

**42 IAC 1-5-5 Conflicts of interest; advisory opinion by Commission (IC 4-2-6-5.5)**

**42 IAC 1-5-6 Conflicts of interest; decisions and voting (IC 4-2-6-9)**

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

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

IDHS sought advice to determine whether the General Counsel of the IDHS could maintain his outside employment as a private attorney, a part-time firefighter and director of the fire department's reserve division. SEC determined that the General Counsel's outside employment with the fire department and in his private law practice would not create a conflict under IC 4-2-6-5.5. Specifically, the information provided by the IDHS Ethics Officer indicated that the General Counsel's outside employment does not provide him with compensation of substantial value nor would it require his recusal from matters that are critical to the performance of his state employment duties. SEC further determined that a conflict of interest could arise if the General Counsel participated in decisions or votes involving the fire department or any of his legal clients, and that the proposed screening mechanism would be appropriate and should be implemented by IDHS to prevent violation of IC 4-2-6-9.

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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). The following opinion is based exclusively on sworn testimony and documents presented by the requestor.

**BACKGROUND**

A state employee is the Ethics Officer for the Indiana Department of Homeland Security ("IDHS"). The Ethics Officer requests an advisory opinion on behalf of the General Counsel of IDHS, to ensure that his outside employment as a private attorney, a part-time firefighter with the White River Township Fire Department ("WRTFD"), and Director of the WRTFD's Reserve Division, conforms to the applicable rules in the Indiana Code of Ethics ("Code").

The General Counsel began serving for IDHS on September 1, 2014. His supervisor in this position is the Executive Director of IDHS. Prior to September 1, 2014, the General Counsel worked as an associate at a private civil law firm. He also served as a part-time firefighter with the WRTFD in Johnson County, Indiana, and functioned as Director of the Fire Department's Reserve Division.

In his role as General Counsel, he effectively serves as the senior in-house attorney for IDHS. He supervises or oversees the agency's staff attorneys, legal support staff, and administrative law judge. He provides legal advice to the agency and the Executive Director regarding the full spectrum of agency operations, including personnel matters and regulatory concerns. He is also involved in the review and approval process for grants and contracts signed or awarded by the agency, with delegated authority to sign for the Executive Director on such agreements.

The General Counsel would like to keep a small client base of private legal clients, during his off-duty hours, focused primarily on estate planning and wills and trusts for friends and family members. He would also like to maintain his status as a firefighter and his leadership role within the WRTFD. As a firefighter he is paid roughly ten dollars (\$10) per hour, working one night per

week on a twelve-hour shift. Payroll funds for this position come from the township's fire protection district funds. The WRTFD does not utilize any state grant funds to pay salaries, nor have they done so at any time since the General Counsel was hired in 2007. His leadership position is uncompensated and in that role he functions primarily as a liaison between the Reserve Division and the Fire Chief.

The Ethics Officer asserts that the General Counsel's outside employment is not incompatible with his official duties as General Counsel because of the relatively insubstantial compensation received for his services as a firefighter and the limited overlap between his proposed private legal practice and his official duties as General Counsel. Nevertheless, a potential conflict of interest has been identified based on the fact that some IDHS grants and contracts might provide a direct or indirect financial benefit to the WRTFD (through, for example, a county-wide or Homeland Security District-wide grant). Similarly, though probably rare, there might be occasions where a private legal client belongs to a profession regulated by IDHS or somehow be otherwise impacted by an IDHS action or contract.

In following the requirements of IC 4-2-6-9(b) when a potential conflict of interest is identified, the IDHS's appointing authority will be notified. The Executive Director is supportive of the General Counsel's outside employment endeavors, subject to the approval of the Commission, and he has drafted screening agreements to remove the General Counsel from any decisions or votes in matters which might potentially involve the WRTFD or any of the General Counsel's private clients. The agreements contemplate the Executive Director retaining exclusive authority to act on these matters as opposed to delegating the authority to any of the attorneys subordinate to the General Counsel. Specifically, the General Counsel will provide a complete list of his private legal clients to the Ethics Officer to facilitate the screening process. When a matter arises that would normally be submitted to or discussed with the General Counsel, concerning one of his private legal clients, the matter will be directed to the Executive Director instead. Likewise, when a matter arises that would normally be submitted to, or discussed with, the General Counsel, concerning the WRTFD, the matter will be directed to the Executive Director instead. The screening agreements have been submitted to the Commission for review.

At present, the General Counsel is not actively representing any clients in a private legal capacity. He retains some files on some of the individuals he would like to represent if this outside employment is approved, but as of now they are clients of his former law firm. Additionally, he has not signed up for any shifts with the WRTFD pending resolution of these concerns.

### **ISSUES**

1. Would a conflict of interest arise for the General Counsel under IC 4-2-6-9? If so, would the proposed screening procedure be appropriate to prevent a conflict of interest from arising for him?

2. What other ethics issues, if any, arise for him given his position as General Counsel at IDHS and his simultaneous employment/professional activity as a private attorney, a part-time firefighter with the WRTFD, and Director of the WRTFD's Reserve Division?

### **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 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 4-2-6-6**

##### **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 if 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 Commission generally defers to an agency's appointing authority or ethics officer regarding outside employment opportunities since it views them as being in the best position to determine whether a conflict of interest might exist between an employee's state duties and an outside employment opportunity. Based on the information provided by the IDHS Ethics Officer, it does not appear that the General Counsel's outside employment as a private attorney with a small caseload, a part-time firefighter with the WRTFD, and Director of the WRTFD's Reserve Division would create a conflict under this provision. Specifically, the information provided does not suggest that the General Counsel receives compensation of substantial value or would require his recusal from matters that are critical to the performance of his state employment duties. Moreover, nothing presented suggests that any of these positions require the General Counsel to disclose confidential information that he may have access to by virtue of his state employment. Similarly, nothing presented suggests that he would use or attempt to use his state position for any unwarranted privileges or exemptions.

#### *B. Conflict of interests*

IC 4-2-6-9(a)(1) prohibits General Counsel from participating in any decision or vote if he has a financial interest in the outcome of the matter. Similarly, IC 4-2-6-9(a)(3) prohibits the General Counsel from participating in any decision or vote if a business organization which employs him has a financial interest in the matter.

##### *1. WRTFD positions*

A state employee is the General Counsel of IDHS. He is also employed as a part-time firefighter and serves as Director of the Reserve Division for the WRTFD. The WRTFD is eligible to receive state funding through grants and contracts approved and/or awarded through IDHS. Though the General Counsel has confirmed that none of his salary from the WRTFD (as a part-time firefighter; the Director position is unpaid) is derived from state grant funds, the WRTFD could have a financial interest in decisions or votes on these contracts and grants that he may be involved in by virtue of his position as General Counsel.

IC 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 IDHS Ethics Officer requested an advisory opinion from the Commission on the General Counsel's behalf as provided in the rule and has disclosed the potential conflict to his appointing authority.

IC 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, IDHS proposes the implementation of a screening procedure in which the General Counsel would be screened from any decisions or votes concerning the WRTFD and any such matters would be referred to the Executive Director. The Executive Director would retain decision-making authority in these instances. Furthermore, the General Counsel would be screened from any discussions of matters concerning the WRTFD; the matters would be directed to the Executive Director instead.

## *2. Private legal practice*

The General Counsel would like to maintain a small base of private legal clients during his off-duty hours, focusing primarily on estate planning, wills, and trusts. The majority of these clients will be friends and family members. IDHS recognizes that there may be rare occasions in which a private legal client belongs to a profession regulated by an IDHS action or contract.

IC 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 IDHS Ethics Officer requested an advisory opinion from the Commission on the General Counsel's behalf as provided in the rule and has disclosed the potential conflict to his appointing authority.

IC 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, IDHS proposes the implementation of a screening procedure in which the General Counsel would provide a list of all of his private legal clients to the IDHS Ethics Officer. IDHS would then ensure that the General Counsel is screened from any decisions or votes concerning matters in which any of these clients would have a financial interest and any such matters would be referred to the Executive Director. The Executive Director would retain decision-making authority in these instances. Furthermore, the General Counsel would be screened from any discussions of matters concerning these clients; the matters would be directed to the Executive Director instead.

## *C. Confidential information*

The General Counsel 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 General Counsel 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, such as a client, and a political subdivision, such as the White River Township. 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 state employee is exposed to or has access to such confidential information in his position as IDHS General Counsel, he would be prohibited not only from divulging that information but from ever using it to benefit anyone in any manner.

*D. Use of state property and Ghost employment*

42 IAC 1-5-12 prohibits the General Counsel 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 General Counsel 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.

To the extent that the General Counsel observes these provisions regarding his employment with the WRTFD and as a private attorney, such outside professional activities would not violate these rules.

**CONCLUSION**

Subject to the foregoing analysis and the implementation of the screening procedures established by IDHS when necessary, the General Counsel's continued outside employment with the WRTFD and his private practice would not be contrary to the Code.