Oregon
John A. Kitzhaber, MD, Governor

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August 12, 2014

Rick Hangartner
2370 NW Rolling Green Dr. #55
Corvallis, OR 97330

Dear Mr. Hangartner:

This opinion is in response to your correspondence dated July 15, 2014, and various subsequent communications, regarding the conflict of interest provisions of Oregon Government Ethics law and how they may apply to City councilors who are also employees or relatives of employees of Oregon State University.

OREGON GOVERNMENT ETHICS COMMISSION STAFF ADVISORY OPINION NO. 14S-003

STATED FACTS: The city of Corvallis (City) is governed by an elected City council. Information provided by the opinion requestor indicates that currently one City councilor is an employee of OSU and another City councilor's spouse is an employee of OSU. City councilors may take actions, make decisions and recommendations, the effect of which would or could have a financial impact on OSU or the City itself. A public official is met with either an actual or potential conflict of interest when participating, in an official capacity, in any action, decision or recommendation if the effect would or could be to the private pecuniary benefit or detriment of the public official, the public official's relative, or any business with which either are associated.

The State of Oregon recently adopted a new governance model for its public universities. Pursuant to ORS 352.054, Oregon State University (OSU) is now a public university with a governing board called the Board of Trustees. OSU is located in the city of Corvallis.

QUESTION 1: Are elected City councilors, who are also employees of OSU or spouses of OSU employees, public officials subject to Oregon Government Ethics law?

ANSWER 1: Yes. The definition of public official includes any person who serves the state of Oregon, any of its political subdivisions, or any other public body as defined in ORS 174.109 as an elected official, appointed official, employee or agent, irrespective of whether the person is compensated for the services.

ORS 174.109 defines public bodies to include state government bodies, local government bodies and special government bodies. ORS 174.117(1)(i) defines a

special government body to include a public university with a governing board, such as OSU.

City councilors serve a local government body. The employees of OSU serve a special government body. City councilors and OSU employees serve statutorily defined public bodies and therefore meet the definition of public officials subject to the provisions of Oregon Government Ethics law. The person who serves in both capacities is a public official both as a City councilor and as an OSU employee.

QUESTION 2: Would elected City councilors, who are also employees of OSU or spouses of employees of OSU, be met with a statutory conflict of interest when taking an official action as City councilor that would or could be to the pecuniary benefit or detriment of OSU, but would not or could not be to the private pecuniary benefit or detriment of the City councilor who is an OSU employee or relative of an OSU employee?

ANSWER 2: No. ORS 244.020(1) defines an actual conflict of interest and ORS 244.020(12) defines a potential conflict of interest. The difference between an actual and potential conflict of interest is determined by the certainty of the private financial impact. An actual conflict of interest occurs when a public official participates in an official action that would have a direct and specific financial impact on that official, the official's relative or any business with which the official or a relative is associated. A potential conflict of interest occurs when a public official's action, decision or recommendation could have a financial impact on the official, the official's relative or any business with which the official or a relative is associated.

If the result of the public official's action, decision or recommendation would or could result in a personal financial benefit or detriment to the public official or their relative, the public official may be met with either an actual or potential conflict of interest and therefore may need to comply with the appropriate disclosure and disposition requirements found in ORS 244.120. However, since it appears that is not the case in this scenario, the only question remaining is whether OSU would be a business with which the official or a relative is associated.

ORS 174.117(1)(i) defines OSU and other public universities with a governing body to be special government bodies and therefore public bodies as defined in ORS 174.109.

ORS 244.020(2), which defines "business" by enumerating several legal entities as businesses, does not include special government bodies or any other public body in the definition. The Commission has never considered and does not now consider public bodies such as OSU to be businesses with which a public official or their relative would be associated for purposes of the application of the conflict of interest provisions of Oregon Government Ethics law. This opinion is consistent with and reaffirms

Commission advisory opinion 06A-1002, which states that government entities are not businesses as defined in ORS 244.020(2).

In conclusion, if a public official who is a Corvallis City councilor and also an employee or relative of an employee of OSU, were to take an official action which would or could have a financial impact on OSU, the public official would not be met with a conflict of interest merely due to the employment of the public official or their relative with OSU.

QUESTION 3: Does Oregon Government Ethics law contain any prohibition against public officials serving more than one public body simultaneously?

ANSWER 3: No. Laws other than Oregon Government Ethics law may prohibit the holding of more than one public office at a time. However, the Legislative Assembly specifically addressed this situation in ORS 244.010(4), which recognizes that it is the policy of the state to have public officials serving at the state or local level who may have potentially conflicting public responsibilities and further, it is the policy of the state that the holding of such offices does not constitute the holding of incompatible offices unless expressly stated in the enabling legislation.

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 GOVERNMENT ETHICS COMMISSION.

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

Sincerely,

Ronald A. Bersin
Executive Director

RAB/dg 14S-003

ADDENDUM

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

Note: The Commission has jurisdiction over the statutes in ORS Chapter 244, but included as well are other relevant statutes.

ORS174.109 "Public body" defined. Subject to ORS 174.108, as used in the statutes of this state "public body" means state government bodies, local government bodies and special government bodies.

ORS 174.117(1) Subject to ORS 174.108, as used in the statutes of this state "special government body" means any of the following:

(i) A university with a governing board listed in ORS 352.054.

ORS 352.054 (1) A governing board is established for each of the following public universities:

(c) Oregon State University, if the president of Oregon State University notifies the Governor that the university will become a university with a governing board in the manner set forth in section 168 or 168a, chapter 768, Oregon Laws 2013;

ORS 244.010(4) The Legislative Assembly recognizes that it is the policy of the state to have serving on many state and local boards and commissions state and local officials who may have potentially conflicting public responsibilities by virtue of their positions as public officials and also as members of the boards and commissions, and declares it to be the policy of the state that the holding of such offices does not constitute the holding of incompatible offices unless expressly stated in the enabling legislation.

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 (12) 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 or a relative of the public official is associated only as a member or board director or in a nonremunerative capacity.

ORS 244.020(3) "Business with which the person is associated" means:

> (a) Any private business or closely held corporation of which the person or the person's relative is a director, officer, owner or employee, or agent or any private business or closely held corporation in which the person or the person's relative owns or has owned stock, another form of equity interest, stock options or debt instruments worth $1,000 or more at any point in the preceding calendar year;
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> (b) Any publicly held corporation in which the person or the person's relative owns or has owned $100,000 or more in stock or another form of equity interest, stock options or debt instruments at any point in the preceding calendar year;
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> (c) Any publicly held corporation of which the person or the person's relative is a director or officer; or
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> (d) For public officials required to file a statement of economic interest under ORS 244.050, any business listed as a source of income as required under ORS 244.060 (3).

ORS 244.020(12) "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:

> (a) An interest or membership in a particular business, industry, occupation or other class required by law as a prerequisite to the holding by the person of the office or position.
>
> (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.
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> (c) Membership in or membership on the board of directors of a nonprofit corporation that is tax-exempt under section 501(c) of the Internal Revenue Code.

ORS 244.020(14) "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 or agent, irrespective of whether the person is compensated for the services.

ORS 244.020(15) "Relative" means:

(a) The spouse, parent, stepparent, child, sibling, stepsibling, son-in-law or daughter-in-law of the public official or candidate;

(b) The parent, stepparent, child, sibling, stepsibling, son-in-law or daughter-in-law of the spouse of the public official or candidate;

(c) Any individual for whom the public official or candidate has a legal support obligation;

(d) Any individual for whom the public official provides benefits arising from the public official's public employment or from whom the public official receives benefits arising from that individual's employment; or

(e) Any individual from whom the candidate receives benefits arising from that individual's employment.

ORS 244.120(1) Except as provided in subsection (2) of this section, when met with an actual or potential conflict of interest, a public official shall:

(a) If the public official is a member of the Legislative Assembly, announce publicly, pursuant to 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.

(b) If the public official is a judge, remove the judge from the case giving rise to the conflict or advise the parties of the nature of the conflict.

(c) If the public official is any other appointed official subject to this chapter, notify in writing the person who appointed the public official to office of the nature of the conflict, and request that the appointing authority dispose of the matter giving rise to the conflict. Upon receipt of the request, the appointing authority shall designate within a reasonable time an alternate to dispose of the matter, or shall direct the official to dispose of the manner in a manner specified by the appointing authority.

(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.

(3) Nothing in subsection (1) or (2) of this section requires any public official to announce a conflict of interest more than once on the occasion which the matter out of which the conflict arises is discussed or debated.

(4) Nothing in this section authorizes a public official to vote if the official is otherwise prohibited from doing so.

ORS 244.130 (1) When a public official gives notice of an actual or potential conflict of interest, the public body as defined in ORS 174.109 that the public official serves shall record the actual or potential conflict in the official records of the public body. In addition, a notice of the actual or potential conflict and how it was disposed of may in the discretion of the public body be provided to the Oregon Government Ethics Commission within a reasonable period of time.