

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

The General Counsel for the Governor's Office was offered employment with a local law firm to chair its environmental practice group. SEC determined the revolving door restrictions in the Postemployment rule would not apply to Counsel's employment opportunity. SEC further found Counsel's involvement in two of the four particular matters identified amounted to personal and substantial participation and would fall within the prohibitions of the particular matter restriction.

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The Indiana State Ethics Commission ("Commission") issues the following advisory opinion concerning the State Code of Ethics pursuant to I.C. 4-2-6-4(b)(1).

BACKGROUND

A state employee is the former General Counsel for Governor Mitch Daniels. The former General Counsel is currently employed with a local law firm (the "Firm"). He is a partner and chair of the Firm's environmental practice group.

The former General Counsel was employed in the Office of Governor Daniels from October 2007 through December 2011. Prior to becoming Governor Daniels' General Counsel, the state employee served as a policy director for environment, natural resources, and eventually, energy. As a policy director, the former General Counsel served as the Governor's liaison with the Indiana Department of Environmental Management, Department of Natural Resources, Board of Animal Health, State Chemist, Department of Agriculture, the Indiana Utility Regulatory Commission, the Office of the Utility Consumer Counselor and the Office of Energy Development. He served as a resource for agencies needing guidance on legislative and regulatory proposals and considering the adoption or implementation of rules, administrative policies, or practices of general application.

In early 2010, the state employee became Governor Daniels' General Counsel. In addition to his policy director duties, the former General Counsel was given signatory authority over land transfers and tort claims settlements when he became General Counsel. He also made recommendations on judicial selections for trial court vacancies and for appellate jurists based on the panels of nominees submitted by the Judicial Nominating Committee. In this capacity, the former General Counsel also reviewed proposed regulations and legislation for legal issues and monitored legal proceedings against the State where the State was represented by the Attorney General's office and sometimes outside legal counsel. The former General Counsel never negotiated or administered a contract with the Firm, nor did he ever make a licensing or regulatory decision that applied to the Firm.

The former General Counsel has identified the following matters as matters in which he was personally and substantially involved in during his tenure with the State:

- Great Lakes-Saint Lawrence River Basin Water Resources Compact ("Compact") – As a Commissioner of the Great Lakes Commission, the former General Counsel facilitated

the final negotiation and legislative passage of the Compact. The Compact is a legislative enactment of general applicability that prevents the depletion of the water resources of the Great Lakes Basin.

- American Recovery and Reinvestment Act (“ARRA”) – The Office of Energy Development and the Indiana Economic Development Corporation received project proposals to be funded by ARRA dollars. These offices scored and awarded projects (“ARRA Projects”) according to the scoring. While the former General Counsel did not do any scoring and never voted on grant determinations, he did review proposals and discussed general policy guidance with members of the scoring teams to ensure the energy policies set forth in the Governor’s Hoosier Homegrown Energy Plan were met. Grant decisions were made and the qualifying projects have been funded and spent in accordance with federal law.
- State of Indiana v. International Business Machines Corporation (“IBM”), Cause No. 49D1-1005-PL-021451 (“IBM Litigation”). Following unacceptable results of a contract to improve Indiana’s welfare administrative services, the State engaged IBM in litigation over the termination of its contract. The State, through the Family and Social Services Administration, is in active litigation with a trial date scheduled for early 2012. As General Counsel, the state employee was substantially involved with the oversight and legal strategy of the outside law firm hired to litigate the matter. The Firm does not represent IBM.
- Indiana State Fair (“ISF”) – On August 13, 2011 a structural collapse injured a number of people attending a concert at the ISF. The former General Counsel was personally and substantially involved with the aftermath response and information gathering necessary to begin the recovery from the tragedy. Numerous public records requests were submitted and information which may become part of litigation discovery needed attention and response. The former General Counsel participated in the establishment of a relief fund and worked with the Attorney General’s office to pay out the tort claims funds without litigation. The State’s role in litigation is complete.
- Substitute Natural Gas – a project which was first pitched in 2006 became a signed contract (“SNG Contract”) in 2011 and is something in which the former General Counsel was personally and substantially involved. The Indiana Finance Authority signed a contract with Indiana Gasification to purchase natural gas derived from coal for the next thirty years. Pursuant to Indiana law, the contract was submitted to the Indiana Utility Regulatory Commission (“IURC”) for approval. The IURC approved the contract in November 2011. One of the three primary gas utilities has fought the project and has indicated that it will appeal the approval by the IURC.

ISSUE

What rules in the Code of Ethics apply to the former General Counsel’s employment with the Firm? What post-employment restrictions under I.C. 4-2-6-11, if any, is the former General Counsel subject to?

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 General Counsel's intended employment with the Firm invokes consideration of the provisions of the Code of Ethics pertaining to confidential information and post-employment. The application of each provision to the former General Counsel is analyzed below.

A. Confidential Information

I.C. 4-2-6-6 prohibits the former General Counsel 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. In this case, the former General Counsel has already accepted the Firm's employment offer based upon advice provided to him in an informal advisory opinion. Accordingly, the Commission can only advise the former General Counsel that he should be mindful of I.C. 4-2-6-6 during the course of his employment with the Firm to ensure he does not accept compensation from any transaction or investment made as a result of material information of a confidential nature.

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, would prevent the former General Counsel from accepting employment for 365 days from the date that he leaves state government under various circumstances. In this case, the former General Counsel has already accepted the Firm’s employment offer based upon advice provided to him in an informal advisory opinion. Accordingly, this opinion does not address the propriety of the former General Counsel’s acceptance of the employment opportunity with the Firm. This opinion only addresses the post-employment restrictions that may apply to the former General Counsel in his current employment with the Firm.

First, the former General Counsel is prohibited from accepting employment as a lobbyist for the entirety of the cooling off period. Per I.C. 4-2-6-1(b) and I.C. 4-2-7-1(5), this restriction applies to lobbying of the executive branch only. It does not include the legislative branch. The former General Counsel indicates that his interaction with the executive branch of government may consist of representing clients in certain proceedings conducted under I.C. 4-21.5, and the like. Representation of clients in such proceedings does not appear to be considered executive branch lobbying.¹ Accordingly, so long as the former General Counsel does not lobby the executive branch, he would not be in violation of this restriction.

Second, the former General Counsel may be subject to the post-employment rule’s “particular matter” prohibition in his employment with the Firm. This restriction prevents him from working 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 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. The particular matter restriction is not limited to 365 days but instead extends for the entire life of the matter at issue.

In this case, the former General Counsel has identified four major matters that he “personally and substantially” participated in as a state employee. The first matter, the Compact, would not qualify as a particular matter because it is a legislative matter which is expressly excluded from the definition of “particular matter”. Accordingly, the

¹ **25 IAC 6-1-1 Definitions**

Sec. 1. The following definitions apply throughout this article:

(8) "Executive branch lobbyist" means any individual who is employed and receives payment, or who contracts for financial consideration, exceeding one thousand dollars (\$1,000) in any registration year, for the purpose of engaging in executive branch lobbying activity. The term does not include any of the following:

...

(B) An attorney or any other individual who represents a client in any proceeding conducted under IC 4-21.5, in a comparable proceeding conducted by an agency exempted by IC 4-21.5-2-4, or in a proceeding described in IC 4-21.5-2-6.

particular matter restriction does not apply to the Compact and the former General Counsel would not be prohibited from ever working on the Compact.

The second major matter identified by the former General Counsel relates to the ARRA Projects. Grant agreements are considered contracts for purposes of ethics. Accordingly, the grant agreements associated with the ARRA Projects are “particular matters” subject to the restriction. In this case, however, the former General Counsel indicates that he did not do any scoring or voted on the individual grant determinations, but he did review proposals and discussed general policy guidance with members of the scoring team to ensure certain energy policies were met. The Commission finds that the former General Counsel’s involvement was not personal and substantial. Accordingly, the particular matter restriction does not apply to the ARRA Projects and the former General Counsel would not be prohibited from ever working on the ARRA Projects.

Third, the IBM Litigation is a lawsuit and therefore a “particular matter.” The Commission finds that the former General Counsel was personally and substantially involved in that matter during his employment with the State. Specifically, he was involved with the oversight and legal strategy of the outside law firm hired to litigate the matter. Accordingly, the “particular matter” restriction applies and the former General Counsel would be prohibited from representing or assisting a person in this matter for the life of the matter.

Regarding the ISF matters, the situation would qualify as a particular matter as a claim. The former General Counsel indicates that he was personally and substantially involved in the establishment of the relief fund and subsequent payment of the tort claims funds to victims. Accordingly, the Commission finds that the restriction applies and the former General Counsel would be prohibited from representing or assisting a person in this matter for the life of the matter.

Finally, it the SNG Contract qualifies as a particular matter since it is a contract. However, the former General Counsel indicates that he no longer anticipates working on this matter, and it is, accordingly, no longer at issue.

CONCLUSION

Subject to the foregoing analysis, the former General Counsel’s continued employment with the Firm would not violate I.C. 4-2-6-6 or the post-employment restrictions in I.C. 4-2-6-11(b)(1) or (c).