

July 7, 2006

John Tobey
P.O. Box 305
Stayton, Oregon 97383

Dear Mr. Tobey:

At its July 7, 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-1003**

STATED FACTS: Oregon Department of Administrative Services (DAS) is proposing a reorganization of the Information Resources Management Division (IRMD). One of the changes is to discontinue providing fee-for-service programming to other state agencies.

There is a computer programmer employed with DAS/IRMD who works in Enterprise Applications Services (EAS). This employee programs applications for various state agencies that do not have Information Technology (IT) resources.

In the DAS reorganization EAS will be discontinued and the state agencies will need to obtain that service from private vendors. The computer programmer(s) employed with EAS will have to find other positions in the public or private sectors.

The computer programmer is considering establishing a private business if his DAS employment is lost in the reorganization. That business would bid and compete with other private computer programming businesses to provide services to state agencies that have lost access to EAS services now provided by DAS.

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 “**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.”

QUESTION: If a DAS computer programmer's position is eliminated in reorganization by DAS, would the programmer violate Government Standards and Practices law in forming a private business and bidding on service contracts with state agencies that lose access to the EAS service now provided by DAS?

OPINION: ORS 244.040(1)(a) would prohibit the computer programmer, a public official, from using or attempting to use the official position held to obtain a financial gain or avoid a financial detriment that would not otherwise be available but for holding the computer programmer position. The only exceptions are official salary, honoraria, reimbursement of expenses or an unsolicited award for professional achievement.

Public officials are not prohibited from engaging in private business endeavors during their personal time. The GSPC created guidelines for public officials regarding outside employment. Even though the computer programmer, in this question, is not considering private employment, while remaining a public official, the guidelines help inform this advisory opinion.

GUIDELINES FOR OUTSIDE EMPLOYMENT OF PUBLIC OFFICIALS

1. That private business not be conducted on public time.
2. That public supplies, facilities, equipment, personnel, records or any other public resources not be used to carry out private business.
3. That no official action toward a third party be conditioned on a private business relationship with that third party.
4. That no confidential information be used to obtain financial benefit for the employee.
5. That employees will notify their appointing authority in writing of a potential or actual conflict of interest if private endeavors could or would be affected by public employment.

The stated facts describe a computer programmer, who may engage in private business if his job is eliminated. That private business would bid to provide services to public agencies, which may or may not have been a client agency serviced by the programmer as a public official.

In general, ORS Chapter 244 would not prohibit the programmer from bidding and entering into service contracts with various state agencies, which may have been clients of the programmer's public employer. However, if the opportunities for private employment stemmed from an official position previously held by the programmer a violation of ORS 244.040(1)(a) may occur. For example, if the programmer's official duties involved preparing a grant proposal to fund a board's ability to pay for computer programming, the programmer would violate ORS 244.040(1)(a) by then bidding as a private business to provide programming services to that board. The application would be the same if official duties involved assisting in the preparation of a request for proposal (RFP) for a commission, for example, and then as a private business submit a bid when the RFP is publicized.

If the programmer forms a private business and bids on service contracts with state agencies, the RFP, bid submission and award process must be the same for all potential service providers. The programmer must not use proprietary information obtained as a public official that is not generally available to other potential bidders to create an advantage over the other bidders.

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

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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 7th day of July 2006.

John P. Kopetski, Chairperson

Lynn Rosik, Assistant Attorney General

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