

**MINUTES OF THE MEETING OF
THE INDIANA STATE ETHICS COMMISSION
November 18, 2021**

I. Call to Order

A regular meeting of the State Ethics Commission (“Commission”) was called to order at 10:00 a.m. The meeting was held virtually using Microsoft Teams. Commission members present were Katherine Noel, Chair; Corinne Finnerty; Sue Anne Gilroy; Kenneth Todd; and Rafael Sanchez. Staff present included David Cook, Inspector General; Tiffany Mulligan, Chief Legal Counsel, Office of Inspector General; Jennifer Cooper, State Ethics Director; Mark Mader, Staff Attorney, Office of Inspector General; and Nathan Baker, Legal Assistant, Office of Inspector General.

Others present were: Ed Feigenbaum, Indiana Legislative Insight; Jessica Keyes, Ethics Officer, Family and Social Services Administration; Mattheus Mitchel, Compliance and Ethics Specialist, Department of Revenue; Amber Nicole Ying, Director/Special Counsel, Compliance and Ethics and Ethics Officer, Department of Revenue; Alexander Van Gorp, Attorney, Indiana State Department of Health; Kathy Mills, Ethics Officer, Indiana Department of Environmental Management; Jennifer Thuma, Administrative Law Judge and Ethics Officer, Indiana Board of Tax Review; Kristi Shute, Deputy General Counsel and Ethics Officer, Indiana Department of Homeland Security; Beth Green, General Counsel/Ethics Officer, Department of Workforce Development; Kyleen Welling, Chief of Staff and Chief Operating Officer, Indiana Housing and Community Development Authority; David Snell, Ethics Officer, Office of Indiana State Chemist; Randy Koester, Chief of Staff and Ethics Officer, Indiana Department of Correction; Sylvia Watson, General Counsel, Indiana State Library; Justin Bruce, Community Programs Fiscal Monitor, Indiana Housing and Community Development Authority; Ted Cotterill, General Counsel, Management Performance Hub; Larissa Patterson, Graduate Student, Marian University; Sarah Stallings; and McKinzie Mimms.

II. Adoption of Agenda and Approval of Minutes

Commissioner Todd moved to adopt the Agenda and Commissioner Gilroy seconded the motion which passed (4-0).

Commissioner Todd moved to approve the Minutes of the October 14, 2021, Commission Meeting and Commissioner Sanchez seconded the motion which passed (4-0). Commission Chair Noel abstained due to her absence from the October Commission Meeting.

III. Consideration of Waiver of Post-Employment Restrictions for Justin Bruce

S. Kyleen Welling, Chief of Staff and Chief Operating Officer for the Indiana Housing and Community Development Authority presented the proposed Waiver of Post-Employment Restrictions in this matter to the Commission for their approval.

Commissioner Gilroy moved to approve the Waiver, and Commissioner Sanchez seconded the motion which passed (5-0).

IV. Request for Formal Advisory Opinion

2021-FAO-011

Randall Koester, Chief of Staff and Ethics Officer
Indiana Department of Correction

Randy Koester is the Chief of Staff and Ethics Officer for the Indiana Department of Correction (IDOC). He is requesting a formal advisory opinion regarding an opportunity that has been presented to IDOC to determine whether it is permissible under the ethics rules.

Specifically, IDOC has been presented with an offer for staff to receive discounted post-secondary educational opportunities through a contractual agreement with Purdue University Global (Purdue Global). Purdue Global serves as Purdue University's (Purdue) online educational provider.

Purdue Global provides educational opportunities to a large class of students, including niche programs for first responders and those in the military. Purdue Global approached IDOC to develop a specialized educational program for those in corrections that would work closely with IDOC's Staff Development & Training (SD&T) Division to offer specialized curricula towards degrees. Mr. Koester has attached a PowerPoint presentation that Purdue provided that offers more information on this program. Through this program, IDOC employees would be able to leverage their IDOC training to earn college credits and financial savings towards degrees.

To date, IDOC has had no business relationship or contractual relationship with Purdue Global. IDOC wishes to enter into an agreement with Purdue Global so qualified IDOC staff can receive educational credits for specific training they earn through IDOC's SD&T Division and so staff can receive discounted credit, including a 20% discount on credits leading to an undergraduate degree and a 14% discount for credits leading toward a graduate degree (see page 9 of attached PowerPoint presentation). These discounts are also reflected in the exhibit included in the proposed agreement (copy attached).

Mr. Koester provides that IDOC supports this agreement for several reasons. IDOC is currently experiencing unprecedented low staff retention and high staff turnover. Providing these benefits could encourage some staff to stay with the agency to pursue their education. A more highly educated workforce would also benefit the agency generally and potentially prepare more staff for opportunities to promote to higher level positions within the agency.

This opportunity was generally discussed and cleared with the Indiana State Personnel Department (SPD) via IDOC's Human Resources Director. As IDOC proceeded through the formal state contracting process, the Indiana Department of Administration (IDOA) stopped the process and expressed concerns that the proposed agreement might, at least appear, to violate the Gift rule (42 IAC 1-5-1). IDOA also questioned whether Purdue Global would be recognized as a "public institution" for purposes of the exception under 42 IAC 1-5-1(b)(1) for gifts from a public institution.

IDOC sought an informal advisory opinion from the Office of Inspector General (OIG), which the OIG issued on September 20, 2021. IDOC included a copy of the informal advisory opinion in this formal advisory opinion request. The informal advisory opinion concluded that the Gift rule, 42 IAC 1-5-1, would not apply to the educational credits/discounts as these are part of the consideration of the proposed contract agreement between IDOC and Purdue Global and not free “gifts” to IDOC employees.

The informal advisory opinion also stated that the credits/discounts would likely not be considered additional compensation under the Additional compensation rule, 42 IAC 1-5-8; however, the OIG recommended IDOC request a formal determination from the Commission on this question.

IDOC is now seeking a formal advisory opinion from the Commission to determine whether the IDOC employees would be able to accept the education credits.

The analysis stated the following:

A. Gifts and Donor Restrictions

The Gift rule prohibits state employees from knowingly soliciting or accepting any gift, favor, service, entertainment, food, drink, travel expenses or registration fees from:

- 1) a person who has a business relationship with the employee’s agency; or
- 2) a person who is seeking to influence an action by the employee in her official capacity.

The donor restrictions rule mirrors the Gift rule and prohibits those with a business relationship with a state employee’s agency from offering a gift in that same circumstance.

In order for the Gift rule to apply, the “person,” defined in IC 4-2-6-1(a)(13), from whom the gift is being accepted or solicited must either have a “business relationship” with the employee’s agency or must be seeking to influence an action by the employee in her official capacity. “Business relationship” is defined in IC 4-2-6-1(a)(5) to include the “dealings of a person with an agency seeking, obtaining, establishing, maintaining or implementing: (i) a pecuniary interest in a contract or purchase with the agency or (ii) a license or permit requiring the exercise of judgment or discretion by the agency.”

The contract that IDOC plans to enter into with Purdue Global to establish this educational partnership would create a business relationship between Purdue Global and IDOC. This relationship would ordinarily prohibit Purdue Global from providing the proposed educational credit and discounts to IDOC employees under the donor restrictions rule. Likewise, IDOC employees would be prohibited from accepting the credits/discounts provided by Purdue Global under the Gift rule; however, because the credits/discounts are part of the consideration of the contract between Purdue Global and IDOC, they would not be considered gifts to IDOC employees. In other words, Purdue Global is not offering anything additional (or free) to IDOC employees beyond what it is providing IDOC through the contract. Because the Commission finds that the credits/discounts are not gifts, the Commission did not consider whether any of the exceptions to the Gift rule, such as gifts from public agencies or institutions, would apply.

The Commission finds that the educational credits/discounts are part of the consideration of the prospective contract between IDOC and Purdue Global and would not be considered gifts. Accordingly, IDOC employees would be permitted to accept the educational credits/discounts from Purdue Global.

B. Additional compensation

The Additional compensation rule prohibits a state employee from soliciting or accepting compensation for the performance of official duties other than provided for by law.

Mr. Koester provides that IDOC employees may be eligible to receive educational credits for certain trainings they complete through IDOC's SD&T. If completion of these trainings is part of their official state duties, IDOC employees would be prohibited from accepting the educational credits, if they would be considered compensation for completion of these trainings.

"Compensation" is defined in IC 4-2-6-1(a)(7) as any money, thing of value or financial benefit conferred on or received by any person in return for services rendered or for services to be rendered whether by that person or another. The Commission has never interpreted "compensation" in the context of educational credits provided to an employee by their agency through a contract with an educational institution. The Commission has, however, interpreted the term "compensation" when analyzing the application of the Additional compensation rule to the payment of state agency attorneys' professional licensing fees.

In [09-I-14](#), the Commission determined that the payment of state attorneys' dues and continuing legal education fees were not considered "compensation;" thus, the Additional compensation rule did not prohibit state agencies from paying the annual attorney registration fees for attorneys practicing law within their agencies. The Commission rationalized that the payment of dues and fees, although a thing of value, would not necessarily be paid "in return for services rendered". The Commission opined that the term "in return for services" implies a specific quid pro quo, and the fees in these types of situations would be paid to maintain the professional standards of the attorneys involved and not necessarily specifically in return for services rendered by the attorneys.

Consistent with 09-I-14, the Commission finds that Purdue Global would not be providing the educational credits to IDOC employees in return for specific services rendered by IDOC employees. Rather, Purdue Global would provide the credits as part of the educational partnership that IDOC and Purdue Global are pursuing through their upcoming contract. Accordingly, this rule would not prohibit IDOC employees from accepting the educational credits/discounts from Purdue Global.

Commissioner Gilroy moved to approve the Commission's findings, and Commissioner Todd seconded the motion which passed (5-0).

V. Director's Report

State Ethics Director, Jen Cooper, indicated that OIG staff has issued 34 informal advisory opinions since the previous last meeting. The majority of these requests dealt with questions concerning conflicts of interests, use of state property, ghost employment, outside employment, post-employment and gifts.

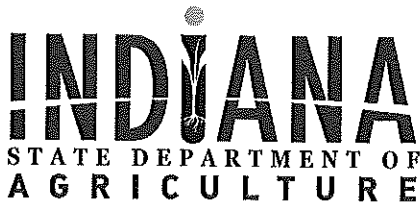
She continued that the 2021 Legal and Ethics Conference was held on November 16, 2021. The Conference was virtual this year and there has been a lot of positive feedback from the attendees.

Finally, Director Cooper noted that the new Ethics Training is still in progress with hopes for a roll-out in early 2022.

VI. Adjournment

Commissioner Finnerty moved to adjourn the public meeting of the State Ethics Commission. Commissioner Todd seconded the motion which passed (5-0).

The public meeting adjourned at 10:21 a.m.



Indiana State Department of Agriculture

Governor Eric Holcomb

Lt. Governor Suzanne Crouch, Secretary of Agriculture and Rural Development

Bruce Kettler, Director

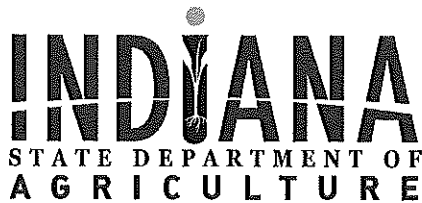
IC 4-2-6-11

Post-employment waiver

As the Appointing Authority of Indiana State Department of Agriculture, I am filing this waiver of the application of the Code of Ethics' post-employment restriction as it applies to Tari Gary in her post-employment with Purdue University.

I understand that I must file and present this waiver to the State Ethics Commission at their next available meeting. I further understand that this waiver is not final until approved by the State Ethics Commission.

- A. This waiver is provided pursuant to IC 4-2-6-11(g) and specifically waives the application of *(Please indicate the specific restriction in 42 IAC 1-5-14 (IC 4-2-6-11) you are waiving)*:
- IC 4-2-6-11(b)(1): 365 day required "cooling off" period before serving as a lobbyist.
 - IC 4-2-6-11(b)(2): 365 day required "cooling off" period before receiving compensation from an employer for whom the state employee or special state appointee was engaged in the negotiation or administration of a contract and was in a position to make a discretionary decision affecting the outcome of such negotiation or administration.
 - IC 4-2-6-11(b)(3): 365 day required "cooling off" period before receiving compensation from an employer for which the former state employee or special state appointee made a directly applicable regulatory or licensing decision.
 - IC 4-2-6-11(c): Particular matter restriction prohibiting the former state employee or special state appointee from representing or assisting 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 worker. *(Please provide a brief description of the specific particular matter(s) to which this waiver applies below)*:



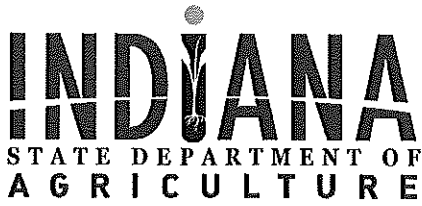
Indiana State Department of Agriculture

Governor Eric Holcomb

Lt. Governor Suzanne Crouch, Secretary of Agriculture and Rural Development

Bruce Kettler, Director

- B. IC 4-2-6-11(g)(2) requires that an agency's appointing authority, when authorizing a waiver of the application of the post-employment restrictions in IC 4-2-6-11(b)-(c), also include specific information supporting such authorization. Please provide the requested information in the following five (5) sections to fulfill this requirement.
1. Please explain whether the employee's prior job duties involved substantial decision-making authority over policies, rules, or contracts: Tari's duties and responsibilities did not involve substantial authority over contracts, rules, or policies, because her manager had to approve any and all contracts, policies, or rules.
 2. Please describe the nature of the duties to be performed by the employee for the prospective employer: In her new role, Tari will develop food safety related educational materials, including videos, publications and presentations that will benefit produce growers and food processors in Indiana.
 3. Please explain whether the prospective employment is likely to involve substantial contact with the employee's former agency and the extent to which any such contact is likely to involve matters where the agency has the discretion to make decisions based on the work product of the employee: There is a possibility that Tari will cross paths with ISDA in her new role with Purdue, but no contact is likely to involve matters where the agency has the discretion to make decisions based on the work product of the employee.
 4. Please explain whether the prospective employment may be beneficial to the state or the public, specifically stating how the intended employment is consistent with the public interest: Tari will be developing and presenting new safety related educational programs, workshops and short courses related to good manufacturing practices, produce food safety and information related to developing HACCP plans for growers and food processors in Indiana. She also will manage the ServSafe Program at Purdue and assist growers and processors who are working with the Food Entrepreneur Manufacturing Institute to develop new food products. Because the scope of the work impacts so many farmers and food processors across the state, the prospective employment would be beneficial to the public and state.
 5. Please explain the extent of economic hardship to the employee if the request for a waiver is denied: If the request for a waiver is denied, Tari would lose this opportunity of a new job. This prospective role would enhance and grow her skillset beyond what she is currently doing at ISDA, and provide an opportunity for professional growth.



Indiana State Department of Agriculture
Governor Eric Holcomb
Lt. Governor Suzanne Crouch, Secretary of Agriculture and Rural Development
Bruce Kettler, Director

C. Signatures

1. Appointing authority/state officer of agency

By signing below I authorize the waiver of the above-specified post-employment restrictions pursuant to IC 4-2-6-11(g)(1)(A). In addition, I acknowledge that this waiver is limited to an employee or special state appointee who obtains the waiver before engaging in the conduct that would give rise to a violation.

Handwritten signature of Bruce R. Kettler over a horizontal line, with the name 'Bruce Kettler' printed below.

Handwritten date '1/26/22' over a horizontal line, with the word 'DATE' printed below.

2. Ethics Officer of agency

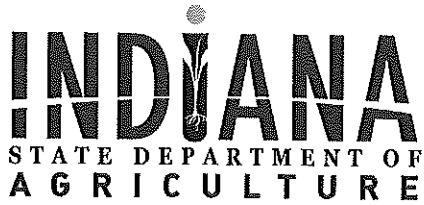
By signing below I attest to the form of this waiver of the above-specified post-employment restrictions pursuant to IC 4-2-6-11(g)(1)(B).

Handwritten signature of Johnathan Roeder over a horizontal line, with the name 'Johnathan Roeder' printed below.

Handwritten date '1/26/22' over a horizontal line, with the word 'DATE' printed below.

D. Approval by State Ethics Commission

FOR OFFICE USE ONLY
Approved by State Ethics Commission
Katherine Noel, Chair, State Ethics Commission
Date



Indiana State Department of Agriculture

Governor Eric Holcomb

Lt. Governor Suzanne Crouch, Secretary of Agriculture and Rural Development

Bruce Kettler, Director

Mail to:

Office of Inspector General
315 West Ohio Street, Room 104
Indianapolis, IN 46202

OR

Email scanned copy to: info@ig.in.gov

Upon receipt you will be contacted with details regarding the presentation of this waiver to the State Ethics Commission.



Indiana State Department of Agriculture
Governor Eric Holcomb
Lt. Governor Suzanne Crouch, Secretary of Agriculture and Rural Affairs
Bruce Kettler, Director

February 4, 2022

Katherine Noel, Chairwoman
Indiana State Ethics Commission
315 W. Ohio Street, Room 104
Indianapolis, IN 46202

Dear Ms. Noel,

As the Director of the Indiana State Department of Agriculture (ISDA), I am writing to you to express my support and approval of the ISDA waiver of post-employment restrictions for Tari Gary as she seeks employment opportunities with Purdue University.

I regret that I am unable to attend in person to present the waiver and my support for Tari in her future endeavors. I have asked ISDA's Deputy Director, Jordan Seger, to attend the Commission meeting on my behalf. I understand that IC § 4-2-6-11(g) requires the state appointing authority authorizing the waiver to present it to the Commission, and I greatly appreciate the granting of my request for this alternative arrangement in advance of the February meeting.

I fully support and approve this waiver for Tari, as her employment with Purdue University is a great opportunity for personal and professional growth, and she will be a benefit to Hoosiers across the state in this new endeavor. The entire ISDA family wishes her the best.

Thank you for consideration of this matter.

Sincerely,

Bruce Kettler
Director



January 28, 2022

Katherine Noel, Chair
Indiana State Ethics Commission
315 West Ohio Street, Room 104
Indianapolis, Indiana 46202

RE: Request for Formal Opinion, Commissioner Joseph McGuinness' Employment Negotiations with Avenew, LLC

Request for Formal Opinion of the Indiana State Ethics Commission

Applicable Law: Ind. Code § 4-2-6-11; Ind. Code § 4-2-6-9

Questions: (1) Does the cooling-off period (Ind. Code § 4-2-6-11(b)) apply to Mr. Joseph McGuinness' proposed employment with Avenew, LLC? (2) Did Mr. Joseph McGuinness' employment negotiations with Avenew, LLC create a decision and voting conflict of interest under Ind. Code § 4-2-6-9?

Background: Mr. Joseph ("Joe") McGuinness is the Commissioner for the Indiana Department of Transportation, appointed to said position by Governor Eric Holcomb in January 2017. On or about January 6, 2022, Joseph McGuinness informed the undersigned Ethics Officer that he had entered employment negotiations to serve as Chief Executive Officer of a startup company called Avenew, LLC. While Avenew is not yet operational, the company will eventually provide planning and consulting services to local governments. Commissioner McGuinness will utilize his experience as the Mayor of Franklin to help build Avenew's programming. Avenew's operations will not include contracting with or lobbying the Indiana Department of Transportation. While Avenew does not have a business relationship with INDOT, the startup is partially funded by a division of the Heritage Group, which is the parent company of several INDOT vendors, including Milestone Contractors, Champaign Asphalt, and Pavement Maintenance Systems, each of which have a business relationship with INDOT, including active contracts with the Department. During his time as INDOT Commissioner, Joe McGuinness has not personally and substantially participated in any matter involving a Heritage Group company.

In accordance with Ind. Code § 4-2-6-9(b), a formal screen was executed by Commissioner McGuinness with the below signed Ethics Officer, preventing Mr. McGuinness from participating in any decision or vote, or matter related to any decision or vote, in which any Heritage Group company has an interest. Said screen is on file with the Department and in force effective January 14, 2022. A copy of said screen is included herewith as Exhibit A.

If it is determined that a disclosure is required under Ind. Code § 4-2-6-9(b), the same will be filed immediately upon the State Ethics Commissioner's recommendation. Such a disclosure has been drafted and is being held pending the formal opinion of the State Ethics Commission. Commissioner McGuinness and the Indiana Department of Transportation are prepared to take whatever additional actions are deemed necessary and appropriate to account for Mr. McGuinness' employment negotiations with Avenew, LLC.

The Department hereby submits the foregoing information to the Indiana State Ethics Commission for its consideration during the Commission's February 10, 2022 regular meeting.

Respectfully Submitted:

/s/ Christopher Bradley Serak

Christopher B. Serak,
Director of Prequalification &
Construction Compliance
Ethics Officer
Indiana Department of Transportation

January 28, 2021

VIA EMAIL ONLY

Indiana State Ethics Commission
315 West Ohio Street, Room 104
Indianapolis, Indiana 46202
info@ig.in.gov

Re: Request for Formal Advisory Opinion

Dear Members of the Commission:

I currently serve as Commissioner of the Indiana Department of Transportation and wish to accept employment as the chief executive officer of Avenew LLC (“Avenew”). Avenew is a newly formed Delaware limited-liability entity with no contracts or revenue; accordingly, Avenew has had no dealings of any kind with INDOT. Once fully operational, Avenew will seek to partner with local communities and private-sector entities throughout Indiana to manage and maintain local roads, buildings, and related infrastructure. I submit this letter to the Ethics Commission (the “Commission”) to request a formal advisory opinion on my compliance with the confidentiality, conflict-of-interest, and post-employment restrictions for state employees. I previously requested and obtained a favorable, informal advisory opinion on these issues from the Inspector General, David Cook (the “IG Opinion”). A copy of the IG Opinion is attached.

Background

Governor Eric Holcomb appointed me Commissioner of INDOT in January 2017. As Commissioner, I oversee the administration of INDOT and its implementation of the State’s transportation policies.

INDOT is responsible for constructing and maintaining interstate highways, U.S. routes, and state roads in Indiana—including adjacent overpasses, ramps, and traffic control devices. *See* Ind. Code § 8-23-2-1 et al. To carry out its responsibilities, INDOT may (and frequently does) enter into contracts with outside contractors. *See id.* § 8-23-2-6. However, responsibility for the construction and maintenance of **local** roads (i.e., roads not within INDOT’s purview) lies with cities, towns, and counties.

As Commissioner, my role within INDOT primarily consists of establishing and implementing agency policy and interacting with the public and local units of government, including:

- Overseeing transportation and infrastructure operations for the State of Indiana,
- Identifying and securing long-term road and bridge funding opportunities, and
- Preparing Indiana's infrastructure for the future of transportation.

Although I have contracting authority for the agency, I have consistently delegated that authority to other INDOT personnel. Consequently, during my entire tenure as Commissioner, I have never negotiated, executed, or administered any contracts with third-party contractors on behalf of INDOT.

Avenew was formed in August 2021 and has had no dealings with INDOT. Avenew will serve as an asset-management company and seek to partner with cities, towns, universities, and private-sector entities throughout Indiana to manage and maintain their local infrastructure, including roads, buildings, and technology-based transportation systems. As Avenew's CEO, my primary responsibilities will include developing a team of employees, raising capital, and promoting Avenew's services to local governments, universities, and private-sector companies throughout Indiana.

Avenew is majority-owned by HG Ventures, which in turn is majority-owned by The Heritage Group ("Heritage"). Heritage is an Indianapolis-based company that manages a portfolio of more than 30 different companies specializing in heavy construction and materials, environmental services, and specialty chemicals. HG Ventures will provide Avenew with initial start-up capital and be a majority owner. Other stakeholders, myself included, will be minority owners.

Heritage, through at least two of its other subsidiary companies, has entered one or more contracts with INDOT during my tenure as Commissioner. However, as noted above, I have not negotiated, managed, advised, administered, executed, or even reviewed any such contracts.

Issue for Consideration

Whether my anticipated employment as CEO of Avenew would violate any ethics laws, including the confidentiality, conflict-of-interest, or post-employment restrictions set forth in Ind. Code §§ 4-2-6-6, 4-2-6-9, or 4-2-6-11, respectively.

Analysis

Laws governing the conduct of state employees prohibit certain conduct related to future employment, including restrictions on confidential information, conflicts of interest, and post-employment restrictions. I address each in turn below.

A. Confidentiality

Indiana Code § 4-2-6-6 prohibits a state employee 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.” I represent that I have disclosed no confidential information in my employment negotiations with Avenew; and I understand this rule applies indefinitely and prohibits me from ever receiving compensation as a result of confidential information.

B. Conflicts of Interest

Indiana Code § 4-2-6-9(a)(1) prohibits a state employee from participating “in any decision or vote, or matter relating to that decision or vote, if the state . . . employee . . . has a financial interest in the outcome of the matter.” This prohibition likewise applies if “[a]ny person or organization with whom the state . . . employee . . . is negotiating or has an arrangement concerning prospective employment” has a financial interest in the matter. Ind. Code § 4-2-6-9(a)(4). “Financial interest” includes “an interest arising from employment or prospective employment for which negotiations have begun.” *Id.* § 4-2-6-1(a)(11).

Although I have begun employment negotiations with Avenew, Avenew has no past, current or prospective matters before INDOT in which Avenew or I have a financial interest. As such, I have identified no actual or potential conflict of interest. Nevertheless, out of an abundance of caution, I disclosed my employment negotiations with Avenew to INDOT’s ethics officer, who implemented an ethics screen (the

“Screen”). A copy of the Screen is being submitted separately by INDOT’s ethics officer.

C. Post-employment Restrictions

As a state employee, I understand that I must comply with the post-employment restrictions under Ind. Code § 4-2-6-11. That provision has two separate limitations—a “cooling-off” period and a “particular-matter” restriction. I submit that neither limitation would prohibit my anticipated employment with Avenew.

1. “Cooling-off” provisions do not apply.

Under certain conditions, the “cooling-off” provisions prohibit former state employees from accepting employment for 365 days from the date they leave state employment. The following conditions trigger the cooling-off period: (1) the prospective employment includes lobbying, (2) the employee made a regulatory or licensing decision affecting the employer, and (3) the employee engaged in the negotiation or the administration of a contract with the employer on behalf of the state or an agency, and he or she had discretionary authority over the outcome of negotiations or the nature of administration. *See* Ind. Code § 4-2-6-11(b)(1)–(3).

The rule against lobbying for 365 days after leaving state employment does not apply. A “lobbyist” is “an individual who seeks to influence decision making of an agency and who is registered as an executive branch lobbyist under rules adopted by the Indiana department of administration.” Ind. Code § 4-2-7-1(5). I represent that I will not engage in any lobbying activities for at least 365 days after leaving INDOT.

Nor have I made any regulatory or licensing decision as Commissioner of INDOT “that directly applied to the employer or to a parent or subsidiary of the employer.” Ind. Code § 4-2-6-11(b)(3). I represent that I have made no licensing or regulatory decisions whatsoever as Commissioner of INDOT.

Finally, as Commissioner I have not negotiated or administered any contracts with Avenew. Section 4-2-6-11(b)(2) imposes a cooling-off period only when a former state employee (i) “engaged in the negotiation or the administration of one or more contracts with that employer on behalf of the state agency,” **and** (ii) was “in a position to make a discretionary decision affecting the outcome of the negotiation or nature of the administration.” This provision is inapplicable for two independent reasons.

First, Avenew simply has no contracts—much less any contracts with INDOT. And although Heritage, does have subsidiaries with INDOT contracts, contracts involving parent companies of a prospective employer do not trigger a cooling-off period in any event.

The statute defines “employer” to mean “any person from whom a state officer or employee or the officer’s or employee’s spouse received compensation.” *Id.* § 4-2-6-1(10). And “person” means “any individual, proprietorship, partnership, unincorporated association, trust, business trust, group, limited liability company, or corporation, whether or not operated for profit, or a governmental agency or political subdivision.” *Id.* § 4-2-6-1(13). Read together, the meaning of “employer” *does not* extend to parents or subsidiaries of the employer.

This construction finds reinforcement in the plain language of Section 4-2-6-11(b), where the legislature expressly distinguishes between an “employer” and its parents or subsidiaries. Section 11(b)(3) imposes a cooling-off period where the employee made a regulatory or licensing decision “that directly applied to the employer or to a parent or subsidiary of the employer.” *Id.* (emphasis added). Section 11(b)(2), on the other hand, applies only if the employee “engaged in the negotiation or the administration of one or more contracts *with that employer.*” *Id.* (emphasis added). Thus, when it comes to regulating or licensing activity, the legislature specifically extended the cooling-off period where the employee’s activity directly applied to parent or subsidiary entities. The absence of that broad language where the employee negotiated or administered contracts confirms that Section 11(b)(2) does not trigger where the employee negotiates or administers contracts with an employer’s parent or subsidiaries. This means that any contracts between INDOT and Heritage or Heritage-owned companies would not trigger a cooling-off period under Section 11(b)(2).

Second, as Commissioner I never personally “engaged in the negotiation or the administration” of *any* contracts between INDOT and outside contractors, including any contracts with Heritage or Heritage-owned companies. Because Section 11(b)(2) applies only if the employee actually engaged in negotiation or administration of contracts, my lack of involvement in contracting at INDOT bars this provision from triggering a cooling-off period.

2. “Particular-Matter” Restriction

The post-employment rule also prohibits state employees from representing or assisting a person “in a particular matter involving the state if the

former . . . employee . . . personally and substantially participated in the matter." Ind. Code § 4-2-6-11(c). The rule defines "particular matter" as any of the following: 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.

Unlike the cooling-off provisions under Section 11(b), the "particular-matter" rule does not prohibit *employment*; rather this rule prohibits the employee from "represent[ing]" or "assist[ing]" an employer in a particular matter and survives the entire life of the particular matter at issue.

Although I have identified no "particular matter" that could potentially trigger this rule, I agree that I must comply with it indefinitely. Because the rule does not prohibit employment, I may accept and maintain employment with Avenew. Should an issue arise concerning a particular matter in which I "personally and substantially participated," I agree that I must refrain from representing or assisting Avenew in that matter.

Conclusion

For the foregoing reasons, and consistent with the IG Opinion, I believe my prospective employment with Avenew will not trigger a "cooling-off" period under Indiana Code § 4-2-6-11. Nor will the lifetime "particular-matter" restriction prevent me from accepting employment with Avenew. And although my negotiations with Avenew have not created an actual or potential conflict of interest, I continue to comply with the Screen. Please advise if you have any questions or require additional information, and I thank you for your consideration.

Regards,



Joseph McGuinness

encl.

CONFLICT OF INTEREST SCREEN FOR JOSEPH ("JOE") MCGUINNESS

January 14, 2022

I. RECITALS

WHEREAS, Joseph ("Joe") McGuinness is Commissioner for the Indiana Department of Transportation ("INDOT" or "Department"); and

WHEREAS, Joe McGuinness is considering potential employment with Avenew, LLC, a startup company partially funded by the Heritage Group; and

WHEREAS, Avenew does not have a business relationship with INDOT, but the Heritage Group is the parent company to several INDOT vendors, including Milestone Contractors, Champaign Asphalt, and Pavement Maintenance Systems, each of which have a business relationship with INDOT; and

WHEREAS, Commissioner Joe McGuinness has not worked with any Heritage Group company as an INDOT employee, and is not subject to the cooling off period with regard to said firms; and

WHEREAS, as INDOT Commissioner, it is possible that Joe McGuinness could, in the future, work with Heritage Group companies or participate in matters in which said companies have an interest; and

WHEREAS, Joe McGuinness's employment negotiations with Avenew created a potential decision and voting conflict of interest under IC 4-2-6-9 with regard to Heritage Group companies requiring disclosure and a formal screen; and

WHEREAS, Joe McGuinness is subject to the particular matter restriction under IC 4-2-6-11(a) and cannot assist future employers, including Avenew, LLC, with any matter he personally and substantially participated in while employed by INDOT.

NOW THEREFORE, Joseph McGuinness, INDOT Commissioner, for his remaining tenure with the Department, or until he discontinues employment negotiations with Avenew, LLC, agrees to in all ways follow, adhere to, and satisfy the terms of the following Conflict of Interest Screen. Joseph McGuinness must adhere to term three (3) regarding the particular matter restriction in perpetuity, for the life of each particular matter.

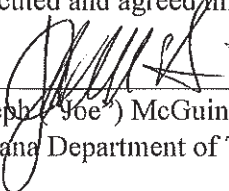
II. CONFLICT OF INTEREST SCREEN

1. Joseph McGuinness shall not participate in any decision or vote, or any matter related to such decision or vote, in which any Heritage Group company has a financial interest.
2. Joseph McGuinness should be screened from participating in any present or future contract or other matter involving a Heritage Group company.
3. Joseph McGuinness shall not assist any future employers, including Avenew, LLC, with any matter he personally and substantially participated in while employed by INDOT.

III. EMPLOYEE AFFIRMATION

I have read and understand the terms of the foregoing Conflict of Interest Screen, and will in all ways follow, adhere to, and satisfy the above stated restrictions on my participation in any decision or vote in which any Heritage Group company has a financial interest. I understand that the first two (2) terms of this screen terminate upon my leaving the Department or the discontinuation of negotiations with Avenew, LLC, whichever occurs first. I further understand that term three (3) concerning the particular matter restrict applies in perpetuity, for the life of each subject matter. I have shared and discussed this Conflict of Interest Screen and its requirements with my appointing authority, Governor Eric Holcomb, and have made arrangements with my executive staff to cover all decisions and votes within my workflow as Commissioner in which any Heritage Group company has an interest.

Executed and agreed this 14th day of January 2022, by:



Joseph ("Joe") McGuinness, Commissioner
Indiana Department of Transportation

Baker, Nathaniel P

From: Mulligan, Tiffany M
Sent: Wednesday, January 5, 2022 12:59 PM
To: jem6881@gmail.com
Cc: Cook, David (IG)
Subject: \$ecure Ethics Informal Advisory Opinion; McGuinness; INDOT; post-employment
Attachments: JosephMcGuinnessletter.pdf

Importance: High

Commissioner McGuinness,

Inspector General Cook put together the informal advisory opinion below in response to your request. He is out of the office today and asked that I send it to you in his absence. Please let us know if you have any questions or concerns.

Thank you,

Tiffany Mulligan
Office of Inspector General

Commissioner McGuinness,

Thank you for contacting our office for ethics advice. We understand that you are currently serving as Commissioner of the Indiana Department of Transportation (INDOT). In this role, you establish and administer agency policy and interact with public and local units of government, including overseeing transportation and infrastructure operations of the State of Indiana. You also identify and secure long-term road and bridge funding opportunities and prepare Indiana's infrastructure for future transportation. You state that even though you have contracting authority on behalf of INDOT, those duties have routinely been delegated to other INDOT personnel, and during your tenure as Commissioner, you have never negotiated, executed or administered any contracts with third parties on behalf of INDOT.

You write you would like to accept a position as Chief Executive Officer (CEO) with Avenew. Avenew is a newly formed Delaware corporation created in August of 2021 to serve as an asset-management company seeking to partner with cities, towns, universities and private sector entities throughout Indiana to manage and maintain their local infrastructure including roads, buildings and technology-based transportations systems. Avenew will be a subsidiary of The Heritage Group, an Indianapolis based company that manages over thirty (30) different companies specializing in heavy construction and materials, environmental services and specialty chemicals. Heritage, through at least two (2) of its subsidiary companies, has contracts with INDOT. You state that even though INDOT has contracted with some of Heritage's subsidiary companies, you have never negotiated, managed, advised, administered, executed or reviewed any such contracts. While Heritage will be the majority owner of Avenew, you and other stake holders will be minority owners. Avenew, as a startup limited-liability company, has no contracts or dealings with INDOT. You write that, in your position as CEO of Avenew, your primary responsibilities would include developing a team of employees, raising capital and promoting Avenew's services to local government, universities and private sector companies throughout Indiana.

Your inquiry primarily invokes consideration of the following Code of Ethics (Code) rules: IC 4-2-6-11, the post-employment rule, which includes both a “cooling off” and “particular matter” restriction; IC 4-2-6-9, the conflicts of interests related to decisions and votes rule; and 42 IAC 1-5-10, 42 IAC 1-5-11 and IC 4-2-6-6, the rules relating to Confidentiality.

1. IC 4-2-6-11 - Post-employment

The post-employment rule (IC 4-2-6-11) consists of two separate limitations: a “cooling off” period and a particular matter restriction.

A. The “cooling off” period

The first prohibition, commonly referred to as the cooling off or revolving door period, prevents you from accepting employment: (1) as a lobbyist, (2) from an employer with whom you were engaged in the negotiation or administration of a contract on behalf of any state agency and were in a position to make a discretionary decision affecting the outcome of the negotiation or nature of the administration or (3) from an employer for whom you made a regulatory or licensing decision that directly applied to the employer or its parent or subsidiary, until the lapse of 365 days from when you leave state employment. In addition, you are prohibited from accepting employment from an employer if the circumstances surrounding the hire suggest the employer’s purpose is to influence you in your official capacity as a state employee.

Regarding subsection (1), you would not be able to work as an executive branch lobbyist in Indiana for one year after leaving state employment. 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). Based on the information you provided regarding your prospective position with Avenew, you understand and agree that you could not and would not serve as a lobbyist or perform any actions as a lobbyist in Indiana on behalf of Avenew until at least 365 days from the date you leave state employment. You may still wish to review IDOA’s [Executive Branch Lobbying Manual](#) to learn about the types of interactions with members of the executive branch (including INDOT) that are considered executive branch lobbying. So long as the intended position with Avenew would not require executive branch lobbying, then this portion of the cooling off period would not apply.

Regarding subsection (2), you would not be able to work for Avenew if you negotiated or administered a contract with Avenew and you were in a position to make a discretionary decision involving the negotiation or administration of the contract. You write that Avenew is a newly formed company; therefore, it has had no dealings or contracts with INDOT. As such, subsection (2) would not apply to your post-employment opportunity with Avenew. As you note, subsection (2) only applies if you participated in contracts with the future employer; it does not extend to contracts with the parents or subsidiaries of the future employer, such as Heritage.

Also, based on the information you provided, subsection (3) would not apply to your potential position with Avenew because you have not made any regulatory or licensing decisions relating to Avenew or Avenew’s parent, Heritage or any of its subsidiaries. Subsection (3) does extend to regulatory or licensing decisions that directly applied to the parent or subsidiary of a future employer; however, you represent that you have not made any regulatory or licensing decisions as INDOT’s Commissioner. Thus, this subsection would not apply to you.

Furthermore, as long as the position with Avenew is not offered to you to influence you in your official capacity as a state employee, then this prospective opportunity would not be in violation of the last part of the rule.

Therefore, so long as your prospective employment with Avenew would not involve executive branch lobbying, you could immediately begin employment with Avenew upon leaving state employment.

B. The particular matter restriction

The second prohibition, commonly referred to as the “particular matter” restriction, prevents you from working on the twelve types of matters listed in IC 4-2-6-11(a) if you personally and substantially participated in the matter as a state employee. These matters are 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 statute specifically excludes “the proposal, consideration, adoption, or implementation of a rule or an administrative policy or practice of general application” from the definition of particular matter. 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*.

Accordingly, you would be prohibited from representing or assisting Avenew, its customers or any other person with a particular matter in which you personally and substantially participated as a state employee. In your position with INDOT, you likely were involved with many particular matters, such as contracts, determinations and public works projects. Only the State Ethics Commission (Commission) has the authority to determine if your involvement in these matters was personal and substantial and thus triggers this restriction. You provide, however, that you have identified no “particular matter” that would trigger this rule. **Nonetheless, during your employment with Avenew, you must recuse yourself from working on any particular matter on which you personally and substantially worked for the lifetime of the matter.** Please note that you can represent or assist Avenew with matters in which you were not personally and substantially involved while with INDOT and with any new matters.

If you have any questions regarding your work after reviewing the twelve matters listed above, you may follow up with our office at any time.

2. IC 4-2-6-9 – Conflicts of Interests Related to Decisions and Votes

IC 4-2-6-9 prohibits a state employee from participating in any decision or vote, or matter related to that decision or vote, if the employee has knowledge that various persons may have a “financial interest” in the outcome of the matter, including (1) the state employee him/herself; (2) an immediate family member; (3) a business organization in which the employee is serving as an officer, director, a member, a trustee, a partner or an employee; and (4) any person or organization with whom the state employee is negotiating employment. The Code defines “financial interest” in IC 4-2-6-1(a)(11) to include “an interest . . . in a purchase, sale, lease, contract, option, or other transaction between an agency and any person; or . . . involving property or services” 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.

The Commission has determined that employment negotiations begin when there is a back-and-forth exchange. You write that you have begun employment negotiations with Avenew; therefore, you are prohibited from participating in any decision or vote, or matter related to a decision or vote, for INDOT in which Avenew or its parent company, the Heritage Group, would have a financial interest in the outcome.

As Commissioner of INDOT, you are likely in a position to participate in decisions or votes, or matters related to decisions or votes, in which the Heritage Group, and thus Avenew, would have a financial interest. As a result, you likely have a potential conflict of interest, and you must follow the rule’s notification requirements in IC 4-2-6-9(b) to avoid violating this rule. **Please note that mere recusal from the decision or vote is not enough. The rule also requires that you notify your appointing authority, Earl Goode, and ethics officer, Chris Serak, in writing and either (1) seek a formal advisory opinion from the Commission or (2) file a written disclosure form with our office in accordance with IC 4-2-6-9’s notification requirements.**

The disclosure form includes the proposed screen that will be in effect with respect to your interaction with Avenew, the Heritage Group or any of its subsidiaries, for any remaining time you are employed by INDOT. If you do not accept an employment offer from Avenew, then the screen can be terminated. Please let us know if you have any questions about this process.

3. 42 IAC 1-5-10 and 42 IAC 1-5-11– Confidential Information

Also, please keep in mind the ethics rules pertaining to confidential information found at 42 IAC 1-5-10 and 42 IAC 1-5-11. These rules prohibit you from benefitting from, permitting another person to benefit from or divulging information of a confidential nature except as permitted by law. To the extent that you possess information of a confidential nature by virtue of your position as INDOT Commissioner that could be used to benefit any person, including Avenew, you would need to ensure you comply with these rules.

4. IC 4-2-6-6 - Confidential Information

Finally, you should keep in mind the ethics rule pertaining to confidential information found at IC 4-2-6-6. IC 4-2-6-6 prohibits a state employee 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. So long as any compensation you receive from your employment with Avenew does not result from information of a confidential nature that you learned in your position with INDOT, any such post-employment would not violate IC 4-2-6-6.

Thank you again for submitting your inquiry. Please let us know if you have any questions regarding this opinion. Please note that this response does not constitute an official advisory opinion. Only the Commission may issue an official advisory opinion. This informal advisory opinion allows us to give you quick, written advice. The Commission will consider that an employee or former employee acted in good faith if it is determined that the individual committed a violation after receiving an informal advisory opinion, and the alleged violation was directly related to the advice rendered. Also, remember that the advice given is based on the facts as we understand them. If this e-mail misstates facts in a material way, or omits important information, please bring those inaccuracies to our attention.

Sincerely,
David Cook
Office of Inspector General

IC 4-2-6-1 Definitions

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

- ...
- (2) "Agency" means an authority, a board, a branch, a bureau, a commission, a committee, a council, a department, a division, an office, a service, or other instrumentality of the executive, including the administrative, department of state government. The term includes a body corporate and politic set up as an instrumentality of the state and a private, nonprofit, government related corporation. The term does not include any of the following:
- (A) The judicial department of state government.
 - (B) The legislative department of state government.
 - (C) A state educational institution.
 - (D) A political subdivision.

- ...
- (5) "Business relationship" includes the following:
- (A) Dealings of a person with an agency seeking, obtaining, establishing, maintaining, or implementing:

- (i) a pecuniary interest in a contract or purchase with the agency; or
 - (ii) a license or permit requiring the exercise of judgment or discretion by the agency.
- (B) The relationship a lobbyist has with an agency.
- (C) The relationship an unregistered lobbyist has with an agency

...

(7) "Compensation" means any money, thing of value, or financial benefit conferred on, or received by, any person in return for services rendered, or for services to be rendered, whether by that person or another.

...

(11) "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.

...

(12) "Information of a confidential nature" means information:

- (A) obtained by reason of the position or office held; and
- (B) which:
 - (i) a public agency is prohibited from disclosing under IC 5-14-3-4(a);
 - (ii) a public agency has the discretion not to disclose under IC 5-14-3-4(b) and that the agency has not disclosed; or
 - (iii) is not in a public record, but if it were, would be confidential.

(13) "Person" means any individual, proprietorship, partnership, unincorporated association, trust, business trust, group, limited liability company, or corporation, whether or not operated for profit, or a governmental agency or political subdivision.

IC 4-2-6-5.5 Conflict of interest; advisory opinion by commission

Sec. 5.5. (a) A current state officer, employee, or special state appointee may not knowingly do any of the following:

- (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.
- (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 stating that an individual's outside employment does not violate subsection (a)(1) or (a)(2) is conclusive proof that the individual's outside employment does not violate subsection (a)(1) or (a)(2).

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.

IC 4-2-6-10.5 State officers and employees; financial interest in contract made by agency; exceptions

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).

IC 4-2-6-11 One year restriction on certain employment or representation; advisory opinion; exceptions; waivers; disclosure statements; restrictions on inspector general seeking state office

Sec. 11. (a) As used in this section, "particular matter" means any of the following:

- (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.
- (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) 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 the individual's 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) consultation by;
- (3) representation by; or
- (4) 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 the following:

- (1) A special state appointee who serves only as a member of an advisory body.
- (2) A former state officer, employee, or special state appointee who has:
 - (A) not negotiated or administered any contracts with that employer in the two (2) years before the beginning of employment or consulting negotiations with that employer; and
 - (B) any contract that:
 - (i) the former state officer, employee, or special state appointee may have negotiated or administered before the two (2) years preceding the beginning of employment or consulting negotiations; and
 - (ii) is no longer active.

(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. A waiver must satisfy all of the following:

- (1) The waiver must be signed by an employee's or a special state appointee's:
 - (A) state officer or appointing authority authorizing the waiver; and
 - (B) agency ethics officer attesting to form.
- (2) The waiver must include the following information:
 - (A) Whether the employee's prior job duties involved substantial decision making authority over policies, rules, or contracts.
 - (B) The nature of the duties to be performed by the employee for the prospective employer.
 - (C) Whether the prospective employment is likely to involve substantial contact with the employee's former agency and the extent to which any such contact is likely to involve matters where the agency has the discretion to make decisions based on the work product of the employee.
 - (D) Whether the prospective employment may be beneficial to the state or the public, specifically stating how the intended employment is consistent with the public interest.
 - (E) The extent of economic hardship to the employee if the request for a waiver is denied.
- (3) The waiver must be filed with and presented to the commission by the state officer or appointing authority authorizing the waiver.
- (4) The waiver must be limited to an employee or a special state appointee who obtains the waiver before engaging in the conduct that would give rise to a violation of subsection (b) or (c).

The commission may conduct an administrative review of a waiver and approve a waiver only if the commission is satisfied that the information provided under subdivision (2) is specifically and satisfactorily articulated. The inspector general may adopt rules under [IC 4-22-2](#) to establish criteria for post employment waivers.

(h) Subsection (b) applies, subject to waiver under subsection (g), to a former state officer, employee, or special state appointee who:

- (1) made decisions as an administrative law judge; or
- (2) presided over information gathering or order drafting proceedings;

that directly applied to the employer or to a parent or subsidiary of the employer in a material manner.

(i) A former state officer, employee, or special state appointee who forms a sole proprietorship or a professional practice and engages in a business relationship with an entity that would otherwise violate this section must file a disclosure statement with the commission not later than one hundred eighty (180) days after separation from state service. The disclosure must:

- (1) be signed by the former state officer, employee, or special state appointee;
- (2) certify that the former state officer, employee, or special state appointee is not an employee of the entity; and
- (3) state in detail the treatment of taxes, insurance, and any other benefits between the entity and the former state officer, employee, or state appointee.

(j) The inspector general may not seek a state elected office before the elapse of at least three hundred sixty-five (365) days after leaving the inspector general position.

As added by P.L.9-1990, SEC.9. Amended by P.L.15-1992, SEC.6; P.L.222-2005, SEC.9; P.L.89-2006, SEC.10; P.L.1-2007, SEC.3; P.L.123-2015, SEC.25.

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.

IC 4-2-6-6 Present or former state officers, employees, and special state appointees; compensation resulting from confidential information

Sec. 6. No state officer or employee, former state officer or employee, special state appointee, or former special state appointee shall accept any compensation from any employment, transaction, or investment which was entered into or made as a result of material information of a confidential nature.

Tiffany Mulligan
Chief of Staff and Chief Legal Counsel
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From: Joe McGuinness <jem6881@gmail.com>

Sent: Monday, January 3, 2022 11:25 AM

To: IG Info <info@ig.IN.gov>

Subject: Request for Informal Advisory Opinion

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Attached is a letter requesting an Informal Advisory Opinion regarding employment outside of State Government. Please let me know if you have any questions.

Thank you,
Joseph McGuinness
317-292-4409



Eric J. Holcomb
Governor

Kristina M. Box, MD, FACOG
State Health Commissioner

January 31, 2022

Ethics Commission
Office of the Inspector General
315 West Ohio Street, Room 104
Indianapolis, Indiana 46202
Via Email: Info@ig.in.gov

RE: Request for Formal Advisory Opinion for Dr. Box

Dear members of the Ethics Commission:

The Indiana Department of Health (IDOH), on behalf of Dr. Kristina Box, requests a Formal Advisory Opinion from the State Ethics Commission addressing whether it would be a conflict of interest for Dr. Box or any other state employee in their official capacity to hold a voting position as a member of the Executive Board of the Indiana Health Information Exchange.

The Indiana Health Information Exchange (IHIE) is an Indiana non-profit organization that facilitates the sharing of patient medical records between medical providers. IHIE created a seat on its board of directors for the state health commissioner to advise and contribute to the board. While not initially a non-voting seat, IHIE wishes to modify its board to provide voting power to the seat as well as open the eligibility of the seat to any IDOH employee and to create a new seat for an employee of the Indiana Family and Social Services Administration (FSSA).

IHIE has active state contracts with IDOH, FSSA, the Indiana Department of Homeland Security and the Indiana Department of Correction. IHIE expects to have contracts with state agencies in the future. The exchange of patients' medical records between providers is governed by the Indiana Network for

To **promote**, **protect**, and **improve** the health and safety of all Hoosiers.



Patient Care (INPC). Eligible members may become INPC members by signing a Joinder Agreement with IHIE and the Regenstrief Institute. Most INPC members are both Data Providers and Data Recipients. Data Providers store data in the INPC, and Data Recipients have access to INPC data under INPC Terms and Conditions and Reasonable Rules. There are some INPC non-members who are otherwise permitted to use, access, exchange or disclose INPC data only as specifically permitted by approved rules. INPC data, when permitted, is exchanged through products made available by IHIE under Subscription/Service Agreements or through other means identified in Third Party Data Use Agreements. IHIE is a business associate to any Data Providers who are covered entities under HIPAA. IHIE must comply with state and federal data privacy laws in addition to INPC Terms and Conditions.

Furthermore, IHIE is a 509(a)(9) non-profit supporting organization, which is a sub-category of 501(c)(3). IHIE currently receives funding through its Subscription Agreements, Service Agreements and other data sharing arrangements and grants. IHIE's Board is a governing Board with the power to manage, control and conduct the affairs of IHIE as required for 509(a)(9) Type 1 supporting organizations. The majority of the Board's directors must be appointed or elected by IHIE supported organizations, and those directors must operate and control IHIE. The IHIE Board is pursuing restructuring activities that will result in a change to the supported organizations and the number of Community directors and National Subject Matter Expert directors on the Board.

IDOH is currently a supported organization, but the state health commissioner, who serves as a director, is currently an ex-officio and non-voting member of the Board. IHIE hopes to add FSSA as a supported organization. To ensure IHIE is operated and controlled by its supported organizations, IDOH and FSSA will need to appoint directors to the Board, and the directors will need to be given voting rights. Any director is permitted to recuse himself or herself from Board activities and voting if there is a conflict of interest regarding a particular matter.



We believe this inquiry primarily invokes consideration of the following Code rules: IC 4-2-6-9, Conflicts of Interests related to Decisions and Votes; IC 4-2-6-5.5, Outside Employment/Professional Activity; IC 4-2-6-10.5, Conflicts of Interests related to Contracts; 42 IAC 1-5-1, Gifts; and 42 IAC 1-5-10 and 42 IAC 1-5-11, Confidential Information.

Based on the information presented, we do not believe that Dr. Box or other state employees' position as a voting member of this board would be incompatible with their duties at IDOH or FSSA. Rather, a position on this board will help fulfill our agencies' missions and benefit public policy. Further, the employees sitting on the board will be able to maintain and build upon their professional skills such that they may better be able to perform the essential functions of their positions as state employees.

We seek a formal advisory opinion on this matter to not only ensure full compliance with the Code of Ethics but also to avoid any appearance of impropriety or unfair competition that may arise. To aid with your analysis, I have included with this request a copy of the informal advisory opinion we received from the Office of Inspector General.

If you have any questions or need any additional information, please feel free to contact me at avangorp@isdh.in.gov or (317) 233-7408.

Sincerely,

Alex Van Gorp
Staff Attorney and Ethics Officer
Indiana Department of Health



Attachment: Informal Advisory Opinion from the Office of Inspector General

Alex,

Thank you for contacting our office in your capacity as Ethics Officer for the Indiana Department of Health (IDOH). We understand you are seeking advice on behalf of the appointing authority for IDOH, Dr. Kristina Box (Dr. Box).

We appreciate the analysis that you and Kelly MacKinnon, IDOH Chief Legal Counsel, provided to us. We carefully reviewed your analysis, but we wanted to provide our own analysis based on previous Formal Advisory Opinions issued by the Indiana State Ethics Commission (Commission) and past Informal Advisory Opinions issued by the Indiana Office of Inspector General (OIG). Although some of the analysis you provided was consistent with past Commission and OIG opinions, we reached a different conclusion on some important points. **As you will see below, we advise IDOH to seek a formal advisory opinion on these questions to ensure full compliance with the Code of Ethics (Code).**

We understand that you are seeking advice to determine whether, under the Code, it would be acceptable for Dr. Box or another IDOH employee to serve on the Board of Directors (Board) for the Indiana Health Information Exchange (IHIE). You advise us that IHIE is an Indiana non-profit organization that facilitates the sharing of patient medical records between providers. You note that IHIE created a seat on its Board for the Commissioner of IDOH to advise and contribute to the Board. You tell us that while the Commissioner's seat was initially a non-voting seat, IHIE wishes to modify its Board to provide voting power to this seat as well as open the eligibility of this seat to any IDOH employee. We understand from the materials you provided that the IDOH Commissioner has been an IHIE board member since the Board's inception in 2004.

In response to several of our questions concerning IHIE, you explain that IHIE has active state contracts with IDOH, the Indiana Family and Social Services Administration (FSSA), the Indiana Department of Homeland Security and the Indiana Department of Correction. You also told us that IHIE expects to have contracts with state agencies in the future. The exchange of patients' medical records between providers is governed by the Indiana Network for Patient Care (INPC). Eligible members may become INPC members by signing a Joinder Agreement with IHIE and the Regenstrief Institute. Most INPC members are both Data Providers and Data Recipients. Data Providers store data in the INPC, and Data Recipients have access to INPC data under INPC Terms and Conditions and Reasonable Rules. There are some INPC non-members who are otherwise permitted to use, access, exchange or disclose INPC data only as specifically permitted by approved rules. INPC data, when permitted, is exchanged through products made available by IHIE under Subscription/Service Agreements or through other means identified in Third Party Data Use Agreements. IHIE is a business associate to any Data Providers who are covered entities under HIPAA. IHIE must comply with state and federal data privacy laws in addition to INPC Terms and Conditions.



You also explain that IHIE is a 509(a)(9) non-profit supporting organization, which is a sub-category of 501(c)(3). IHIE currently receives funding through its Subscription Agreements, Service Agreements and other data sharing arrangements and grants. You also explain that IHIE's Board is a governing Board with the power to manage, control and conduct the affairs of IHIE as required for 509(a)(9) Type 1 supporting organizations. The majority of the Board's directors must be appointed or elected by IHIE supported organizations, and those directors must operate and control IHIE. The IHIE Board is pursuing restructuring activities that will result in a change to the supported organizations and the number of Community directors and National Subject Matter Expert directors on the Board.

You note that IDOH is currently a supported organization, but the IDOH Commissioner, who serves as a director, is currently an ex-officio and non-voting member of the Board. IHIE hopes to add FSSA as a supported organization. To ensure IHIE is operated and controlled by its supported organizations, IDOH and FSSA will need to appoint directors to the Board, and the directors will need to be given voting rights. You write that any director is permitted to recuse himself or herself from Board activities and voting if there is a conflict of interest regarding a particular matter.

Your inquiry primarily invokes consideration of the following Code rules: IC 4-2-6-9, Conflicts of Interests related to Decisions and Votes; IC 4-2-6-5.5, Outside Employment/Professional Activity; IC 4-2-6-10.5, Conflicts of Interests related to Contracts; 42 IAC 1-5-1, Gifts; and 42 IAC 1-5-10 and 42 IAC 1-5-11, Confidential Information. We have included all relevant rules and definitions at the end of this opinion for your reference.

1. IC 4-2-6-9 Conflict of Interests; Decisions and Votes

IC 4-2-6-9 (a) prohibits a state employee from participating in any decision or vote, or matter relating to that decision or vote, if any of the following have a financial interest in the outcome of the matter: the state employee himself or herself; an immediate family member of the state employee; a business organization in which the state employee serves as an officer, a director, a member, a trustee, a partner or an employee; or any person or organization with whom the state employee is negotiating or has an arrangement concerning prospective employment. In addition, the rule requires a state employee who identifies a potential conflict of interests to notify his or her agency's appointing authority and ethics officer in writing and either (1) seek a formal advisory opinion from the Commission or (2) file a written disclosure form with the OIG.

In this case, IDOH is asking if Dr. Box or another IDOH employee can serve as a voting member of the Board. This would make Dr. Box or the participating IDOH employee a director or member of IHIE and would prohibit her from participating in any decision or vote, or matter related to a decision or vote, in which IHIE would have a financial interest. Also, it would trigger the disclosure requirements in IC 4-2-6-9(b) if Dr. Box or the participating IDOH employee identifies a potential conflict of interests.

You write that if the participating IDOH employee is a member of IHIE, it would present a conflict of interests under IC 4-2-6-9(a)(3) because the employee would be in a position



at IHIE to participate in decisions or votes in which IHIE would have a financial interest in the outcome; however, the important question is whether Dr. Box or the participating IDOH employee is in a position at IDOH in which it is probable that she will be asked to participate in decision or votes, or matters related to decisions or votes, for IDOH in which IHIE has a financial interest.

As you note, [2018- FAO-0018](#) provides a similar set of facts. In that case, the Commission determined that a police captain's service on an advisory board of an automobile manufacturer was a "member" of the automobile manufacturer for purposes of IC 4-2-6-9. The Commission found the police captain had identified a potential conflict of interests under IC 4-2-6-9(a)(3) as he was in a position at his agency to participate in decisions or votes, or matters related to decisions or votes in which the automobile manufacturer would have a financial interest in the outcome. Accordingly, the Commission required the police captain to notify his agency's appointing authority of the potential conflict of interests and required the agency to screen him from participating in all decisions or votes in which the automobile manufacturer would have a financial interest. The Commission confirmed with the agency's ethics officer that the agency was prepared to implement such a screen. The Commission required the agency to provide the proposed screen for approval via filing the Conflict of Interests-Decisions and Voting disclosure form with the OIG.

Based on the information you provided, IDOH has contracts with IHIE. As the appointing authority for IDOH, Dr. Box is in a position to participate in decisions or votes, or matters related to those decisions or votes, in which IHIE would have a financial interest in the outcome, such as any matters related to IHIE's contract with IDOH. As the head of the agency, we believe the Commission likely would find Dr. Box has a potential conflict of interests under IC 4-2-6-9 if she serves as a voting member of the Board. Accordingly, pursuant to IC 4-2-6-9(b), Dr. Box or the participating IDOH employee would need to notify her agency's appointing authority and ethics officer in writing of the potential conflict of interests and either seek Formal Advisory Opinion from the Commission or file a [disclosure statement](#) with our office. Earl Goode in the Governor's Office is considered the appointing authority for all agency heads.

If you or Dr. Box would like to request a formal advisory opinion from the Commission, you can find instructions for submitting a request on our website: <http://www.in.gov/ig/2334.htm>. **The next Commission meeting is February 10, 2022, and to appear at this meeting, you must submit your request for a formal advisory opinion no later than January 31, 2022.** Please let us know if you have any further questions about the formal advisory opinion process.

2. IC 4-2-6-5.5 – Outside Employment/Professional Activity

The outside employment/professional activity rule prohibits state employees from:

- 1) accepting other employment that would involve compensation of substantial value if the responsibilities of that employment are inherently incompatible with the responsibilities of public office or would require them to recuse



- themselves from matters so central or critical to the performance of their official duties that their ability to perform them would be materially impaired;
- 2) accepting other employment or engaging in professional activity that would require them to disclose confidential information that was gained in the course of state employment; or
 - 3) using their official position to secure unwarranted privileges or exemptions that are of substantial value and not properly available to similarly situated individuals outside state government

Generally, this rule states that a state employee may not engage in professional activities if they trigger any of the above listed matters. Based on the information you provided, Dr. Box or the participating IDOH employee would be serving on the Board in their official capacity; therefore, it is unlikely that subsections (1) or (2) of the rule would prohibit them from serving on the Board. Regarding subsection (3), Dr. Box or the participating IDOH employee is prohibited from using her IDOH position to secure unwarranted privileges or exemptions for IHIE or anyone else that subsection (3) prohibits.

Additionally, please note that only the Commission can provide conclusive proof that an outside employment/professional activity is not in conflict with an employee's state duties. **Dr. Box or the participating IDOH employee should consider seeking a Formal Advisory Opinion from the Commission on this question as well as under IC 4-2-6-9.**

3. IC 4-2-6-10.5 – Conflicts of Interests Related to Contracts

Pursuant to IC 4-2-6-10.5, a state employee may not knowingly have a financial interest in a contract made by any state agency. The Code defines "financial interest" to include an interest arising from employment. The Commission has interpreted this rule to apply when a state employee derives compensation from a contract between a state agency and a third party. In other words, if Dr. Box or the participating IDOH employee receives compensation from IHIE for participating on the Board and if a contract or grant from the State of Indiana funds any compensation that the participating IDOH employee would receive for her work on the Board, then the rule would prohibit the IDOH employee from accepting the compensation unless she can meet the requirements of the rule's exception.

The rule's exception provides that an employee may have a financial interest in a contract made by a state agency so long as that employee (1) does not participate in or have official contracting responsibility for the contracting agency, and (2) files a disclosure form with our office prior to the contract's execution between the agency and third party. You did not provide any information indicating that IHIE will be compensating Dr. Box or the participating IDOH employee or that any compensation from IHIE will be derived from a state contract; therefore, this rule may not apply.

Should Dr. Box or the participating IDOH employee discover in the future that she is receiving compensation from IHIE and it is derived from a contract between an Indiana state agency and IHIE, she would not be able to accept the compensation unless an exception to IC 4-2-6-10.5 applies.



4. 42 IAC 1-5-1 Gifts

As you note in your request, Dr. Box or the participating IDOH employee also will want to be aware of 42 IAC 1-5-1, the Gifts rule. The Gifts rule states, in part, that a state employee shall not knowingly solicit, accept or receive any gift, favor, service, entertainment, food, drink, travel expenses or registration fees from: (1) a person who has a business relationship with the employee's agency; or (2) a person who is seeking to influence an action by the employee in his or her official capacity.

"Business relationship" is defined in IC 4-2-6-1 (a)(5) to include the dealings of a person with an agency seeking, obtaining, establishing, maintaining or implementing (i) a pecuniary interest in a contract or purchase with an agency; (ii) a license or permit requiring the exercise of an agency's judgment or discretion; or (iii) the relationship a registered or unregistered lobbyist has with an agency.

The general prohibition on gifts is subject to the eight exceptions outlined in subsection (b) of 42 IAC 1-5-1 or its application in certain circumstances may be waived by the agency's appointing authority as provided for in subsections (c) and (d).

IHIE provides that it has contracts with IDOH. As such, IHIE has a business relationship with IDOH, and Dr. Box, or any other IDOH employee, is prohibited from accepting any gifts from IHIE unless an exception to the rule applies or unless the IDOH employee obtains a gift waiver.

5. 42 IAC 1-5-10 and 42 IAC 1-5-11 Confidential information

Under 42 IAC 1-5-10 and 42 IAC 1-5-11, a state employee is prohibited from benefitting from, permitting any other person to benefit from or divulging information of a confidential nature except as permitted or required by law.

To the extent that Dr. Box possesses information of a confidential nature by virtue of her position with IDOH that could be used to benefit IHIE, or any other person or organization, she must ensure that she complies with these rules.

Additionally, even if Dr. Box or the participating IDOH employee's membership on the Board does not amount to an ethics violation, it may present the appearance of impropriety and/or unfair competition. **As a result, we strongly advise that IDOH request a Formal Advisory Opinion from the Commission and look for ways to minimize any appearance of impropriety or unfair competition that could arise.** You also may wish to review Inspector General Investigative Report [2017-04-0071](#), wherein our office addressed a similar matter regarding state employees serving as voting members on a state contractor's board of directors. In the Report, our office provided recommendations of ways state agencies and employees could reduce the appearance of conflicts of interests or unfair competition.

Thank you again for submitting your inquiry. Please let us know if you or Dr. Box have any questions regarding this opinion. Please note that this response does not constitute an official advisory opinion. Only the Commission may issue an official advisory opinion. This informal advisory opinion allows us to give you quick, written advice. The Commission will consider that an employee or former employee acted in good faith if it is determined that



the individual committed a violation after receiving an informal advisory opinion, and the alleged violation was directly related to the advice rendered. Also, remember that the advice given is based on the facts as we understand them. If this e-mail misstates facts in a material way, or omits important information, please bring those inaccuracies to our attention.

Sincerely,

Mark Mader
Staff Attorney
Office of Inspector General