


Theodore R. Kulongoski, Governor

September 5, 2003

Barbara Britch
Oregon Department of Fish and Wildlife
Human Resources Division
3406 Cherry Ave NE
Salem, OR 97303-4924

Dear Ms. Britch:

This is in response to your correspondence dated August 28 2003 regarding a "potential conflict of interest" involving an Oregon Department of Fish and Wildlife (ODFW) fisheries biologist.

OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION
STAFF OPINION NO. 03S-014

STATED FACTS: A fisheries biologist with the Oregon Department of Fish and Wildlife (ODFW) retired on July 1, 2003. The biologist was rehired as a temporary employee shortly thereafter. The biologist was assigned work that was part of the biologist's duties prior to retirement.

The U.S. Army Corps of Engineers ("corps") has contracted with ODFW to operate the Elk Creek Trap and Haul Project ("project") since it began in 1992. For the two seasons prior to retirement, the biologist supervised and directed the project.

ODFW has decided to terminate its contract with the corps for operation of the project. Accordingly, the corps will receive proposals and bids for the private operation of the project. The biologist intends to submit a proposal and bid for the private contract.

The biologist currently serves as the ODFW representative on a multi-agency work group to assist the corps with the planning and design of a new trap and haul facility that will be constructed to replace the existing facility within the next five years. The biologist also is presently assigned to assist with planning,

budget and contract preparation for ODFW's activities during the transition period and coordinating and providing information to the corps needed for the transition.

RELEVANT STATUTES: The following Oregon Revised Statutes (ORS) are applicable to the issues that are addressed in this opinion:

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(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."

244.040(4) No public official shall attempt to further or further the gain of the public personal gain of the public official through the use of confidential information gained in the course of or by reason of the official position or activities of the public official in any way.

QUESTION: Would it violate Government Standards and Practices law for the biologist to submit a proposal and bid for the contract to operate the project?

OPINION: It appears that the experience and knowledge the biologist has gained about the project as a result of his ODFW job duties would not be known to other potential bidders. This knowledge especially includes project related financial information. If such and information is not publicly available and is confidential in nature, the biologist would violate ORS 244.040(4) by using such information to prepare a proposal and bid.

While such information may be publicly available upon request, it is unlikely that members of the public would make such a request or even know to make such a request. Accordingly, if the biologist used such information as an advantage in the preparation of a proposal and bid to the corps, it is likely that a violation of ORS 244.040(1)(a) would occur.

There is, however, a way to avoid a violation. If information known by the biologist as a result of ODFW duties was provided to all other potential bidders for the project, the biologist and all other bidders would be on a "level playing field" and the biologist would not violate the prohibition in ORS 244.040(1)(a).

THIS RESPONSE ADDRESSES ONLY THE APPLICATION OF ORS 244 TO THE FACTS STATED HEREIN. ANY RELEVANT INFORMATION, WHICH WAS NOT INCLUDED BY THE REQUESTER OF THIS OPINION IN THE STATED FACTS, COULD COMPLETELY CHANGE THE OUTCOME OF THIS OPINION. OTHER LAWS OR REQUIREMENTS MAY ALSO APPLY. THIS IS NOT A FORMAL ADVISORY OPINION PURSUANT TO ORS CHAPTER 244.280. THIS OPINION DOES NOT EXEMPT A PUBLIC OFFICIAL FROM LIABILITY UNDER ORS CHAPTER 244 FOR ANY ACTION OR TRANSACTION CARRIED OUT IN ACCORDANCE WITH THIS OPINION. THIS OPINION IS ONLY MY PERSONAL ASSESSMENT AS THE EXECUTIVE DIRECTOR OF THE OREGON STANDARDS AND PRACTICES COMMISSION.

Please contact this office again if you would like this opinion submitted to the Government Standards and Practices Commission for adoption as a formal advisory opinion pursuant to ORS 244.280.

Sincerely,

L. Patrick Hearn
Executive Director