

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

**42 IAC 1-5-7 Prohibition against financial interest in contract; exceptions (IC 4-2-6-10.5)**

The IEDC Ethics Officer submitted an updated Confidentiality & Conflicts of Interest Policy, which revises IEDC's 2013 policy and carries forward the screening procedures that the SEC approved for the IEDC in Advisory Opinion No. 13-I-33. The updated Policy also extends these screening procedures to employees under IC 4-2-6-9 and board members and employees under IC 4-2-6-10.5. SEC found that given the statutory protections afforded to IEDC negotiations, the IEDC's updated Confidentiality & Conflicts of Interest Policy for handling potential conflicts of interest for its Board members and employees is appropriate. SEC also found that the IEDC Board members and employees who were screened from matters must file the appropriate conflicts of interest form with the SEC after IEDC confidential negotiations have concluded.

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No. 17-I-2

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**

The IEDC is the State of Indiana's lead economic development agency. In order to respond quickly to the needs of businesses, the IEDC was established in February 2005 as "a body politic and corporate, not a state agency but an independent instrumentality exercising essential public functions." *See* IC 5-28-3-2(a). The IEDC exists to improve the quality of life for the citizens of Indiana by encouraging the (i) diversification of Indiana's economy and the orderly economic development and growth of Indiana; (ii) creation of new jobs; (iii) retention of existing jobs; (iv) growth and modernization of existing industry; and, (v) promotion of Indiana. *See* IC 5-28-1-1.

Consistent with these statutory responsibilities, the IEDC provides performance-based tax incentives and workforce training grants to incentivize companies to create and retain high-wage jobs and make investments to expand operations here in Indiana. The IEDC also leads the Regional Cities Initiative, which is designed to help attract and retain talent by improving the quality of life in our communities, and the \$1 Billion Innovation & Entrepreneurship Initiative, which is designed to strengthen and accelerate Hoosier innovation through strategic partnerships, ensuring that Indiana plays a leading role in solving 21<sup>st</sup> century challenges while supporting long-term economic growth, job creation, and talent attraction.

The Governor serves as the Chair of the IEDC Board of Directors ("Board"), which oversees the corporation. There are 11 other members of the Board who are appointed by, and serve at the pleasure of, the Governor. *See* IC 5-28-4-2, 3, and 4. Appointed members "must be employed in or retired from the private or nonprofit sector or academia." *See* IC 5-28-4-2(a). The IEDC is led by the chief executive officer, who serves as the Secretary of Commerce and the President of the IEDC. Both positions are appointed by the Governor. *See*

IC 5-28-3-4. The Secretary of Commerce and the President oversee a staff of approximately 70 employees at the IEDC.

The IEDC is subject to “the jurisdiction of and rules adopted by the Indiana State Ethics Commission” and the “ethics rules and requirements that apply to the executive branch of state government.” *See* IC 5-28-5-5. (In addition to its other powers, the IEDC Board is expressly permitted to “adopt additional ethics rules and requirements that are more stringent than those adopted by the state ethics commission.” *See id.*) The IEDC is also subject to the Indiana Access to Public Records Act (“APRA”) and the Indiana Open Door Law. *See* IC 5-28-5-9.

The IEDC negotiates incentive packages with prospect companies considering job expansion projects in the State. Under the APRA, certain records of the IEDC are specifically exempted from disclosure. *See* IC 5-14-3-4(b)(5)(A-B). The IEDC publishes the terms of all incentive agreements (“the terms of the final offer of public financial resources”) on the IEDC Transparency Portal. The statute expressly incorporates the primary policy reason behind disclosure: the obligation and utilization of “public financial resources.” IC 5-14-3-4 (b)(5)(B).

### Conflicts Policy

In 2005, the IEDC Board adopted a Confidentiality & Conflict of Interest Policy (hereinafter “the 2005 Policy”) designed to protect confidential information entrusted to the IEDC and to require recusal of a Board member when that Board member has a financial interest in a company that makes an application to the IEDC for incentives.

On July 29, 2013, the IEDC requested a formal advisory opinion to approve screening procedures designed to protect the confidentiality of negotiations with prospects while ensuring compliance with the Indiana Code of Ethics. Following a hearing on August 8, 2013, the Commission approved the request. In its Formal Advisory Opinion No. 13-I-33 approving the IEDC’s request, the Commission explained:

The Commission finds that a conflict of interest could arise for the Board members under I.C. 4-2-6-9 in certain situations arising from financial interests of the Board members. Given the statutory protections afforded to the IEDC’s negotiations, the Commission finds it appropriate for the Board members to file and continually update a conflict of interest disclosure form with the Commission and, when a potential conflict of interest arises, the proposed screen be implemented without requiring that the Board member request an advisory opinion from the Commission on a case-by-case basis.

The IEDC Ethics Officer provides that Board member conflicts of interests are not frequent, but they do occur and, when they do, this process is followed. Further, as required by Advisory Opinion No. 13-I-33, the IEDC must “report to the Commission that a potential conflict of interest was identified and that the screen was implemented,” which the IEDC Ethics Officer prepares and files.

The IEDC Ethics Officer advises that together the conflicts of interest safeguards for IEDC board members in the 2005 Policy and Advisory Opinion No. 13-I-33 have proven effective at ensuring compliance with the Indiana Code of Ethics while also preserving the confidentiality necessary for effective economic development.

### Statutory Changes

Effective July 1, 2015, IC 4-2-6-9 was amended to provide an option for a written disclosure for identified potential conflicts of interests. At the time the Commission issued Advisory Opinion No. 13-I-33, an individual was required to seek a formal advisory opinion each time a potential conflict of interest arose. This limited option and the length of time between meetings when the conflicts issues could be addressed were factors considered in the Commission's approval for the departure from the standard disclosure process.

Under the new language of IC 4-2-6-9(b), IEDC Board members and employees would be able to file a conflict of interests disclosure form upon the identification of a potential conflict of interests instead of seeking a formal advisory opinion each time a conflict arises.

In addition, IC 4-2-6-10.5, pertaining to financial interests in state contracts, was amended to require that the disclosure statement - filed by state employees, special state appointees, and state officers who meet certain statutory requirements - be filed before a contract is executed. This statute was not addressed in Advisory Opinion No. 13-I-33, but the timing used to be such that this disclosure could be filed after the state contract was executed.

### Updated conflicts policy

On December 13, 2016, the IEDC Board conditionally approved an updated Confidentiality & Conflicts of Interest Policy (hereinafter "the 2016 Policy"). This approval was conditioned upon the Commission's approval to extend the screening procedures, as requested herein.

Compared to the 2005 Policy, the IEDC designed the 2016 Policy as a more detailed "how to" guide for Board members and employees to use when ethical considerations arise. Additionally, the 2016 Policy includes various definitions that relate directly to the Indiana Code of Ethics in IC 4-2-6-1. The 2016 Policy also recognizes that there may be ethical considerations, in addition to those that should be considered under IC 4-2-6-9 and IC 4-2-6-10.5. The 2016 Policy highlights the fact that the term "business organization" includes non-profit organizations. These are among the many various intended improvements.

Notwithstanding its improvements, the 2016 Policy carries forward the screening procedures that the Commission approved under Advisory Opinion No. 13-I-33. These safeguards include the filing of annual disclosure statements with the Commission, logging interests in the Conflicts of Interest Management System maintained by the IEDC, and the conflicts of interest screening process. The IEDC Ethics Officer emphasizes that those procedures still

only apply when confidentiality must be maintained with an economic development prospect. These special procedures do *not* apply to other contracts, such as contracts with vendors. Thus, a Board member or employee having a financial interest in other non-economic development prospect matters, such as a proposed contract with a vendor must still go through the normal disclosure processes required by IC 4-2-6-9(b) and IC 4-2-6-10.5(b).

The 2016 Policy also provides on its first page that “[i]n the event there is an inconsistency between the Indiana Code of Ethics and this Policy, the more restrictive provision(s) shall control.” Further, it provides that “[o]nly the Indiana State Ethics Commission can conclude with finality whether a Financial Interest exists under the Indiana Code of Ethics....” See Attachment E at III(6) on p. 4. Also, it provides that “[n]othing in this Policy shall be construed to limit a Board Member or Employee’s ability to consult directly with the Indiana Office of Inspector General or the Indiana State Ethics Commission regarding any ethics concern.” See *id.* at (V)(9) on p. 7.

The most significant change in the 2016 Policy, and the cause for this request for a formal advisory opinion, is the proposed extension of the screening procedures approved under Advisory Opinion No. 13-I-33, which apply to IEDC board members under IC 4-2-6-9. The IEDC would like to extend these procedures to include (1) employees under IC 4-2-6-9 and (2) board members and employees under IC 4-2-6-10.5.

The IEDC’s request in 2013, and the Commission’s approval thereof, was premised on the statutory confidentiality afforded to the IEDC’s negotiations with prospects. Though the IEDC’s request in 2013 only applied to Board members, the same statutory confidentiality is afforded to IEDC employees. Further, while the IEDC’s request in 2013 applied only to disclosures filed under IC 4-2-6-9, the same concept at the core of IC 4-2-6-9—*i.e.*, a financial interest in a contract—is at the core of IC 4-2-6-10.5. Therefore, the risks to economic development (as detailed in Attachment B on pages 2 and 3), which were addressed in the context of board members under IC 4-2-6-9 with Advisory Opinion No. 13-I-33, remain for (1) employees under IC 4-2-6-9; and (2) board members and employees under IC 4-2-6-10.5.

### Proposed resolution

The IEDC requests that the Commission extend the procedures permitted under Advisory Opinion No. 13-I-33 so that there is one straightforward process for dealing with apparent conflicts of interests involving the IEDC’s confidential economic development negotiations, whether the conflict involves a board member or employee and whether the disclosure would be required under IC 4-2-6-9 or IC 4-2-6-10.5.

The IEDC believes that this will not only protect the confidentiality of economic development negotiations as permitted by Indiana law, but it will also make administration of these issues easier for the IEDC and presumably the OIG, the Commission, and their respective staff.

## ISSUE

1. Would a conflict of interest arise for IEDC employees and Board members under IC 4-2-6-9 in certain situations arising from financial interests of the employees and Board members?
2. If so, would the proposed implementation of the disclosure and screening procedures outlined in the IEDC's 2016 Policy satisfy the requirements set forth in IC 4-2-6-9(b) for IEDC employees and board members when a potential conflict of interests is identified?
3. Would the proposed implementation of the disclosure and screening procedures outlined in the IEDC's 2016 policy satisfy the requirements set forth in IC 4-2-6-10.5 for IEDC employees and Board members who have a financial interest in a state contract?

## RELEVANT LAW

### **IC 4-2-6-1 Definitions**

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

...

(10) "Financial interest" means an interest:

(A) in a purchase, sale, lease, contract, option, or other transaction between an agency and any person; or

(B) involving property or services.

The term includes an interest arising from employment or prospective employment for which negotiations have begun. The term does not include an interest of a state officer or employee in the common stock of a corporation unless the combined holdings in the corporation of the state officer or the employee, that individual's spouse, and that individual's unemancipated children are more than one percent (1%) of the outstanding shares of the common stock of the corporation. 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.

### **42 IAC 1-5-6 Conflicts of interest; decisions and voting**

Authority: IC 4-2-7-3; IC 4-2-7-5

Affected: IC 4-2-6-9; IC 4-2-7

Sec. 6. Decision and voting restrictions are set forth in IC 4-2-6-9.

### **IC 4-2-6-9**

#### **Conflict of economic interests; commission advisory opinions; disclosure statement; written determinations**

Sec. 9. (a) A state officer, an employee, or a special state appointee may not participate in any decision or vote, or matter relating to that 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 member, 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 ethics officer in writing and do either of the following:
- (1) 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:
    - (A) 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
    - (B) 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.
  - (2) File a written disclosure statement with the commission that:
    - (A) details the conflict of interest;
    - (B) describes and affirms the implementation of a screen established by the ethics officer;
    - (C) is signed by both:
      - (i) the state officer, employee, or special state appointee who identifies the potential conflict of interest; and
      - (ii) the agency ethics officer;
    - (D) includes a copy of the disclosure provided to the appointing authority; and
    - (E) is filed not later than seven (7) days after the conduct that gives rise to the conflict.
- A written disclosure filed under this subdivision shall be posted on the inspector general's Internet web site.
- (c) A written determination under subsection (b)(1)(B) 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)(1)(B) shall be filed with the appointing authority.

#### **42 IAC 1-5-7 Conflicts of Interest; contracts**

Authority: IC 4-2-7-3; IC 4-2-7-5

Affected: IC 4-2-6-9; IC 4-2-7

Sec. 7. Contracting restrictions are set forth in IC 4-2-6-10.5.

#### **IC 4-2-6-10.5**

#### **Prohibition against financial interest in contract; exceptions; disclosure statement; penalty for failure to file statement**

Sec. 10.5. (a) Subject to subsection (b), a state officer, an employee, or a special state appointee may not knowingly have a financial interest in a contract made by an agency.

(b) The prohibition in subsection (a) does not apply to a state officer, an employee, or a special state appointee who:

(1) does not participate in or have contracting responsibility for the contracting agency; and

(2) files a written statement with the inspector general before the state officer, employee, or special state appointee executes the contract with the state agency.

(c) A statement filed under subsection (b)(2) must include the following for each contract:

(1) An affirmation that the state officer, employee, or special state appointee does not participate in or have contracting responsibility for the contracting agency.

(2) An affirmation that the contract: (A) was made after public notice and, if applicable, through competitive bidding; or (B) was not subject to notice and bidding requirements and the basis for that conclusion.

(3) A statement making full disclosure of all related financial interests in the contract.

(4) A statement indicating that the contract can be performed without compromising the performance of the official duties and responsibilities of the state officer, employee, or special state appointee.

(5) In the case of a contract for professional services, an affirmation by the appointing authority of the contracting agency that no other state officer, employee, or special state appointee of that agency is available to perform those services as part of the regular duties of the state officer, employee, or special state appointee. A state officer, employee, or special state appointee may file an amended statement upon discovery of additional information required to be reported.

(d) A state officer, employee, or special state appointee who:

(1) fails to file a statement required by rule or this section; or

(2) files a deficient statement; before the contract start date is, upon a majority vote of the commission, subject to a civil penalty of not more than ten dollars (\$10) for each day the statement remains delinquent or deficient. The maximum penalty under this subsection is one thousand dollars (\$1,000).

## **ANALYSIS**

### *Conflict of interests – Decisions and votes*

IC 4-2-6-9 prohibits a state officer, state employee, or special state appointee from participating in any decision or vote, or matter relating to that decision or vote, if the individual has knowledge that various persons may have a “financial interest” in the outcome of the matter, including the individual or a business organization in which they are serving as an officer, director, a member, a trustee, a partner, or an employee. The term financial interest as defined in IC 4-2-6-1(a)(11) includes an interest involving property, services, or a transaction between an agency and any person. 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, a conflict of interests would arise for an IEDC Board member or employee if they were to participate in a decision or vote, or matter relating to such decision or vote, in which the member or employee, a member of their immediate family, or a business organization in which they are serving as an officer, a director, a member, a trustee, a partner, or an employee would have a financial interest in the outcome of the matter.

For example, it is possible that a company that a Board member or an employee's immediate family member is employed by would apply for a specific incentive program administered by the IEDC. The Board member or employee would be prohibited from participating in any decision or vote, or matter related to such decision or vote, in that matter because the employer or immediate family member would have a financial interest in whether the incentive program is approved or not.

IC 4-2-6-9(b) requires that an employee or special state appointee who identifies a potential conflict of interests shall notify the person's appointing authority and ethics officer in writing and either (1) 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; or (2) file a written disclosure statement with the Commission that details the conflict of interests and describes and affirms the implementation of a screen established by the ethics officer.

Under the IEDC's 2016 policy, IEDC Board members and employees would be required to file and continually update a conflict of interest disclosure form with the IEDC's Ethics Officer, which is then logged in the IEDC's Conflict of Interest Management System to proactively identify any potential conflicts of interest. The Board members and employees would also be required to file the disclosure form with the Commission. The 2016 policy outlines a detailed conflicts of interests screening process based on the disclosure form that would be implemented whenever a Board member or employee has an identified potential conflict of interest. This process includes ensuring the Board member or employee is screened from the matters in which they have a potential conflict of interest and that a disclosure is made in accordance with the requirements under IC 4-2-6-9(b).

However, in cases in which the filing of a public disclosure to the Commission would have the possibility of revealing the identity of an economic development prospect still in negotiations with the State, the IEDC proposes that the filing of the disclosure be deferred until such risk has ended (e.g., when the project has been announced). In these cases, the screening and other safeguards required by the 2016 Policy would be implemented without requiring the Board member or employee to request an advisory opinion from the Commission or file the Conflicts of Interest-Decisions and Voting Ethics Disclosure Statement form until the risk of revealing information on negotiations is ended. At that time, the Ethics Officer would be required to file a report with the Commission that a potential conflict of interest was identified and that the required screen was implemented.

This proposed policy and its procedures are an extension of the screening procedures that the Commission approved in Advisory Opinion 13-I-33 to allow the Board members to file and continually update a conflict of interest disclosure form with the Commission. Under the



proposed policy, when a potential conflict of interest arises, IEDC will implement the proposed screen without the Board members having to request an advisory opinion from the Commission on a case-by-case basis so long as the IEDC reports to the Commission that a potential conflict was identified and that the screen was implemented after negotiations become public.

The Commission based this decision on the unique statutory protections afforded to the IEDC's negotiations. The IEDC is once again requesting a departure from the disclosure requirements for IEDC Board members and also for IEDC employees under IC 4-2-6-9(b) involved in economic development project negotiations. Under the current language of this statute, these individuals must request an advisory opinion or file the conflict of interests disclosure form when a potential conflict is identified. The request for a formal advisory opinion or disclosure form must detail the conflict of interests and the individual's financial interest in the matter. The individual would then have to attend a public Commission meeting to receive the formal advisory opinion or, in the case of the disclosure form option, the form would be posted on the OIG website. Making such a public disclosure via either option would highlight the identity of a prospect company while it is still in negotiations with the State. This public disclosure, the IEDC claims, before a prospect company has made a final determination to expand in or come to Indiana, could have a negative impact on the State's job attraction efforts.

Given the statutory protections afforded to the IEDC's negotiations, along with the IEDC's robust internal screening procedures, the Commission finds that the IEDC's proposed method of handling potential conflicts of interests for its Board members and employees is appropriate. Once the negotiations conclude, however, the IEDC Board member or employee must follow all of the requirements in IC 4-2-6-9(b) to publicly disclose any potential conflict of interests.

#### *Conflict of interests – contracts*

The IEDC is also requesting that the Commission approve a departure from the disclosure statement requirements in IC 4-2-6-10.5 given the statutory protections afforded to the IEDC's negotiations.

IC 4-2-6-10.5 prohibits a state officer, employee, or special state appointee from knowingly having a financial interest in a contract made by a state agency. This prohibition does not apply to an individual who (1) does not participate in or have contracting responsibility for the contracting agency; and (2) files a written statement with the Inspector General *before* the individual executes the contract with the state agency. [emphasis added]

The IEDC wishes to extend the process for handling conflicts of interests as described in the 2016 Policy to individuals who identify a financial interest in a contract with a state agency under IC 4-2-6-10.5. Accordingly, the IEDC proposes implementing all of the screening safeguards described in the 2016 Policy and deferring the public disclosure of the financial interest - when there is a possibility of revealing the identity of an economic development project in negotiations with the State - until such risk has ended.

Given the statutory protections afforded to the IEDC's negotiations, along with the IEDC's robust internal screening procedures, the Commission finds that the IEDC's proposed method of

handling financial interests in state contracts for its Board members and employees is appropriate. Once the negotiations conclude, however, the IEDC Board member or employee must follow all of the requirements in IC 4-2-6-10.5 to publicly disclose any financial interests in a state contract.

### **CONCLUSION**

The Commission finds that a conflict of interests could arise for the IEDC Board members and employees under IC 4-2-6-9 and IC 4-2-6-10.5 in certain situations arising from financial interests of the Board members and employees. Given the statutory protections afforded to the IEDC's negotiations, the Commission finds it appropriate for the Board members and employees to follow the IEDC's updated Confidentiality & Conflicts of Interest Policy. This policy will ensure that Board members and employees file and continually update a conflict of interest disclosure form with the Commission and that the IEDC will implement the proposed screening mechanism when a potential conflict of interest arises to ensure that Board members and employees do not have a conflict of interests under the Code of Ethics. Once IEDC negotiations conclude, the Board members and employees who were screened from the matters must file the appropriate conflict of interest disclosure forms.

Respectfully Submitted,

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