

**42 IAC 1-5-5 Outside employment (IC 4-2-6-5.5)**  
**42 IAC 1-5-6 Conflicts of interest; decisions and voting (IC 4-2-6-9)**  
**42 IAC 1-5-10 Benefiting from confidential information**  
**42 IAC 1-5-11 Divulging confidential information**  
**42 IAC 1-5-12 Use of state property**  
**42 IAC 1-5-13 Ghost employment**

The prospective Director of the Division of Historic Preservation with DNR previously operated an archaeological firm in Indiana. The Director agreed to cease firm operations in the State upon his acceptance of employment with DNR but wanted to ensure the firm would be permitted to operate outside Indiana and that the proposed screen on any matters his firm had previously worked on complied with the Code of Ethics. SEC found the arrangement proposed by the Director and DNR was sufficient to avoid any potential conflicts of interest.

September 2013  
No. 13-I-35

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 serves as the Ethics Officer for the Department of Natural Resources (“DNR”). A owner and Vice-President of Operations of an archaeological consulting firm has accepted DNR’s offer to take over as the agency’s Director of the Division of Historic Preservation and Archaeology (“Division”). The consulting firm that provides business expertise in assisting clients with complying with state and federal archaeological guidelines. In his position with the consulting firm, the owner is responsible for the daily operation of the consulting firm’s archaeology program including submitting client archaeology plans to the Division for approval and working with the Division should any issues arise.

The owner has voluntarily agreed to cease operations within Indiana to accept the Division Director’s position and is finishing up all active archaeological plans filed with the State. All parties anticipate that any current consulting firm projects involving the State will be completed at the time the owner begins working for DNR. In the event that this is not the case, however, DNR will screen the owner from any involvement in the project. Specifically, the owner’s immediate supervisor, DNR Deputy Director of Regulatory Affairs, will assume the owner’s duties in such a scenario. All Division employees will also be made aware of the processes in place regarding the screen to ensure that the owner is not involved in any of the consulting firm’s projects. Moreover, in the unlikely event a completed consulting firm project with the State is reopened, the owner will again be screened off from any involvement, and the Deputy Director will assume the owner’s duties. The owner is aware of this proposed screen, and the consulting firm has agreed to cease all operations in Indiana upon completion of any pending projects or involvement in any reopened projects.

**ISSUES**

Does the proposed arrangement between DNR and the owner regarding the consulting firm create any issues under the Code of Ethics?

## 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**

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

Affected: IC 4-2-7

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**

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

Affected: IC 4-2-7

Sec. 11. A state officer, employee, or special state appointee shall not divulge information of a confidential nature except as permitted by law.

#### **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 when 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.

In this case, the owner has agreed to cease operations within Indiana and is finishing up all active archeological plans filed with the State. In addition, the consulting firm has agreed to cease all future operations in Indiana upon completion of pending projects. The DNR Ethics Officer is

aware of and has approved this arrangement. Based on this information, it does not appear as though the owner's involvement with the consulting firm would create any conflict of interest under IC 4-2-6-5.5.

#### *B. Conflict of interests*

A further conflict of interest may arise for a state employee under IC 4-2-6-9 if he knowingly participates in a decision or vote in which certain persons have a financial interest in the outcome of the matter, including the employee himself as well as a business organization in which he serves as an officer, a director, a trustee, a partner or an employee. "Financial interest" is defined in IC 4-2-6-1(a)(11) as an interest in a purchase, sale, lease, contract, option, or other transaction between an agency and any person or an interest involving property or services.

An employee who identifies such a potential conflict of interest is required to notify his appointing authority and seek an advisory opinion from the Commission to determine whether a) procedures should be implemented to screen the employee from involvement in the matter or b) the interest is not so substantial that the Commission considers it likely to affect the integrity of the services the state expects from the employee.

Although all of the parties expect any consulting firm projects with the State to be completed by the time the owner begins his employment with DNR, there is the potential that some of those projects may remain unfinished or that a previously completed project may be reopened. In either such instance, DNR has proposed a screen whereby the owner's immediate supervisor, the Deputy Director, will assume the owner's responsibilities and DNR staff will be informed of the screening process to ensure that the owner is not involved in the consulting firm project. So long as the DNR's appointing authority has been notified of the screening procedure, the owner would not be in violation of this rule.

#### *C. Confidential information*

Pursuant to the ethics rules on confidential information, state employees are prohibited from benefitting from, permitting another person to benefit from, or even divulging information of a confidential nature, as defined in IC 4-2-6-1(a)(12).

Given that the owner will be involved in the same professional field in his position as the Division Director at DNR as he was with the consulting firm, he may encounter information of a confidential nature that would otherwise benefit the consulting firm. In that event, the owner would need to ensure he complies with these rules on benefitting from and divulging confidential information.

#### *D. Use of state property and Ghost employment*

42 IAC 1-5-12 prohibits the owner 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 owner 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. So long as the owner observes these provisions, should he continue to be involved with the consulting firm in any business the company engages in outside of the state, he would not be in violation of these rules.

### **CONCLUSION**

Subject to the foregoing analysis and the implementation of the proposed screen if necessary, the employment arrangement between DNR and the owner would not be in violation of the Code.