

42 IAC 1-5-5 Outside employment (IC 4-2-6-5.5)
42 IAC 1-5-6 Conflicts 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 Director of the District Services Branch, Field Services Division at IDHS was elected to serve as a member of the board of directors for an incident management association. IDHS has provided funds for employees to attend conferences and events hosted by the association in the past, and the Director anticipates the agency will continue to do so in the future. SEC found the Director's involvement with the association would not pose any conflicts of interest and approved the screen proposed by IDHS that would divert any issues pertaining to the association to the Director's supervisor.

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The Indiana State Ethics Commission ("Commission") issues the following advisory opinion concerning the State Code of Ethics ("Code") pursuant to I.C. 4-2-6-4(b)(1). The following opinion is based exclusively on sworn testimony and documents presented by the requestor.

BACKGROUND

A state employee currently serves as the Director of the District Services Branch, Field Services Division ("Director") for the Indiana Department of Homeland Security ("IDHS"). In December 2010, the Director was elected as a member of the Board of Directors of the newly created All-Hazards Incident Management Teams Association, Inc ("Association"). The Association is a non-profit corporation based in Golden, Colorado. The Director currently serves as President of the Association.

In December 2012, the Association held a conference in Indianapolis, Indiana. The IDHS provided funds for agency employees and for local response personnel to attend the conference. The Director was originally the IDHS employee designated to oversee the use and distribution of these funds. However, in August 2012, the Director and his supervisor who is the Director Field Services Division, transferred oversight of the funds to the Director's supervisor out of a concern that this arrangement would constitute a possible conflict of interest.

The IDHS, through a request for a Formal Advisory Opinion by the Ethics Officer is seeking to formalize a screening mechanism for the Director in order to avoid a violation of I.C. 4-2-6-9 in light of the likelihood that the Association will hold additional conferences and other events for which IDHS will provide funds for agency personnel and local responders to attend. IDHS proposes screening the Director, who would normally be the IDHS employee responsible for oversight of these funds, from participating in any agency decisions in which the Association would have a financial interest by having the Director's supervisor make any such decisions for the agency. The Ethics Officer also indicates that the Director would not use any state resources, including his state computer, cell phone and email account, in support of his position with the Association, and that all activities concerning the Association would be conducted on the Director's own personal time.

ISSUES

1. Does the Director's outside professional activity of serving as President of the Association create a conflict of interest under the Code?
2. Would a conflict of interest arise for the Director under I.C. 4-2-6-9 if he participates in any decision or vote in which he or the Association would have a financial interest in the outcome of the matter? If so, would a screening procedure be appropriate in this case to prevent a conflict of interest from arising for the Director?

RELEVANT LAW

42 I.A.C. 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 I.A.C. 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.

I.C. 4-2-6-5.5 (42 I.A.C. 1-5-5)

Conflict of interest; advisory opinion by inspector general

Sec. 5.5. (a) A current state officer, employee, or special state appointee shall not knowingly:

- (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; or
- (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 or the individual's appointing authority or agency ethics officer granting approval of outside employment is conclusive proof that an individual is not in violation of subsection (a)(1) or (a)(2).

I.C. 4-2-6-9 (42 I.A.C. 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.

I.C. 4-2-6-1

Definitions

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

(7) "Compensation" means any money, thing of value, or financial benefit conferred on, or received by, any person in return for services rendered, or for services to be rendered, whether by that person or another.

(12) "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.

ANALYSIS

The Director's request for a formal advisory opinion invokes consideration of the provisions of the Code pertaining to confidential information, outside employment/professional activity and conflicts of interest. The application of each provision to the Director is analyzed below.

A. Confidential Information

The Director is prohibited under 42 I.A.C. 1-5-10 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 I.A.C. 1-5-11 prohibits the Director 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)(13) to encompass both an individual and a corporation, such as the Association. In addition, the definition of “information of a confidential nature” is set forth in I.C. 4-2-6-1(a)(12). While it would be a violation of 42 I.A.C. 1-5-10 for the Director to permit the Association or any other person to benefit from information of a confidential nature to which he has access, it would also be a violation under 42 I.A.C. 1-5-11 for him to even divulge any such information, regardless of whether it is used to anyone’s benefit. In this case, it is unclear if the Director has access to confidential information and whether this information could be used to the Association’s benefit in any manner. To the extent that the Director does not benefit from or divulge information of a confidential nature, the Director would not be in violation of either of these rules.

B. Outside Employment

As an initial matter, the Commission cannot advise the Director as to his past conduct as President of the Association; instead the Commission must analyze the application of the Code’s provisions to the Director’s future involvement with the Association. In this case, the Director’s intention to continue to serve as President of the Association would create a conflict of interest according to I.C. 4-2-6-5.5 if this employment/professional activity would trigger subsection (1), (2) or (3) of the statute.

The restriction in subsection (1) prohibits a state employee from accepting 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 his official duties that his ability to perform those duties would be materially impaired. In addition, subsection (2) prevents a state employee from engaging in business or professional activity that would require the individual to disclose confidential information that was gained in the course of state employment. The restriction in subsection (3) above prohibits an employee from using or attempting to use his official position to secure unwarranted privileges or exemptions that are both of substantial value and not properly available to similarly situated individuals outside state government. Based on the information provided, it would appear that the IDHS does not believe that the Director’s outside employment/professional activity as President of the Association would create a conflict of interest according to I.C. 4-2-6-5.5. Accordingly, the Director’s continued services as President of the Association would not violate I.C. 4-2-6-5.5.

C. Conflicts of Interest

I.C. 4-2-6-9(a) prohibits a state employee from participating in any decision or vote if he has knowledge that various persons may have a “financial interest” in the outcome of the matter, including himself or a business organization in which he is serving as an officer, a director, a trustee, a partner, or an employee. The term financial interest as defined in I.C. 4-2-6-1(a)(11) 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.

In this case, the Director may be required to participate in decisions or votes concerning the Association as an IDHS Director, specifically in making decisions regarding the distribution and use of funds provided to agency employees and local response personnel to attend Association conferences and other events. Though it is unclear if the Director would have a financial interest himself in a decision to send agency employees and local response personnel to an Association event, it would appear that the Association could have a financial interest and such a situation would, at a minimum, give rise to a potential conflict of interest. Accordingly, the Director 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 Director requested an advisory opinion from the Commission as provided in the rule. The Director has disclosed this information to his Ethics Officer and his agency's appointing authority.

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 particular 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 IDHS would screen the Director from participating in any agency decisions in which the Association would have a financial interest. The IDHS would assign these matters to the Director's supervisor. To the extent that the screening procedure is put in place and the Director abstains from participation in any decision or vote in which he or the Association has a financial interest in the outcome of the matter, it does not appear that he would be in violation of I.C. 4-2-6-9.

CONCLUSION

The Commission finds that the Director's outside professional activity in serving as President of the Association does not create a conflict of interest under I.C. 4-2-6-5.5. However, a conflict of interest would arise for the Director under I.C. 4-2-6-9 if he participates in any decision or vote in which he or the Association would have a financial interest in the outcome of the matter. Accordingly, it is the opinion of the Commission that the proposed screening procedure would be appropriate in this case and should be implemented to prevent a conflict of interest from arising for the Director.