

May 19, 2006

Cindy Price  
PO Box 477  
Astoria OR 97103

Dear Ms. Price:

At its May 19, 2006 meeting, the Oregon Government Standards and Practices Commission (GSPC) adopted the following advisory opinion:

**OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION**  
**ADVISORY OPINION NO. 06A-1002**

STATED FACTS: A candidate for county commissioner is the spouse of the District Attorney (DA) for the same county. While the DA is a state officer and is compensated primarily by the state, the county pays the DA a stipend of \$13,000 annually.

The following are potential scenarios in which the DA might have to appear before or otherwise interact with the Board of County Commissioners (BOCC):

1. Five lay citizens and the five county commissioners comprise the county's Budget Committee. The Budget Committee makes recommendations to the BOCC, which adopts a final budget. Each year the DA is required to submit a requested budget to the Budget Committee. The DA may or may not seek additional funding over the previous year's budget.
2. The DA may ask the BOCC for an increase in the amount of the DA's yearly \$13,000 stipend, which would raise the DA's household income.
3. The DA may ask the BOCC to expedite funding for a new jail, which would be managed by the Sheriff.
4. The DA co-signs labor agreements with the County as co-employers of members of the union representing Deputy District Attorneys.

5. The DA may urge the BOCC to reprioritize its capital project funding to expedite work on the courthouse in which the DA's offices are located.
6. The BOCC appoints persons to advisory boards. The DA may advise in favor of or in opposition to a particular nominee.
7. The BOCC approves zoning variances. Someone known to have publicly criticized the DA may request a zoning variance.

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 (14) 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 is associated in a nonremunerative capacity."

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

(a) Any 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;

244.020(14) " '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.”

244.020(16) " 'Relative' means the spouse of the public official, any children of the public official or of the public official's spouse, and brothers, sisters or parents of the public official or of the public official's spouse.”

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(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.”

**QUESTION:** According to the stated facts, would a conflict of interest or violation of Government Standards and Practices law arise for the spouse of a District Attorney to serve as member of the BOCC in the same county?

**OPINION:** The mere existence of a particular situation or set of circumstances, such as the spouse of a District Attorney serving as a commissioner of the same county, cannot create a conflict of interest or violation under Oregon Government Standards and Practices law.

Oregon Government Standards and Practices laws define actual conflict of interest [ORS 244.020(1)] and potential conflict of interest [ORS 244.020(14)]. The difference between an actual conflict of interest and a potential conflict of interest is determined by the words “would” and “could.” An actual conflict of interest occurs when the action is certain to result in a financial benefit or detriment. It will occur when an action taken by the official would directly and specifically affect the financial interest of the official, the official’s relative or a business with which the official or a relative of the official is associated. A potential conflict of interest exists when an official takes action that could have a financial impact on that official, a relative of that official or a business with which the official or the relative of that official is associated. In this case the impact is not certain.

A government entity is not operated for economic gain. Government entities do not, therefore, fall within the definition of “business” in ORS 244.020(2). Accordingly, any official action taken by the spouse of the DA, in the capacity of a County Commissioner, which impacted the office of the DA, such as in scenario numbers 1 and 5 of the stated facts, would not give rise to a conflict of interest or violation of Government Standards and Practices law.

ORS 244.040(1) (a) prohibits a public official from using or attempting to use an official position or office to obtain financial gain or to avoid a financial detriment that would not otherwise be available but for the public official's holding the official position or office. The only exceptions are that the public official may accept financial gain in the form of official salary, honoraria, reimbursement of expenses or an unsolicited award for professional achievement. A public official is also prohibited from using an official position to obtain a financial gain for a relative or to aid the relative in avoiding a financial detriment. Using official position to obtain financial gain for a business with which either a public official or relative of a public official is associated is also prohibited.

It appears that if the spouse/commissioner took official action as described in scenario number 2 above, to increase the annual stipend paid to the DA, the commissioner would be faced with an actual conflict of interest and would also violate ORS 244.040(1) (a) because the commissioner would have used official position to obtain financial gain for both a relative and the commissioner. Accordingly, the commissioner would be

required to publicly declare an actual conflict of interest and refrain from any official participation on that issue.

It does not appear that any of the actions described in scenarios 3, 4, 5, 6 or 7 would violate or otherwise have any relation to Government Standards and Practices laws.

**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. OTHER LAWS OR REGULATIONS NOT WITHIN THE JURISDICTION OF THE GSPC MAY ALSO APPLY.**

Issued by Order of the Oregon Government Standards and Practices Commission at Salem, Oregon on the 19th day of May 2006.

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Carl Visintainer, Chairperson

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Lynn Rosik, Assistant Attorney General