



Oregon

John A. Kitzhaber, MD, Governor

Government Ethics Commission

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Jill Gibson Odell
O'Donnell Clark & Crew, LLP
1650 NW Naito Parkway, Suite 302
Portland, Oregon 97209-2534

Dear Ms. Odell:

This is in response to your correspondence regarding how the provisions of Oregon Government Ethics law may apply to a legislative official considering participation in a proposed private income producing opportunity.

OREGON GOVERNMENT ETHICS COMMISSION STAFF ADVISORY OPINION NO. 11S-001

STATED FACTS: The stated facts refer to a public official who is a member of the Oregon Legislative Assembly. The legislator's private profession apparently includes the advancement of business development opportunities. The legislator has received an offer to enter into a consulting agreement with a private medical research company. The private research company will be partnering with Oregon Health & Science University (OHSU) to conduct medical research. The consulting agreement would allow the legislator, as an independent contractor, to introduce potential investors to the private research company and receive a percentage of any funds invested by the parties he introduced.

The legislator's role would be limited to the introduction of potential investors, separate and apart from his public position, to the private research company and would not extend into the company's partnership with OHSU. Information indicates the partnership and joint research conducted by the private research company and OHSU does not require state approval or a vote of the legislature; however, approval by OHSU's administration would be required.

QUESTION: Would it be a violation of Oregon Government Ethics law for a member of the Oregon Legislative Assembly to engage in the private income producing activities as outlined in the stated facts?



ANSWER: No, with the understanding of and the compliance with the limitations and restrictions as described in this opinion.

ORS 244.040(1) prohibits a public official from using or attempting to use an official position to obtain financial gain or to avoid 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, a relative or member of the household of the public official are associated, if the opportunity would not otherwise be available but for the public official's holding the position. ORS 244.040(1) also prohibits a public official from using or attempting to use an official position to create or accept a private income producing opportunity that would not otherwise be available but for holding the official position.

The stated facts do not indicate how the opportunity for the legislator to enter into this consulting agreement became available. The legislator needs to evaluate if the opportunity is available to him because he is a member of the Oregon Legislative Assembly, or if the opportunity is available to him separate and apart from his position held as a public official. Further, the legislator would need to consider if he used or attempted to use his official position, including his access and authority, to create or advance the opportunity.

If the legislator were to accept or pursue the proposed opportunity and it was not apparent that the possibility to engage in the opportunity would be available to him apart from his public position or if he used or attempted to use his official position to create or advance the opportunity, he could potentially violate ORS 244.040(1). Although ORS 244.040(1) does not prohibit the legislator from pursuing or engaging in all private income producing activities, it does require the legislator to pursue or engage in such opportunities separate and distinct from his public position.

The Oregon Government Ethics Commission (Commission) has long recognized that there are public officials who have and will continue to pursue private income producing activities. The Commission has established guidelines to assist public officials who may wish to engage in such activities so as to avoid violating Oregon Government Ethics law:

GUIDELINES FOR OUTSIDE EMPLOYMENT OF PUBLIC OFFICIALS

1. Public officials are not to engage in private business interests or other employment activities on their governmental agency's time.
2. A governmental agency's supplies, facilities, equipment, employees, records or any other public resources are not to be used to engage in private business interests.
3. The position as a public official is not to be used to take official action that could have a financial impact on a private business with which you, a relative or member of your household are associated.

4. Confidential information gained as a public official is not to be used to obtain a financial benefit for the public official, a relative or member of the public official's household or a business with which any are associated.
5. When participating in an official capacity and met with a potential or actual conflict of interest related to a business, associated with the public official, relative or household member, the public official must disclose the nature of the conflict of interest using one of the following methods:

Employees of governmental agencies must give written notice to their appointing authority.

Elected or appointed public officials must publicly disclose once during each meeting convened by the governing body they serve.

The primary principle underscored in the guidelines is that a public official, who also engages in private income producing activities, must maintain a clear distinction between the use of official time and resources of the government body and personal time and resources of the official. A member of the Legislative Assembly must take particular care to insure that the member's official position is not used in any manner related to private income producing activities.

The stated facts do not indicate how the legislator would select or develop potential investors to introduce to the private research company. The legislator would need to be rigorous in the complete separation of these activities from his public position because he may not utilize the resources or authority of his public position to pursue or advance his private business interests. The legislator needs to consider the resources of his public position may include, but not be limited to, legislative staff, supplies, time, facilities, equipment, records and contacts developed as a legislative official including the ability to obtain access to individuals or representatives of businesses or other organizations. Further, the legislator should make certain that any contact with potential investors would not cause them to feel pressured or influenced due to the legislative position he holds. If the legislator fails to maintain strict compliance with the restrictions placed on him he could potentially violate Oregon Government Ethics law and possibly be the subject of a complaint or inquiry by the Commission.

As this opinion addresses a public official who is a member of the Oregon Legislative Assembly, a point of clarification regarding the fifth directive in the Commission's aforementioned guidelines is necessary. ORS 244.120(1)(a) requires that when met with an actual or potential conflict of interest [ORS 244.020(1); ORS 244.020(12)], a member of the Legislative Assembly shall announce publicly, pursuant to rules of the house of which the public official is a member, the nature of the conflict before taking any official action thereon in the capacity of a public official.

Although the stated facts do not indicate that the legislator would be met with a statutory conflict of interest, as conflicts of interest arise as a result of taking official actions not from the existence of circumstances or situations, it should be noted that Oregon Attorney General Opinion No. 8265, dated February 24, 1999, indicates that the authority to investigate and sanction members of the Legislative Assembly for alleged violations of ORS 244.120 was not delegated to any other body, including the Commission. Because of the Attorney General's opinion, the Commission does not take any official position concerning how compliance with ORS 244.120(1)(a) is achieved.

Although it is not apparent in the stated facts, it should also be understood that ORS 244.040(3) prohibits a public official from, directly or indirectly, soliciting or accepting the promise of future employment based on the understanding that the offer is influenced by the public official's vote, official action or judgment. Any employer who may directly or indirectly offer employment under these conditions may also violate this provision.

The statutes relevant to issues addressed in this opinion are provided as an addendum to this Staff Advisory Opinion.

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

ADDENDUM

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

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.

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.

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;

(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;

(c) Any publicly held corporation of which the person or the person's relative is a director or officer; or

(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).

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:

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, agent or otherwise, irrespective of whether the person is compensated for the services.

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:

- (a) Any part of an official compensation package as determined by the public body that the public official serves.
- (b) The receipt by a public official or a relative or member of the household of the public official of an honorarium or any other item allowed under ORS 244.042.
- (c) Reimbursement of expenses.
- (d) An unsolicited award for professional achievement.
- (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.

(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.

(g) The receipt by a public official or a relative or member of the household of the public official of any item, regardless of value, that is expressly excluded from the definition of "gift" in ORS 244.020.

244.040(3) A public official may not solicit or receive, either directly or indirectly, and a person may not offer or give to any public official any pledge or promise of future employment, based on any understanding that the vote, official action or judgment of the public official would be influenced by the pledge or promise.

244.040(4) A public official may not attempt to further or further the personal gain of the public official through the use of confidential information gained in the course of or by reason of holding position as a public official or activities of the public official.

244.120 Methods of handling conflicts; Legislative Assembly; judges; appointed officials; other 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:

(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.