

August 15, 2008

Matt C. Markee  
Capitol Club President  
5605 Inland Shores Way, N., #202  
Salem, Oregon 97303

Dear President Markee:

At its August 15, 2008 meeting, the Oregon Government Ethics Commission (Commission) adopted the following advisory opinion:

**OREGON GOVERNMENT ETHICS COMMISSION ADVISORY OPINION NO. 08A-1003**

**STATED FACTS:** During the 2007 session of the Oregon Legislative Assembly made some changes to the Oregon Government Ethics law provided in Chapter 244 of the Oregon Revised Statutes. The changes have prompted many questions as to how the Commission will interpret and apply the statutes to a variety of circumstances. The Commission received a letter that was submitted on behalf of the Capitol Club with a wide range of questions some of which related to the definition and application of “legislative or administrative interest.” The primary importance of understanding the term is because it is determinative in whether a person may offer a public official a gift or whether a public official may accept a gift and, if allowed, what restrictions may apply.

Legislative or administrative interest is defined in ORS 244.020(8) as follows:

“Legislative or administrative interest” means an economic interest, distinct from that of the general public, in one or more bills, resolutions, regulations, proposals or other matters subject to the action or vote of a person acting in the capacity of a public official.

The definition places the emphasis of a legislative or administrative interest on the “person acting in the capacity of a public official” but when legislative or administrative interest is used in ORS Chapter 244, other than the definition section [ORS 244.020], the emphasis of the legislative or administrative interest is on the “governmental agency in which the public official holds” any official position.

When applying provisions related to a legislative or administrative interest the Commission will determine if the distinct economic interest is in the governmental agency of the public official. This was the approach used by the Commission before the recent revisions and will continue as the Commission's approach.

The letter dated 4/21/08 and submitted by Bruce A. Bishop on behalf of the Capitol Club presented 39 questions as to how the Commission interprets and applies the Oregon Government Ethics law in a variety of hypothetical circumstances. Any opinion on how Oregon Government Ethics law applies to a hypothetical set of circumstances must be offered on that set of circumstances. Once an opinion is offered its application would only be useful to the specific set of circumstances addressed. The Commission wishes to provide useful information regarding the revisions to Oregon Government Ethics law to as many public officials as is possible while addressing the issues that are raised in the questions presented on behalf of the Capitol Club.

The Commission has chosen to issue three separate Commission Advisory Opinions in response to the Capitol Club request. This one addresses legislative or administrative interest another will address the issues related to gifts [Commission Advisory Opinion 08A-1004] and a third will address issues related to the prohibited use of official position or office [Commission Advisory Opinion 08A-1005].

**QUESTION:** How does the Oregon Government Ethics Commission determine if a person has a legislative or administrative interest in the public official's governmental agency?

**ANSWER:** A person has a legislative or administrative interest in a governmental agency if the interest is economic and distinct from the economic interest that is held by members of the general public in any bills, resolutions, regulations, proposals or other matters subject to the action or vote of a public official within a governmental agency. If a person has a legislative or administrative interest in a governmental agency, the Commission applies the provisions of ORS Chapter 244 when that source gives a gift or gifts to any public officials, elected, appointed, employed or volunteer, in that governmental agency.

The differences in organizational structure and the size of state or local governments and special districts create uncertainty as to whether the legislative or administrative interest in a governmental agency affects all public officials of state and local government or special districts or does it only affect public officials in single branches, departments or divisions of these government organizations.

When the Commission decides if a person has a legislative or administrative interest in a governmental agency it considers what constitutes a governmental agency and then evaluates whether that person has an economic interest in actions taken within that

governmental agency. Not every situation is the same and the Commission or any person affected must make these judgments on a case by case basis.

The following examples are offered to illustrate what the Commission would identify as a legislative or administrative interest in a governmental agency. [For these illustrations the legislative or administrative interest is referred to only as an economic interest]:

- A vendor, contractor, organization or business that seeks to provide services or sell products to a governmental agency would have a distinct economic interest in the actions of the agency that impact the acquisition of the services or products offered.
- A developer, builder or real estate agency that is impacted by permits issued, codes, zoning and regulations would have a distinct economic interest in the actions on those matters by local or state governmental agencies.
- A business or any organization that is impacted by funding or regulations overseen by state or local governmental agencies would have a distinct economic interest in the actions or enforcement of those regulations by those governmental agencies.
- A lobbyist, business, organization, state or local agency that is seeking legislative action or could be impacted by legislative action would have a distinct economic interest in the actions within the Legislative Assembly.
- Any entity, public or private, that must seek funding or is regulated by a state or local agency would have a distinct economic interest in the actions of those governmental agencies.

**QUESTION:** What does the Oregon Government Ethics Commission define as a governmental agency and where in the organizational structure of a governmental agency would the legislative or administrative interest reside?

**ANSWER:** In our representative form of government, governmental agencies are governed by either one elected official who is the chief executive officer, or a governing body made up of elected or appointed members. The organizational structure of state governmental agencies is different than organizational structures of local governments or special districts. There are two reasons for the differences. One is the size of governmental agencies and the other is the separation between the three branches of state government, executive, legislative and judicial.

The following examples are offered to illustrate how the Commission would identify what constitutes a governmental agency and what public officials in the organizational

structure of the agency would be affected by the legislative or administrative interest provisions. [For these illustrations the legislative or administrative interest is referred to only as an economic interest]:

#### CITY GOVERNMENT

- City governments are governed by a city council that has the authority and responsibility to act on a variety of issues to include ordinances, resolutions, regulations, proposals and budgets. How elected city officials, employees or volunteers are affected by the legislative or administrative interest provisions will vary from city to city because not all cities have identical organizational structures.

In general, city governments have a governing body and a chief executive officer (city manager or city recorder) who oversees an organizational structure made up of various departments. [Some cities may use bureaus or divisions instead of departments and those terms have the same meaning as department in this opinion.] If a person has a distinct economic interest in a city department, all public officials in that department, including the manager, employees and volunteers would be affected by the application of the legislative or administrative interest provisions.

The effect of the legislative or administrative interest on the manager or employees of one department would not automatically impact managers or employees of other city departments if those other departments could not influence the outcome of actions in the department in which a person holds the economic interest. For example, an economic interest in the police department does not automatically affect the public works department. The term governmental agency is applied to individual departments [bureaus or divisions] and extends up through the organizational structure of a city to the chief executive and the governing body. However, there are many sources that may have an economic interest in more than one department in the same city.

#### COUNTY GOVERNMENT

- County governments are governed by a county commission or a county judge and two commissioners who act as a commission that have the authority and responsibility to act on a variety of issues to include codes, resolutions, regulations, proposals and budgets. How elected county officials, employees or volunteers are affected by the legislative or administrative interest provisions will

vary from county to county because not all counties have identical organizational structures.

In general, county governments have a commission as a governing body. Some have a chief executive officer who oversees an organizational structure made up of various departments. [Some counties may use bureaus or divisions instead of departments and those terms have the same meaning as department in this opinion.] If a person has a distinct economic interest in a county department, all public officials in that department, including the manager, employees and volunteers would be affected by the application of the legislative or administrative interest provisions. [County departments that are managed by an elected public official are discussed later.]

The effect of the legislative or administrative interest on the manager or employees of one department would not automatically impact managers or employees of other county departments if those other departments could not influence the outcome of actions in the department in which a person holds the economic interest. For example, an economic interest in the planning department does not automatically affect the public works department. However, there are many sources that may have an economic interest in more than one department in the same county.

The term governmental agency is applied to individual departments [bureaus or divisions] and extends up through the organizational structure to the chief executive and the county commission.

- In county governments, in addition to commissioners, there are separately elected officials who manage departments and have authority to act on a variety of matters related to their departments. This would include sheriffs, treasurers, assessors and surveyors. There are also certain elected state officials, district attorneys and presiding circuit judges, who manage agencies in counties and interact with the county government managed by commissions.

The elected officials act as the chief executive officer who oversees an organizational structure that may be made up of various bureaus or divisions. If a person has a distinct economic interest in the department, all public officials in that department, including managers, employees and volunteers would be affected by the application of the legislative or administrative interest provisions.

The term governmental agency is applied to each of these departments and extends up through the organizational structure to the elected chief

executive and on to the county commission. The county commission also has some budget authority over elected state chief executives, such as district attorneys and circuit court judges.

## STATE GOVERNMENT

State government consists of three branches, executive, legislative and judicial. Each branch is organized with various departments, boards or commissions. Some of the departments are managed by separately elected chief executive officers, such as the Attorney General, Secretary of State, State Treasurer, Superintendent of Public Instruction and the Commissioner of the Bureau of Labor and Industries. The following is an explanation of how the terms governmental agency and legislative or administrative interest will apply to state agencies:

### Legislative Branch

- The Legislative Assembly is a governmental agency when applying the legislative or administrative interest provisions because other state or local governmental agencies, special districts, businesses or various organizations could be economically impacted by legislative actions of the Legislative Assembly. The actions of legislators or members of their staff could impact funding or the expenses of many agencies, organizations or businesses which means that representatives from those entities would have a distinct economic interest in the Legislative Assembly, its members and staff.

Directors of state departments and members of boards and commissions would be impacted by legislative actions of the Legislative Assembly. These actions could impact retention of a position, funding or expenses of their agencies which means that these directors, board or commission members and their agencies would have a distinct economic interest in the Legislative Assembly, its members and staff.

Elected chief executive officers of state agencies would be impacted by legislative actions of the Legislative Assembly. These actions could impact retention of a position, funding and expenses of their agencies which means that these chief executive officers would have a distinct economic interest in the Legislative Assembly, its members and staff.

### Executive Branch

The Governor's office is a governmental agency when applying the legislative or administrative interest provisions because, as the elected chief executive officer of state government, the Governor has the authority and responsibility to act on issues that

could have distinct economic impact on many individuals, businesses, organizations, state or local governments and special districts.

- State agency directors, elected or appointed, and members of boards and commissions would be impacted by the legislative or administrative actions of the Governor. They would have a distinct economic interest in actions of the Governor because those actions may impact the retention of their position, funding and expenses of their agencies. This distinct economic interest would affect the Governor and members of the Governor's staff.
- Each state board or commission is a governmental agency when applying the legislative or administrative interest provisions because any economic interest held by one board or commission is not exactly the same as the economic interest held by another board or commission. If a person has a distinct economic interest in a board or commission, all members of the governing body, the director and members of the staff would be affected by the application of the legislative or administrative interest provisions. Boards and commissions do not commonly oversee a staff that is organized into departments. However, if so, any economic interest a person has in a department would affect all public officials in that department and from the manager continue up through the organizational structure of the board or commission, to and including the director and members of the board or commission.
- Each individual state agency in the executive branch, regardless of size, such as the Department of Human Services, is a governmental agency when applying the legislative or administrative interest provisions because any economic interest held by one department is not exactly the same as the economic interest held by another department. If a person has a distinct economic interest in a department, the director, managers and members of the staff could be affected by the application of the legislative or administrative interest provisions.

The effect of the legislative or administrative interest on the director, managers or employees of one executive department would not automatically impact directors, managers or employees of other executive departments if those other departments could not influence the outcome of actions by a department in which a person holds the economic interest. For example, an economic interest in the Department of Employment does not automatically affect the Department of Administrative Services or the Department of Transportation.

- The Department of Justice, Secretary of State, State Treasurer, Department of Education and Bureau of Labor and Industries are separate governmental agencies when applying the legislative or administrative interest provisions because each is managed by an elected chief executive officer and any

economic interest held by one of these agencies is not exactly the same as the economic interest held by the others. The effect of a legislative or administrative interest on the managers or staff within these agencies would be the same as is described in the discussion regarding state departments of the executive branch.

#### Judicial Branch

Any discussion of the legislative or administrative interest as defined in ORS 244.020(8) applies to provisions related to gifts, both the exceptions to the definition of gift and the restrictions or prohibitions. ORS 244.025(5) specifically excludes members of the Judicial Branch who are subject to the Oregon Code of Judicial Conduct from the restrictions or prohibitions in ORS 244.025. This exemption applies only to judges, not to other public officials in the Judicial Branch.

Judges are required to report certain events on the Quarterly Public Official Disclosure form. Two of those are events that meet the definition of exceptions to the gift definition involve accepting paid expenses for food, lodging and travel from a person other than the judges governmental agency employer. The other is honorarium as defined in ORS 244.020(6).

- The Judicial Department is a governmental agency when applying the legislative or administrative interest provisions. If a person has a distinct economic interest in the actions of the department, the director and department employees would be affected by the application of the legislative or administrative interest provisions. The effect would apply to the director, managers, staff and employees of the department.

#### SPECIAL DISTRICT GOVERNMENT

There are many special districts that are governed by a board of directors or commissioners. In most cases the authority for actions by these governmental agencies is held by a board and the distinct economic interest would be in the board of directors or commissioners. For special districts the term governmental agency is applied to the governing body and extends through the organizational structure to all subordinate employees or volunteers.

**QUESTION:** Do public officials employed by the same governmental agency have a legislative or administrative in one another?

**ANSWER:** In Oregon, governmental agencies have public officials who are elected, appointed, employed or volunteer. Public officials within a governmental agency could have an economic interest in the actions taken by superiors in their governmental agency. Those actions may be personnel actions, duty assignments, resource

allocations or other such decisions that may have a personal economic impact on subordinate employees. If there were intermediate positions where action could impact the outcome of a decision having an economic impact on a public official, the public official would have an economic interest in that intermediate position.

Public officials in any governmental agency, who are subordinate to an official having authority to take action, would have an administrative interest in the superior official because of actions that could have an economic impact on the subordinate public official.

Public officials in any governmental agency, who hold superior positions and oversee public officials in the agency, would not have an administrative interest in actions taken by subordinates because any actions taken by subordinates would not represent a distinct economic impact on the public official holding the superior position.

The following examples are provided to illustrate how the Commission would determine whether public officials within a single governmental agency would have a legislative or administrative interest in positions held by other public officials of the same agency. [For these illustrations the legislative or administrative interest is referred to only as an economic interest]:

- In any city, a city manager or city recorder would have an economic interest in the actions of the city council or commission with regard to retaining a position, gaining a promotion or compensation.
- Employees of any local government would have an economic interest in the position(s) within the governmental agency that have or have been delegated the authority to take action with regard to retaining a position, gaining a promotion or compensation.
- In any county, the county administrator and other employees would have an economic interest in the county commission or any position(s) within the county that have or have been delegated the authority to take action with regard to retaining a position, gaining a promotion or compensation.
- In any county, with governmental agencies managed by an elected official, such as sheriffs, assessors, treasurers or surveyors, the public officials who are overseen by that elected official would have an economic interest in the elected official. The elected officials would have an economic interest in the county commission, if the elected official's compensation or other funding could be impacted by actions of the county commission.

- In most special districts, the managers, employees and volunteers would have an economic interest in the actions of the district's board of directors with regard to retaining a position, gaining a promotion, compensation or other benefits.
- In larger special districts, the managers, employees and volunteers would have an economic interest in the position(s) within the district that have or have been delegated the authority to take action with regard to retaining a position, gaining a promotion, compensation or other benefits.
- State employees of smaller agencies and independent boards or commissions would have an economic interest in the actions of the agency's director, board or commission with regard to retaining a position, gaining a promotion, compensation or other benefits.
- State employees in larger agencies would have a distinct economic interest in their agency's chief executive officer or director, elected or appointed, or in any intermediate position to which authority for action has been delegated for matters such as retaining a position, gaining a promotion, compensation or other benefits.

**QUESTION:** Do the gift provisions in Oregon Government Ethics law apply when a public official is engaged in personal activities on personal time that may involve interaction with a person who has a legislative or administrative interest in the public official's governmental agency?

**ANSWER:** When the 2007 revisions of Oregon Government Ethics law became operative the issues raised by this question became more significant. While previous revisions of ORS Chapter 244 placed restrictions on gifts, the newest revisions placed lower limits on the aggregate value of gifts that could be accepted and made the conditions under which gifts could be accepted more restrictive. The restrictions on gifts apply if the source of a gift has a legislative or administrative interest in the public official's governmental agency.

Once a person accepts a position where they meet the definition of "public official" they are also accepting the benefits and restrictions placed on a person holding that position. By enacting the provisions in Oregon Government Ethics law the Legislative Assembly declared "that service as a public official is a public trust and that, as one safeguard for that trust, the people require all public officials to comply with the" provisions of ORS Chapter 244. [ORS 244.010(1)]

When a person becomes a public official through an election, appointment, employment or as a volunteer they are a public official until they terminate their public service or public employment. The provisions in ORS Chapter 244 that place requirements or

restrictions on persons who are public officials often create questions regarding the propriety of certain practices or behavior that would not be raised if not for being a public official.

There have been frequent questions as to whether a public official is allowed to accept gifts that are offered on traditional or seasonal occasions when the giving or exchange of gifts is customary. The question of propriety is raised when the source of a traditional or seasonal gift has a legislative or administrative interest in the governmental agency of a public official. In ORS 244.020(5)(b) there are occasions or events that are defined as exceptions to the definition of a gifts and therefore may be accepted. There is no exception for customary gifts that are given or exchanged in accord with tradition or seasons.

There have also been frequent questions as to whether a public official is allowed to accept gifts while engaged in personal business on personal time. The context for these questions is that there are elected or appointed public officials who also own and operate businesses in their private lives and there is often a customary practice for gifts to be offered to owners or managers in these private businesses. The common question is, if the source of such gifts has a legislative or administrative interest in the governmental agency of the public official, do the restrictions on gifts apply?

If the source of any gift has a legislative or administrative interest in the governmental agency represented by the public official, ORS 244.020(5)(b) does not provide an exception for gifts that are given to a public official who is engaged in personal business activity on personal time.

While such gifts would be restricted by Oregon Government Ethics law, the Commission establishes the following guidelines. If observed by a public official, the Commission believes that it would be unreasonable to view gifts offered to or accepted by public officials, regardless a source's legislative or administrative interest, as a practice prohibited by ORS Chapter 244:

1. The ownership or management of the business was clearly established prior to becoming a public official.
2. When holding the public official position the ownership or management of the business must have been clearly established without the public official using the public position or resources.
3. The business is managed on personal time and without the use of the public official's governmental agencies resources.

4. It is clearly established that there is a customary business practice of providing product samples, meals or paid expenses to learn of products and services available to the public official's private business.
5. The offer and acceptance of a gift under these guidelines does not occur while the public official is on time paid by the governmental agency; or at an event at which the public official is attending in an official capacity and the public official is not using agency facilities or other resources.

Lobbyists should remember that ORS Chapter 171 requires them to report lobbying activity expenses. While the Commission believes that it would be unreasonable to view the offer or acceptance of the above described gifts as prohibited by ORS Chapter 244, the lobbyists and client/employer of lobbyists may have to report the expenses for such gifts.

If any person has a question as to how Oregon Government Ethics law may apply to a specific situation a request for a Commission Advisory Opinion can be submitted for that specific situation.

The statutes and rules cited in this opinion are provided as an addendum to this Commission Advisory Opinion.

**THIS OPINION IS ISSUED BY THE OREGON GOVERNMENT ETHICS 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 GOOD FAITH IN RELIANCE ON THIS OPINION. THIS OPINION IS LIMITED TO THE FACTS SET FORTH HEREIN. OTHER LAWS OR REGULATIONS NOT WITHIN THE JURISDICTION OF THE COMMISSION MAY ALSO APPLY.**

Issued by Order of the Oregon Government Ethics Commission at Salem, Oregon on the 15th day of August 2008.

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Judith Stiegler, Chairperson

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Lynn Rosik, Assistant Attorney General

## ADDENDUM

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

**244.010 Policy.** (1) The Legislative Assembly declares that service as a public official is a public trust and that, as one safeguard for that trust, the people require all public officials to comply with the applicable provisions of this chapter.

244.020(5)(a) "Gift" means something of economic value given to a public official or a relative or member of the household of the public official:

244.020(5)(a)(A) Without valuable consideration of equivalent value, including the full or partial forgiveness of indebtedness, which is not extended to others who are not public officials or the relatives or members of the household of public officials on the same terms and conditions; or

244.020(5)(a)(B) For valuable consideration less than that required from others who are not public officials.

244.020(5)(b)(F) Reasonable expenses paid by any unit of the federal government, a state or local government, a Native American tribe that is recognized by federal law or formally acknowledged by a state, a membership organization to which a public body as defined in ORS 174.109 pays membership dues or a not-for-profit corporation that is tax exempt under section 501(c)(3) of the Internal Revenue Code and that receives less than five percent of its funding from for-profit organizations or entities, for attendance at a convention, fact-finding mission or trip, or other meeting if the public official is scheduled to deliver a speech, make a presentation, participate on a panel or represent state government as defined in ORS 174.111, a local government as defined in ORS 174.116 or a special government body as defined in ORS 174.117.

244.020(5)(b)(H) Reasonable food, travel or lodging expenses provided to a public official, a relative of the public official accompanying the public official, a member of the household of the public official accompanying the public official or a staff member of the public official accompanying the public official, when the public official is representing state government as defined in ORS 174.111, a local government as defined in ORS 174.116 or a special government body as defined in ORS 174.117:

- (i) On an officially sanctioned trade-promotion or fact-finding mission; or
- (ii) In officially designated negotiations, or economic development activities, where receipt of the expenses is approved in advance.

244.020(6) "Honorarium" means a payment or something of economic value given to a public official in exchange for services upon which custom or propriety prevents the setting of a price. Services include, but are not limited to, speeches or other services rendered in connection with an event.

244.020(8) "Legislative or administrative interest" means an economic interest, distinct from that of the general public, in one or more bills, resolutions, regulations, proposals or other matters subject to the action or vote of a person acting in the capacity of a public official.

244.020(13) "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 as defined in ORS 174.109 as an elected official, appointed official, employee, agent or otherwise, irrespective of whether the person is compensated for the services.

**244.025 Gift limit; entertainment prohibition.** (1) During a calendar year, a public official, a candidate for public office or a relative or member of the household of the public official or candidate may not solicit or receive, directly or indirectly, any gift or gifts with an aggregate value in excess of \$50 from any single source that could reasonably be known to have a legislative or administrative interest in any governmental agency in which the public official holds, or the candidate if elected would hold, any official position or over which the public official exercises, or the candidate if elected would exercise, any authority.

244.025(2) During a calendar year, a person who has a legislative or administrative interest in any governmental agency in which a public official holds any official position or over which the public official exercises any authority may not offer to the public official or a relative or member of the household of the public official any gift or gifts with an aggregate value in excess of \$50.

244.025(5) This section does not apply to public officials subject to the Oregon Code of Judicial Conduct.

**244.040 Prohibited use of official position or office; exceptions; other prohibited actions.** (1) Except as provided in subsection (2) of this section, a public official may not use or attempt to use official position or office to obtain financial gain or avoidance of financial detriment for the public official, a relative or member of the household of the public official, or any business with which the public official or a relative or member of the household of the public official is associated, if the financial gain or avoidance of financial detriment would not otherwise be available but for the public official's holding of the official position or office.

244.040(2) Subsection (1) of this section does not apply to:

244.040(2)(e) Gifts that do not exceed the limits specified in ORS 244.025 received by a public official or a relative or member of the household of the public official from a source that could reasonably be known to have a legislative or administrative interest in a governmental agency in which the official holds any official position or over which the official exercises any authority.

244.040(2)(f) Gifts received by a public official or a relative or member of the household of the public official from a source that could not reasonably be known to have a legislative or administrative interest in a governmental agency in which the official holds any official position or over which the official exercises any authority.