

Advisory Opinion

IECDB AO 2015-04

March 26, 2015

Cory R. Thein
Kintzinger Harmon Konrardy PLC
100 West 12th Street
Dubuque, IA 520004-0703

Dear Mr. Thein:

This opinion is in response to your request for an advisory opinion on whether Iowa Code section 68B.4 applies to a certain state employee who desires to also work as a realtor. We note at the outset the Board's jurisdiction is limited to the application of Iowa Code chapters 68A and 68B, Iowa Code section 8.7, and rules in Iowa Administrative Code chapter 351. Advice in a Board opinion, if followed, constitutes a defense to a subsequent complaint based on the same facts and circumstances.

BACKGROUND FACTS:

We understand you request this opinion in your capacity as attorney for Ronald McCarthy. Mr. McCarthy is employed by the Iowa Department of Agriculture and Land Stewardship (hereafter "the Department") as a Soil Conservation Technician III in Dubuque County. Mr. McCarthy's job is to design, layout, and oversee conservation practices, such as erosion strips, terraces, waterways, and ponds. He has held this position since 1984.

As a Soil Conservation Technician III, Mr. McCarthy has access to confidential information for nearly every farm in Dubuque County. This confidential information includes whether a property is subject to a "highly erodible" or "wetland" determination. This information is not open to the public unless the landowner authorizes the release of the information about his or her tract of land.¹

In September 2014, Mr. McCarthy obtained his license to sell real estate. While still employed with the Department, he is now affiliated with American Realty of Dubuque. Mr. McCarthy works exclusively with residential real estate but other realtors affiliated with American Realty assist clients with buying and selling agricultural real estate.

¹ Iowa Code section 22.7 governs what is a confidential public record. The Board does not have jurisdiction to determine what is or is not a confidential public record. That jurisdiction rests with the Public Information Board. See Iowa Code ch. 23 (2015). We assume for purposes of this opinion that Mr. McCarthy has access to confidential information related to Dubuque County farms.

When Mr. McCarthy's supervisors learned of this association with American Realty, they expressed concern that Mr. McCarthy's position with the Department gives him access to confidential information that would give him and American Realty an advantage over other realtors. After speaking with the Board's director and legal counsel, the Department advised Mr. McCarthy that he may not be associated with a realty company that works with agricultural land in Dubuque County unless he obtains the Department's consent through Iowa Code section 68B.4. Mr. McCarthy, through his attorney, encourages the Board to hold that Iowa Code section 68B.4 does not apply to him under the circumstances described above.

QUESTION:

Is Iowa Code section 68B.4 triggered when a Soil Conservation Technician III with the Department of Agriculture and Land Stewardship desires to sell real estate in the same county where he works for the Department?

ANALYSIS:

Iowa Code section 68B.4 states “[a]n official or employee of any regulatory agency shall not sell or lease, either directly or indirectly, any goods or services to individuals, associations, or corporations subject to the regulatory authority of the agency in which the person is an official or employee” unless certain conditions have been met.² The Department is a “regulatory agency” and Mr. McCarthy is a Department employee.³ As a licensed realtor, Mr. McCarthy is in the business of selling his services to individuals buying and selling land. Buyers and sellers of agricultural land are subject to the regulatory authority of the Department.

While Mr. McCarthy is not directly involved in agricultural real estate sales, he nevertheless is associated with a realty company that is involved in agricultural real estate sales in Dubuque County. Mr. McCarthy could easily provide confidential information obtained through his employment with the Department to other realtors in the company.⁴ Hence, we are of the opinion that Mr. McCarthy's association with American Realty triggers section 68B.4 because he has the ability to “indirectly” sell his realty services to members of the regulated community by providing confidential information to other realtors associated with American Realty for the benefit of those realtors' clients. Consequently, he may not engage in this outside employment or activity unless the conditions found in section 68B.4 are met. They are:

- a. The consent of the [Department] is obtained and [Mr. McCarthy] is not the official or employee with the authority to determine whether agency consent is to be given under this section.

² Iowa Code § 68B.4(1).

³ *Id.* § 68B.2(23).

⁴ *But see* Iowa Admin. Code r. 351—6.9 (prohibiting executive branch employees and officials from disclosing or using confidential information for the personal gain or benefit of any person).

- b. The duties or functions performed by [Mr. McCarthy] for the [Department] are not related to the regulatory authority of the [Department] over the individual, association, or corporation, or the selling or leasing of goods or services by [Mr. McCarthy] to the individuals, associations, or corporations does not affect [Mr. McCarthy's] duties or functions at the [Department].
- c. The selling or leasing of any goods or services by [Mr. McCarthy] to an individual, association, or corporation does not include advocacy on behalf of the individual, association, or corporation to the [Department].
- d. The selling or leasing of any goods or services by [Mr. McCarthy] to an individual, association, or corporation does not cause [Mr. McCarthy] to sell or lease goods or services to the [Department] on behalf of the individual, association, or corporation.⁵

The Board has an administrative rule that explains the criteria for processing a request for consent under section 68B.4.⁶ According to this rule, Mr. McCarthy should request the Department's consent in writing, and should include a statement explaining how the proposed sale of services (in this case Mr. McCarthy's services as a realtor) will not violate the provisions of Iowa Code section 68B.4 or create a conflict of interest under Iowa Code section 68B.2A.⁷ The Department has fourteen days to respond, unless the parties agree to more time.⁸ McCarthy may appeal a denial or conditional consent to the Board.⁹

Mr. McCarthy urges us to hold that section 68B.4 does not apply under the circumstances because the confidential information to which he has access is not typically used by realtors selling agricultural land and similar information is publicly available through other means such as Google Earth. The Board is not in a position to determine the value of this confidential information and thus is not in a position to determine the potential harm or benefit the unauthorized release of such information could cause. We merely hold the statute applies and thus the Department must consent before Mr. McCarthy associates himself with a realty company that assists clients with the purchase or sale of agricultural land in Dubuque County. The Department is in a much better position to weigh the potential harm and to determine whether safeguards could be implemented to prevent the unauthorized release of confidential information. If the Department's decision is unreasonable, then Mr. McCarthy has the option to file an appeal with the Board.

Mr. McCarthy also claims section 68B.4 does not apply because he is an independent contractor and not an employee of American Realty. He claims that as an

⁵ Iowa Code § 68B.4(1)

⁶ Iowa Admin. Code r. 351—6.11.

⁷ *Id.* r. 351—6.11(3)(b).

⁸ *Id.* r. 351—6.11(5).

⁹ *Id.* r. 351—6.11(6).

independent contractor he is not indirectly selling his realty services to other American Realty realtors' clients. This argument ignores the fact the statute is meant identify and prevent unacceptable conflicts of interest, regardless of how people choose to associate. By analogy, if an attorney has a conflict of interest, then that conflict is generally imputed to every lawyer in the law firm, regardless of whether those lawyers are considered employees or independent contractors.¹⁰ We see no reason why this situation should be treated any differently.

CONCLUSION:

Mr. McCarthy is engaging in an outside employment or activity that triggers Iowa Code section 68B.4. This outside employment or activity is prohibited unless he meets all of the conditions set forth in section 68B.4.

BY DIRECTION AND VOTE OF THE BOARD

James Albert, Board Chair

Jonathan Roos, Vice Chair

Saima Zafar

Carole Tillotson

John Walsh

Mary Rueter

Submitted by Megan Tooker, Board Legal Counsel

¹⁰ See Iowa r. Prof'l Conduct 32:1.10 (2015).