



## INSPECTOR GENERAL REPORT

2010-08-0196

September 7, 2010

### CRIMINAL CONFLICT OF INTEREST LANGUAGE

#### *Summary*

*A recommendation to amend the criminal conflict of interest statute to (1) codify the offense, defenses and definitions, to (2) further define the limits of the governmental entity contracting prohibition, and (3) eliminate duplicative disclosure requirements.*

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*Inspector General David O. Thomas reports as follows:*

This case involves a review of the statute defining the criminal offense of conflict of interest. IC 35-44-1-3 (Exhibit A, current version, attached). This law is one of the fundamental public offense criminal statutes within the jurisdiction of the Office of the Inspector General (OIG). IC 4-2-7-3(3)(D).

The OIG is charged with the statutory duty to “recommend legislation to the Governor and General Assembly to strengthen public integrity laws.” IC 4-2-7-3(9).

Coupled with this charge is the statutory requirement that the OIG make

recommendations aimed to reduce fraud and waste. IC 4-2-7-3(2).

The issues addressed below are not purely academic questions. These issues have arisen both in the OIG's advisory (IC 4-2-7-3(8)) and investigatory (IC 4-2-7-3(3)) functions. Accordingly, the OIG seeks Legislative guidance to better advise and investigate.

Within these parameters, the OIG respectfully makes the following findings and recommendations.

1

The OIG respectfully submits that the current language within IC 35-44-1-3 might be considered by some to be cumbersome. *See* Exhibit A. The criminal offense is clearly presented, but the definitions and defenses to the rule are interspersed throughout the statute.

The OIG respectfully has taken the liberty of drafting a modification to the language which may accomplish the same prohibited conduct, attached hereto as Exhibit B, and which may be compared with the current version of IC 35-44-1-3 in Exhibit A.

2

The OIG also respectfully submits that within this criminal offense,<sup>1</sup> the

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<sup>1</sup> Currently:

IC 35-44-1-3

Conflict of interest

Sec. 3. (a) A public servant who knowingly or intentionally:

limits of “the government entity served by the public servant” should be defined.

Mindful that this offense applies to many governmental entities<sup>2</sup> beyond the OIG’s limited jurisdiction within the Indiana Executive Branch,<sup>3</sup> we have found that “public servants” often immediately serve a government entity that is part of a larger governmental unit. For purposes of the application of this criminal offense, the issue then becomes the extent of the prohibited contracting, a question that has arisen in our investigations. For example, the question arises as to whether a member of a state agency *commission* which addresses only a fraction of the agency’s actions is barred by this crime from otherwise contracting with the actual umbrella *agency* in other agency business unrelated to the commission.

Furthermore, without a definition of the limits of “the government entity served by the public servant”, the question remains whether that same state commission member is prohibited from contracting with anyone in the Executive Branch of state government, since the Executive Branch might, itself, be deemed a “government entity” within IC 35-41-1-12<sup>4</sup>.

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(1) has a pecuniary interest in; or

(2) derives a profit from;

a contract or purchase connected with an action by the governmental entity served by the public servant commits conflict of interest, a Class D felony [emphasis added].

<sup>2</sup> See definition of “public servant” in IC 35-41-1-24 and IC 35-41-1-12 (further defining “governmental entity”) which includes the application of this crime to federal, state, and local government employees; persons within the instrumentalities of those entities (e.g. commissions and boards); and persons in state-assisted universities and colleges.

<sup>3</sup> IC 4-2-6-1(1) and IC 4-2-7-1(1).

<sup>4</sup> See the use of the words “any authority” in IC 35-41-1-12(2) and “the United States” in IC 35-41-1-12(1)).

In short, limits establishing how far up the governmental hierarchy the criminal prohibition applies should be delineated.

An important consideration in determining how pervasive the criminal conflict of interest law applies is the fact that, often, the persons sought for such commissions are experts in their field and chosen, for the benefit of the state, with that deliberate recognition. If so, the preclusion of their contracting with the entire agency or branch of government could chill the willingness of such commission members to serve, often in voluntary capacities.

It would also seem that the more removed the person is from the immediate governmental entity, the less likely the prohibited conflict-of-interest policy concerns within the crime would be invoked.

For consideration, we have respectfully recommended in Exhibit B (proposed revised language to IC 35-44-1-3) a proposed definition that maintains the definition of “government entity” within IC 35-41-1-12 (which definition applies to other offenses outside the subject crime in IC 35-44-1-3), but additionally defines the limits in this crime to that of an action by the “immediate” governmental entity served by the public servant.

3

The OIG also respectfully submits in the newly proposed language of IC 35-44-1-3 the deletion of subsections (e)<sup>5</sup> and (f).<sup>6</sup>

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<sup>5</sup> IC 35-44-1-3(e) currently reads: “The state board of accounts shall forward to the state ethics commission a copy of all disclosures filed with the board under IC 16-22-2 [county and city hospital s] through IC 16-22-5 [id.], IC 16-23-1 [id.], or this section.”

These subsections require conflict of interest disclosure forms regarding city and county hospitals received by the State Board of Accounts (SBOA) to be forwarded to the State Ethics Commission (SEC). However, the SEC and the OIG are specifically excluded in jurisdiction from these county and municipal entities. IC 4-2-6-1(1) and IC 4-2-7-1(1).

Although the OIG and SEC enjoy their relationship with the SBOA, as evidenced by multiple investigations, the deletion of these two subsections would retain the statutory duty of filing the disclosures with the SBOA<sup>7</sup> and eliminate the duplicative filing of these documents with another agency.

### Conclusion

For the above reasons, the OIG respectfully and pursuant to the above statutory authority recommends and submits for consideration the attached modified language in an attempt to strengthen this public integrity law pursuant to the Legislative directive given the OIG in IC 4-2-7-3(9). The OIG remains committed to providing additional information or research upon request.

Dated this 7<sup>th</sup> day of September, 2010.



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David O. Thomas, Inspector General

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<sup>6</sup> IC 35-44-1-3(f) currently reads: “The state ethics commission shall maintain an index of all disclosures received by the commission. The index must contain a listing of each public servant, setting forth the disclosures received by the commission made by that public servant.”

<sup>7</sup> IC 35-44-1-3(d)(6)(A) currently requires these disclosure forms to be filed with the SBOA. This duty is retained in the proposed amendments in Exhibit B.

**IC 35-44-1-3****Conflict of interest**

Sec. 3. (a) A public servant who knowingly or intentionally:

- (1) has a pecuniary interest in; or
- (2) derives a profit from;

a contract or purchase connected with an action by the governmental entity served by the public servant commits conflict of interest, a Class D felony.

(b) This section does not prohibit a public servant from receiving compensation for:

- (1) services provided as a public servant; or
- (2) expenses incurred by the public servant as provided by law.

(c) This section does not prohibit a public servant from having a pecuniary interest in or deriving a profit from a contract or purchase connected with the governmental entity served under any of the following conditions:

(1) If the:

(A) public servant is not a member or on the staff of the governing body empowered to contract or purchase on behalf of the governmental entity;

(B) functions and duties performed by the public servant for the governmental entity are unrelated to the contract or purchase; and

(C) public servant makes a disclosure under subsection (d)(1) through (d)(6).

(2) If the contract or purchase involves utility services from a utility whose rate structure is regulated by the state or federal government.

(3) If the public servant:

(A) is an elected public servant or a member of the board of trustees of a state supported college or university; and

(B) makes a disclosure under subsection (d)(1) through (d)(6).

(4) If the public servant:

(A) was appointed by an elected public servant or the board of trustees of a state supported college or university; and

(B) makes a disclosure under subsection (d)(1) through (d)(7).

(5) If the public servant:

(A) acts in only an advisory capacity for a state supported college or university; and

(B) does not have authority to act on behalf of the college or university in a matter involving a contract or purchase.

(6) If the public servant:

(A) is employed by the governing body of a school corporation and the contract or purchase involves the employment of a dependent or the payment of fees to a dependent; and

(B) makes a disclosure under subsection (d)(1) through (d)(6).

(7) If the public servant is under the jurisdiction of the state ethics commission as provided in IC 4-2-6-2.5 and obtains from the state ethics commission, following full and truthful disclosure, written approval that the public servant will not or does not have a conflict of interest in connection with the contract or purchase under IC 4-2-6 and this section. The approval required under this subdivision must be:

(A) granted to the public servant before action is taken in connection with the contract or purchase by the governmental entity served; or

(B) sought by the public servant as soon after the contract or purchase as the public servant becomes aware of the facts that give rise to a question of conflict of interest.

(d) A disclosure required by this section must:

- (1) be in writing;
- (2) describe the contract or purchase to be made by the governmental entity;
- (3) describe the pecuniary interest that the public servant has in the contract or purchase;
- (4) be affirmed under penalty of perjury;
- (5) be submitted to the governmental entity and be accepted by the governmental entity in a public meeting of the governmental entity prior to final action on the contract or purchase;
- (6) be filed within fifteen (15) days after final action on the contract or purchase with:
  - (A) the state board of accounts; and
  - (B) if the governmental entity is a governmental entity other than the state or a state supported college or university, the clerk of the circuit court in the county where the governmental entity takes final action on the contract or purchase; and
- (7) contain, if the public servant is appointed, the written approval of the elected public servant (if any) or the board of trustees of a state supported college or university (if any) that appointed the public servant.

(e) The state board of accounts shall forward to the state ethics commission a copy of all disclosures filed with the board under IC 16-22-2 through IC 16-22-5, IC 16-23-1, or this section.

(f) The state ethics commission shall maintain an index of all disclosures received by the commission. The index must contain a listing of each public servant, setting forth the disclosures received by the commission made by that public servant.

(g) A public servant has a pecuniary interest in a contract or purchase if the contract or purchase will result or is intended to result in an ascertainable increase in the income or net worth of:

- (1) the public servant; or
- (2) a dependent of the public servant who:
  - (A) is under the direct or indirect administrative control of the public servant; or
  - (B) receives a contract or purchase order that is reviewed, approved, or directly or indirectly administered by the public servant.

(h) It is a defense in a prosecution under this section that the public servant's interest in the contract or purchase and all other contracts and purchases made by the governmental entity during the twelve (12) months before the date of the contract or purchase was two hundred fifty dollars (\$250) or less.

(i) Notwithstanding subsection (d), a member of the board of trustees of a state supported college or university, or a person appointed by such a board of trustees, complies with the disclosure requirements of this chapter with respect to the member's or person's pecuniary interest in a particular type of contract or purchase which is made on a regular basis from a particular vendor if the member or person files with the state board of accounts and the board of trustees a statement of pecuniary interest in that particular type of contract or purchase made with that particular vendor. The statement required by this subsection must be made on an annual basis.

(j) This section does not apply to members of the governing board of a hospital organized or operated under IC 16-22-1 through IC 16-22-5 or IC 16-23-1.

(k) As used in this section, "dependent" means any of the following:

(1) The spouse of a public servant.

(2) A child, stepchild, or adoptee (as defined in IC 31-9-2-2) of a public servant who is:

(A) unemancipated; and

(B) less than eighteen (18) years of age.

(3) Any individual more than one-half (1/2) of whose support is provided during a year by the public servant.

*As added by Acts 1978, P.L.144, SEC.7. Amended by Acts 1981, P.L.304, SEC.1; P.L.329-1983, SEC.1; P.L.66-1987, SEC.28; P.L.13-1987, SEC.16; P.L.183-1988, SEC.1; P.L.109-1988, SEC.3; P.L.197-1989, SEC.3; P.L.2-1993, SEC.185; P.L.22-1995, SEC.3; P.L.1-1997, SEC.149.*

**IC 35-44-1-3****Conflict of interest**

Sec. 3. (a) The following definitions apply throughout this section:

(1) A “disclosure” required by this section must:

(A) be in writing;

(B) describe the contract or purchase to be made by the governmental entity;

(C) describe the pecuniary interest that the public servant has in the contract or purchase;

(D) be affirmed under penalty of perjury;

(E) be submitted to the governmental entity and be accepted by the governmental entity in a public meeting of the governmental entity prior to final action on the contract or purchase;

(F) be filed within fifteen (15) days after final action on the contract or purchase with:

(i) the state board of accounts; and

(ii) if the governmental entity is a governmental entity other than the state or a state supported college or university, the clerk of the circuit court in the county where the governmental entity takes final action on the contract or purchase; and

(G) contain, if the public servant is appointed, the written approval of the elected public servant (if any) or the board of trustees of a state supported college or university (if any) that appointed the public servant.

A member of, or a person appointed by, the board of trustees of a state supported college or university complies with the disclosure requirements of this chapter with respect to the individual's pecuniary interest in a particular type of contract or purchase which is made on a regular basis from a particular vendor if the individual files with the state board of accounts and the board of trustees a statement of pecuniary interest in that particular type of contract or purchase made with that particular vendor. The statement required by this subsection must be made on an annual basis.

(2) "Dependent" means any of the following:

(A) The spouse of a public servant.

(B) A child, stepchild, or adoptee (as defined in IC 31-9-2-2) of a public servant who is:

(i) unemancipated; and

(ii) less than eighteen (18) years of age.

(C) Any individual more than one-half (1/2) of whose support is provided during a year by the public servant.

(3) “Governmental entity served by the public servant” in subsection (b) refers only to the actual entity being served. It does not include other governmental units related to the actual governmental unit.

(4) “Pecuniary interest” means an interest in a contract or purchase if the contract or purchase will result or is intended to result in an ascertainable increase in the income

or net worth of:

(A) the public servant; or

(B) a dependent of the public servant who:

(i) is under the direct or indirect administrative control of the public servant; or

(ii) receives a contract or purchase order that is reviewed, approved, or directly or indirectly administered by the public servant.

(5) “Public servant” for purposes of this section means the definition in IC 35-41-1-24, but does not include members of the governing board of a hospital organized or operated under IC 16-22-1 through IC 16-22-5 or IC 16-23-1.

(b) A public servant who knowingly or intentionally:

(1) has a pecuniary interest in; or

(2) derives a profit from;

a contract or purchase connected with an action by the governmental entity served by the public servant

commits conflict of interest, a Class D felony.

(c) It is a defense if:

(1) the public servant receives the compensation for:

(A) services provided as a public servant; or

(B) expenses incurred by the public servant as provided by law.

(2) the public servant's interest in the contract or purchase and all other contracts and purchases made by the governmental entity during the twelve (12) months before the date of the contract or purchase was two hundred fifty dollars (\$250) or less.

(3) a disclosure (as defined in subsection (a)) is made by a public servant who is:

(A) not a member or on the staff of the governing body empowered to contract or purchase on behalf of the governmental entity, and functions and performs duties for the governmental entity unrelated to the contract or purchase;

(B) elected or a member of the board of trustees of a state supported college or university;

(C) appointed by an elected public servant or the board of trustees of a state supported college or university;

(D) employed by the governing body of a school corporation and the contract or purchase involves the employment of a dependent or the payment of fees to a dependent;

(4) the contract or purchase involves utility services from a utility whose rate structure is regulated by the state or federal government;

(5) the public servant:

(A) acts in only an advisory capacity for a state supported college or

university; and

(B) does not have authority to act on behalf of the college or university in a matter involving a contract or purchase.

(6) a public servant under the jurisdiction of the state ethics commission as provided in IC 4-2-6-2.5 obtains from the state ethics commission, following full and truthful disclosure, written approval that the public servant will not or does not have a conflict of interest in connection with the contract or purchase under IC 4-2-6 and this section. The approval required under this subdivision must be:

(A) granted to the public servant before action is taken in connection with the contract or purchase by the governmental entity served; or

(B) sought by the public servant as soon after the contract or purchase as the public servant becomes aware of the facts that give rise to a question of conflict of interest.