

**MINUTES OF THE MEETING OF
THE INDIANA STATE ETHICS COMMISSION
January 12, 2017**

I. Call to Order

A regular meeting of the State Ethics Commission (“Commission”) was called to order at 10:00 a.m. Members present included James N. Clevenger, Chairperson; Priscilla Keith (by telephone); Peter Nugent (arrived late); and Daryl Yost. Office of Inspector General staff present included Lori Torres, Inspector General; Jennifer Cooper, Ethics Director; Stephanie Mullaney, Compliance Officer; Tiffany Mulligan, Chief Legal Counsel; and Cindy Scruggs, Director of Administration.

Others present were Rachel Russell, Deputy Director and Ethics Officer, Indiana State Department of Health; Deanna Smith, Staff Attorney, Indiana State Department of Health; Mark Wuellner, Ethics Officer, Indiana Office of Rural and Community Affairs; Geoff Schomacker, Deputy Director, Indiana Office of Community and Rural Affairs; Bill Konyha, Executive Director; Indiana Office of Community and Rural Affairs; Sarah Kamhi, Deputy General Counsel, Indiana Economic Development Corporation; Chris Cotterill, General Counsel & Ethics Officer, Indiana Economic Development Corporation; Mark Tidd, Ethics Officer, Indiana Department of Transportation; Ryan Gallagher, Deputy Commissioner of Operations, Indiana Department of Transportation; Joe McGuinness, Commissioner, Indiana Department of Transportation; Erica Sullivan, Ethics Officer, Department of Child Services; Dan Brumfield, Regional Manager, Department of Child Services; Brandye Hendrickson, Director of State Personnel/Commissioner, Indiana Department of Transportation; Deborah Frye, Director, Professional Licensing Agency; Michael Minglin, Ethics Officer, Professional Licensing Agency; Michael Brady, Director of INSPECT, Professional Licensing Agency; Jeff Gill, General Counsel, Department of Workforce Development; Ian Gunn, Business Analyst, Department of Workforce Development; Steven Braun, Commissioner, Department of Workforce Development; Josh Wakefield, Department of Workforce Development; and Terrie Daniel, Deputy Commissioner, Department of Administration.

II. Adoption of Agenda and Approval of Minutes

Chairman Clevenger stated that there was a change to the agenda as the Department of Workforce Development requested to be moved from being item number six on the agenda to item number four. Commissioner Yost moved to adopt the agenda with this change and Commissioner Keith seconded the motion which passed (3-0). Commissioner Keith moved to approve the minutes of the December 2, 2016 Commission meeting and Commissioner Yost seconded the motion which passed (3-0).

III. Consideration of Post-Employment Waiver

Ryan Gallagher, Deputy Commissioner of Operations
Brandye Hendrickson, Former Commissioner
Joe McGuinness, current Commissioner
Mark Tidd, Ethics Officer
Indiana Department of Transportation

Mr. Tidd and former INDOT Commissioner Hendrickson presented a post-employment waiver for Ryan Gallagher, Deputy Commissioner of Operations, Indiana Department of Transportation. Mr. Gallagher presented his reasons for requesting the waiver and Mr. Tidd and former Commissioner Hendrickson provided a summary of the waiver highlighting INDOT's reasons for presenting the waiver to the Commission and answered the Commission members' questions on the matter.

After the Commission discussed the matter, Commissioner Yost moved to approve the Post-Employment waiver. Commissioner Keith seconded the motion which passed (3-0).

IV. Consideration of Post-Employment Waiver

Ian Gunn, Business Analyst
Steve Braun, Commissioner
Jeff Gill, Ethics Officer
Indiana Department of Workforce Development

Commissioner Braun and Mr. Gill provided a summary of the waiver highlighting DWD's reasons for presenting the waiver to the Commission and answered the Commission members' questions on the matter.

After the Commission discussed the matter, Commissioner Keith moved to approve the Post-Employment waiver. Commissioner Yost seconded the motion which passed (3-0).

V. Consideration of Post-Employment Waiver

Michael Brady, Director of INSPECT
Deborah Frye, Executive Director
Michael Minglin, Ethics Officer
Professional Licensing Agency

Executive Director Frye and Mr. Minglin provided a summary of the waiver highlighting PLA's reasons for presenting the waiver to the Commission and answered the Commission members' questions on the matter.

After the Commission discussed the matter, Commissioner Yost moved to approve the Post-Employment waiver. Commissioner Keith seconded the motion which passed (3-0).

VI. Consideration of Post-Employment Waiver

Geoff Schomacker, Deputy Director
William Konya, Executive Director
Mark Wuellner, Ethics Officer
Indiana Office of Rural and Community Affairs

Mr. Wuellner and Executive Director Konya provided a summary of the waiver highlighting OCRA's reasons for presenting the waiver to the Commission and answered the Commission members' questions on the matter.

After the Commission discussed the matter, Commissioner Keith moved to approve the Post-Employment waiver. Commissioner Yost seconded the motion which passed (3-0).

The Commission took a short break at 10:52 a.m. The meeting resumed at 11:05 a.m.

VII. Request for Formal Advisory Opinion

17-I-1 Dan Brumfield, Regional Manager
Erica Sullivan, Ethics Officer
Indiana Department of Child Services

Erica Sullivan stated that Daniel Brumfield is a state employee at the Indiana Department of Child Services (DCS). Mr. Brumfield began working at DCS in March 2002, where he worked in Marion County as a Family Case Manager (FCM). He was later promoted to FCM Supervisor and then to Division Manager. He became the Regional Manager of Region 11 (Hamilton, Hancock, Madison, and Tipton counties) in February 2013. In this position, Mr. Brumfield oversees the daily operations of the four local DCS offices in each county. As Regional Manager, Mr. Brumfield also works to ensure that each local office follows DCS policy, to help build and sustain relationships with various stakeholders in the local communities in his region, and to serve as the conduit between the DCS Central Office and his local offices. Although he typically works directly with other DCS staff members, he also works with foster parents, bio-parents, community stakeholders, and provider agencies to help navigate challenges that arise with children and families involved with DCS. He also works with these various individuals, groups, and providers through his role on the Regional Services Council (RSC) in Region 11.

The RSC is comprised of Mr. Brumfield, his Region's four local office directors, two foster parents, a Court Appointed Special Advocate (CASA), a Juvenile Prosecutor, two members from Juvenile Probation and two DCS FCMs. The RSC is tasked with identifying community-based service needs within the region for families who are involved with DCS as well as preventative services for families who are experiencing challenges, but who are not yet involved with DCS. Mr. Brumfield and the RSC work to identify potential service gaps in the community. Once the RSC identifies community-based service needs, DCS issues a Request for Proposal (RFP) to search for and solicit vendors to provide those services. These RFPs are developed by the DCS Central Office and scored at the regional or local level by DCS staff, including Mr. Brumfield, and the non-DCS staff members of the RSC provide input. A DCS Service Specialist guides the local staff in the scoring process, ensuring that the local staff is reviewing proposals based on how it relates to the actual RFP. After scoring is complete, the RSC identifies the number of providers needed in each service category and recommends the providers with the highest scores to the DCS Service Specialist so that the DCS Central Office can work on contract negotiations. The DCS Central Office finishes contract negotiations and decides which entities receive contracts based on their proposals sent in response to the RFP.

In addition to community-based services, the RSC also works with a "Community Partner" agency to provide prevention services to families. In Region 11, the Community Partner is the Indiana Children's Bureau (the Bureau). DCS works with the Bureau to identify and provide prevention services for families who are not yet involved with DCS. Similar to community-based services, the RSC identifies potential prevention service needs for the region. However, the Bureau, as the Region's Community Partner, is the one who develops and puts out the RFP for the prevention services. The DCS local offices score the prevention RFPs similarly to how they score the community-based RFPs, and the RSC then makes a recommendation to the Bureau regarding which services should be added. The Bureau then works with the DCS Central Office to determine if the proposed services and providers meet the prevention criteria, and then the Bureau and DCS Central Office begin the contract negotiation process and determines which providers will receive contracts. The Bureau and DCS have the discretion to turn down a recommendation made by the RSC. The Bureau then subcontracts directly with the chosen providers for these prevention services.

Mr. Brumfield is submitting this request because, in November 2016, he was offered a position with the Bureau to be the Vice President of four Community Partner Child Safety Programs outside of Region 11 (Regions 8, 9, 10, and 12). The Bureau serves as the Community Partner in these four regions performing prevention services. Mr. Brumfield, as the Regional Manager and a member of the RSC, has worked with the Bureau regarding both community-based and preventative services contracts. He has participated in scoring teams for RFPs for various types of community-based services in his region. The Bureau often responds with proposals to provide services for several types of services, and Mr. Brumfield has been a part of the team to review these proposals. He has also been involved in scoring the preventative services RFPs that the Bureau administers.

The advisory opinion stated the following analysis:

A. Confidential Information

IC 4-2-6-6 prohibits Mr. Brumfield from accepting any compensation from any employment, transaction, or investment that was entered into or made as a result of material information of a confidential nature. Mr. Brumfield confirmed that he would not be required to utilize any confidential information in his prospective employment with the Bureau. So long as any compensation Mr. Brumfield receives does not result from confidential information, his potential employment with the Bureau would not violate IC 4-2-6-6.

B. Conflicts of Interest

IC 4-2-6-9(a)(1) prohibits Mr. Brumfield from participating in any decision or vote, or matter related to that decision or vote, if he has a financial interest in the outcome of the matter. Similarly, IC 4-2-6-9(a)(4) prohibits him from participating in any decision or vote, or matter related to that decision or vote, in which a person or organization with whom he is negotiating or has an arrangement concerning prospective employment has a financial interest in the outcome of the matter. The definition of financial interest in IC 4-2-6-1(a)(11) includes, “an interest arising from employment or prospective employment for which negotiations have begun.”

In this case, employment negotiations have already begun, as Mr. Brumfield indicates that the Bureau offered him the position in November 2016. Accordingly, Mr. Brumfield would be prohibited from participating in any decision or vote, or matter related to a decision or vote, in which he, by virtue of his employment negotiations with the Bureau, or the Bureau itself, would have a financial interest in the outcome of the matter.

Mr. Brumfield stated that he has not participated in any votes or decisions, or matters relating to such decisions or votes, in matters in which the Bureau would have a financial interest since employment negotiations have begun. Further, he stated that his current job responsibilities do not include participating in such matters.

Mr. Brumfield must ensure that he does not participate in any decisions or votes, or matters relating to any such decisions or votes, in which he or the Bureau has a financial interest in the outcome of the matter for the remainder of his state employment. Further, if he identifies a potential conflict of interests, he must follow the requirements in IC 4-2-6-9(b) to avoid violating this rule.

C. Post-Employment

IC 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 or revolving door period, prevents Mr. Brumfield from accepting employment from an employer for 365 days from the date that he left state employment under various circumstances. Employer is defined in IC 4-2-6-1(a)(10) as any person from whom a state employee receives compensation.

First, Mr. Brumfield is prohibited from accepting employment as a lobbyist for the entirety of the cooling off period. A lobbyist is defined as an individual who seeks to influence decision making of an agency and who is registered as an executive branch lobbyist under the rules adopted by the Indiana Department of Administration (IDOA). Mr. Brumfield provided that he does not anticipate engaging in any lobbying activities in his prospective employment with the Bureau. To the extent that Mr. Brumfield does not engage in executive branch lobbying for one year after leaving state employment, his

intended employment with the Bureau would not violate this provision of the post-employment rule.

Second, Mr. Brumfield is prohibited from accepting employment for 365 days from the last day of his state employment from an employer with whom 1) he engaged in the negotiation or administration of a contract on behalf of a state agency and 2) was in a position to make a discretionary decision affecting the outcome of the negotiation or nature of the administration of the contract.

Mr. Brumfield serves on the Regional Services Council (RSC) that helps identify community-based and preventative service needs throughout his community. As part of the RSC, Mr. Brumfield, along with other committee members, participate in scoring RFPs that are developed by the DCS Central Office to address these needs. After scoring is complete, the RSC identifies the number of providers needed in each service category and recommends the providers with the highest scores to the DCS Service Specialist so that the DCS Central Office can work on contract negotiations. The DCS Central Office finishes contract negotiations and decides which entities receive contracts based on their proposals sent in response to the RFP.

The Commission finds that Mr. Brumfield's participation in scoring the RFPs and making recommendations to the DCS Central Office as part of the RSC does not amount to making a discretionary decision in the negotiation of a contract. Mr. Brumfield is one of several committee members on the RSC and the committee's recommendations are forwarded to the DCS Central Office for decision-making regarding contracts. Specifically, the Central Office considers the RSC's recommendations, but ultimately makes the decision whether to award a contract to any providers and negotiates all contracts. Accordingly, the Commission finds that Mr. Brumfield is not prohibited under this provision from accepting employment with the Bureau immediately upon leaving state employment.

Third, Mr. Brumfield is prohibited from accepting employment for 365 days from the last day of his state employment from an employer for whom he made a regulatory or licensing decision that directly applied to the employer or its parent or subsidiary. Nothing in the information provided indicates that Mr. Brumfield ever made any regulatory or licensing decisions that directly applied to the Bureau at any time during his state employment.

The Commission finds that this provision does not apply to Mr. Brumfield because he has not made any regulatory or licensing decisions that applied to the Bureau as a DCS employee. Consequently, he is not prohibited under this provision from accepting employment with the Bureau immediately upon leaving state employment.

Fourth, Mr. Brumfield is prohibited from accepting employment from an employer if the circumstances surrounding the hire suggest the employer's purpose is to influence him in his official capacity as a state employee. The information presented to the Commission does not suggest that the Bureau extended an offer of employment to Mr. Brumfield in an attempt to influence him in his capacity as a state employee. Accordingly, the

Commission finds that this restriction would not apply to his intended employment opportunity with the Bureau.

Finally, Mr. Brumfield is subject to the post-employment rule's "particular matter" prohibition in his prospective post-employment. This restriction prevents him from representing or assisting a person 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 particular matter restriction is not limited to 365 days but instead extends for the entire life of the matter at issue, which may be indefinite.

Based on the information provided, Mr. Brumfield may have personally and substantially participated in various contracts, determinations, and business transactions. However, Mr. Brumfield does not expect to work on any of these matters in his prospective employment with the Bureau. Specifically, Mr. Brumfield indicated that his prospective position with the Bureau is in regions 8, 9, 10, and 12, outside of his current region. He indicates that he would not be working on any of the same matters he worked on while serving as Regional Manager of Region 11.

The Commission finds that Mr. Brumfield must ensure compliance with the particular matter restriction and refrain from assisting or representing the Bureau, or any other person, on any of the particular matters listed above that he personally and substantially worked on during his state employment regardless of whether it involved the Bureau.

The Commission found that Mr. Brumfield's post-employment opportunity with the Bureau would not violate the post-employment restrictions found in IC 4-2-6-11.

Commissioner Yost moved to approve the Commission's findings and Commissioner Keith seconded the motion which passed (4-0).

VIII. Request for Formal Advisory Opinion

**17-I-2 Chris Cotterill, General Counsel and Ethics Officer
 Sarah Kamhi, Deputy General Counsel
 Indiana Economic Development Corporation**

Chris Cotterill stated that he is the General Counsel and Ethics Officer for the Indiana Economic Development Corporation ("IEDC"). 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 21st 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 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 Indiana Access to Public Records Act (“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 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. *See* Attachment A (hereinafter “the 2005 Policy”).

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. *See* Attachment B. Following a

hearing on August 8, 2013, the Commission approved the request. *See* Attachment C. 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.

Mr. Cotterill 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. (An example of a report filed by the IEDC is included in Attachment D.)

Mr. Cotterill 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. *See* Attachment E (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. Mr. Cotterill 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). *See* Attachment E at IV(3)(f) on p. 6.

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.

The advisory opinion stated the following 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.

The Commission found 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.

Commissioner Yost moved to approve the Commission's findings and Commissioner Nugent seconded the motion which passed (4-0).

VI. Director's Report

Ms. Cooper stated that OIG staff issued 27 informal advisory opinions since the last Commission meeting and that the majority of these opinions dealt with the ethics rules on post-employment, conflict of economic interests, gifts, confidential information, ghost employment, and the use of state property. Ms. Cooper advised that the annual Financial Disclosure Statement filing season and the OIG is communicating with all of the required filers to ensure they file by the February 1, 2017, deadline.

VIII. Adjournment

Commissioner Yost moved to adjourn the public meeting of the State Ethics Commission and Commissioner Nugent seconded the motion which passed (4-0).

The Public Meeting adjourned at 11:44 a.m.