

#### **42 IAC 1-5-14 Postemployment restrictions (IC 4-2-6-11)**

The former Executive Director of the Government Efficiency Division at OMB began working with a consulting firm following his departure from state government. The Executive Director identified three contracts he was involved in negotiating and/or administering during the course of his state employment; however, all of them were concluded and none of them were with the firm. SEC concluded that while the contracts would qualify as particular matters, the application of the restriction was moot since all of them had been concluded. Consequently, it would not be a problem for the Executive Director to work with the firm on other particular matters involving the State as long as they were not matters in which he personally and substantially participated.

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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 former state employee served as Executive Director of the Government Efficiency Division within the Office of Management and Budget from February 2005 to January 2013. He served as Deputy Chief of Staff in the Office of the Governor from November 2010 until January 2013. The former Executive Director was also the Governor’s designee to serve as Chairman of the Indiana Board for Depositories from June 2007 to January 2013. He negotiated or administered three contracts in which all have concluded.

The former Executive Director accepted the position of director at a consulting firm effective January 28, 2013. While the consulting firm has had and currently has contracts with the State, the former Executive Director neither negotiated nor administered any contract involving the consulting firm. Similarly, he did not make any regulatory or licensing decisions related to the consulting firm.

#### **ISSUE**

Does the Code of Ethics prohibit the former Executive Director from participating or assisting the consulting firm with certain particular matters involving the State?

#### **RELEVANT LAW**

##### **I.C. 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.

**I.C. 4-2-6-11 (42 IAC 1-5-14)**

**One year restriction on certain employment or representation; advisory opinion; exceptions**

Sec. 11. (a) As used in this section, "particular matter" means:

- (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 term does not include the proposal or consideration of a legislative matter or the proposal, consideration, adoption, or implementation of a rule or an administrative policy or practice of general application.

(b) This subsection applies only to a person who served as a state officer, employee, or special state appointee after January 10, 2005. A former state officer, employee, or special state appointee may not accept employment or receive compensation:

- (1) as a lobbyist;
- (2) from an employer if the former state officer, employee, or special state appointee was:
  - (A) engaged in the negotiation or the administration of one (1) or more contracts with that employer on behalf of the state or an agency; and
  - (B) in a position to make a discretionary decision affecting the:
    - (i) outcome of the negotiation; or
    - (ii) nature of the administration; or
- (3) from an employer if the former state officer, employee, or special state appointee made a regulatory or licensing decision that directly applied to the employer or to a parent or subsidiary of the employer;  
before the elapse of at least three hundred sixty-five (365) days after the date on which the former state officer, employee, or special state appointee ceases to be a state officer, employee, or special state appointee.

(c) A former state officer, employee, or special state appointee may not represent or assist a person in a particular matter involving the state if the former state officer, employee, or special state appointee personally and substantially participated in the matter as a state officer, employee, or special state appointee, even if the former state officer, employee, or special state appointee receives no compensation for the representation or assistance.

(d) A former state officer, employee, or special state appointee may not accept employment or compensation from an employer if the circumstances surrounding the employment or compensation would lead a reasonable person to believe that:

- (1) employment; or
- (2) compensation;

is given or had been offered for the purpose of influencing the former state officer, employee, or

special state appointee in the performance of his or her duties or responsibilities while a state officer, an employee, or a special state appointee.

(e) A written advisory opinion issued by the commission certifying that:

- (1) employment of;
- (2) representation by; or
- (3) assistance from;

the former state officer, employee, or special state appointee does not violate this section is conclusive proof that a former state officer, employee, or special state appointee is not in violation of this section.

(f) Subsection (b) does not apply to a special state appointee who serves only as a member of an advisory body.

(g) An employee's or a special state appointee's state officer or appointing authority may waive application of subsection (b) or (c) in individual cases when consistent with the public interest. Waivers must be in writing and filed with the commission. The inspector general may adopt rules under I.C. 4-22-2 to establish criteria for post employment waivers.

### ANALYSIS

The former Executive Director's intended post-employment venture implicates the provisions of the Code pertaining to confidential information and post-employment. The application of each provision to the former Executive Director's arrangement is analyzed below.

#### *A. Confidential Information*

I.C. 4-2-6-6 prohibits the former Executive Director from accepting any compensation from any employment, transaction, or investment which was entered into or made as a result of material information of a confidential nature. It does not appear that compensation the former Executive Director would receive from his intended work with the consulting firm on the identified contracts involving the state would be a result of information of a confidential nature.

Accordingly, it would not appear that the former Executive Director's work with the consulting firm on the identified contracts with the State would violate I.C. 4-2-6-6.

#### *B. Post-Employment*

I.C. 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 period, prevents the former Executive Director from accepting employment for 365 days from the date that he leaves state government under various circumstances. For purposes of the former Executive Director's inquiry, the only relevant provision in the cooling off period is the prohibition against lobbying. A lobbyist is defined as an individual who seeks to influence decision making of an agency and who is registered as an executive branch lobbyist under the rules adopted by the Indiana Department of Administration. Based on the information provided, it does not appear that the former Executive Director's intended work with the consulting firm on the identified State contracts would be considered lobbying activity. To the extent this is accurate, this restriction would not apply.

The former Executive Director is still subject to the post-employment rule's "particular matter" prohibition in his post-employment. This restriction prevents him from representing or assisting a person on any of the following twelve matters if he personally and substantially participated in the matter as a state employee: 1) an application, 2) a business transaction, 3) a claim, 4) a contract, 5) a determination, 6) an enforcement proceeding, 7) an investigation, 8) a judicial proceeding, 9) a lawsuit, 10) a license, 11) an economic development project, or 12) a public works project. The particular matter restriction is not limited to 365 days but instead extends for the entire life of the matter at issue, which may be indefinite.

In this case, the former Executive Director has identified three contracts that qualify as "particular matters," consistent with I.C. 4-2-6-11(a)(4). The former Executive Director would be prohibited from assisting or representing any person, including the consulting firm, with any of these contracts in which he personally and substantially participated; however, since all of contracts identified have been completed, the application of the restriction to these matters is moot. As a result, the former Executive Director is not prohibited under the particular matter restriction from working on any contracts the consulting firm now has—or will have in the future—with the State. Should he encounter any additional particular matters in the course of his employment with the consulting firm, the former Executive Director is welcome to seek further advice on how this restriction would impact his representation or assistance with the matter.

### **CONCLUSION**

Subject to the foregoing analysis, the Commission finds that the former Executive Director's work at the consulting firm on contracts with the State is not contrary to I.C. 4-2-6-11.