

**42 IAC 1-5-14 Postemployment restrictions (IC 4-2-6-11)**  
**42 IAC 1-5-6 Conflicts of interest; decisions and voting (IC 4-2-6-9)**

An FSSA employee planned to return to the private sector as a self-employed consultant. A potential client had some past connections with an entity that had contracted with FSSA, but the employee was not directly involved with any matters, including contracts or regulatory decisions, related to the client during his tenure at the agency. SEC determined that the employee was not subject to the one-year cooling off requirement found in IC 4-2-6-11 and that he could provide consulting services to the client immediately upon leaving state employment so long as he complied with the executive branch lobbying restrictions. SEC further found that the employee must refrain from assisting or representing any clients in any particular matters he personally and substantially participated in as a state employee.

November 2015  
No. 15-I-18

The Indiana State Ethics Commission (“Commission”) issues the following advisory opinion concerning the State Code of Ethics (“Code”) pursuant to IC 4-2-6-4(b)(1). The following opinion is based exclusively on sworn testimony and documents presented by the requestor.

**BACKGROUND**

A state employee has served in various leadership roles within the Family and Social Services Administration (“FSSA”). The state employee first joined FSSA on July 13, 2009, as Deputy Secretary and Chief of Staff to then-Secretary of FSSA. Upon then-Secretary’s return to the private sector, the state employee was appointed Secretary of FSSA on November 15, 2010. He held this role until March 1, 2013, at which point the state employee returned to the private sector as Managing Director of a small woman-owned business based in Indianapolis. On July 7, 2014, the state employee returned to FSSA as Deputy Secretary to lead the implementation of Indiana's Healthy Indiana Plan (HIP) 2.0 program. After a successful roll-out of HIP 2.0, the Deputy Secretary desires to return to the private sector as a self-employed consultant.

The Deputy Secretary first approached the FSSA's General Counsel and Ethics Officer, on August 6, 2015, to indicate his general interest to return to self-employment. At that time, the state employee did not have any particular clients in mind nor had he had any particular discussions with outside parties; he simply expressed his desire to transition out of the role of Deputy Secretary. At that time, the General Counsel and Ethics Officer informed the Deputy Secretary that he would need to notify her when he had decided to discuss specific opportunities with outside parties so that she could set up any necessary internal screens and notify the Secretary of FSSA and the Office of Inspector General.

On September 14, 2015, the Deputy Secretary and the General Counsel and Ethics Officer discussed a particular opportunity for him to provide consulting services to assist BioCrossroads, Inc. (“BioCrossroads”) upon leaving state government. At that time, the Deputy Secretary and the General Counsel and Ethics Officer discussed the concept of an internal screen; however, it was determined there were no current existing matters between FSSA and BioCrossroads, and thus nothing to screen. The General Counsel and Ethics Officer and the Deputy Secretary discussed that should any such matters arise, the General Counsel and Ethics Officer would prepare a screen for any dealings with BioCrossroads or related entities during his remaining tenure with FSSA. The Deputy Secretary has historically had little to no contact or oversight of BioCrossroads or related entities during his tenure at FSSA.

The Deputy Secretary has identified two entities related to BioCrossroads: the Central Indiana Corporate Partnership, Inc. ("CICP") and Indiana Health Information Exchange ("IHIE") (together referred to as "Related Entities"). CICP was formed in 1999 to bring together chief executives of Central Indiana's prominent corporations, foundations and university presidents in a strategic and collaborative effort dedicated to the region's continued prosperity and growth. BioCrossroads is one of six key economic development initiatives sponsored by CICP. BioCrossroads' mission is to serve as a catalyst for the continued growth of Indiana's robust life sciences industry. IHIE was started in 2004 to help lower Indiana's healthcare expenses with funding and support from BioCrossroads along with community collaboration from Indianapolis-area hospitals, the Regenstrief Institute and state and local health departments. To the best of the General Counsel and Ethics Officer's knowledge, this relationship today is not financially based. Instead, the relationship is established through the President and CEO of CICP and BioCrossroads, while also serving on IHIE's Board of Directors and Executive Committee. There are no other current relationships between BioCrossroads and IHIE. BioCrossroads does not provide funding support of any kind to IHIE or receive any services from IHIE.

For purposes of this request, FSSA's Director of Contract Management ran a search on BioCrossroads and the Related Entities from 2008 through current, which confirmed that FSSA does not have any current or previous contracts with BioCrossroads. The contract search did identify two previous contracts with IHIE, neither of which is applicable. The first was a professional services contract with IHIE, relating to a grant that the Centers for Medicare and Medicaid Services ("CMS") awarded to FSSA's Office of Medicaid Policy and Planning ("OMPP") from September 30, 2007 to March 31, 2009, entitled "Health Information Exchange Services to Improve Effectiveness and Efficiency in Providing Medical Assistance under Medicaid". In order to execute the grant, OMPP contracted with IHIE. The Deputy Secretary was not a state employee during the term of this contract.

The other contract identified by FSSA's Director of Contract Management was a professional services contract from September 9, 2011 to December 31, 2011, between FSSA and IHIE for \$91,050. This contract was extended twice, ultimately through May 22, 2012, and was signed by the Deputy Secretary in his capacity as then-Secretary. This contract with IHIE was to assist with a feasibility study to determine technology needs and costs to establish a health information exchange. Although the Deputy Secretary did sign this contract in his capacity as Secretary, he indicates he did not negotiate or administer the contract, but he merely signed it in his capacity as Secretary of FSSA.

According to the General Counsel and Ethics Officer, the state employee's roles as Deputy Secretary and Chief of Staff, Secretary and Deputy Secretary were largely leadership and policy positions. He was generally involved in large scale strategy and communicating broad policy issues and ensuring FSSA's general mission was carried out and annual goals were met. Any particular discussions with BioCrossroads or other life science or health technology providers would have occurred at the division or program level within FSSA. The Deputy Secretary indicates there are no particular matters (whether it was an application, a business transaction, a claim, etc.) that he substantially or personally participated in during his tenure with FSSA that would preclude him from providing services post-employment to BioCrossroads.

The Deputy Secretary's plans to provide consulting services to BioCrossroads after leaving state employment will involve assisting with a life sciences talent study. This study will look at the demand and supply of life sciences workers, including those working in healthcare delivery, in Indiana and the factors shaping how demand and supply can be more closely linked. The Deputy Secretary will be responsible for attending and helping to facilitate focus groups on this initiative. He will also help review report drafts and assist in review and preparation of materials relating to the study. It is possible through his work with BioCrossroads that he will seek and/or attend meetings with the Indiana Department of Workforce Development to better assess the life sciences worker needs. The Deputy Secretary's role with BioCrossroads would not require him to register as an executive branch lobbyist with the Indiana Department of Administration nor will his new role require him to have substantial contact with FSSA.

Going forward, the Deputy Secretary understands that the Code will continue to apply to him as a self-employed consultant, and with each potential new client, he should consult the Code and/or the Office of Inspector General to ensure compliance with the laws. He understands and agrees to keep confidential information of FSSA confidential during his post-employment endeavors.

### **ISSUE**

What rules in the Code apply to the Deputy Secretary's post-employment opportunity with BioCrossroads? Would the Deputy Secretary be prohibited from providing consulting services to BioCrossroads immediately upon leaving state employment?

### **RELEVANT 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.

#### **IC 4-2-6-9 (42 IAC 1-5-6)**

#### **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 related 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 no 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 4-2-6-11 (42 IAC 1-5-14)**

#### **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.

## ANALYSIS

The Deputy Secretary's post-employment opportunity with BioCrossroads implicates the provisions of the Code pertaining to confidential information, conflicts of interest, and post-employment. The application of each provision to the Deputy Secretary's prospective post-employment opportunity with BioCrossroads is analyzed below.

### *A. Confidential Information*

IC 4-2-6-6 prohibits the Deputy Secretary 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. Based on the information provided, it does not appear that the Deputy Secretary would utilize confidential information in his potential employment with BioCrossroads. So long as any compensation the Deputy Secretary receives does not result from confidential information, his prospective opportunity with BioCrossroads would not violate IC 4-2-6-6.

### *B. Conflicts of Interest*

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

In this case employment negotiations have already begun as the Deputy Secretary indicated that he intends to provide consulting services to BioCrossroads to assist them with a life sciences talent study. Although the Deputy Secretary intends to be self-employed and provide consulting services to BioCrossroads on a contractual basis, the definition of "employer" found at IC 4-2-6-1(a)(10) means any person from whom a state employee receives compensation. Accordingly, a conflict of interest would arise for the Deputy Secretary if he participates in a decision or vote, or matter related to such decision or vote, in which either he, by virtue of his employment negotiations with BioCrossroads, or BioCrossroads itself would have a financial interest.

The Deputy Secretary informed the General Counsel and Ethics Officer of the particular opportunity with Bio Crossroads, and they determined that there were no existing matters between FSSA and BioCrossroads. The Deputy Secretary must continue to ensure he does not participate in any decisions or votes, or matters relating to any such decisions or votes, in which he or BioCrossroads has a financial interest in the outcome of the matter

for the remainder of his state employment. Further, if he identifies a potential conflict of interests, he must follow the requirements in IC 4-2-6-9(b) to avoid violating this rule.

### *C. Post-Employment*

IC 4-2-6-11 consists of two separate limitations: a “cooling off” period and a “particular matter” restriction. The first prohibition commonly referred to as the cooling off or revolving door period prevents the Deputy Secretary from accepting employment from an employer for 365 days from the date that he leaves state employment under various circumstances. Employer is defined in IC 4-2-6-1(a)(10) as any person from whom a state employee receives compensation and therefore includes a client or customer of a self-employed individual.

First, the Deputy Secretary is prohibited from accepting employment as a lobbyist for the entirety of the cooling off period. A lobbyist is defined as an individual who seeks to influence decision making of an agency and who is registered as an executive branch lobbyist under the rules adopted by the Indiana Department of Administration. The information provided by the Deputy Secretary indicates that his intended work with BioCrossroads would not require him to engage in lobbying activities or register as an executive branch lobbyist. To the extent that the Deputy Secretary ensures compliance with this provision for the entirety of the cooling off period, the Commission finds that the Deputy Secretary’s intended opportunity with BioCrossroads would not violate this provision of the post-employment rule.

Second, the Deputy Secretary is prohibited from accepting employment for 365 days from the last day of his state employment from an employer for whom he made a regulatory or licensing decision that directly applied to the employer or its parent or subsidiary.

The Deputy Secretary indicates that all of his roles with FSSA were largely leadership and policy positions and he was generally involved in large scale strategy and communications regarding broad policy positions, and his responsibilities did not include making regulatory or licensing decisions. The Commission finds that this restriction does not apply to the Deputy Secretary’s intended employment with BioCrossroads because he did not make regulatory or licensing decisions affecting BioCrossroads or any of its subsidiaries at any time during his tenure with the State. Consequently, the Deputy Secretary is not prohibited under this provision from providing consulting services to BioCrossroads immediately upon leaving state employment.

Third, the Deputy Secretary is prohibited from accepting employment for 365 days from the last day of his state employment from an employer, including a client or customer he may contract with as an independent consultant, with whom 1) he engaged in the negotiation or administration of a contract on behalf of a state agency and 2) was in a position to make a discretionary decision affecting the outcome of the negotiation or nature of the administration of the contract.

BioCrossroads does not have any current or previous contracts with FSSA. FSSA's Director of Contract Management did identify two previous contracts with IHIE. BioCrossroads provided funding and support to IHIE when it was started in 2004. The entities' current relationship is limited to BioCrossroads' President and CEO also serving on the IHIE Board of Directors.

The Deputy Secretary was not a state employee during the term of the first identified contract with IHIE. The other contract identified by FSSA's Director of Contract Management was a professional services contract from September 9, 2011 to December 31, 2011, between FSSA and IHIE for \$91,050. This contract was extended twice, ultimately through May 22, 2012, and was signed by the Deputy Secretary in his capacity as then-Secretary. This contract with IHIE was to assist with a feasibility study to determine technology needs and costs to establish a health information exchange. Although the Deputy Secretary did sign this contract in his capacity as Secretary of FSSA, the contract was between FSSA and IHIE and was not related to BioCrossroads. In addition, this contract expired over two years ago and thus meets the two-year exception to the cooling off period under IC 4-2-6-11(f)(2).

Accordingly, the Commission finds that this provision of the cooling-off restriction would not prohibit the Deputy Secretary from pursuing the employment opportunity with BioCrossroads as an independent consultant immediately upon leaving state employment.

Fourth, the Deputy Secretary is prohibited from accepting employment from an employer if the circumstances surrounding the hire suggest the employer's purpose is to influence him in his official capacity as a state employee. The information presented to the Commission does not suggest that the offer of employment from BioCrossroads was extended to the Deputy Secretary in an attempt to influence him in his capacity as a state employee. Accordingly, the Commission finds that this restriction does not apply to the Deputy Secretary's intended employment opportunity with BioCrossroads.

Finally, the Deputy Secretary is subject to the post-employment rule's "particular matter" prohibition in his prospective post-employment. This restriction prevents him from representing or assisting a person on any of the following twelve matters if he personally and substantially participated in the matter as a state employee: 1) an application, 2) a business transaction, 3) a claim, 4) a contract, 5) a determination, 6) an enforcement proceeding, 7) an investigation, 8) a judicial proceeding, 9) a lawsuit, 10) a license, 11) an economic development project, or 12) a public works project. The particular matter restriction is not limited to 365 days but instead extends for the entire life of the matter at issue, which may be indefinite.

The Deputy Secretary has not identified any particular matters that he anticipates working on in his intended employment opportunity with BioCrossroads. The Commission finds that the Deputy Secretary must ensure compliance with the particular matter restriction and refrain from assisting or representing BioCrossroads or any other person, including other clients or customers of his private consulting business, on any of the particular matters listed above that he may have personally and substantially worked on during his state employment regardless of whether it involves BioCrossroads.

## **CONCLUSION**

Subject to the foregoing analysis and the application of the one-year restriction regarding executive branch lobbying, the Commission finds that the Deputy Secretary's post-employment opportunity with BioCrossroads would not violate the post-employment restrictions found in IC 4-2-6-11.