

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

The IEDC Ethics Officer drafted a conflicts policy for the IEDC Board in an effort to balance the disclosure requirements of the ethics rules with the confidentiality of certain Board negotiations and sought advice on whether the policy adequately addressed all relevant ethics issues. SEC found IEDC's proposal to file disclosures up front, implement a screen where necessary and notify the SEC when any such procedures were implemented sufficiently complied with the conflicts of interest rules in light of the concern for confidentiality.

June 2013  
No. 13-I-33

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 is the Ethics Officer for the Indiana Economic Development Corporation ("IEDC"). He requests an advisory opinion from the Commission concerning the screen and recusal process for potential conflicts of interest involving members of the IEDC Board of Directors ("Board").

The IEDC administers state incentive programs aimed at attracting or retaining job-creating businesses in the State. The incentive programs include, inter alia, tax credits, workforce training grants, and public infrastructure assistance. The IEDC is governed by a twelve-member Board. The Governor, who serves as chairperson of the Board, appoints the other members on a bipartisan basis. IEDC employees and the Board are under the jurisdiction and rules adopted by the Commission.

#### **Conflicts Policy**

With the assumption of a new Board appointed by a new Governor, the IEDC anticipates the potential for future conflicts of interest arising from financial interests of the new Board members. In 2005, the IEDC Board adopted a Confidentiality and Conflict of Interest Policy ("Policy") for its members. The Policy requires the Board members to complete and sign an annual Conflicts of Interest Disclosure Statement. The Policy also requires, in relevant part, the following when a Board member has a direct or indirect financial interest in a company in which the IEDC is considering the issuance of an offer of a state incentive:

- 1) Board members shall not participate in discussions concerning an incentive project in which the member has a financial interest;
- 2) That IEDC staff shall evaluate a project according to established criteria;
- 3) Irrespective of the amount of incentives to be offered, a company's application for incentives shall be brought to the full IEDC Board for consideration and approval; and,
- 4) The interested Board member shall not participate or vote on such a project under consideration.

The Policy further clarifies that “[i]n the event that there is an inconsistency between the Code of Ethics and the requirements and procedures set forth in this Policy, the more restrictive provision or provisions control.”

### *IEDC Negotiations*

The IEDC negotiates incentive packages with prospect companies considering job expansion projects in the State. Under the Indiana Access to Public Records Act (“APRA”), certain records of the IEDC are specifically exempted from disclosure. *See* I.C. 5-14-3-4(b)(5)(A-B). The IEDC publishes the terms of all incentive agreements (“the terms of the final offer of public financial resources”) on the IEDC Transparency Portal. The statute expressly incorporates the primary policy reason behind disclosure: the obligation and utilization of “public financial resources.” I.C. 5-14-3-4 (b)(5)(B). However, by waiting for specific projects with individualized conflicts to arise and then submitting a request for an advisory opinion pursuant to I.C. 4-2-6-9(b), it is probable that the advisory opinion process would highlight the identity of a prospect company while it is still in negotiations with the State. This public disclosure, before a prospect company has made a final determination to expand in or come to Indiana, could have a negative impact on the State’s job attraction efforts and run contrary to the confidentiality afforded such records under APRA.

### *Proposed Resolution*

To satisfy the statutory provisions of I.C. 4-2-6-9(b) and, at the same time, avoid potentially compromising confidentiality through case-by-case submissions, the IEDC collectively submits the conflicts information provided by Board members in their annual disclosure statements. The IEDC further proposes that the Commission consider the following screen and recusal options:

- (A) Based on conflicts information submitted by Board members, the IEDC would enter conflict information into the IEDC CRM database to track and alert staff members to the issue. The IEDC would adhere to the four-step conflicts Policy outlined above. For any applicable project and prior to Board approval, the IEDC Ethics Officer would monitor compliance with the process and report in the public session of an IEDC Board meeting on the compliance with this process.
- (B) Based on conflicts information submitted by Board members, the IEDC would enter the conflict information into the CRM database to track and alert staff members to the issue. The IEDC would adhere to the four-step conflicts Policy outlined above. For any applicable project and prior to Board approval, the IEDC Chief Financial Officer would certify to the Board that any proposed incentives satisfied established incentive criteria.

IEDC Board members provide signed updates of conflicts information, at a minimum on an annual basis or more often as new conflicts or changes to their conflicts arise. When a Board member has a new conflict or a change to his or her conflict, he or she should submit a revised statement with IEDC’s Ethics Officer to be filed with the Commission. In addition, Board membership may change from time-to-time. As a result of these factors, the IEDC anticipates that the collectively submitted information may need to be updated over time. The IEDC will

supplement the submitted information to the Commission as information develops. If an IEDC Board member does not have an accurate conflict statement filed with the Commission and the IEDC is scheduled to consider an issue involving an organization in which the Board member has a potential conflict of interest, then the Board member must come before the Commission individually.

### **ISSUE**

1. Would a conflict of interest arise for the Board members under I.C. 4-2-6-9 in certain situations arising from financial interests of the Board members?
2. If so, would the filing of a conflicts of interest disclosure statement and implementation of the screening procedures proposed by the IEDC satisfy the statutory requirements set forth in I.C. 4-2-6-9(b) for the board members when a potential conflict of interest is identified?

### **RELEVANT LAW**

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

##### **Conflict of economic interests**

Sec. 9. (a) A state officer, an employee, or a special state appointee may not participate in any 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 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 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:

(1) 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

(2) 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.

(c) A written determination under subsection (b)(2) 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

## ANALYSIS

IC 4-2-6-9(a) prohibits a special state appointee from participating in any decision or vote if they have knowledge that various persons may have a “financial interest” in the outcome of the matter, including the special state appointee, a member of their immediate family, or a business organization in which the appointee is serving as an officer, a director, a trustee, a partner, or an employee. The term financial interest as defined in IC 4-2-6-1(a)(11) includes an interest in a contract and an interest involving services. However, the term does not include an interest that is not greater than the interest of the general public or any state employee.

In this case, a conflict of interest would arise for the Board members if they were to participate in a decision or vote in which the member, or more likely, a business organization in which the member is serving as an officer, a director, a trustee, a partner, or an employee would have a financial interest in the outcome of the matter. For example, it is possible that a company that a Board member is employed by would apply for a specific incentive program administered by the IEDC. The Board member would be prohibited from participating in any decision or vote related to that matter because the member’s employer would have a financial interest in whether the incentive program is approved or not.

I.C. 4-2-6-9(b) provides that a special state appointee who identifies a potential conflict of interest shall notify the person's appointing authority and 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. I.C. 4-2-6-9(b)(1) further provides that when a potential conflict of interest arises, the Commission may, with the approval of the appointing authority, assign the particular matter to another person and implement all necessary procedures to screen the state employee seeking an advisory opinion from involvement in the matter.

In this case, instead of requiring the Board members to request an advisory opinion from the Commission on a case-by-case basis, the IEDC proposes that the members file and continually update a conflict of interest disclosure form with the Commission and when a potential conflict of interest arises, the proposed screen be implemented. The IEDC cites to the statutory protections afforded to the IEDC negotiations as a reason for the Commission to depart from the established practice of requiring individuals to request an advisory opinion and specifically 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 when and if a matter arises. The IEDC further notes that doing so when a specific matter arises would highlight the identity of a prospect company while it is still in negotiations with the State. This public disclosure, the IEDC claims, before a prospect company has made a final determination to expand in or come to Indiana, could have a negative impact on the State’s job attraction efforts.

Accordingly, the Commission must decide whether to depart from the current practice of requiring individual Board members to request an advisory opinion on a case-by-case basis or accept the IEDC’s proposed method of handling conflicts of interests for the Board members.

## **CONCLUSION**

The Commission finds that a conflict of interest could arise for the Board members under I.C. 4-2-6-9 in certain situations arising from financial interests of the Board members. Given the statutory protections afforded to the IEDC's negotiations, the Commission finds it appropriate for the Board members to file and continually update a conflict of interest disclosure form with the Commission and, when a potential conflict of interest arises, the proposed screen be implemented without requiring that the Board member request an advisory opinion from the Commission on a case-by-case basis. The IEDC must, however, report to the Commission that a potential conflict of interest was identified and that the screen was implemented.