

November 28, 2001

Hon. Janet Carlson, Ph.D.
Oregon State Representative
4560 Patriot Court
Salem, Oregon 97302

Dear Representative Carlson:

On November 28, 2001 the Oregon Government Standards and Practices Commission (GSPC) adopted the following advisory opinion:

OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION
ADVISORY OPINION 01A-1012

STATED FACTS: A member of the Legislative Assembly is a former employee of the State Commission on Children and Families. The legislator is also a private consultant who works under contract to local commissions on children and families.

When SB555 was enacted in 1999 counties were expected to do extensive planning with phase I plans being due in September 2000 and phase II plans due in January 2002. The legislator was requested by Douglas and Marion Counties to facilitate phase I planning and is currently engaged in facilitating phase II planning in both counties plus Jefferson County.

The legislator has also performed projects for cities, counties and non-profit groups providing feasibility studies, gaps analysis, grant writing, data presentation, facilitating retreats, family resource center development, among other services.

In September 1999 the legislator became a candidate for House District 32 in Salem. The legislator was elected in November 2000. In January 2001 the legislator was appointed to three committees including the Joint Ways and Means Subcommittee on Human Services. The subcommittee makes recommendations to the full Ways and Means Committee on the budgets for state human services agencies, one being the State Commission on Children and Families. Because the Oregon Children's Plan was part of the commission's budget, that budget was the last to come out of the legislator's committee in early July. The legislator declared a potential conflict of interest at the time of the subcommittee and also on the House floor.

The legislator has worked with other legislators on bills regarding children and has sponsored many of which passed and were signed into law by the Governor.

In March, during the 2001 session, the legislator was appointed by the Speaker of the House to serve as the designated House member on the State Commission on Children and Families. The legislator is a non-voting, advisory member of the commission. With this assignment in mind the legislator decided to declare a potential conflict of interest on the commission's budget bill because the legislator's contracts with local commissions, which ended on June 30, 2001, were based on prior legislative budget decisions and that future contracts based on the 2001-03 budget would not be negotiated until after session had ended.

At the legislator's first full State Commission on Children and Families meeting the legislator was assigned by the chair to serve on the Emerging Issues Committee. At the first committee meeting the legislator volunteered to participate in a workgroup to further define "basic capacity" of local commissions. The legislator also volunteered to participate in an administrative rules advisory committee, the primary impetus for rule revisions being four bills that the legislator sponsored or was actively involved in during the 2001 legislative session.

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

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 (7) of this section."

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:"

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."

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:"

244.040(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."

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:"

244.120(1)(a) "If the public official is a member of the Legislative Assembly, announce publicly, pursuant to the rules of the house of which the public official is a member, the nature of the conflict before taking any action thereon in the capacity of a public official"

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:"

244.120(2)(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"

244.120(2)(b) "When met with an actual conflict of interest, announce publicly the nature of the actual conflict and:"

244.120(2)(b)(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."

244.120(2)(b)(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: Could the legislator's service on the State Commission on Children and Families as a non-voting advisory member present situations where the legislator would have to declare a conflict of interest?

OPINION: Yes. If service on the State Commission on Children and Families gives the legislator an opportunity to participate in debate concerning any action that "could" or "would" have a private pecuniary benefit to the legislator, the legislator must declare either an actual or potential conflict of interest as directed by ORS 244.120. The definition of "potential conflict of interest" applies when the official takes any "action or any decision or recommendation. . . the effect of which could be to the private pecuniary benefit of the person". A non-voting member of the Commission can, by participating in the debate on particular agenda items, make a "recommendation" that must be preceded by a conflict of interest disclosure as mandated by ORS 244.120(2).

This opinion does not address official action the legislator takes as a legislator because the Attorney General has advised that the GSPC is "constitutionally precluded from adjudicating legislators for their legislative activities." 49 Op Atty Gen 167, at 10 (1999). In response, ORS 244.260(1)(c) and (e) were amended to provide:

(c) Before investigating any complaint or undertaking any investigation at the commission's own instigation, if the public official who is the subject of the complaint or of the commission's own action is a member of the Legislative Assembly, the commission shall determine whether the alleged violation of any provision of this chapter involves conduct protected by section 9, Article IV of the Oregon Constitution. If the commission determines that the conduct is protected by section 9, Article IV of the Oregon Constitution, the commission shall dismiss

the complaint or rescind the motion as provided in paragraph (e) of this subsection.

- (e) If the commission does not make a finding of cause, or if the commission determines that the alleged violation of this chapter involves conduct protected by section 9, Article IV of the Oregon Constitution, the commission shall dismiss the complaint or rescind its motion and shall formally enter the dismissal or rescission on its records.

Section 9, Article IV of the Oregon Constitution contains "the Debate Clause": "Nor shall a member for words uttered in debate in either house, be questioned in any other place." According to the 1999 Attorney General opinion, this clause reserves to each house of the Legislature the exclusive authority to adjudicate charges against its members based on what they say or fail to say during the legislative process. Therefore any question concerning the legislator's acts in the legislative process, including floor votes, hearings, work sessions and votes in committee, do not come within the GSPC's jurisdiction and will not be considered further.

The legislator serves on the State Commission on Children and Families pursuant to ORS 417.730(1)(d). The Speaker of the House of Representatives appoints one member of the House of Representatives to be a "nonvoting, advisory member" of the Commission. In that capacity the legislator is not participating in the "legislative function" and the legislator's service as a member of the Commission is not conduct protected by section 9, Article IV of the Oregon Constitution. Therefore the legislator is subject to the disclosure requirements of ORS 244.120(2) if any situation arises where the legislator's participation as a Commission member involves a "recommendation" that could or would be to the legislator's financial benefit.

Because of the described separation between the decisions of the State Commission on Children and Families and the actual financial decisions of local governments which provide direct services and may contract for the legislator's services as a private consultant, it appears likely that the Commission's issues present only potential conflicts of interest. Nonetheless, if the legislator participates as a member of the Commission in the Commission's deliberations on a decision that could be to the legislator's private pecuniary benefit or detriment, the legislator must comply with ORS 244.120(2) and publicly announce the nature of the conflict prior to participating in the discussion. If the Commission's decision presents an actual conflict of interest, then the legislator shall announce the nature of the conflict and refrain from participating in the discussion or debate on the issue. ORS 244.120(2)(b)(A).

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THIS OPINION IS ISSUED BY THE OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION PURSUANT TO ORS 244.280. A PUBLIC OFFICIAL OR BUSINESS WITH WHICH A PUBLIC OFFICIAL IS ASSOCIATED SHALL NOT BE LIABLE UNDER ORS CHAPTER 244 FOR ANY ACTION OR TRANSACTION CARRIED OUT IN ACCORDANCE WITH THIS OPINION. THIS OPINION IS LIMITED TO THE FACTS SET FORTH HEREIN.

Issued by Order of the Oregon Government Standards and Practices Commission at Salem, Oregon on the 19th day of October, 2001.

Katherine E. Tennyson, Chairperson

Lynn Rosik
Assistant Attorney General

Date