with the appropriate screening and application of Code requirements. This question is similar to the issue raised by IDOH.

The Ethics Officer seeks a formal advisory opinion on behalf of FSSA 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 an FSSA employee if he or she were to serve as a voting member 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 an FSSA employee on the Board is analyzed below.

*A. Conflict of interests - decisions and votes*

IC 4-2-6-9 (a)(1) prohibits an FSSA employee from participating in any decision or vote, or matter relating to that decision or vote, if he or she has a financial interest in the outcome of the matter. Similarly, IC 4-2-6-9(a)(3) prohibits an FSSA employee from participating in any decision or vote, or matter relating to that decision or vote, if a business organization in which the employee serves 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 Office of Inspector General.

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

The Ethics Officer provides that FSSA has contracts with IHIE. If the FSSA employee who serves on the Board is in a position to participate in decisions or votes in which IHIE would have a financial interest, such as decisions involving IHIE's contracts with FSSA, then the employee must 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 FSSA should execute an appropriate screen that prohibits the FSSA 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 FSSA in which IHIE would have a financial interest. So long as FSSA executes an appropriate screen, the Commission finds that the participating FSSA 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 his or her official duties that his or 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 his or 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 participating FSSA employee would be serving on the Board in his or her official capacity; therefore, subsections (1) and (2) would not prohibit the FSSA employee from serving on the Board. Regarding subsection (3), the participating FSSA employee is prohibited from using his or her FSSA 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 participating FSSA 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 FSSA has a contract with IHIE. As such, IHIE has a business relationship with FSSA, and an FSSA employee is prohibited from accepting any gifts from IHIE, unless an exception applies or the FSSA employee obtains a gift waiver.



*E. Confidential information*

The participating FSSA 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 FSSA employee will possess information of a confidential nature by virtue of his or her position with FSSA that could be used to benefit the Board, IHIE or any other person or entity, the participating FSSA employee must ensure that he or she complies with these rules.

**CONCLUSION**

Subject to the foregoing analysis, the Commission finds that the participating FSSA employee would have a potential conflict of interests under IC 4-2-6-9 if he or she were to participate in decisions or votes, or matters related to such decisions and votes for FSSA in which IHIE would have a direct financial interest in the outcome of the matter. The Commission further finds that FSSA should implement a screening mechanism to ensure the participating FSSA 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)