

42 IAC 1-5-6 Conflict of interest; decisions and voting (IC 4-2-6-9)
42 IAC 1-5-10 Benefiting from confidential information
42 IAC 1-5-11 Divulging confidential information

The DNR wanted to appoint one of its employees as a new District Forester; however, the employee's husband worked for a forest management company that covered the same geographic region. The DNR proposed a screening procedure under IC 4-2-6-9(b) to ensure the employee did not violate the Conflict of interest rule. SEC found the procedures outlined by the DNR were appropriate to ensure the employee complied with the Code of Ethics

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The Indiana State Ethics Commission ("Commission") issues the following advisory opinion concerning the State Code of Ethics pursuant to IC 4-2-6-4(b)(1).

BACKGROUND

A state employee is a current employee with the Department of Natural Resources ("DNR"). The DNR would like to appoint the state employee as the new District Forester in District 16, which is comprised of Gibson, Pike, Warrick, Vanderburgh, and Posey counties. However, the state employee's husband works as a private consultant forester for a forest management company that operates across southern Indiana including the counties located in District 16. As a consultant forester, the spouse provides forestry services to private landowners including management planning, inventory, timber sales, timber stand improvement, tree planting, and invasive species control. Consultant foresters may also assist private landowners with estate and tax planning.

As a District Forester, the state employee would be responsible primarily for administering the Classified Forest and Wildlands ("CFW") program, providing scientific and technical forestry assistance to private landowners, administering federal cost share programs through the Natural Resource Conservation Service ("NRCS") including the approval of work done by consultant foresters, maintaining all necessary files and databases associated with managing the district, and promoting scientific forest management to a variety of organizations and individuals. The DNR has identified four specific areas in which a conflict of interest may arise for the state employee in light of these duties and the spouse's responsibilities with the forest management company, as enumerated below.

- 1) The CFW program files and related databases contain management plans and recommendations on how a landowner can best achieve his/her forest management objectives. A perception of impropriety could exist if other consultants or individuals thought the state employee was making those files and databases available to the forest management company to prospect for new clients.
- 2) The District Forester is often questioned by landowners about the selection of a consultant forester. A perception of impropriety could exist if other consultants or individuals thought the state employee was referring private landowners to the forest management company.

- 3) The District Forester advises landowners on the procedures for enrolling land in NRCS programs. The District Forester also develops plans for performing a variety of forest management activities for private landowners. The District Forester inspects and approves projects prior to the payment of cost share money. A perception of impropriety could exist if other consultants or individuals thought the state employee was referring private landowners to the forest management company for the purpose of securing work or if the state employee was perceived as approving substandard work performed by the forest management company.
- 4) District Foresters are required to inspect land enrolled in the CFW program every five years. A perception of impropriety could exist if other consultants or individuals thought the state employee was being lenient during inspections on lands managed by the forest management company.

ISSUE

Would a conflict of interest arise for the state employee under I.C. 4-2-6-9 in the performance of her duties as the DNR's District 16 District Forester given that her husband works for the forest management company as a private consultant forester in the same region? If so, would the screening procedures proposed by DNR be appropriate in this case to prevent a conflict of interest from arising for the state employee?

RELEVANT LAW

42 IAC 1-5-10 Benefiting from confidential information

Authority: IC 4-2-7-3; IC 4-2-7-5

Affected: IC 4-2-7

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

Authority: IC 4-2-7-3; IC 4-2-7-5

Affected: IC 4-2-7

Sec. 11. A state officer, employee, or special state appointee shall not divulge information of a confidential nature except as permitted by law.

IC 4-2-6-9 (42 IAC 1-5-6)

Conflict of economic interests

Sec. 9. (a) A state officer, an employee, or a special state appointee may not participate in any 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 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 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:

(1) 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

(2) 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.

(c) A written determination under subsection (b)(2) 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)(2) shall be filed with the appointing authority.

IC 4-2-6-1

Definitions

Sec. 1. (a) As used in this chapter, and unless the context clearly denotes otherwise:

...

(10) "Financial interest" means an interest:

(A) in a purchase, sale, lease, contract, option, or other transaction between an agency and any person; or

(B) involving property or services.

The term includes an interest arising from employment or prospective employment for which negotiations have begun. The term does not include an interest of a state officer or employee in the common stock of a corporation unless the combined holdings in the corporation of the state officer or the employee, that individual's spouse, and that individual's unemancipated children are more than one percent (1%) of the outstanding shares of the common stock of the corporation. The term does not include an interest that is not greater than the interest of the general public or any state officer or any state employee.

(11) "Information of a confidential nature" means information:

(A) obtained by reason of the position or office held; and

(B) which:

(i) a public agency is prohibited from disclosing under IC 5-14-3-4(a);

(ii) a public agency has the discretion not to disclose under IC 5-14-3-4(b) and that the agency has not disclosed; or

(iii) is not in a public record, but if it were, would be confidential.

(12) "Person" means any individual, proprietorship, partnership, unincorporated association, trust, business trust, group, limited liability company, or corporation, whether or not operated for profit, or a governmental agency or political subdivision.

...

- (18) The masculine gender includes the masculine and feminine.
- (19) The singular form of any noun includes the plural wherever appropriate.
- (b) The definitions in IC 4-2-7 apply throughout this chapter.

ANALYSIS

42 IAC 1-5-10 prohibits the state employee from benefitting from or permitting any other person to benefit from information of a confidential nature except as permitted or required by law. Similarly, 42 IAC 1-5-11 prohibits the state employee from divulging information of a confidential nature except as permitted by law. The term “person” is defined in I.C. 4-2-6-1(a)(12) to encompass both an individual, such as the state employee’s spouse, and a corporation, such as the forest management company. In addition, the definition of “information of a confidential nature” is set forth in I.C. 4-2-6-1(a)(11).

In this case, the state employee will have access to CFW program files and related databases containing confidential information. Furthermore, some of the information contained in these files and databases could be used to benefit the forest management company in attracting new clients. While it would be a violation of 42 IAC 1-5-10 for the state employee to permit her spouse, the forest management company, or any other person to benefit from the information of a confidential nature contained in those files and databases, it would also be a violation under 42 IAC 1-5-11 for her to even divulge any such information, regardless of whether it is used to that person’s benefit.

I.C. 4-2-6-9(a) prohibits the state employee from participating in any decision or vote if she has knowledge that various persons may have a “financial interest” in the outcome of the matter, including herself or her spouse. The term financial interest as defined in I.C. 4-2-6-1(a)(10) includes an interest involving property or services. However, the term does not include an interest that is not greater than the interest of the general public or any state officer or any state employee.

Regarding a conflict of interest, it appears the state employee would be required to participate in decisions or votes as a District Forester in which the forest management company may have a financial interest. It is unclear, however, whether her spouse would have a financial interest himself in the resulting services provided by the forest management company to its clients. Specifically, the request does not indicate whether the state employee’s spouse’s compensation is tied to the decisions or votes the state employee would participate in in which the forest management company would have a financial interest. Regardless of whether the spouse would have a financial interest in the outcome of the matter in violation of I.C. 4-2-6-9(a), though, it would appear that such a situation would, at a minimum, give rise to a potential conflict of interest. Accordingly, the state employee would be required to observe the provisions of I.C. 4-2-6-9(b).

I.C. 4-2-6-9(b) provides that a state employee who identifies a potential conflict of interest shall notify the person's appointing authority and 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. In this case, the state

employee requested an advisory opinion from the Commission as provided in the rule. To the extent that the state employee's disclosure to her Ethics Officer was also disclosed to her appointing authority she would appear to be in compliance with this provision.

I.C. 4-2-6-9(b)(1) further provides that when a potential conflict of interest arises, the Commission may, with the approval of the appointing authority, assign the matter to another person and implement all necessary procedures to screen the state employee seeking an advisory opinion from involvement in the matter. In this case, the DNR has proposed procedures to ensure the state employee's work as a District Forester in District 16 does not violate the Code of Ethics. These procedures correspond to the potential conflicts outlined above and include:

- 1) The state employee and the State Forester will sign a document acknowledging that all files and databases associated with the CFW Program are confidential and may not be shared with the forest management company or any other person. The Assistant State Forester overseeing the District Foresters will monitor compliance through periodic office visits and reminders on the importance of keeping district files confidential.
- 2) The Indiana Forestry and Woodland Owner's Association maintains the Directory of Professional Foresters as both a hard copy publication and a searchable database. The Division of Forestry policy is to encourage private landowners to use the Directory when seeking the services of a consultant forester. It is the practice of the Division of Forestry to forbid District Foresters from recommending specific consultants. The Division of Forestry would consistently emphasize the importance of following this policy.
- 3) Private landowners would be instructed to use the Directory of Professional Foresters when selecting a consultant to write work plans and install forestry practices based on those plans. In addition, the state employee would not be allowed to approve any project performed by the forest management company. These inspections would be performed by the Assistant State Forester who oversees private lands management. If the Assistant State Forester is unavailable, a District Forester from another district can be assigned to make the inspection.
- 4) CFW five-year inspections are done to make sure the landowner is in compliance with the policies and guidelines that govern the CFW program. These guidelines focus on administrative issues such as the presence of grazing land, the unauthorized construction of buildings, and the conversion of land to agriculture or other non-forest use. Rarely does a CFW five-year inspection uncover problems related to following silvicultural prescriptions to other forest management advice. The Assistant State Forester who supervises District Foresters will work with the state employee to identify CFW tracts that are due for inspection and are under the management of the forest management company. The state employee will conduct the five-year inspections; however, review and approval of the inspections conducted by the state employee of land on which the forest management company is the consulting firm shall be made by the state employee's immediate supervisor or, if her immediate supervisor is unavailable, a district forester from another district.

CONCLUSION

The Commission finds that the procedures outlined by the DNR are appropriate to ensure the state employee's compliance with the state's Code of Ethics. Should the state employee abide by the procedures as set forth by the DNR, her new position with the DOF would not be contrary to the Code, specifically: 42 IAC 1-5-10, 42 IAC 1-5-11, and I.C. 4-2-6-9.