

**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**

**42 IAC 1-5-15 Nepotism (IC 4-2-6-16)**

INDOT's Director of Bridges sought advice regarding the potential conflict of interest created by her husband's employment at an engineering and design firm with a business relationship with INDOT. SEC approved the screen proposed by INDOT in which the Director removed herself from all RFP matters involving her husband's firm. In addition, SEC advised the Director to be mindful of the ethics rules on confidential information as well as the provision in the Nepotism rule that applies to an employee who contracts with or supervises the work of a business with which a relative is employed.

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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 currently serves as the Director of Bridges for the Indiana Department of Transportation ("INDOT"). The Director's husband works for an engineering and design firm that has a current business relationship with INDOT.

As the Director of Bridges, she oversees the following areas: bridge standards and policy; hydraulics; bridge design; bridge rehabilitation; bridge inspection; and bridge asset management. She has very limited involvement in the process for selection of consultants through the Request for Proposal ("RFP") process. With INDOT's consultant selection RFP process, INDOT advertises an RFP, consultants submit letters of interest in response to the RFP, three to five INDOT scorers score the Letters of Interest, the Selection Review Committee reviews the scores and either approves the ranking of consultants or sends it back to the owner office for further review, and the Commissioner or his designee makes the final selection. The Director has scored two RFPs while with INDOT. One RFP she scored was three to four years ago, and the other RFP she scored was the recent Ohio River Bridges East End Crossing Design Review and Construction Administration RFP neither of which the engineering and design firm submitted a Letter of Interest on. INDOT's Contract Administration Division may ask the Director to score RFPs in the future; however, it is anticipated that this will be on very rare occasions. Although the Director's husband does not have an ownership interest in the engineering and design firm, the Director has stated she currently recuses herself from scoring an RFP in which the engineering and design firm has submitted a Letter of Interest to avoid the appearance of impropriety.

The Director previously assigned her staff to score RFPs involving bridge or hydraulic work. The engineering and design firm may submit a Letter of Interest for the RFPs the Director's staff scores; therefore, her staff may score the engineering and design firm's Letters of Interest. The Director does not review the scores her staff submits, and she is not a member of the Selection Review Committee, which reviews all scores on consultant RFPs. She also does not serve as the

Commissioner's designee for finalizing consultant selections. Furthermore, since her request for an informal advisory opinion, the Director has placed additional barriers to remove herself further from the selection process. Specifically, requests for staff to score RFPs are now sent directly to the supervisor of each area instead of to the Director with the request to assign someone.

The Director has limited involvement with the engineering and design firm's staff. Her most common communication with the engineering and design firm is responding to policy questions and approving or rejecting design exceptions according to INDOT policy. In general, very few contracts go through the Director's division. Most contracts for INDOT projects go through INDOT's Project Management or INDOT's District offices. The Division the Director oversees provides quality control on projects but not management.

The Director does not supervise individual contracts with INDOT; therefore, she does not violate INDOT's conflict of interest policy, which prohibits an INDOT employee from supervising a contract if she has a close social relationship with an employee of a contractor associated with that contract.

In her position, The Director has access to some confidential information; however, this access is limited. In addition, the Director's privileges in PSCS, the automated contract system, have been archived.

Currently, the Director's husband is the Roadway Services Manager for the engineering and design firm and in this capacity supervises three roadway design teams and is involved in the design of major road projects, which include INDOT projects. The design teams he leads submit Technical Proposals on design-build projects and submit Letters of Interest on projects delivered in the traditional, design, bid, build process, both of which include INDOT projects, some of which are bridges. The Director's husband neither supervises, acts in an advisory capacity, nor acts as a liaison between INDOT and the engineering and design firm on matters related to bridges. However, the Director's husband's design team also performs hydraulic designs, which are reviewed by the INDOT bridge department, and in this function the Director's husband does supervise, act in an advisory capacity, and on occasion act as a liaison between his team and the hydraulic reviewers at INDOT. He also manages the Right of Way team, which includes right of way engineering and the parcel acquisition process. The Director's husband performs work in Indiana, as well as in other states and internationally.

As the Roadway Services Manager for the engineering and design firm, the Director's husband has no shares of ownership in the company (nor has he ever had an ownership interest in the engineering and design firm). He has never been and is currently not an officer of the engineering and design firm. He also is not on the track to have ownership interest in or become an officer of the engineering and design firm.

On December 7, 2012, the Director requested an Informal Advisory Opinion ("IAO") from the Office of Inspector General ("OIG"). The OIG issued an IAO on December 11, 2012, indicating that, because the Director's husband could possibly have a financial interest in the votes and decisions the Director could make regarding the engineering and design firm, specifically through her limited involvement in the RFP process, a potential conflict of interest had been

identified. Though the Director's husband does not own shares in the engineering and design firm and is not an officer of the engineering and design firm, it was unclear whether the Director's husband's compensation was in any way tied to these decisions or votes the Director would participate in involving the engineering and design firm. The IAO advised that I.C. 4-2-6-9(b) requires that a state employee who identifies a potential conflict of interest shall notify the person's appointing authority and seek a formal advisory opinion from the Commission. Subsequently, the Director has requested a formal advisory opinion to address the potential conflict of interest.

### **ISSUE**

1. Would a conflict of interest arise for the Director under I.C. 4-2-6-9 in the performance of her duties as INDOT's Director of Bridges given that her husband is the Roadway Services Manager for the engineering and design firm, a company which has a current business relationship with INDOT? If so, would a screening procedure be appropriate in this case to prevent a conflict of interest from arising for the Director?
2. What other rules in the Code of Ethics would apply to the Director?

### **RELEVANT LAW**

#### **42 IAC 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 IAC 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 4-2-6-9 (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

#### **IC 4-2-6-16 (42 IAC 1-5-15)**

##### **Nepotism**

Sec. 16. (a) This chapter does not prohibit the continuation of a job assignment that existed on July 1, 2012.

(b) As used in this section, "employed" refers to all employment, including full-time, part-time, temporary, intermittent, or hourly. The term includes service as a state officer or special state appointee.

(c) An individual employed in an agency may not hire a relative.

(d) Except as provided in subsection (e), an individual may not be employed in the same agency in which an individual's relative is the appointing authority.

(e) An individual may be employed in the same agency in which the individual's relative is the appointing authority, if the individual has been employed in the same agency for at least twelve (12) consecutive months immediately preceding the date the individual's relative becomes the appointing authority.

(f) Except as provided in subsection (e), an individual may not be placed in a relative's direct line of supervision.

(g) An individual employed in an agency may not contract with or supervise the work of a business entity of which a relative is a partner, executive officer, or sole proprietor.

(h) Any person within an agency who knowingly participates in a violation of this chapter is subject to the penalties set forth in section 12 of this chapter.

#### **ANALYSIS**

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

##### *A. Confidential Information*

The Director is prohibited under 42 IAC 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 IAC 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, such as the Director's

husband, and a corporation, such as the engineering and design firm. In addition, the definition of “information of a confidential nature” is set forth in I.C. 4-2-6-1(a)(12). In this case, the Director has access to some confidential information, though it is unclear if this information could be used to her husband’s or the engineering and design firm’s benefit in obtaining approval for matters related to bridges. Since requesting an IAO from the OIG, the Director’s privileges in PSCS, the automated contract system, have been archived thereby limiting at least some of her access to confidential information. While it would be a violation of 42 IAC 1-5-10 for the Director to permit her spouse or any other person to benefit from information of a confidential nature to which she has access, 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.

#### *B. Conflicts of Interest*

I.C. 4-2-6-9(a) prohibits a 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)(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 state employee.

Regarding a conflict of interest, it appears the Director may be required to participate in decisions or votes as Director of Bridges, specifically in her limited involvement in the RFP scoring process, in which the engineering and design firm may have a financial interest. It is unclear, however, whether her spouse would have a financial interest specifically if the engineering and design firm were selected as a result of this process. Specifically, the request does not indicate whether the Director’s husband’s compensation is tied to the decisions or votes the Director would participate in involving the engineering and design firm. Regardless of whether the Director’s husband 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 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. To the extent that the Director’s disclosure to her Ethics Officer was also disclosed to her agency’s 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 employee from

involvement in the matter. In this case, the Director has taken steps to screen herself from participation in decisions and votes involving her husband or the engineering and design firm. The Director recuses herself from scoring RFPs involving the engineering and design firm in order to avoid the appearance of impropriety. In addition, since receiving the IAO, she has removed herself altogether from the RFP scoring process. Instead of requests for her staff to score RFPs being sent to her, they are now sent directly to the supervisor of each area. It is unclear whether the appointing authority has approved this re-assignment and screening procedure. To the extent that the screening procedure is approved and adopted by INDOT and the Director abstains from participation in any decision or vote in which her husband or the engineering and design firm has a financial interest in the outcome of the matter, it does not appear that the Director would be in violation of I.C. 4-2-6-9.

*C. Nepotism*

I.C. 4-2-6-16(g) states that an individual employed in an agency may not contract with or supervise the work of a business entity of which a relative is a partner, executive officer, or sole proprietor. So long as the Director's husband does not become a partner or an executive officer of the engineering and design firm, this restriction would not apply. In addition, even if the Director's husband became a partner or an executive officer of the engineering and design firm, it does not appear that this restriction would apply because the Director does not supervise individual contracts with INDOT.

**CONCLUSION**

The Commission finds that a potential conflict of interest could arise for the Director if she participates in decisions and/or votes related to her husband or the engineering and design firm. Moreover, it is the Commission's opinion that the screening mechanism proposed by INDOT is appropriate so long as the Director's supervisor oversees the implementation of the screen and submits periodic reports of compliance to the Commission.