

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)
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The Ethics Officer for the Indiana Family Social Services Administration sought advice on behalf of FSSA's Chief Data Officer regarding a post-employment opportunity with a data consulting firm that contracts with FSSA. The Commission finds that the post-employment opportunity would not violate the post-employment restrictions and that FSSA shall implement all necessary procedures to screen the Chief Data Officer from participating in business in which his post-employment employer may have a financial interest for the duration of his remaining time as a state employee.

August 10, 2023
2023-FAO-006

The Indiana State Ethics Commission (Commission) issues the following formal advisory opinion (FAO) 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 Agency Ethics Officer and Deputy General Counsel, the Agency General Counsel and the state employee whose post-state employment activities serve as the basis for the request.

BACKGROUND

The Ethics Officer and Deputy General Counsel for the Indiana Family and Social Services Administration (FSSA) requested the Commission's FAO on behalf of FSSA's Chief Data Officer (CDO). Specifically, The Ethics Officer is requesting an opinion from the Commission regarding the CDO's proposed post-state employment opportunity with Delineate, LLC (Delineate), a data and analytics consulting firm.

The Ethics Officer previously sought an informal advisory opinion on behalf of the CDO from the Office of Inspector General (OIG) and has provided the OIG's confidential guidance as an attachment to this FAO request.

The FSSA Chief Data Officer responsibilities include supporting enterprise data warehouses for the Supplemental Nutrition Assistance Program (SNAP)/Temporary Assistance for Needy Families (TANF) and Medicaid data analytics; designing, developing and implementing data governance strategy to support data-driven culture; conducting research studies and program evaluation to measure and improve service delivery and policy implementation; overseeing components of state and federal reporting for the Office of Medicaid Policy and Planning; collaborating with state agencies to improve the use of health data in support of operation performance monitoring; and providing technical assistance to FSSA divisions for data initiatives.

The CDO has an offer for a post-state employment position at Delineate. Delineate currently provides three employees to aFit Staffing, Inc. (aFit) for the purpose of temporary staffing at FSSA through Indiana's Managed Service Provider, CAI. The contract between aFit and CAI for the three Delineate staff workers is for the performance of specific data related projects at FSSA and is set to expire in six months; however, the contract may be extended or renewed based on FSSA's needs.

In the CDO's role at FSSA, he was not involved in the selection or hiring of these contract workers and is not involved in the supervision of their day-to-day activities. The CDO directly supervises FSSA's Deputy Chief Data Officer and Data Science Supervisor, who are responsible for the supervision of the contract workers at FSSA who are ultimately employed by Delineate. The CDO retains the authority to make decisions regarding the Delineate contract workers at FSSA but does not anticipate any need to exercise such authority.

The CDO is not a signatory on any agency contracts and was not involved in the negotiation or administration of any active contracts for FSSA with one exception: the CDO initiated and signed a change order to a contract with Resultant, LLC. Further, the CDO does not have regulatory or licensing authority in his current position.

In the CDO's prospective role at Delineate, he will guide the technical aspects of solutions developed by the company. Delineate was founded in 2022 by an individual who previously worked at FSSA, and Delineate does not maintain any current or historical contracts with FSSA. Further, the CDO provides that he will not participate in executive branch lobbying in his position with Delineate.

Delineate does not and has not maintained a contract with the State of Indiana; its contract with respect to the three contract workers at FSSA is maintained between aFit and CAI.

The CDO provides that he understands that he may not assist Delineate or any other person in his post-state employment activities with any particular matters on which he both personally and substantially participated in his role at FSSA. The CDO is not aware of any potential future business that Delineate is considering or pursuing with FSSA.

On behalf of the CDO, the Ethics Officer sought the Commission's FAO regarding the application of any of the rules in the Code to the CDO's proposed post-employment with Delineate.

ISSUES

What ethics issues, if any, arise for the CDO during the rest of his tenure at FSSA and in his post-employment position with Delineate?

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 4-2-6-11 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.

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.

ANALYSIS

The Ethics Officer's request for a FAO invokes consideration of the provisions of the Code pertaining to Conflicts of Interests, Post-employment and Benefitting from and Divulging Confidential Information. The application of each provision to the CDO is analyzed below.

A. Conflict of interests - decisions and votes

IC 4-2-6-9 (a)(1) prohibits the CDO 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. Similarly, IC 4-2-6-9(a)(4) prohibits the CDO from participating in any decision or vote, or matter relating to that decision or vote, if the business organization with whom he is negotiating or has an arrangement concerning prospective employment has a financial interest in the matter.

IC 4-2-6-9(b) requires that an employee who identifies a potential conflict of interests notify his or her Ethics Officer and Appointing Authority in writing and either seek an advisory opinion from the Commission or file a written disclosure statement.

The CDO's offer for employment from Delineate constitutes an arrangement concerning prospective employment. The Commission finds that Delineate has a financial interest in matters regarding the three Delineate employees who work at FSSA under the contract between aFit and CAI. The Commission further finds that a potential conflict of interests exists under this rule and that FSSA shall implement all necessary procedures to screen the CDO. McFarlane from participating in any decisions or votes, or matters related to decisions or votes, in which Delineate would have a financial interest for the remainder of the CDO's employment at FSSA.

B. 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 CDO from accepting employment from an employer for 365 days from the date that he leaves state employment under various circumstances.

First, the CDO 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. Based on the information provided, the CDO would not be engaging in any lobbying activities in his position at Delineate. To the extent that the CDO does not engage in executive branch lobbying for one year after leaving state employment, his post-employment opportunity at Delineate would not violate this provision of the post-employment rule.

Second, the CDO 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. Based on the information provided, the CDO has not negotiated or administered a contract with Delineate, as Delineate does not currently and has not previously maintained a contract with FSSA.

Third, the CDO 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 CDO does not have regulatory or licensing authority in his position with FSSA.

Fourth, the CDO 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 Delineate has extended an offer for his prospective new role in an attempt to influence the CDO in his capacity as a state employee.

Accordingly, the Commission finds that the post-employment rule's cooling off period would not apply to the CDO's employment opportunity with Delineate and he may begin such employment immediately after his separation from state employment.

Finally, the CDO 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 CDO would be prohibited from representing or assisting Delineate or any other person in a particular matter in which he personally and substantially participated as a state employee.

The CDO has not identified any particular matter on which he personally and substantially participated in his FSSA role on which he may assist others in his post-state employment at Delineate.

The Commission finds that the series of contracts between Delineate and aFit and between aFit and CAI for the Delineate employees performing work at FSSA constitutes a business transaction for the purpose of this rule. As such, the CDO would be prohibited from representing or assisting Delineate or any other person in this business transaction if he personally and substantially participated in this particular matter in his role at FSSA. The Commission advises the CDO to work with FSSA to seek a waiver of the post-employment rule's particular matter restriction pursuant to IC 4-2-6-11(g) should the CDO be in a position to participate in the identified business transaction involving the Delineate workers' work at FSSA in his post-state employment activities.

C. Confidential information

The CDO 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 CDO from accepting any compensation from any employment, transaction or investment that 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) to encompass both an individual and a corporation, such as Delineate. In addition, the definition of “information of a confidential nature” is set forth in IC 4-2-6-1(a)(12).

To the extent that the CDO has acquired or maintains access to such confidential information obtained in his role at FSSA, he is prohibited not only from divulging that information but from ever using it to benefit any person, including Delineate or its clients, in any manner.

CONCLUSION

The Commission finds that Delineate has a financial interest in matters regarding the three Delineate employees who work at FSSA under the contract between aFit and CAI. The Commission further finds that a potential conflict of interests exists under this rule and that FSSA shall implement all necessary procedures to screen the CDO from participating in any decisions or votes, or matters related to decisions or votes in which Delineate would have a financial interest for the remainder of the CDO’s employment at FSSA.

The Commission finds that the post-employment rule’s cooling off period would not apply to the CDO’s employment opportunity with Delineate and he may begin such employment immediately after his separation from state employment.

The Commission finds that the series of contracts between Delineate and aFit and between aFit and CAI for the Delineate employees performing work at FSSA constitutes a business transaction for the purpose of this rule. As such, the CDO would be prohibited from representing or assisting Delineate or any other person in this business transaction if he personally and substantially participated in this particular matter in his role at FSSA. The Commission advises the CDO to work with FSSA to seek a waiver of the post-employment rule’s particular matter restriction pursuant to IC 4-2-6-11(g) should the CDO be in a position to participate in the identified business transaction involving the Delineate workers’ work at FSSA in his post-state employment activities.

Finally, to the extent that the CDO has acquired or maintains access to confidential information obtained in his role at FSSA, he is prohibited not only from divulging that information but from ever using it to benefit any person, including Delineate or its clients, in any manner.

Respectfully Submitted,

Sean M. Gorman

Sean Gorman
State Ethics Director