

**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)**  
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**42 IAC 1-5-12 Use of state property**  
**42 IAC 1-5-13 Ghost employment**

A DNR Nursery Inspector operated a tree and shrub care business in Kentucky and was interested in expanding the business into southern Indiana. SEC found the Inspector would be permitted to conduct business in Indiana without violating the Code of Ethics so long as he observed the rules on conflicts of interest, confidential information and use of state resources. Moreover, SEC advised the Inspector to work with DNR to establish guidelines to ensure his business activity complied with the Code.

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

**BACKGROUND**

A state employee serves as a Nursery Inspector for the Division of Entomology and Plant Pathology with the Department of Natural Resources (“DNR”). The state employee’s position as an Inspector with DNR is regulatory in nature, and he is responsible for dealing with the producers of plants and plant commodities, the public, private citizens and commercial establishments, and others subject to the plant health laws of Indiana set forth in IC 14-24. The Inspector’s *Employee Work Profile and Performance Appraisal Report* states “[t]he incumbent works closely with USDA-APHIS-PPQ, and Purdue University, and manages compliance with USDA and state quarantines of gypsy moth, emerald ash borer, pine shoot beetle, and other regulated exotic pests.”

The Inspector currently also operates a LLC, a company that monitors and manages pest and disease issues for property owners in Kentucky as well as maintenance of landscape plants such as pruning, tree removal projects, tree appraisals, and tree risk assessments. The Inspector would like to expand the Company’s operations from Kentucky to also include southern Indiana. The Inspector would continue to conduct the Company’s business on his own time and with the use of his own personal resources. In expanding his operations, the Inspector would not accept work from the nursery industry that is regulated or receives referrals from those relationships of the private nurseries DNR regulates. The Inspector further represents that he will screen business calls to ensure they originate from his own private marketing efforts and not from those in the plant industry in Indiana.

The Inspector contacted the Director in April 2013 regarding his efforts to expand the Company. The Director served as the agency’s Chief Legal Counsel and Ethics Officer at the time but has since been appointed as the Director of DNR. In his response, the Director expressed his concern that the Company’s Indiana customer base would overlap with those entities actually—or potentially—regulated by DNR. The Director also noted that the Inspector would essentially

have insider information by virtue of his capacity with DNR for any Indiana resident or company seeking advice on treating trees that could lead to an actual or perceived conflict. The Director did, however, advise the Inspector that he would be welcome to request a formal advisory opinion from the Commission.

### ISSUE

Is the Inspector prohibited from expanding the Company's business to southern Indiana in light of his position as a Nursery Inspector with DNR?

### RELEVANT LAW

#### **IC 4-2-6-5.5 (42 IAC 1-5-5)**

##### **Conflict of interest; advisory opinion by commission**

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).

#### **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.

#### **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.

#### **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.

#### **42 IAC 1-5-12 Use of state property**

Sec. 12. A state officer, employee, or special state appointee shall not make use of state materials, funds, property, personnel, facilities, or equipment for any purpose other than for official state business unless the use is expressly permitted by a general written agency, departmental, or institutional policy or regulation.

#### **42 IAC 1-5-13 Ghost employment**

Sec. 13. A state officer, employee, or special state appointee shall not engage in, or direct others to engage in, work other than the performance of official duties during working hours, except as permitted by general written agency, departmental, or institutional policy or regulation.

## ANALYSIS

### *A. Outside employment*

An outside employment or professional activity opportunity creates a conflict of interest under IC 4-2-6-5.5 if it results in the employee: 1) receiving compensation of substantial value when the responsibilities of the employment are inherently incompatible with the responsibilities of public office or require the employee's recusal from matters so central or critical to the performance of his official duties that his ability to perform them would be materially impaired; 2) disclosing confidential information that was gained in the course of state employment; or 3) using or attempting to use his official position to secure unwarranted privileges or exemptions of substantial value that are not properly available to similarly situated individuals outside state government.

The Inspector indicates that the business he conducts through the Company is not inherently incompatible with his duties at DNR and will not require him to recuse himself from his state duties. In addition, he will ensure he does not improperly benefit from any confidential information gained through the course of his state employment or misuse his position at DNR to gain an unfair competitive advantage in his private business.

### *B. Conflict of interests*

A further conflict of interest may arise for a state employee under IC 4-2-6-9 if he knowingly participates in a decision or vote in which certain persons have a financial interest in the outcome of the matter, including the employee himself as well as a business organization in which he serves as an employee. "Financial interest" is defined in IC 4-2-6-1(a)(11) as an interest in a purchase, sale, lease, contract, option, or other transaction between an agency and any person or an interest involving property or services.

An employee who identifies such a potential conflict of interest is required to notify his appointing authority and seek an advisory opinion from the Commission to determine whether a) procedures should be implemented to screen the employee from involvement in the matter, or b) the interest is not so substantial that the Commission considers it likely to affect the integrity of the services the state expects from the employee.

A potential conflict of interest would arise for the Inspector under IC 4-2-6-9 to the extent he participates in any decisions or votes at DNR in which he or the Company has a financial interest in the outcome of the matter. The Inspector has already taken steps to address this potential conflict by notifying his appointing authority and requesting a formal advisory opinion from the Commission. In addition, the Inspector proposes a screening process in which he will refer any inquiries he receives in his position with the state to the International Society of Arboriculture website. Moreover, the Inspector will work with DNR to ensure guidelines are established and followed to avoid a conflict of interest under this rule.

### *C. Confidential information*

The Inspector 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 Inspector from accepting any compensation from any employment, transaction, or investment which 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 the Company. In addition, the definition of “information of a confidential nature” is set forth in IC 4-2-6-1(a)(12).

To the extent the Inspector is exposed to such confidential information as an Investigator with DNR, he is prohibited not only from divulging that information but from ever using it to benefit the Company in any manner.

*D. Use of state property and Ghost employment*

42 IAC 1-5-12 prohibits the Inspector from using state property for any purpose other than for official state business unless the use is expressly permitted by a general written agency, departmental, or institutional policy or regulation. Likewise, 42 IAC 1-5-13 prohibits the Inspector from engaging in, or directing others to engage in, work other than the performance of official duties during working hours, except as permitted by general written agency, departmental, or institutional policy or regulation.

The Inspector indicates that he has observed these provisions in operating his Company to this point and will continue to abide by them in expanding his territory into southern Indiana.

**CONCLUSION**

The Commission finds it would not be a violation of the Code to expand the Company’s business to Indiana. Specifically, the Inspector will conduct his business exclusively on his own time and through the use of his own resources; will focus his efforts primarily on private citizens and commercial establishments and avoid conducting business through the Company for any entities, such as nurseries, he knows to be regulated by the DNR; will ensure he does not use his position at DNR to direct any business to the Company; and will ensure he does not do work for DNR through the Company. Moreover, the Inspector will be in contact with DNR to establish guidelines necessary to avoid any conflicts of interest and to ensure the Company’s business does not overlap with his responsibilities with DNR.