

January 20, 1998

Karin Holton
Research Analyst
Oregon Criminal Justice Commission
155 Cottage Street NE
Salem, Oregon 97310

Dear Ms. Holton:

This is in response to your correspondence dated November 25, 1998 concerning possible conflicts of interest that might arise for members of the Asset Forfeiture Oversight Advisory Committee (AFOAC).

**OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION STAFF OPINION
98-026**

STATED FACTS: The Asset Forfeiture Oversight Advisory Committee (AFOAC) is a statutory advisory committee established under ORS 475A.155. It has 12 members. Three members are senators appointed by the President of the Senate. Three members are representatives appointed by the Speaker of the House of Representatives. The Governor and the Attorney General each appoint three members.

The basic duties of the committee are:

1. To prepare reports detailing the number and nature of forfeitures carried out under ORS Chapter 475A, including reports on the disposition and use of the proceeds from forfeitures.
2. To review and modify reports from forfeiture counsel and political subdivisions to ensure that information necessary for oversight is being obtained and is gathered in an efficient manner.
3. To make any recommendations the committee deems necessary to increase the effectiveness, fairness and efficiency of forfeiture actions brought under ORS Chapter 475A.
4. To make any recommendations for additional legislation governing

forfeiture actions brought under ORS Chapter 475A.

5. To conduct studies or other activities as necessary to accomplish the above listed duties.

RELEVANT STATUTES: The following Oregon Revised Statutes are applicable to the issues addressed herein:

ORS 244.020(1): Actual conflict of interest means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit or detriment of the person or the person's relative or any business with which the person or a relative of the person is associated unless the pecuniary benefit or detriment arises out of circumstances described in subsection (8)(a) to (c) of this section.

ORS 244.020(2): Business means any corporation, partnership, proprietorship, firm, enterprise, franchise, association, organization, self-employed individual and any other legal entity operated for economic gain but excluding any income-producing not-for-profit corporation that is tax exempt under section 501(c) of the Internal Revenue Code with which a public official is associated in a nonremunerative capacity.

ORS 244.020(3): Business with which the person is associated means any business of which the person or the person's relative is a director, officer, owner or employee, or agent or any corporation in which the person or the person's relative owns or has owned stock worth \$1,000 or more at any point in the preceding calendar year.

ORS 244.020(7): Potential conflict of interest means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which could be to the private pecuniary benefit or detriment of the person or the person's relative, or a business with which the person or the person's relative is associated, unless the pecuniary benefit or detriment arises out of the following:

(b) Any action in the person's official capacity which would affect to the same degree a class consisting of all inhabitants of the state, or a smaller class consisting of an industry, occupation or other group including one of which or in which the person, or the person's relative or business with which the person or the person's relative is associated, is a member or is engaged. The commission may by rule limit the minimum size of or otherwise establish criteria for or identify

the smaller classes that qualify under this exception.

ORS 244.020(15): Public official means any person who, when an alleged violation of this chapter occurs, is serving the State of Oregon or any of its political subdivisions or any other public body of the state as an officer, employee, agent or otherwise, and irrespective of whether the person is compensated for such services.

ORS 244.040: Code of ethics; prohibited actions; honoraria. The following actions are prohibited regardless of whether actual conflicts of interest or potential conflicts of interest are announced or disclosed pursuant to ORS 244.120.

(1)(a) No public official shall use or attempt to use official position or office to obtain financial gain or avoidance of financial detriment that would not otherwise be available but for the public official's holding of the official position or office, other than official salary, honoraria, except as prohibited in paragraphs (b) and (c) of this subsection, reimbursement of expenses or an unsolicited award for professional achievement for the public official or the public official's relative, or for any business with which the public official or a relative of the public official is associated.

ORS 244.120: Methods of handling conflicts; generally; application to elected officials or members of boards. (1) Except as provided in subsection (2) of this section, when met with an actual or potential conflict of interest, a public official shall:

ORS 244.120(2): An elected public official, other than a member of the Legislative Assembly, or an appointed public official serving on a board or commission, shall:

(a) When met with a potential conflict of interest, announce publicly the nature of the potential conflict prior to taking any action thereon in the capacity of a public official; or

(b) When met with an actual conflict of interest, announce publicly the nature of the actual conflict and:

(A) Except as provided in subparagraph (B) of this paragraph, refrain from participating as a public official in any discussion or debate on the issue out of

which the actual conflict arises or from voting on the issue.

(B) If any public official's vote is necessary to meet a requirement of a minimum number of votes to take official action, be eligible to vote, but not to participate as a public official in any discussion or debate on the issue out of which the actual conflict arises.

QUESTION #1: Based on the fact that a portion of the proceeds from civil forfeitures carried out by cities is required to go to counties to help defray some of the costs of prosecution, would a district attorney appointed to the AFOAC have an actual or potential conflict of interest if the committee discussed changing or removing this requirement?

OPINION: No. Government entities, such as incorporated Oregon cities and counties, are not operated for economic gain. Thus, such entities are not a business as defined by ORS 244.020(2). Accordingly, employees of a governmental entity, such as a district attorney, do not come within the definition of business with which the person is associated as defined by ORS 244.020(3). They are not, therefore, subject to the definition of an actual conflict of interest as defined in ORS 244.020(1). Neither are they subject to the definition of a potential conflict of interest as defined in ORS 244.020(7).

No conflict of interest arises when they serve on a public body and take official action which results in a financial benefit or detriment to their employing public entity. The legislative intent of these statutes which define business clearly appears to have been referring to income producing private entities.

QUESTION #2: Since all or a portion of the proceeds go to repay the cost of the local government's attorney fees incurred to prosecute the forfeiture, would a local forfeiture counsel, whose salary is paid from the proceeds of forfeitures, have an actual or potential conflict of interest if the committee discussed changing this portion of the statutes?

OPINION: Yes. If a committee member whose private law practice includes asset forfeiture prosecution were to take any official action which could or would have a financial impact on the committee member's private law practice, the committee member would have to proceed according to the requirements of ORS 244.120(2). The law prescribes different actions by the committee member depending upon whether the conflict of interest is actual or potential.

Oregon Government Standards and Practices laws define actual conflict of interest [ORS 244.020(1)] and potential conflict of interest [ORS 244.020(7)]. An actual conflict of interest occurs when the action is reasonably certain to result in a financial benefit or detriment. It will occur when an action taken by a public official would directly and

specifically affect the financial interest of that official, a relative of that official or a business with which that official or a relative of that official is associated. A potential conflict of interest exists when an official takes action that could possibly have a financial impact on the official, a relative of the official or a business with which the official or the official's relative is associated. Such possible financial impact is not certain.

If the committee member, acting in official capacity, was faced with taking official action which would impact the committee member's private law practice, an actual conflict of interest would arise. The committee member would therefore be required to declare the actual conflict of interest pursuant to ORS 244.120(2)(b). If the action to be taken could impact the committee member's private law practice, a potential conflict of interest would arise and the committee member would be required to declare a potential conflict of interest pursuant to ORS 244.120(2)(a).

If an actual conflict of interest arises, the official must publicly disclose the actual conflict and refrain from taking any official action on the issue. If the official's vote is necessary for the public body to take action on the matter, the official may vote but may not discuss, debate or otherwise participate in the matter. In the case of a potential conflict of interest, the official may participate in the action, once a public disclosure has been made.

ORS 244.020(7)(b) provides an exception to conflicts of interest when an official action affects all members of a class to the same degree. Sometimes a public official may take action that would have a financial effect on that official, a relative of that official or a business with which that official or that official's relative is associated. If other people in a class are also affected to the same degree by that action, the official would be exempt from conflict of interest disclosure requirements.

It appears from the stated facts that action taken by the AFOAC member/asset forfeiture prosecutor, in official capacity as a committee member, would have the same financial impact on the committee member as it would have on all attorneys who, on occasion, conduct prosecution on asset forfeiture cases. The AFOAC member would, therefore, come within the class exception and would not need to declare a conflict of interest nor refrain from taking action.

It should be noted that only the Oregon Government Standards and Practices Commission is authorized by law to determine the existence of a class for the purpose of compliance with the conflict of interest provisions of ORS Chapter 244.

ORS 244.040(1)(a) prohibits a public official from using, or attempting to use, official

position or office to obtain financial gain or avoidance of financial detriment for the official, the official's relative or a business with which the official or the official's relative is associated. This prohibition exists regardless of whether actual conflicts of interest or potential conflicts of interest are announced or disclosed pursuant to ORS 244.120.

QUESTION #3: With a portion of the proceeds going back to the law enforcement agency(ies) responsible for the seizure, would a police chief/officer serving on the committee have an actual or potential conflict of interest if the committee discussed changing this portion of the statute?

OPINION: No. See opinion to question #1.

QUESTION #4: Since the state forfeiture statute (ORS 475A) permits a successful claimant to recover their attorney fees, would a defense attorney whose practice includes forfeiture defense have an actual or potential conflict of interest if the committee discussed changing or eliminating the attorney fee provision?

OPINION: Yes. The opinion to this question is similar to the opinion to question #2.

According to the stated facts, an AFOAC member may be a defense attorney whose practice includes forfeiture defense. The AFOAC may undertake debate, discussion or otherwise make a decision which could change or eliminate the state forfeiture statute provision which permits a successful claimant to recover attorney fees. It appears from the stated facts that, any action taken by the AFOAC member/forfeiture defense attorney, in official capacity as a committee member, would have the same impact on all private attorneys who practice forfeiture defense. The AFOAC member would, therefore, come within the class exception and would not need to declare a conflict of interest nor refrain from taking action.

THIS RESPONSE ADDRESSES ONLY THE APPLICATION OF ORS CHAPTER 244 TO THE FACTS STATED HEREIN. OTHER LAWS OR REQUIREMENTS MAY ALSO APPLY. THIS IS NOT A FORMAL ADVISORY OPINION PURSUANT TO ORS CHAPTER 244.280. IT IS MY PERSONAL ASSESSMENT AS THE EXECUTIVE DIRECTOR OF THE OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION.

Please advise this office if you would like this matter submitted to the GSPC for adoption as a formal advisory opinion at a future meeting. Do not hesitate to call or write again if you have further questions or would like additional clarification.

Karin Holton
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Sincerely,

L. Patrick Hearn
Executive Director

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