MINUTES OF THE MEETING OF
THE INDIANA STATE ETHICS COMMISSION
April 11, 2019

I. Call to Order

A regular meeting of the State Ethics Commission ("Commission") was called to order at 10:00 a.m. Commission members present included Katherine Noel, Chairperson; Sue Anne Gilroy, Kenneth Todd and Corinne Finnerty. Staff present included Jennifer Cooper, Ethics Director; Lori Torres, Inspector General; Heidi Adair, Staff Attorney; Tiffany Mulligan, Chief Legal Counsel; Dale Brewer, Legal Assistant and Cynthia Scruggs, Director of Administration, Office of Inspector General.

Others present were Joan Blackwell, General Counsel/Ethics Officer, Office of the Attorney General; Christopher Proffitt, Office of the Attorney General; Stephanie Mullaney, Ethics Officer, Office of the Attorney General; James Bergens, Property Manager, Jasper-Pulaski Fish & Wildlife Area; Samantha DeWester, General Counsel/Ethics Officer, Department of Natural Resources; Kevin Moore, Director, Division of Mental Health & Addictions; Latosha N. Higgins, Managing Attorney/Ethics Officer, Family & Social Services; Donna Marks, Provider Communications Manager.

II. Adoption of Agenda and Approval of Minutes

Commissioner Finnerty moved to adopt the Agenda and Commissioner Gilroy seconded the motion which passed (4-0). Commissioner Gilroy moved to approve the Minutes of the March 14, 2019 Commission Meeting and Commissioner Todd seconded the motion which passed (3-0, Commissioner Noel abstained due to her absence at the March 14 meeting.)

III. Inspector General's Report

Inspector General Torres presented a report on the first quarter of 2019. She reported the following: The OIG received 87 requests to investigate, and of these 87 requests, 14 new cases were opened. The OIG also closed 17 investigations. The office received 81 requests for informal advisory opinions of which four were withdrawn. The office issued 77 informal advisory opinions in an average of 1.19 days for each opinion. The OIG also made six recommendations.

Inspector General Torres also announced that the agency will host an Auditor & Investigator Conference on Tuesday, June 4th from 1 to 4 p.m. She also stated that the Office of Inspector General's Annual Report should be completed by the next commission meeting.

IV. Request for Formal Advisory Opinion

2019-FAO-004 Joan Blackwell, General Counsel/Ethics Officer
Chris Proffitt, Communications Director
Office of the Attorney General

Joan Blackwell, General Counsel and Ethics Officer for the Office of the Indiana Attorney General (OAG), requested a formal advisory opinion on behalf of the OAG's Communications Director, Christopher Profitt. This formal advisory opinion request is in regards to the application of IC 4-2-6-15 to specific types of video/audio communications that the OAG Communications Division wishes to post on Attorney General (AG) Curtis T. Hill, Jr.'s official state social media accounts, including the AG's official Facebook, Instagram, and Twitter accounts and on the official OAG website.[1]

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

The OAG's request reads that the OAG is continually looking for ways to engage with the citizens of the State of Indiana and raise awareness and familiarity with the services and initiatives of the OAG. They write that one of the initiatives the OAG has implemented toward achieving this goal is the OAG's Mobile Operation Unit, an office-owned vehicle that allows OAG staff to conduct mobile outreach to Hoosiers on unclaimed property and consumer protection as well as on other initiatives of interest to citizens and consumers. Another way that the OAG strives to increase engagement with Indiana citizens is through effective use of the office's social media accounts. The OAG, like other statewide-elected officials, has an official state Facebook account, Instagram account, and Twitter account. Each of these social media accounts includes the AG's name and title in the handle[2] - "Indiana Attorney General Curtis T. Hill, Jr" - and includes a picture of the AG as the account's profile picture. As part of the OAG's effort to use social media to more fully engage with the citizens of Indiana, the OAG would like to post various types of video and audio communications to these accounts, as described more fully below.

The OAG would like to use these communications on the OAG's social media accounts because the OAG recognizes that social media use is highly prevalent and that the way individuals

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

[2] "Handle" refers to the public username on a social media account.

engage with social media has evolved. The OAG believes individuals are more likely to engage with social media content that contains a video communication; therefore, the most effective way for the OAG to conduct outreach to Hoosiers on various office initiatives is through the use of video communications posted on social media.

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

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

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

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

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

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

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

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

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

B. **May audio/video communications created by the OAG's vendor for Unclaimed Property that do <u>not</u> include the AG's name or likeness be posted on the AG's state digital media accounts?**

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

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

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

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

C. **May audio/video communications paid for by a third party that include the AG's name and likeness be posted on the AG's state digital media accounts?**

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

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

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

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

The advisory opinion stated the following analysis:

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

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

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

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

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

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

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

Under the question raised, an audio/visual communication, which includes the AG's name and likeness, is being paid for in part by appropriations – here the state employees' time and state equipment used to create the communication. Accordingly, this type of communication is not permitted under IC 4-2-5-15.

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

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

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

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

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

questions, these videos would be posted on the OAG's social media accounts, which are managed by state employees.

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

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

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

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

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

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

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

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

Commissioner Finnerty moved to approve the Commission's findings, and Commissioner Todd seconded the motion which passed (4-0).

V. **Request for Formal Advisory Opinion**

2019-FAO-006 James Bergens, Property Mgr, Jasper-Pulaski Fish & Wildlife Area
Samantha DeWester, General Counsel/Ethics Officer, DNR
Department of Natural Resources

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

Mr. Bergens' 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 Mr. Bergens' 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, Mr. Bergens 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.

Mr. Bergens 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, Ken Hasselkus. Mr. Hasselkus suggested Mr. Bergens request an ethics opinion, and DNR's Ethics Officer, Samantha DeWester, referred Mr. Bergens to the Office of Inspector General for an informal advisory opinion.

In his request for an informal advisory opinion from the OIG, Mr. Bergens 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. Mr. Bergens provided the example of the Jasper-Pulaski FWA's trash contract. Mr. Bergens 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. Mr. Bergens 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.

Ms. Bergens 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 Mr. Bergens 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 Mr. Bergens 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 Mr. Bergens 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.

The advisory opinion stated the following analysis:

A. *Conflict of interests-decisions and votes*

IC 4-2-6-9 (a)(1) prohibits Mr. Bergens 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.

Mr. Bergens provides that he does not participate in any final decisions regarding land acquisition. Ms. Dewester confirmed that, moving forward, Mr. Bergens' 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 Mr. Bergens does not have a potential conflict of interests under this rule at this time.

Although Mr. Bergens does not have a conflict of interests under this rule at this time, the Commission asks that DNR provide written confirmation that neither Mr. Bergens 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 Mr. Bergens 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 Mr. Bergens 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).

Ms. DeWester and Mr. Bergens confirmed that Mr. Bergens 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, Mr. Bergens would not have a conflict of interests under this rule.

C. Confidential information

Mr. Bergens 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 Mr. Bergens 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, Mr. Bergens 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 Mr. Bergens 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 Mr. Bergens 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 Mr. Bergens 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.

The Commission found that that Mr. Bergens would not violate the Code of Ethics if he were to sell his land to DNR. Mr. Bergens 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.

Commissioner Noel moved to approve the Commission's findings, and Commissioner Gilroy seconded the motion which passed (4-0).

VI. Request for Formal Advisory Opinion

2019-FAO-0007 Kevin Moore, Director, Division of Mental Health & Addictions
Latosha N. Higgins, Managing Attorney/Ethics Officer
Family & Social Services Administration

Latosha Higgins is the Ethics Officer for the Indiana Family and Social Services Administration (FSSA). Ms. Higgins requested an advisory opinion on behalf of Kevin Moore, Director for FSSA's Division of Mental Health and Addition (DMHA).

As Director, Mr. Moore's responsibilities include the development, implementation and oversight of programs, operations and policies relating to the provision of information, resources and publicly funded services to individuals with mental illness and addictions. Mr. Moore plans to retire from state service on April 30, 2019. He is interested in pursuing a post-employment opportunity as a Senior Consultant with Health Management Associates (HMA), following his retirement with an anticipated start date of May 13, 2019. He expects that he will be consulting and providing recommendations to states on how they should proceed with certain Medicaid waivers and how they can improve services they provide as related to the criminal justice system and addiction and mental health services, as well as other HMA national projects in this role.

HMA is an independent national research and consulting firm in the healthcare industry. HMA has offices throughout the United States, with its corporate headquarters in Michigan. FSSA currently has a contract with HMA that is set to expire on June 30, 2019. The scope of work for the contract requires HMA to assist the State's Medicaid program in policy development, implementation efforts and operational support. Specifically, the contract requires HMA to: (1) perform tasks for the Healthy Indiana Plan (HIP), such as project management, evaluation and monitoring, etc.; (2) perform tasks for the 1115 waiver; and (3) provide policy support, including ad hoc consulting as requested by FSSA division directors.

Mr. Moore did not have any involvement in the negotiation or administration of HMA's contract with FSSA nor was he in a position to make a discretionary decision affecting the outcome of the negotiation or the nature of the administration.

Ms. Higgins provides that Mr. Moore 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, Mr. Moore understands and agrees to abide by the one-year restriction regarding registering as an executive branch lobbyist. Ms. Higgins and Mr. Moore are seeking a formal advisory opinion to ask the Commission whether it is permissible for Mr. Moore to be employed by HMA upon leaving state employment.

The advisory opinion stated the following analysis:

Mr. Moore's post-employment opportunity with HMA implicates the provisions of the Code pertaining to confidential information; conflict of interests, decisions and votes; and post-employment. The application of each provision to Mr. Moore's prospective post-employment is analyzed below.

A. Confidential Information

IC 4-2-6-6 prohibits Mr. Moore 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 Mr. Moore receives does not result from confidential information, his prospective employment with HMA would not violate IC 4-2-6-6.

B. Conflict of Interests

IC 4-2-6-9(a)(1) prohibits Mr. Moore 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."

In this case, employment negotiations have already begun. Accordingly, Mr. Moore is 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 HMA, or HMA itself would have a financial interest in the outcome of the matter.

IC 4-2-6-9(b) requires that a state employee who identifies a potential conflict of interests notify his or her agency's appointing authority and ethics officer and either (1) seek a formal advisory opinion from the Commission; or (2) file a written disclosure form with the OIG.

Ms. Higgins filed a Conflict of Interests: Decisions and Votes disclosure form on behalf of Mr. Moore with the Office of Inspector General on March 19, 2019. Under the screen overseen by FSSA's Deputy Medicaid Director, Mr. Moore is prohibited from participating in any meetings, discussions, votes, or decisions involving HMA.

The Commission finds that Mr. Moore must ensure he continues to refrain from participating in any decisions or votes, or matters relating to any such decisions or votes, in which he or HMA has a financial interest in the outcome of the matter for the remainder of his state employment in order to avoid violating IC 4-2-6-9.

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

First, Mr. Moore 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.

Ms. Higgins provides that Mr. Moore understands he is prohibited from engaging in any lobbying activities in his prospective employment with HMA. To the extent that Mr. Moore does not engage in executive branch lobbying for one year after leaving state employment, his intended employment with HMA would not violate this provision of the post-employment rule.

Second, Mr. Moore 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, Mr. Moore has not been involved in any negotiation or administration of HMA's contract with FSSA nor was he in a position to make a discretionary decision affecting the outcome of the negotiation or the nature of the administration of the contract.

Accordingly, the Commission finds that Mr. Moore is not prohibited under this provision from accepting employment with HMA immediately upon leaving state employment.

Third, Mr. Moore 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 Commission finds that Mr. Moore has never made a regulatory or licensing decision that directly applied to HMA during the course of his state employment. Accordingly, Mr. Moore is not prohibited under this provision from accepting employment with HMA immediately upon leaving state employment.

Fourth, Mr. Moore 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 HMA has extended an offer of employment to Mr. Moore in an attempt to influence him in his capacity as a state employee. Accordingly, the Commission finds that this restriction would not apply to Mr. Moore's employment opportunity with HMA.

Finally, Mr. Moore is subject to the post-employment rule's "particular matter" prohibition in his prospective post-employment. This restriction prohibits 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.

Based on the information provided, Mr. Moore would not be expected to assist or represent HMA on any particular matters in which he personally and substantially participated in as a state employee. The Commission finds that Mr. Moore must ensure compliance with the particular matter restriction and refrain from assisting or representing any person on any of the particular matters listed above that he may have personally and substantially worked on during his state employment.

The Commission found that subject to the foregoing analysis and the application of the one-year restriction regarding executive branch lobbying, Mr. Moore's post-employment opportunity with HMA would not violate the post-employment restrictions found in IC 4- 2-6-11.

Commissioner Gilroy moved to approve the Commission's findings, and Commissioner Noel seconded the motion which passed (4-0).

VII. Request for Formal Advisory Opinion

2019-FAO-0007 Donna Marks, Provider Communications Manager
Latosha N. Higgins, Managing Attorney/Ethics Officer
Family & Social Services Administration

Donna Marks, a former employee of the Indiana Family and Social Services Administration (FSSA), requested a Formal Advisory Opinion regarding her post-employment as a consultant on an FSSA project.

Ms. Marks retired from her position with the State of Indiana on February 1, 2019. At FSSA, Ms. Marks worked as a Provider Communications Manager for the Office of Medicaid Policy and Planning (OMPP). In this position, she was responsible for overseeing OMPP provider communications and provider-facing guidance and resources.

Specifically, she worked with FSSA/OMPP's fiscal agent contractor, DXC Technology (DXC), to process and publish all provider-facing communication regarding Indiana Medicaid. This included reviewing, editing and approving all provider bulletins, banner page articles and website content. As such, she interfaced with OMPP subject matter experts to understand, clarify and communicate provider guidance, and she managed the process for updating provider policy and guidance modules, forms and other provider documents consistent with OMPP policy.

Ms. Marks has been offered an opportunity to subcontract with netlogx LLC (netlogx) to provide consultation services to OMPP related to the new FSSA Provider Enrollment and Credentialing (EnCred) Project. Netlogx contracts with FSSA/OMPP to provide project management assistance and consultation on a number of projects. As related to EnCred, netlogx serves in a project management role for FSSA/OMPP on the design, development and implementation of this project.

As the Provider Communications Manager, Ms. Marks was not involved in the solicitation or selection process for any FSSA vendors nor did she have contracting responsibilities with any FSSA vendors. Accordingly, she was not involved in the solicitation or contracting process with the EnCred vendor, Conduent, or with the solicitation or contracting process with netlogx. Once the design/development for EnCred was underway she was involved on an as-needed basis to address issues related to provider communication or provider interfacing with the new system.

Prior to leaving state employment, Ms. Marks worked on and approved the initial provider communications about EnCred, as she did with all provider communications. With respect to netlogx, she was involved in some agency projects for which netlogx provided project management assistance. Her involvement included project meetings, document reviews and responding to project action items related to provider communications, which in some cases, were coordinated by netlogx. She was not responsible for directing netlogx's work on any projects.

In her potential role as a subcontractor with netlogx, Ms. Marks will be consulting with the OMPP provider enrollment team on the EnCred communication strategy and on configurable provider-facing elements of the EnCred product itself. Consultation will include advising on strategies and timelines for publications, document development and training as well as evaluating the EnCred solution in test mode relative to provider data entry, navigation and other interface issues. Although she will be involved to some degree with provider-facing or stakeholder-facing publications and document development, she will be doing so from the perspective of a subject

matter expert. She will not be responsible for approving publications or documents generated by the project or for overseeing the State's publication of same. Her subcontract would not include executive branch lobbying or require the disclosure of confidential information. Further, Ms. Marks' position with FSSA did not involve making any regulatory or licensing decisions.

Ms. Marks requested an informal advisory opinion from the Office of Inspector General. The OIG advised that she seek a formal advisory opinion from the Commission regarding the post-employment rule's particular matter restriction and its application to her prospective subcontract with netlogx.

The advisory opinion stated the following analysis:

Ms. Marks' post-employment opportunity with netlogx implicates the provisions of the Code pertaining to confidential information and post-employment. The application of each provision to Ms. Marks' prospective post-employment is analyzed below.

A. Confidential Information

IC 4-2-6-6 prohibits Ms. Marks 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. Based on the information provided, it does not appear that Ms. Marks would utilize confidential information in her consultant work with netlogx. So long as any compensation Ms. Marks receives does not result from confidential information, her post-employment opportunity with netlogx would not violate IC 4-2-6-6.

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 Ms. Marks from accepting employment from an employer for 365 days from the date that she leaves state employment under various circumstances. Employer is defined in IC 4-2-6-1(a)(10) as any person from whom a state employee receives compensation.

First, Ms. Marks 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 (IDOA).

Ms. Marks has provided that her subcontract with netlogx would not involve any executive branch lobbying activities. To the extent that Ms. Marks does not engage in executive branch lobbying for one year after leaving state employment, the Commission finds that she would not violate this provision of the post-employment rule.

Second, Ms. Marks is prohibited from accepting employment for 365 days from the last day of her state employment from an employer with whom 1) she 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 Commission finds that Ms. Marks' FSSA position did not involve any contracting responsibility and she did not participate in the negotiation or administration of a contract with netlogx during the course of her state employment. Accordingly, this provision would not apply to Ms. Marks' post-employment opportunity with netlogx.

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

The Commission finds that Ms. Marks' duties with FSSA did not include making regulatory or licensing decisions and that she has never made a regulatory or licensing decision that directly applied to netlogx during the course of her state employment. Accordingly, this provision would not apply to Ms. Marks' post-employment opportunity with netlogx.

Fourth, Ms. Marks is prohibited from accepting employment from an employer if the circumstances surrounding the hire suggest the employer's purpose is to influence her in her official capacity as a state employee. The Commission finds that Ms. Marks is already retired from state employment; therefore, any future employer cannot influence her in her official capacity as a state employee.

Finally, Ms. Marks is subject to the post-employment rule's "particular matter" prohibition in her prospective post-employment. This restriction prevents her from representing or assisting a person on any of the following twelve matters if she 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, Ms. Marks would be prohibited from representing or assisting netlogx, as well as any other person, in a particular matter in which she personally and substantially participated as a state employee. Based on the information she provided, it appears Ms. Marks had at least some involvement in the EnCred project as an FSSA employee and netlogx has a contract with FSSA to provide project management services to FSSA related to the EnCred project.

The Commission finds that Ms. Marks had no contracting responsibility for FSSA and her involvement in netlogx's contract as related to the EnCred project was not personal

and substantial. Accordingly, she is not prohibited from working as a subcontractor on netlogx's contract with FSSA. The Commission further finds that Ms. Marks must ensure compliance with the particular matter restriction and refrain from assisting or representing any person on any other particular matters that she may have personally and substantially worked on during her state employment.

The Commission found that subject to the foregoing analysis and the application of the one-year restriction regarding executive branch lobbying, Ms. Marks' potential post-employment opportunity with netlogx would not violate the post-employment restrictions found in IC 4- 2-6-11.

Commissioner Todd moved to approve the Commission's findings, and Commissioner Finnerty seconded the motion which passed (4-0).

VIII. Director's Report

State Ethics Director, Jen Cooper, stated that the number of informal advisory opinions issued by the Office of Inspector General since the last meeting was 25. She also reported that Adam Jones and Arvin Copeland recently paid their fines in full.

IX. Adjournment

Commissioner Gilroy moved to adjourn the public meeting of the State Ethics Commission and Commissioner Todd seconded the motion, which passed (4-0).

The public meeting adjourned at approximately 11:40 a.m.