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An Indiana State Trooper sought advice regarding outside employment for starting an LLC to conduct law enforcement training and consulting as well as write publications on these subjects. The Commission finds that his prospective outside employment position would not create a conflict of interests under the Code of Ethics.

September 10, 2020
2020-FAO-009

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

The Commander and Ethics Officer in the Office of Professional Standards (Ethics Officer) for the Indiana State Police (ISP) is requesting a Formal Advisory Opinion on behalf of an ISP Master Trooper related to his proposed non-department business during his off-duty hours.

The Master Trooper is an ISP trooper and former ISP K-9 officer. The Master Trooper has worked for ISP for over 20 years and intends to remain with ISP. The Master Trooper is currently assigned to an ISP District Post for road patrol duties. The Master Trooper does not have any contracting or decision-making responsibilities for ISP and does not currently train any K-9 teams for ISP.

The Master Trooper has created an LLC through which he seeks to conduct training and consulting and write publications in the areas of self-defense; canine training; certifications; tactical deployments; Strategies and Tactics for Patrol Stops (STOPS); and leadership. The Master Trooper has submitted to ISP an application for non-department employment based on his plans for operating the LLC. According to the Master Trooper, he will not disclose any confidential ISP information and will be integrating the K-9 deployment tactics with the STOPS curriculum of the LLC. The Master Trooper explains that his duties with the LLC will not interfere with his responsibilities and current duties as an ISP employee.

The Master Trooper explains that he will not conduct his business using state property, state equipment or state time. The Master Trooper will conduct his business when he is off duty and on his personal time. The Master Trooper does not intend to contract with ISP or any other Indiana state agencies while remaining employed with ISP. Further, he provides that if any proposed contract would result in him having a financial interest in a contract with the State, the Master Trooper will comply with IC 4-2-6-10.5 by filing a written statement with the Indiana

Office of Inspector General (OIG) prior to the contract's execution. According to the Master Trooper, his clients will be local, state and federal/government agencies, but his clients will not include any Indiana state agencies.

The Ethics Officer is requesting a Formal Advisory Opinion on behalf of the Master Trooper regarding whether he could carry out his non-departmental employment with the LLC while remaining employed with ISP. Her supervisor, The Assistant Chief of Staff / Intelligence and Investigations (Assistant Chief of Staff), attended the Commission meeting on The Ethics Officer's behalf to assist in answering the Commission's questions.

ISSUES

- 1) Would the Master Trooper's outside employment with the LLC create any conflicts of interests for him under the Code of Ethics?
- 2) What other ethics issues, if any, arise for the Master Trooper given his position as a Master Trooper and his simultaneous outside employment with the LLC?

RELEVANT LAW

IC 4-2-6-5.5 (42 IAC 1-5-5)

Conflict of interest; advisory opinion by commission

Sec. 5.5. (a) A current state officer, employee, or special state appointee 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 (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 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 (42 IAC 1-5-7)

Prohibition against financial interest in contract; exceptions; disclosure statement; penalty for failure to file statement

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).

42 IAC 1-5-10

Benefiting from confidential information

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

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.

IC 4-2-6-17

Use of state property for other than official business; exceptions; Violations

Sec. 17. (a) Subject to IC 4-2-7-5, a state officer, an employee, or a special state appointee may not use state materials, funds, property, personnel, facilities, or equipment for purposes other than official state business unless the use is expressly permitted by a general written agency, departmental, or institutional policy or regulation that has been approved by the commission. The commission may withhold approval of a policy or rule that violates the intent of Indiana law or the code of ethics, even if Indiana law or the code of ethics does not explicitly prohibit that policy or rule.

(b) An individual who violates this section is subject to action under section 12 of this chapter.

42 IAC 1-5-13

Ghost employment

Sec. 13. A state officer, employee, or special state appointee shall not engage in, or direct others to engage in, work other than the performance of official duties during working hours, except as permitted by general written agency, departmental, or institutional policy or regulation.

ANALYSIS

A. Outside employment

An outside employment or professional activity opportunity creates a conflict of interests under IC 4-2-6-5.5(a) if it results in the employee: 1) receiving compensation of substantial value when the responsibilities of the employment are inherently incompatible with the responsibilities of public office or require the employee's recusal from matters so central or critical to the performance of his or her official duties that his or her ability to perform them would be materially impaired; 2) disclosing confidential information that was gained in the course of state employment; or 3) using or attempting to use his or her official position to secure unwarranted privileges or exemptions of substantial value that are not properly available to similarly situated individuals outside state government.

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).

The Commission generally defers to an agency's ethics officer regarding outside employment opportunities as these individuals are in a better position to determine whether a conflict of interests might exist between an employee's state duties and an outside employment/professional activity opportunity. Based on the information provided by the Ethics Officer and the Assistant Chief of Staff, the Master Trooper's outside position with the LLC is not inherently incompatible with his ISP position nor would it

require his recusal from his official state duties to the extent that his ability to perform them would be materially impaired. The Master Trooper is currently assigned to a District Post conducting road patrol duties and is a former ISP K-9 officer. The Master Trooper does not currently train any K-9 teams for ISP. The Master Trooper provides that his duties with the LLC would include conducting trainings, consulting and writing publications in the areas of self-defense; canine training; certifications; tactical deployments; Strategies and Tactics for Patrol Stops (STOPS); and leadership. According to the Master Trooper, his duties with the LLC will not interfere with his responsibilities and current duties as an ISP employee in any way.

Further, the Assistant Chief of Staff provided in his testimony at the Commission meeting that ISP is supportive of the Master Trooper's outside employment and does not have any concerns that his outside activities would interfere with his ISP duties and responsibilities.

The Commission confirmed that the Master Trooper would not have to disclose any confidential ISP information through the LLC. Similarly, nothing in the information presented suggests that the Master Trooper would use or attempt to use his official ISP position to secure unwarranted privileges or exemptions that subsection (3) prohibits, such as using his position to secure clients or customers for the LLC.

Accordingly, based on all of the information provided, the Commission finds that IC 4-2-6-5.5 does not prohibit the Master Trooper from operating the LLC while also working for ISP.

B. Conflict of interests – decisions and votes

IC 4-2-6-9 (a)(1) prohibits the Master Trooper from participating in any decision or vote, or matter relating to that decision or vote, if he has a financial interest in the outcome of the matter. Similarly, IC 4-2-6-9(a)(3) prohibits the Master Trooper from participating in any decision or vote, or matter relating to that decision or vote, if a business organization in which he is serving as an officer, a director, a member, a trustee, a partner or an employee has a financial interest in the matter.

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. . ."

A potential conflict of interests would arise for the Master Trooper if he participates in any matter related to a decision or vote for ISP in which the LLC would have a financial interest. This restriction goes beyond the actual decision or vote and prohibits his participation in any matter related to the decision or vote.

Based on the information provided, the Master Trooper does not have any contracting or decision-making responsibilities for ISP. The Master Trooper currently performs road patrol duties for a District Post. Through his LLC, the Master Trooper intends to provide various services to local, state and federal/government agencies with the exception of Indiana state agencies.

Accordingly, the Commission finds that the Master Trooper is currently not in a position at ISP in which he would participate in decisions or votes, or matters related to such decisions or votes, in which the LLC would have a financial interest in the outcome.

If, however, the Master Trooper's circumstances change and a potential conflict of interests is identified in the future, he must follow the disclosure requirements in IC 4-2-6-9(b), including notifying his agency's ethics officer and appointing authority in writing and either (1) seek a formal advisory opinion from the Commission; or (2) file a written disclosure form with the OIG.

C. Conflict of interests – 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.

This prohibition however does not apply to an employee that (1) does not participate in or have official contracting responsibility for any of the activities of the contracting agency; and (2) files written statement with the OIG before the employee executes the contract with the state agency. If, however, an employee seeks to derive compensation from a contract between a third party and state agency, the Commission has found that the employee must instead file a written statement with the OIG before the third party executes the contract with the state agency (*See* [2019-FAO-020](#), [2019-FAO-021](#) and [2020-FAO-003](#)).

As a business owner, the rule would apply to the Master Trooper in two ways. First, the rule would be implicated if the Master Trooper contracts directly with a state agency to provide services. The Master Trooper explains that he does not intend to contract with ISP or any other Indiana state agency while remaining employed with ISP.

Second, the rule would be implicated if the compensation the Master Trooper receives from a client/customer is derived from a state agency contract/grant. This could occur if the Master Trooper contracts with local Indiana clients or local government agencies that receive state funds under a contract/grant. The rule would prohibit the Master Trooper from receiving compensation derived from those state funds unless he can meet both requirements of the rule.

Although the Master Trooper does not participate in contracting nor does he have any contracting responsibilities in his state position, the Master Trooper would still need to

meet *both* requirements of the rule's exception before accepting compensation from any client or customer who has a state contract if his compensation would be derived from a state contract.

The Master Trooper confirmed that he understands that he cannot derive any compensation from an existing state contract and that he would not be entering into any contracts for his services with any Indiana state agencies. He further provided that, in his experience, local law enforcement agencies with whom the LLC may contract do not receive state funding for the type of training he intends to provide. In response to the Commission's concerns about the possibility of state funds being used as the revenue source for LLC contracts, the Master Trooper confirmed that he would ensure that no state funding would be used to compensate the LLC for services rendered. Further, he agreed with the Commission's suggestion that he should include a provision in any contracts he enters into that the entity will not use any state funding to pay for LLC services.

Accordingly, the Commission finds that, so long as he does not enter into any Indiana state contracts, or contracts with other entities that would be state-funded, the Master Trooper would not have a financial interest in a state contract.

D. Confidential information

The Master Trooper is prohibited under 42 IAC 1-5-10 and 42 IAC 1-5-11 from benefitting from, permitting any other person to benefit from or divulging information of a confidential nature except as permitted or required by law. Similarly, IC 4-2-6-6 prohibits the Master Trooper from accepting any compensation from any employment, transaction or investment which is entered into or made as a result of material information of a confidential nature. The term "person" is defined in IC 4-2-6-1(a)(13) to encompass both an individual and a corporation. In addition, the definition of "information of a confidential nature" is set forth in IC 4-2-6-1(a)(12).

To the extent the Master Trooper is exposed to or has access to such confidential information in his position with ISP, he would be prohibited not only from divulging that information but from ever using it to benefit any person, including the LLC, in any manner.

E. Use of state property and Ghost employment

IC 4-2-6-17 prohibits the Master Trooper from using state property for any purpose other than for official state business unless the use is expressly permitted by a general written agency, departmental or institutional policy or regulation. Likewise, 42 IAC 1-5-13 prohibits the Master Trooper from engaging in, or directing others to engage in, work other than the performance of official duties during working hours, except as permitted by general written agency, departmental or institutional policy or regulation.

To the extent that the Master Trooper observes these provisions in his outside work with the LLC, such outside employment activity would not violate these ethics laws.

CONCLUSION

Subject to the foregoing analysis, the Commission finds that the Master Trooper's outside employment opportunity with his LLC would not be contrary to the Code of Ethics.

Respectfully Submitted,

Jennifer Cooper
State Ethics Director