

Agenda Item Number 2.0

METRO ETHICS AND PUBLIC RECORDS

Metro Council Work Session
Tuesday, April 5, 2011
Metro Council Chambers

WHO PAYS?

Metro, MERC, Public Official

\$50/year cumulative Gift limit DOES NOT APPLY

Source DOES NOT have a "legislative or administrative interest" in Metro/MERC in a matter subject to the Public Official's decision or vote.

Source DOES have a "legislative or administrative interest" in Metro/MERC in a matter subject to the Public Official's (or subordinate's) decision or vote.

Guide to Oregon Ethics Act* Gift Limitations and Exceptions - ORS 244.020(6)(b) Exceptions (A)-(O)

Category	Scenario	Conditions	Limitation/Exception	
Food Beverage Admission Reception Meeting	Public Official "represents" Metro/MERC at reception, meal, meeting	Factors: Large number of people invited; event is publicized; written program available	Allowable as Exception to Gift Rules (exception (E))	
	Food/beverage consumed in association with review or execution of financial documents including any business agreement		Allowable as Exception to Gift Rules (exception (I))	
	Food/beverage is incidental (secondary or minor) to main purpose of reception and no cost is placed on food or beverage	Social gathering where food and beverages are informally provided	Allowable as Exception to Gift Rules (exception (L))	
		Plated sit-down meal	\$50/year cumulative Gift limit applies	
	Food/beverage consumed during trade-promotion, fact-finding mission, economic development activity, or negotiation	Sponsor is directly and immediately associated with the event.	Public Official receives authorization to represent Metro/MERC and activity has been "officially sanctioned" via written approval from Council or supervisor.	Allowable as Exception to Gift Rules (exception (H))
	Private meals		\$50/year cumulative Gift limit applies	
	None of above		\$50/year cumulative Gift limit applies	
Travel Lodging Food Reasonable Expenses	Expenses paid by fed/state/local govt; membership organization to which Metro/MERC pay dues; or by 501©(3)	Public Official will deliver speech, make presentation, participate on panel	Allowable as Exception to Gift Rules (exception (F))	
		Public Official will "represent" Metro/MERC but will not deliver speech, make presentation, participate on panel	Must receive authorization to represent Metro/MERC via written approval from Council or supervisor.	Allowable as Exception to Gift Rules (exception (F))
		None of Above		\$50/year cumulative Gift limit applies
				\$50/year cumulative Gift limit applies
	Trip is trade-promotion, fact-finding mission, economic development activity, or negotiation	Sponsor is directly and immediately associated with the event.	Public Official receives authorization to represent Metro/MERC and activity has been "officially sanctioned" and trip expenses approved in advance via written approval from Council or supervisor.	Allowable as Exception to Gift Rules (exception (H))
	Travel expenses paid by one public official to another for travel within Oregon	To or from an event that bears a relationship to Public Official's office and Public Official participates in an official capacity		Allowable as Exception to Gift Rules (exception (K))
	None of Above			\$50/year cumulative Gift limit applies
Entertainment Spectator or Participant	Entertainment is incidental (secondary or minor) to main purpose of another event			Allowable as Exception to Gift Rules (exception (M))
	Public Official is viewing and/or participating in the entertainment for a ceremonial purpose with an official role in the entertainment event	Public Official is acting in official capacity and is representing Metro/MERC	Must receive authorization to represent Metro/MERC via written approval from Council or supervisor.	Allowable as Exception to Gift Rules (exception (N))
	None of Above			\$50/year cumulative Gift limit applies**
				\$50/year cumulative Gift limit applies**
Anything of economic value**	As part of the usual/customary practice of Public Official's private business, employment, volunteer work.	Gift bears no relationship to Public Official's official position.		Allowable as Exception to Gift Rules (exception (O))
Unsolicited tokens or awards of appreciation	plaque, trophy, desk item, wall memento, or similar	Resale value reasonably expected to be less than \$25 (assumed unless made from valuable raw material)		Allowable as Exception to Gift Rules (exception (C))
	None of Above			\$50/year cumulative Gift limit applies
None of Above				\$50/year cumulative Gift limit applies

* Note: this chart is intended as a **guide only**, and is not a substitute for legal advice regarding specific situations. Please call Ethics Commission at 503-378-5105 regarding application of these rules to specific situations.

OREGON
GOVERNMENT ETHICS
LAW

A GUIDE FOR PUBLIC OFFICIALS



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Adopted October 2010

DISCLAIMER

This guide has been approved by the Oregon Government Ethics Commission pursuant to ORS 244.320. ORS 244.320 requires this publication to explain in understandable terms the requirements of Oregon Government Ethics law and the Oregon Government Ethics Commission's interpretation of those requirements. Toward that end, statutes and rules have been summarized and paraphrased in this guide. Therefore, the discussion in this guide should not be used as a substitute for a review of the specific statutes and rules.

Any public official, business or any person shall not be liable under ORS Chapter 244 for any action or transaction carried out in accordance with Commission opinions set forth in this guide. "In accordance with" the opinions means that the fact circumstances of any action or transaction for which any public official, business or person shall not be liable must be the same fact circumstances for an action or transaction described in this guide as the basis for an opinion in this guide.

There may be other laws or regulations not within the jurisdiction of the Commission that apply to actions or transactions described in this guide.

TABLE OF CONTENTS

	<u>Page</u>
Introduction	1
Jurisdiction	2
Public Official: An Overview	3
Are You a Public Official?	5
Volunteers as Public Officials	5
Relatives of Public Officials	6
A Business Associated With a Public Official	8
Use of Position or Office	9
Nepotism	14
Private Employment by Public Officials	16
Private Employment of Former Public Officials	17
Contracts of Former Public Employer	17
Post-Public Employment Waiting Periods	17
Conflicts Of Interest	21
Legal Expense Trust Fund	25
Gifts	26
Gifts as an Exception to the Use of Office Prohibition	33
Annual Verified Statement of Economic Interest	38
SEI Form	39
Commission	41
Written Advice/Opinions	42
No "Safe Harbor"	43
Procedures	44
Index	47

INTRODUCTION

In 1974, voters approved a statewide ballot measure to create the Oregon Government Ethics Commission (Commission). The measure established laws that are contained in Chapter 244 of the Oregon Revised Statutes (ORS).

When the Commission was established, it was given jurisdiction to implement and enforce the provisions in ORS Chapter 244 related to the conduct of public officials. In addition, the Commission has jurisdiction for ORS 171.725 through 171.992, related to lobbying regulations, and ORS 192.660, which are the executive session provisions of Oregon Public Meetings law.

The Commission publishes a guide for lobbyists and clients or employers of lobbyists regulated under provisions in ORS Chapter 171. This guide for public officials includes a discussion of some provisions that may also apply to lobbying activities, which are addressed by Lobbying Regulations. This is especially true when a lobbying activity involves paying the expenses for meals, lodging, travel, entertainment or other financial benefits of a legislative or executive official. Under specific circumstances, ORS Chapter 244 would allow the payment of such expenses, but the public official may have a reporting requirement under ORS Chapter 244 and the source of the payment may be required to register as a lobbyist or report the expenditure. If you have questions regarding registering as a lobbyist, lobbying activity or reports for lobbying expenditures, please refer to our Guide to Lobbying in Oregon.

ORS 192.660 lists the specific criteria a governing body must use when convening an executive session. The statutory authority for executive sessions is limited to specific topics or procedures. This guide does not discuss that portion of the Oregon Public Meetings law, but there is a detailed discussion of ORS 192.660 in the Attorney General's Public Records and Meetings Manual, available on-line at www.doj.state.or.us/public_records/manual.shtml.

This guide will discuss how the provisions in ORS Chapter 244 apply to public officials and will summarize Commission procedures. It should be used in conjunction with applicable statutes and rules. It is intended to be a useful discussion, in understandable terms, of topics and issues that are often the focus of inquiries the Commission receives from public officials and citizens. This guide should not be used as a substitute for a review of the specific statutes and rules.

You will find links to ORS Chapter 244, ORS Chapter 171.725 through 171.992, relevant Oregon Administrative Rules (OAR), and other publications referenced in this guide on the Commission's website at www.oregon.gov/ogec. Questions or comments may be submitted to the Commission by email at ogec.mail@state.or.us, by fax to 503-373-1456 or by telephone to 503-378-5105.

JURISDICTION

The jurisdiction of the Oregon Government Ethics Commission is limited to provisions in ORS Chapter 244, ORS 171.725 through 171.992 and ORS 192.660. Other Oregon statutes may also regulate the activities of elected officials and public employees. Some examples are:

- The Elections Division of the Secretary of State's Office regulates campaign finance and campaign activities.
- Criminal activity of any type would fall under the jurisdiction of federal, state or local law enforcement.
- The Commission does not have jurisdiction over the laws that govern public meetings or records, except for the executive session provisions in ORS 192.660.
- The Oregon Bureau of Labor and Industries investigates cases involving employment related sexual harassment or discrimination on the basis of race, religion, disability or gender.

There are occasions when a public official engages in conduct that may be viewed as unethical, but that conduct may not be governed by Oregon Government Ethics law. Without an apparent statutory violation, the following are some examples of conduct by public officials that are not within the authority of the Commission to address:

- An elected official making promises or claims that are not acted upon.
- Public officials mismanaging or exercising poor judgment when administering public money.
- Public officials being rude or unmannerly.
- Public officials using deception or misrepresenting information or events.

While the conduct described above may not be addressed in Oregon Government Ethics law, public agency policies and procedures may prohibit or redress the behavior. Please contact the Commission staff if you need further clarification regarding how the Oregon Government Ethics law may apply to circumstances you may encounter.

PUBLIC OFFICIAL: AN OVERVIEW

The provisions in Oregon Government Ethics law restrict some choices, decisions or actions of a public official. The restrictions placed on public officials are different than those placed on private citizens because service in a public office is a public trust and the provisions in ORS Chapter 244 were enacted to provide one safeguard for that trust.

Public officials must know that they are held personally responsible for complying with the provisions in Oregon Government Ethics law. This means that each public official must make a personal judgment in deciding such matters as the use of official position for financial gain, what gifts are appropriate to accept, or when to disclose the nature of conflicts of interest. If a public official fails to comply with the operative statutes, a violation cannot be dismissed by placing the blame on the public official's government employer or the governing body represented by the public official.

Since compliance is the personal responsibility of each public official, public officials need to familiarize themselves with the wide variety of resources that offer information or training on the provisions in Oregon Government Ethics law. First, there are the statutes in ORS Chapter 244 and the Oregon Administrative Rules (OAR) in Chapter 199. Second, the Commission website, www.oregon.gov/ogec, offers information, training and links to this guide, ORS Chapter 244 and OAR Chapter 199. Many government agencies offer training or the agency may request it from the Commission's trainers. There are a number of membership organizations, such as The League of Oregon Cities, Association of Oregon Counties, Oregon School Boards Association and Oregon Special Districts Association that provide training to public officials from their government members. It is imperative for government agencies or organizations that employ or represent public officials to ensure their public officials receive training in Oregon Government Ethics law. Those that fail to provide this training do a disservice to the public officials who they employ or who represent them.

One provision, which is the cornerstone of Oregon Government Ethics law, prohibits public officials from using or attempting to use their official positions or offices to obtain a financial benefit for themselves, relatives or businesses they are associated with through opportunities that would not otherwise be available but for the position or office held.

Public officials are allowed to receive salary and reimbursed expenses from their own government agencies. Under specific conditions public officials may also accept gifts. This guide will discuss those provisions.

Another provision that frequently applies to public officials when engaged in official actions of their official positions or offices is the requirement to disclose the nature of conflicts of interest. This guide will discuss the definition of a conflict of interest and describe the methods a public official must follow when met with a conflict of interest.

There is a requirement for some public officials who are elected to offices or hold other select positions to file an Annual Verified Statement of Economic Interest form. This guide

will discuss that filing requirement.

It is important for both public officials and members of the general public served by public officials to know that the provisions in Oregon Government Ethics law apply to the actions and conduct of individual public officials and not the actions of state and local governing bodies or government agencies. Each individual public official is personally responsible for complying with provisions in ORS Chapter 244. The statutes and rules discussed or illustrated in this guide do not and cannot address every set of circumstances a public official may encounter. When a public official is anticipating an official action or participation in an official event they must make a personal judgment as to the propriety of the action or the participation. The Commission staff is available to discuss the issues and offer guidance in making such judgments.

Oregon Government Ethics law addresses a wide range of actions, situations or events which a public official may encounter while serving a state or local government. This guide provides a discussion of the provisions that apply to circumstances that most public officials may encounter.

A PUBLIC OFFICIAL

Are you a public official?

“Public official” is defined in ORS 244.020(14) as any person who, when an alleged violation of ORS Chapter 244 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.

There are approximately 200,000 public officials in Oregon. You are a public official if you are:

- Elected or appointed to an office or position with a state, county or city government.
- Elected or appointed to an office or position with a special district.
- An employee of a state, county or city agency or special district.
- An unpaid volunteer for a state, county or city agency or special district.
- Anyone serving the State of Oregon or any of its political subdivisions, such as the State Accident Insurance Fund or the Oregon Health & Science University.

The Commission has adopted, by rule, additional language used to clarify the use of “agent in the definition of “public official.” The following is OAR 199-005-0035(7):

“As defined in ORS 244.020(14), a public official includes anyone serving the State of Oregon or any of its political subdivisions or any other public body in any of the listed capacities, including as an “agent.” An “agent” means any individual performing governmental functions. Governmental functions are services provided on behalf of the government as distinguished from services provided to the government. This may include private contractors and volunteers, depending on the circumstances. This term shall be interpreted to be consistent with Attorney General Opinion No. 8214 (1990).”

If I am a volunteer, does that make me a public official?

If the position for which you have volunteered serves the State of Oregon or any of its political subdivisions or any other public body, “irrespective of whether” you are “compensated” you are a public official. It is difficult to determine how many public officials are volunteers, but the number may approach 50,000. Volunteers may be elected, appointed or selected by the government agency or public body to hold a position or office or to provide services.

Among the public officials who volunteer, there are elected or appointed members of

governing bodies of state boards or commissions, city councils, planning commissions, fire districts, school districts and many others. There are also many who apply and are selected to perform duties for a government agency, board or commission without compensation, such as fire fighters, reserve law enforcement officers and parks or recreation staff members.

The Commission recognizes that there are many who volunteer to work without compensation for many state and local government agencies, boards, commissions and special districts. This guide provides criteria to identify volunteers who will be considered public officials when applying the provisions in ORS Chapter 244.

If any one of the following elements apply to a volunteer position, the person holding that volunteer position will be defined as a “public official”:

- Elected or appointed to a governing body of a public body
- Appointed or selected for a position with a governing body or a government agency with responsibilities that include deciding or voting on matters that could have a pecuniary impact on the governing body, agency or other persons
- The volunteer position includes all of the following:
 1. Responsible for specific duties
 2. The duties are performed at a scheduled time and designated place.
 3. Volunteer is provided with the use of the public agency’s resources and equipment.
 4. The duties performed would have a pecuniary impact on any person, business or organization served by the public agency.

For purposes of ORS Chapter 244, volunteers are not public officials if they perform such tasks as picking up litter on public lands, participating in a scheduled community cleanup of buildings or grounds, participating in locating and eradicating invasive plants from public lands and other such occasional or seasonal events.

How are relatives of public officials affected by Oregon Government Ethics law?

Public officials must always comply with state law when participating in official actions that could result in personal financial benefits and also when participating in official actions that could result in financial benefits for a relative. Public officials should also know there may be limits and restrictions on gifts their relatives may accept when offered.

There are provisions in ORS Chapter 244 that restrict or prohibit a public official from using or attempting to use official actions of the position held to benefit a relative; or may limit the value of financial benefits accepted by a relative of the public official or may require the public official to disclose the nature of a conflict of interest when a relative may receive a financial benefit. These provisions are discussed more comprehensively in the use of

position or office section starting on page 9, the gifts section starting on page 26 and the conflicts of interest section starting on page 21.

Who is a relative?

Public officials need to know how Oregon Government Ethics law defines who a “relative” is. In everyday conversation the use of “relative” is applied to a broader spectrum of individuals with “family ties” than those defined as relatives in ORS 244.020(15). When a provision in ORS Chapter 244 refers to “relative” it means one of the following:

- **Spouse** of a public official or candidate
- **Children** of a public official or candidate
- **Children of the spouse** of a public official or candidate
- **Siblings** of a public official or candidate
- **Siblings of the spouse** of a public official or candidate
- **Spouse of siblings** of a public official or candidate
- **Spouse of siblings of the spouse** of a public official or candidate
- **Parents** of the of public official or candidate
- **Parents of the spouse** of a public official or candidate
- **Person** for whom the public official or candidate has a **legal support obligation**
- **Person benefiting from a public official** when benefits are from the public official’s public employment
- **Person who provides benefits to a public official** or candidate when benefits are from the person’s employment

For purposes of “relatives” defined by the last two bulleted items, examples of benefits may include, but not be limited to, elements of an official compensation package including benefits such as insurance, tuition or retirement allotments.

How do the laws apply to a public official who either owns or is employed by a private business?

As with the definition of relative, public officials need to know how Oregon Government Ethics law defines what a “business” is or what a “business with which the person is associated is.” The same sound judgment a public official exercises when participating in actions that could result in a financial benefit to the public official or a relative of the public official should be used when participating in actions that could result in a financial benefit to a business with which the public official or the relative is associated.

There are provisions in ORS Chapter 244 that restrict or prohibit a public official from using actions of the position held to benefit a business with which the public official or a relative is associated. The provisions may also require the public official to disclose the nature of a conflict of interest when a business may receive a financial benefit.

ORS 244.020(2) provides the definition of a “**business**,” paraphrased as follows:

A “business” is a legal entity that has been formed for the purpose of producing income.

- Excluded from this definition are income-producing organizations that are not-for-profit and tax exempt under section 501(c) of the Internal Revenue Code, if a public official or a relative of the public official holds membership or an unpaid position as a member of the board of directors.
- It is important to remember that state and local government or special district entities are not formed for the purpose of producing income, which means they are not businesses.

ORS 244.020(3) provides the definition of a “**business with which the person is associated,**” paraphrased as follows:

In brief, a public official or the relative of the public official is associated with a business in the following circumstances:

- When, during the preceding calendar year, a public official or relative has held a position as director, officer, owner, employee or agent of a private business or a closely held corporation in which the public official or relative held or currently holds stock, stock options, equity interest or debt instrument over \$1,000.
- When, during the preceding calendar year, the public official or relative has owned or currently owns stock, equity interest, stock options or debt instruments of \$100,000 or more in a publicly held corporation.
- When the public official or relative is a director or officer of a publicly held corporation.
- When a public official is required by ORS 244.050 to file an Annual Verified Statement of Economic Interest form and the business is listed as a source of household income.

USE OF POSITION OR OFFICE

What are the provisions of law that prohibit a public official from using the position or office held for financial gain?

As defined earlier, public officials become public officials through employment, appointment, election or volunteering. **ORS 244.040(1) prohibits every public official from using or attempting to use the position held as a public official to obtain a financial benefit, if the opportunity for the financial benefit would not otherwise be available but for the position held by the public official.** The financial benefit prohibited can be either an opportunity for gain or to avoid an expense.

Not only is a public official prohibited from using the position as a public official to receive certain financial benefits, but the public official is prohibited from using or attempting to use the position as a public official to obtain financial benefits for a relative or a member of the public official's household. Also prohibited is the use or attempted use of the public official position to obtain financial benefits for a business with which the public official, a relative, or a member of the public official's household is associated.

Public officials often have access to or manage information that is confidential and not available to members of the general public. **ORS 244.040(4) specifically prohibits public officials from attempting to use confidential information** gained because of the position held or by carrying out assigned duties to further the public official's personal gain. **ORS 244.040(5) also prohibits a former public official from attempting to use confidential information for personal gain** if that confidential information was obtained while holding the position as a public official, from which access to the confidential information was obtained.

ORS 244.040(6) also has a single provision to address circumstances created when public officials, who are members of the governing body of a public body, own or are associated with a specific type of business. The type of business is one that may occasionally send a representative of the business who appears before the governing body on behalf of a client for a fee. Public officials who are members of governing bodies and own or are employed by businesses, such as a law, engineering or architectural firm, may encounter circumstances in which this provision may apply. For example, a member of a city council who is an architect has a developer as a client of the architect's business. If the developer has a proposed subdivision to be approved by the city council, the architect may not appear before the city council on behalf of the client developer. Another person representing the client developer on behalf of the architect's business may appear, but not the councilor/architect.

There are a variety of actions that a public official may take or participate in that could constitute the prohibited use or attempted use of the public official position. The use of a position could be voting in a public meeting, placing a signature on a government agency's document, making a recommendation, making a purchase with government agency funds, conducting personal business on a government agency's time or with a government

agency's resources [i.e. computers, vehicles, heavy equipment or office machines].

The following examples are offered to illustrate what may constitute prohibited use or attempted use:

- The mayor of a city signs a contract obligating the city to pay for janitorial services provided by a business owned by a relative of the mayor.
- A city treasurer signs a city check payable to an office supply business that is owned by a relative.
- A city billing clerk alters water use records so that the amount billed to the clerk's parents will be less than the actual amount due.
- A volunteer firefighter borrows the fire district's power washer to prepare the exterior of the volunteer's personal residence for painting.
- A county public works employee stores a motor home that is owned by the employee's parents in a county building used for storing heavy equipment.
- An employee of a state agency has a private business and uses the agency's computer to advance the business by promoting, corresponding and managing the activities of the private business.
- A school district superintendent approves and signs her own request for reimbursement of personal expenses the superintendent incurred when conducting official business.

NOTE: While these examples are offered to illustrate the use of a public official's position prohibited by ORS 244.040(1), the practices in the examples may also illustrate occasions where a public official may be met with a conflict of interest as defined in ORS 244.020(1) and (12). There are circumstances when a public official may comply with provisions in ORS 244.040(1) while violating conflict of interest provisions in ORS 244.120 or the reverse [ORS 244.040(7)]. Refer to the detailed discussion of conflicts of interest starting on page 21.

Are there any circumstances in which a public official may use their position to accept financial benefits that would not otherwise be available but for holding the position as a public official?

Yes, ORS 244.040(2) provides a list of financial benefits that would not otherwise be available to public officials but for holding the position as a public official. The following financial benefits are not prohibited and may be accepted by a public official and some may also be accepted by a public official's relative or member of the public official's household:

Official Compensation: Public officials may accept any financial benefit that is identified by the public body served by the public official as part of the "official compensation package" of the public official. If the public body identifies such benefits as salary, health insurance or various paid allowances in the employment agreement or contract of a public official, those financial benefits are part of the "official compensation package." [ORS 244.040(2)(a)]

OAR 199-005-0035(3) provides a definition of “official compensation package:”

An “official compensation package” means the wages and other benefits provided to the public official. To be part of the public official's “official compensation package”, the wages and benefits must have been specifically approved by the public body in a formal manner, such as through a union contract, an employment contract, or other adopted personnel policies that apply generally to employees or other public officials. “Official compensation package” also includes the direct payment of a public official's expenses by the public body, in accordance with the public body's policies.

The Commission often receives complaints that allege that a public official is using or attempting to the position held to gain financial benefits prohibited by ORS 244.040(1). Occasionally the financial benefits in these complaints are gained through the use of the public body's resources. Some examples are use of a vehicle for personal transportation, use of a computer for a personal private business enterprise or use of telecommunications equipment for personal business. Some respondents to complaints that involve the use a public body's resources will defend their use as being consistent with an informal longstanding practice. The financial benefit to a public official, from the use of a public body's resources, from what may be understood as an informal and longstanding practice does not meet the definition of part of an “official compensation package.” This is because the practice has not been specifically approved by the public body in a formal manner.

Reimbursement of Expenses: A public official may accept payments from the public official's public body as reimbursement for expenses the public official has personally paid while conducting the public body's business [ORS 244.040(2)(c)].

The Commission has provided a definition in OAR 199-005-0035(4):

The “reimbursement of expenses’ means the payment by a public body to a public official serving that public body, of expenses incurred in the conduct of official duties on behalf of the public body. Any such repayment must comply with any applicable laws and policies governing the eligibility of such repayment.”

There are occasions when someone will refer to the payment of a public official's expenses by a person or entity other than the public official's public body as a reimbursement of expenses. That is not the reimbursement of expenses as used in ORS 244.040(2)(c) and defined in OAR 199-005-0035(4). If the payment of a public official's personal expenses does not meet this definition, it may be a financial benefit prohibited or restricted by other provisions in ORS Chapter 244.

There are occasions when public officials are reimbursed for travel expenses the public official has paid while conducting official duties on behalf of the public official's public body. Sometimes the public body will prearrange for a public official's travel and pay the expenses in advance. Such advance payments are also viewed by the Commission

as the reimbursement of expenses allowed by ORS 244.040(2)(c).

Some public officials hold positions identified in ORS 244.050 as having a requirement to file the Annual Verified Statement of Economic Interest (SEI) form in April of each year. This requirement will be discussed elsewhere in this guide, but some who must submit the SEI forms believe that travel related expenses paid by the public official's public body must be listed in the SEI form. That is not true. Expenses paid by the public body to their own public officials need not be reported by the public official under ORS 244.060 [OAR 199-005-0035(4)].

Honorarium: Public officials are allowed to accept honorarium by ORS 244.040(2)(b) as it is defined in ORS 244.020(7). A public official must know how honorarium is defined because there are many occasions when someone will offer them a financial benefit and call it an honorarium, but it does not meet the definition of honorarium in ORS 244.020(7).

A payment or something of economic value given to a public official in exchange for services provided by the public official is an honorarium when the setting of the economic value has been prevented by custom or propriety. The services provided by a public official may include but not be limited to speeches or other services provided in connection with an event. A public official may not accept honorarium if the value exceeds \$50 [ORS 244.042(3)(a)].

In brief, for a payment or something of economic value to be defined as an honorarium, several conditions must be met:

- The offer of a payment or something of economic value cannot be arranged or agreed to before the public official provides services.
- The services provided by the public official must precede the offer of payment or something of economic value.
- The payment or something of economic value must be delivered in return for and following the delivery of services.

Public officials may accept honorarium for services performed in relation to the private profession of the public official, although public officials must be sure, when they are offered a payment or something of economic value and it is referred to as an honorarium, that it does meet the definition in ORS 244.020(7). If it does not meet this definition, it may be a financial benefit prohibited or restricted by other provisions in ORS Chapter 244.

Awards for Professional Achievement: Public officials may accept an award, if the public official has not solicited the award, and the award is offered to recognize a professional achievement of the public official [ORS 244.040(2)(d)].

Awards for professional achievement should not be confused with awards of appreciation, allowed by ORS 244.020(6)(b)(C), honorarium allowed by ORS 244.040(2)(b), or gifts that are allowed or restricted by other provisions in ORS Chapter 244.

Awards for professional achievement are best illustrated by awards that denote national or international recognition of a public official's achievement. These awards may also be offered by public or private organizations in the state that are meant to recognize a public official for an achievement. Professional achievements recognized may be identified as a single accomplishment or an accomplishment achieved during a period of time, such as a calendar year or a public official's career upon retirement. Public officials may be educators, lawyers, certified public accountants or may hold a doctorate in some field. These public officials may receive awards recognizing achievements in their fields and those awards would be considered by the Commission to be awards regulated by ORS 244.040(2)(d).

Contributions to Legal Expense Trust Fund: There are provisions in ORS 244.209 that allow public officials who have become a respondent to a complaint under Oregon Government Ethics law to establish a legal expense trust fund. ORS 244.040(2)(h) allows a public official who has established this trust fund to solicit, accept and be the trustee for contributions to the established fund.

Gifts: Public officials may accept gifts [ORS 244.040(2)(e),(f) and (g)]. There are circumstances in which there are no limits on the quantity or aggregate value of gifts that can be accepted by a public official. On the other hand, there are circumstances when the aggregate value of gifts accepted by a public official is restricted. There may also be reporting requirements that apply to public officials who accept gifts and to sources that provide the gifts. Refer to the detailed discussion of issues related to gifts starting on page 26.

NEPOTISM

Does Oregon Government Ethics law prevent two or more relatives from being employees of the same public body?

No. Public officials who are relatives can be employed by the same public body employer at the same time, or serve on the same governing body of a public body at the same time.

However, ORS Chapter 244 does address the issue of “nepotism.” Nepotism, as used in ORS Chapter 244, is based on the relative relationship alone. The definition of “relative” in ORS Chapter 244 [ORS 244.175(4)] takes on a broader meaning when applying ORS 244.175 through ORS 244.179:

- **Spouse** of a public official
- **Children** of the public official or spouse
- **Parents** of the public official or spouse
- **Stepparents** of the public official or spouse
- **Stepchildren** of the public official or spouse
- **Brothers** of the public official or spouse
- **Sisters** of the public official or spouse
- **Half-brothers** of the public official or spouse
- **Half-sisters** of the public official or spouse
- **Brothers-in-law** of the public official or spouse
- **Sisters-in-law** of the public official or spouse
- **Sons-in-law** of the public official or spouse
- **Daughters-in-law** of the public official or spouse
- **Mothers-in-law** of the public official or spouse
- **Fathers-in-law** of the public official or spouse
- **Aunts** of the public official or spouse
- **Uncles** of the public official or spouse
- **Nieces** of the public official or spouse
- **Nephews** of the public official or spouse

What are the provisions that address nepotism?

After complying with the conflict of interest provisions in ORS 244.120, public officials cannot participate in any personnel action taken by the public agency that would impact the employment of a relative or member of the public official’s household. A public official may not participate in the following [ORS 244.177(1)]:

- Appointing, employing or promoting
- Discharging, firing or demoting
- Interviewing
- Discussing or debating the appointment, employment, promotion, discharge, firing or demotion

NOTE: Public officials who are elected members of the Oregon Legislative Assembly are not prohibited from participating in employment actions taken on positions held by relatives of the member's personal staff [ORS 244.177(2)].

A public official who is assigned duties that include performing "ministerial acts" related to any stage of a relative's employment is not prohibited from performing such acts. "Ministerial acts" would include mailing or filing forms or correspondence, taking and relaying messages, scheduling appointments or preparing documents and minutes for public meetings.

A public official may serve as a reference or provide a recommendation for a relative who has applied for a position of employment, promotion or is subject to any personnel action.

If a public official has a relative or a member of the public official's household who has applied to be or serves as an unpaid volunteer, the public official may participate in any personnel action that involves the relative or member of the household. This provision only applies to unpaid volunteers who provide services to the public body and does not apply to unpaid volunteers who serve or seek appointment to a governing body of a public body. [ORS 244.177(3)(a) and (b)]

A public official may not directly **supervise** a person who is a relative or member of the public official's household [ORS 244.179], except when:

- The public official is an elected member of the Oregon Legislative Assembly
- The public official is supervising an unpaid volunteer for the public body

Volunteers who are relatives or members of the household of a public official may be supervised by the public official. However, this would not apply if the volunteer position is as a member of the governing body of the public body. [ORS 244.179(3)]

ORS 244.179(4) allows a public body to adopt policies that specify when a public official, acting in an official capacity for the public body, may directly supervise a person who is a relative or member of the public official's household.

PRIVATE EMPLOYMENT OF PUBLIC OFFICIAL

Does Oregon Government Ethics law prohibit a public official from owning a private business or working for a private employer while continuing employment with or holding a position with a public body?

No. As mentioned earlier, many public officials are volunteers, meaning there is little or no compensation for the public position. Other public officials may receive compensation, but choose to seek additional sources of income. Some work for a private business and others establish a private business of their own. **NOTE: This guide does not address other statutes or agency policies that may limit private employment for public officials.**

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.

In general, public officials may obtain employment with a private employer or engage in private income producing activity of their own. They must not use the position held as a public official to create the opportunity for additional personal income. The public official must also ensure that there is a clear distinction between the use of personal resources and time for personal income producing activity and the use of the public body's time and resources. The Commission has created guidelines for public officials to follow in order to avoid violating Oregon Government Ethics law when engaged in private employment or a personally owned business.

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:
 - o Employees of governmental agencies must give written notice to their appointing authority.
 - o Elected or appointed public officials must publicly disclose once during each meeting convened by the governing body they serve.

EMPLOYMENT OF FORMER PUBLIC OFFICIALS

How would Oregon Government Ethics law apply when a former public official is employed by a business that has a contract with the public body previously represented by the former public official?

For two years after a public official ceases holding or being employed in a position as a public official, that public official may not have a direct beneficial financial interest in a public contract when one of the parties to the contract is the public official's former public body if the contract was authorized by [ORS 244.047(2) and (3)]:

- The former public official, who authorized the contract while acting in the capacity previously held as a public official.
- The former public official, as a member of a governing body [board, commission, council, bureau, committee], participated in official action to approve the contract.

“Authorized by” is defined in OAR 199-005-0035(6) as meaning that the former public official had a significant role in the contracting process to include participating on a selection committee, recommending approval, voting, giving final authorization or signing a contract. The definition in the rule is as follows:

“As used in ORS 244.047, a public contract is “authorized by” a public official if the public official performed a significant role in the selection of a contractor or the execution of the contract. A significant role can include recommending approval or signing of the contract, including serving on a selection committee or team, or having the final authorizing authority for the contract.

What are the restrictions on employment after I resign, retire or leave my public official position?

- ORS 244.040(1) prohibits public officials from using their official positions or offices to create a new employment opportunity; otherwise, most former public officials may enter the private work force with few restrictions.
- ORS 244.040(5) prohibits a former public official from attempting to use confidential information for personal gain if the confidential information was obtained while holding the position as a public official.
- Oregon Government Ethics law restricts the subsequent employment of certain public officials. The restrictions apply to positions listed below:

ORS 244.045(1)

State Agencies:

Director of Department of Consumer and Business Services

Administrator of Division of Finance and Corporate Securities
Administrator of Insurance Division
Administrator of Oregon Liquor Control Commission
Director of Oregon State Lottery
Public Utility Commissioner

1. One year restriction on gaining financial benefits from a private employer in the activity, occupation or industry that was regulated by the agency for which the public official was the Director, Administrator or Commissioner.
2. Two year restriction on lobbying or appearing as a representative before the agency on behalf of the activity, occupation or industry regulated by the agency for which the public official was the Director, Administrator or Commissioner.
3. Two year restriction on disclosing confidential information gained as the Director, Administrator or Commissioner for the agency.

ORS 244.045(2)

Oregon Department of Justice:

Deputy Attorney General
Assistant Attorney General

1. Restricted for two years from lobbying or appearing before an agency that they represented while with the Department of Justice.

ORS 244.045(3)

Office of the Treasurer:

State Treasurer
Chief Deputy State Treasurer

1. Restricted for one year from accepting financial benefit from a private entity with which there was negotiation or contract awarding \$25,000 in one year by the State Treasurer or Oregon Investment Council.
2. Restricted for one year from accepting financial benefit from a private entity with which there was investment of \$50,000 in one year by the State Treasurer or Oregon Investment Council.
3. Restricted for one year from being a lobbyist for an investment institution, manager or consultant or from appearing as a representative of an investment institution, manager or consultant before the office of State Treasurer or Oregon Investment Council.

ORS 244.045(4)

Public Officials who invested public funds:

1. Restricted for two years from being a lobbyist or appearing before the agency, board or commission for which public funds were invested.
2. Restricted for two years from influencing or trying to influence the agency, board or commission.
3. Restricted for two years from disclosing confidential information gained through employment.

ORS 244.047

Public Officials who authorized a public contract:

1. A public official who authorized or had a significant role in a contract while acting in an official capacity may not have a direct, beneficial, financial interest in the public contract for two years after leaving the official position.
2. A member of a board, commission, council, bureau, committee or other governing body who has participated in the authorization of a public contract may not have a direct, beneficial, financial interest in the public contract for two years after leaving the official position.

OAR 199-005-0035(6) indicates that “authorized by” means that public official performed a significant role in the selection of a contractor or the execution of the contract. A significant role can include recommending approval of a contract, serving on a selection committee or team, having the final authorizing authority or signing a contract.

ORS 244.045(5)

Department of State Police

Supervising programs related to Native American tribal gaming

Supervising programs related to Oregon State Lottery

1. Restricted for one year from accepting employment from or gaining financial benefit related to gaming from the Lottery or a Native American Tribe.
2. Restricted for one year from gaining financial benefit from a private employer who sells gaming equipment or services.
3. Restricted for one year from trying to influence the Department of State Police or from disclosing confidential information.

Exceptions include subsequent employment with the state police,

appointment as an Oregon State Lottery Commissioner, Tribal Gaming Commissioner or lottery game retailer, or personal gaming activities.

ORS 244.045(6)
Legislative Assembly

Representative
Senator

After a legislator's membership in the Legislative Assembly ends, a legislator may not become a compensated lobbyist until adjournment of the next regularly scheduled session of the Legislative Assembly following the end of membership in the Legislative Assembly. *[Note: In 2008 and 2010, the first special sessions are considered to be regular sessions.]*

CONFLICTS OF INTEREST

How does a public official know when they are met with a conflict of interest and, if met with one, what must they do?

Oregon Government Ethics law identifies and defines two types of conflicts of interest. An **actual conflict of interest** is defined in ORS 244.020(1) and a **potential conflict of interest** is defined in ORS 244.020(12). In brief, a public official is met with a conflict of interest when participating in official action which could or would result in a financial benefit or detriment to the public official, a relative of the public official or a business with which either is associated.

The difference between an actual conflict of interest and a potential conflict of interest is determined by the words “would” and “could.” A public official is met with an **actual** conflict of interest when the public official participates in action that **would** 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 public official is met with a **potential** conflict of interest when the public official participates in action that **could** affect the financial interest of the official, a relative of that official or a business with which the official or the relative of that official is associated. The following hypothetical circumstances are offered to illustrate the difference between actual and potential conflicts of interest:

A city councilor is employed by a building supply business from which the city public works director purchases building materials. City payments on invoices must be submitted to the city council and approved by a vote. The city councilor, who is employed by the building supply business, while participating in a meeting, would be met with an **actual conflict of interest** when the request to pay the invoice from the business that employs the councilor is presented to the city council for official action.

A member of a fire district board of directors owns a sheetrock contracting business. The fire district is planning to remodel a fire station in the district. To reduce cost, the district will manage the project and solicit bids from contractors for specified work, such as the sheetrock that needs to be installed. The member on the board of directors, who is the contractor, while participating in a meeting of the board of directors, would be met with a **potential conflict of interest** when the members discuss or act on the invitation for bids on the sheetrock installation.

What if I am met with a conflict of interest?

A public official must announce or disclose the nature of a conflict of interest. The way the disclosure is made depends on the position held. The following public officials must use the methods described below:

Legislative Assembly:

Members must announce the nature of the conflict of interest in a manner pursuant

to the rules of the house in which they serve. The Oregon Attorney General has determined that only the Legislative Assembly may investigate and sanction its members for violations of conflict of interest disclosure rules in ORS 244.120(1)(a). [49 Op. Atty. Gen. 167 (1999) issued on February 24, 1999]

Judges:

Judges must remove themselves from cases giving rise to the conflict of interest or advise the parties of the nature of the conflict of interest. [ORS 244.120(1)(b)]

Public Employees:

Public officials in public bodies who are appointed, employed or volunteer must provide a written notice to the person who appointed or employed them. The notice must describe the nature of the conflict of interest with which they are met. [ORS 244.120(1)(c)]

Elected Officials or Appointed Members of Boards and Commissions:

Except for members of the Legislative Assembly, these public officials must publicly announce the nature of the conflict of interest before participating in any official action on the issue giving rise to the conflict of interest. [ORS 244.120(2)(a) and ORS 244.120(2)(b)]

- Potential Conflict of Interest: Following the public announcement, the public official may participate in official action on the issue that gave rise to the conflict of interest.
- Actual Conflict of Interest: Following the public announcement, the public official must refrain from further participation in official action on the issue that gave rise to the conflict of interest. [ORS 244.120(2)(b)(A)]

If a public official is met with an actual conflict of interest and the public official's vote is necessary to meet the minimum number of votes required for official action, the public official may vote. The public official must make the required announcement and refrain from any discussion, but may participate in the vote required for official action by the governing body. [ORS 244.120(2)(b)(B)] These circumstances do not often occur. This provision does not apply in situations where there are insufficient votes because of a member's absence when the governing body is convened. Rather, it applies in circumstances when all members of the governing body are present and the number of members who must refrain due to actual conflicts of interest make it impossible for the governing body to take official action.

The following circumstances may exempt a public official from the requirement to make a public announcement or give a written notice describing the nature of a conflict of interest:

- If the conflict of interest arises from a membership or interest held in a particular business, industry, occupation or other class and that membership is a prerequisite

for holding the public official position. [ORS 244.020(12)(a)] For example, if a member of a state board is required by law to be employed in a specific occupation, such as an accountant or a doctor, then the official actions taken by the board member that affect all accountants or doctors to the same degree would be exempt from the conflict of interest disclosure requirements and participation restrictions.

- If the financial impact of the official action would impact the public official, relative or business of the public official to the same degree as other members of an identifiable group or “class”. The Commission has the authority to identify a group or class and determine the minimum size of that “class.” [ORS 244.020(12)(b) and ORS 244.290(3)(a)] For example, if a county commissioner votes to approve a contract to improve or maintain a county road that leads to the property the commissioner owns, but the improvements would also benefit many other property owners to the same degree, the commissioner would be exempt from the conflict of interest disclosure requirements and participation restrictions. The number of persons affected to the same degree as the public official will help to determine whether this exception applies.
- If the conflict of interest arises from an unpaid position as officer or membership in a nonprofit corporation that is tax-exempt under 501(c) of the Internal Revenue Code. [ORS 244.020(12)(c)] For example, a city councilor is also an unpaid board member or member at the local YMCA. The decision, as a city councilor, to award a grant to that YMCA would be exempt from the conflict of interest disclosure requirements and participation restrictions.

How is the public announcement of the nature of a conflict of interest recorded?

- The public body that is served by the public official will record the disclosure of the nature of the conflict of interest in the official records (minutes, audio/video recording) of the public body. [ORS 244.130(1)]

Is a public official required to make an announcement of the nature of a conflict of interest each time the issue giving rise to the conflict of interest is discussed or acted upon?

- The announcement needs to be made on each occasion when the public official is met with the conflict of interest. Each time a public official is met with a conflict of interest the nature must be disclosed. For example, an elected member of the city council would have to make the public announcement one time when met with the conflict of interest, but only one time in each meeting of the city council. If the matter giving rise to the conflict of interest is raised at another meeting, the disclosure must be made again at that meeting. Another example would involve an employee in a city planning department who would have to give a separate written notice before each occasion they encounter a matter that gives rise to a conflict of interest. [ORS 244.120(3)]

If a public official failed to announce the nature of a conflict of interest and participated in official action, is the official action voided?

- No. Any official action that is taken may not be voided by any court solely by reason of the failure of the public official to disclose an actual or potential conflict of interest [ORS 244.130(2)]. However, the public official faces the potential of personal liability for the violation.

LEGAL EXPENSE TRUST FUND

If a public official is the respondent to a complaint, can the public official solicit funds in order to pay for the cost of a legal defense?

The Oregon Government Ethics Commission can authorize a public official to establish a trust fund to be used to defray expenses incurred for a legal defense in any civil, criminal or other legal proceeding that relates to or arises from the course and scope of duties of the person as a public official. [ORS 244.205]

The provisions regarding the establishment of this fund are detailed in ORS 244.205 through ORS 244.221. If a public official is considering the need to establish a legal expense trust fund, these provisions should be reviewed. The Commission staff is available to provide guidance on the procedures. The following are some of the significant elements of a legal expense trust fund:

- A public official may only have one trust fund at any one time [ORS 244.205(4)].
- The application to establish the fund must be submitted to the Commission for review and authorization. ORS 244.209 details what information and documents must accompany the application.
- The public official may act as the public official's fund trustee [ORS 244.211(2)].
- Once authorized and established, any person may contribute to the fund [ORS 244.213].
- Contributions from a principal campaign committee are not allowed [ORS 244.213(3)].
- Funds must be maintained in a single exclusive account [ORS 244.215].
- Quarterly reports of contributions and expenditures from the fund are required [ORS 244.217].
- The fund must be terminated within six months after the legal proceeding for which the fund was established has been concluded [ORS 244.219].
- When terminated, funds must be used to pay legal expenses, returned to contributors or donated to an organization exempt from taxation under section 501(c)(3) of the internal Revenue Code [ORS 244.221].

GIFTS

When Oregon Government Ethics law uses the word “gift” it has the meaning in ORS 244.020(6)(a):

“Gift” means something of economic value given to a public official, a candidate or a relative or member of the household of the public official or candidate:

(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 candidates or the relatives or members of the household of public officials or candidates on the same terms and conditions; or

(B) For valuable consideration less than that required from “others” who are not public officials or candidates.”

The Commission interprets “others” to indicate a significant portion of the general public in Oregon who are not public officials or candidates.

In other words, a “gift” is something of economic value that is offered to,

- A public official or candidate or to relatives or members of the household of a public official or candidate,
- Without cost or at a discount or as forgiven debt and,
- The same offer is not made or available to the general public who are not public officials or candidates.

[NOTE: In the following discussion, references to candidates are omitted to simplify the discussion. In most of the discussion, if you are a candidate, read the references to public official to mean “public official or candidate, if elected.”]

Oregon Government Ethics law establishes a framework of conditions for public officials to apply when they, their relatives or members of their households are offered gifts. If offered a gift, the public official must analyze the offer and decide if “something of value” can be accepted with or without restrictions.

There are restrictions on the value of gifts accepted by a public official, if the source of the gift has a legislative or administrative interest in decisions or votes the public official makes when acting in the capacity of a public official.

Legislative or administrative interest is defined in ORS 244.020(9) and is used, primarily, when applying the law to gifts accepted by public officials. Whether there is a legislative or administrative interest is pivotal to any decision a public official makes on accepting gifts. It

will mean the difference between being allowed to accept gifts without limits, accepting gifts with a limit of \$50 on the aggregate value, or accepting gifts under specific conditions and within specific parameters. As will be apparent in the following discussion, the burden of any decision on accepting a gift rests solely with the individual public official.

What does a public official need to know about a “Legislative or Administrative Interest”?

Beginning in 2010, the change to the definition of what a legislative or administrative interest is represents one of the most significant changes made in Oregon Government Ethics law during the 2009 session of the Oregon Legislative Assembly.

The change is significant because knowing if the source of a gift has a legislative or administrative interest will help determine whether the gift offered can be accepted without limits or with restrictions. Before this change, a public official only had to know if a gift was offered from a source with a legislative or administrative interest in official actions of the public official’s governmental agency. Now the focus is on the votes or decisions of each individual public official. The change places greater responsibility on the individual public official to decide if a gift can be accepted without limits or with restrictions imposed by ORS Chapter 244. Not every public official makes decisions or casts votes, as those actions are used in defining a legislative or administrative interest. This means that when gifts are offered to two or more public officials, in the same setting, one public official may be allowed to accept the offer without limits and another public official may be able to accept the offer, but it would be limited as to value or restricted by conditions that must be met when accepting.

The definition of a legislative or administrative interest as set forth in ORS 244.020(9) as follows:

“‘Legislative or administrative interest’ means an economic interest, distinct from that of the general public, in:

(a) Any matter subject to the decision or vote of the public official acting in the public official’s capacity as a public official; or

(b) Any matter that would be subject to the decision or vote of the candidate who, if elected, would be acting in the capacity of a public official.”

In the context of gifts accepted by a public official, the public official must determine if the source of the offered gift has a legislative or administrative interest in the decisions or votes of the public official. When analyzing a set of circumstances and applying “legislative or administrative interest”, there are several factors to consider:

Source: The Commission adopted a rule that identifies the source of a gift as the person or entity that makes the ultimate and final payment of the gift’s expense. OAR 199-005-0030 places two burdens on a public official who accepts gifts. The

public official must know the identity of the source and, if applicable, avoid exceeding the limit on the aggregate value of gifts accepted from that source. [OAR 199-005-0030(2)]

Distinct from that of the general public: With regard to gifts, this phrase refers to a distinct economic interest held by the source of a gift. That economic interest is in the financial gain or loss that could result from any votes cast or decisions made by a public official. If the source of a gift would realize a financial gain or detriment from a vote or decision of a public official, that source has an economic interest in that public official. That economic interest is “distinct from that of the general public”, if the potential financial gain or detriment is distinct from the financial impact that would be realized by members of the general public from the votes or decisions of that same public official.

There are decisions or votes that have an economic impact on single individuals or individuals from specific businesses or groups that are distinct from the economic impact on members of the general public. On the other hand, there are many votes or decisions made by public officials that have the same general economic impact on individuals, businesses, organizations and members of the general public. Some examples of decisions or votes that would have an economic impact on the general public would be those that change water usage rates, fees for licenses or permits or fines for parking violations.

To illustrate, private contractors have an economic interest in any public official who has the authority to decide or vote to award them contracts. The economic interest of these contractors is distinct from the economic interest held by members of the general public in those decisions or votes.

To further illustrate, real estate developers have an economic interest in any public official who has the authority to decide or vote to approve their land use applications or building permits. The economic interest of these developers is distinct from the economic interest held by members of the general public in those decisions or votes.

Vote: This has the common meaning of to vote as an elected member of a governing body of a public body or as an appointed member of a committee, commission or board appointed by a governing body, Oregon Legislative Assembly or the Office of the Governor.

Decision: The Commission adopted OAR 199-005-0003 and defines “decision” in OAR 199-005-0003(2). A public official makes a decision when the public official exercises the authority given to the public official to commit the public body to a particular course of action. Making a recommendation or giving advice in an advisory capacity does not constitute a decision.

The change to the definition of a legislative or administrative interest places the focus on

the decision or vote of each individual public official. That means that any decision to accept or reject the offer of a gift must be made individually by each public official. It also means that there will be some public officials who may accept unlimited gifts from a source and other public officials within the same public body that would have restrictions on gifts from that same source. This is because not all public officials in the same public body have the same authority, responsibilities or duties. Some may vote and make decisions, others may do one but not the other and many will not vote or make decisions, as “decision” is used in legislative or administrative interest.

There are public officials who, because they hold positions specified in ORS 244.050, must file the Annual Verified Statement of Economic Interest (SEI) form with the Commission on April 15 of each year. Some information listed in that form is required when certain financial interests, assets or liabilities, are related to a source with a legislative or administrative interest in the votes or decisions of the public official submitting the form. Refer to the table of contents to find the discussion of the SEI form in this guide.

Any discussion of gifts must begin with the reminder that if the source of the offer of a gift to a public official does not have a legislative or administrative interest in the decisions or votes of the public official, the public official can accept unlimited gifts from that source. [ORS 244.040(2)(f)]

If the source of the offer of a gift to a public official has a legislative or administrative interest in the decisions or votes of the public official, the public official can only accept gifts from that source when the aggregate value of gifts from that source does not exceed \$50 in a calendar year. [ORS 244.025]

While gifts from a source with a legislative or administrative interest in the decisions or votes of a public official have a \$50 limit, there are some gifts that are excluded from the definition of a “gift.” If the offer of a gift is excluded from the definition of a “gift,” the offer may be accepted by a public official. The value of gifts that are allowed as exclusions does not have to be included when calculating the aggregate value of gifts received from that source in one calendar year. [ORS 244.020(6)(b)]

Sources who offer gifts or other financial benefits to public officials must also be aware of the provisions in ORS Chapter 244. While the specific gift of paid expenses may be allowed by ORS 244.020(6)(b)(F), ORS 244.100(1) requires the source of this gift, if over \$50, to notify the public official in writing of the aggregate value of the paid expenses. There is also a notice requirement in ORS 244.100(2) for the source of an honorarium when the value exceeds \$15. Lobbyists, clients or employers of lobbyist and others who provide gifts or financial benefits to public officials should also familiarize themselves with the provisions in ORS 171.725 through ORS 171.992 and Divisions 5 and 10 of Chapter 199 in the Oregon Administrative Rules. The Commission has published a “Guide to Lobbying in Oregon” that provides a summary of these regulations and rules.

As previously mentioned, there are gifts that are allowed because they are excluded from the definition of a “gift” when offered under specific conditions or when prerequisites are

met. Although some gifts are allowed, it should be remembered that a source may have a notice requirement or there may be reporting requirements for the public official or the source. If you are a public official accepting gifts or a source offering gifts, it is important you become familiar with the requirements that may apply to you.

ORS 244.020(6)(b) provides a description of the **GIFTS THAT ARE ALLOWED** as exclusions to the definition of a “gift”:

[NOTE: Not all of these exclusions apply to gifts offered to candidates.]

- Campaign contributions as defined in ORS 260.005. *[ORS 244.020(6)(b)(A)]*
- Contributions to a legal expense trust fund established under ORS 244.209. *[ORS 244.020(6)(b)(G)]*
- Gifts from relatives or members of the household of public officials or candidates. *[ORS 244.020(6)(b)(B)]*
- Anything of economic value received by a public official or candidate, their relatives or members of their household when; *[ORS 244.020(6)(b)(O)]*

The receiving is part of the usual and customary practice of the person’s business, employment, or volunteer position with any legal non-profit or for-profit entity. *[ORS 244.020(6)(b)(O)(i)]*

The receiving bears no relationship to the person’s holding the official position or public office. *[ORS 244.020(6)(b)(O)(ii)]*

- Unsolicited gifts with a resale value of less than \$25 and in the form of items similar to a token, plaque, trophy and desk or wall mementos. *[ORS 244.020(6)(b)(C) and see resale value discussed in OAR199-005-0010]*
- Publications, subscriptions or other informational material related to the public official’s duties. *[ORS 244.020(6)(b)(D)]*
- Waivers or discounts for registration fees or materials related to continuing education or to satisfy a professional licensing requirement for a public official or candidate. *[ORS 244.020(6)(b)(J)]*
- Entertainment for a public official or candidate and their relatives or members of their households when the entertainment is incidental to the main purpose of the event. *[ORS 244.020(6)(b)(M) and see OAR 199-005-0001(3) and OAR 199-005-0025(1) for meaning of “incidental”]*
- Entertainment for a public official, a relative of the public official or a member of the public official’s household when the public official is acting in an official capacity and

representing a governing agency for a ceremonial purpose. [ORS 244.020(6)(b)(N) and see “ceremonial” defined in OAR 199-005-0025(2)]

- Cost of admission or food and beverage consumed by the public official, a member of the public official’s household or staff when they are accompanying the public official, who is representing government, state, local or special district, at a reception, meal or meeting held by an organization. [ORS 244.020(6)(b)(E) and see this exception discussed in OAR 199-005-0015]
- Food or beverage consumed by a public official or candidate at a reception where the food and beverage is an incidental part of the reception and there was no admission charged. [ORS 244.020(6)(b)(L) and OAR 199-005-0025(1) also see OAR 199-005-0001(3) and (8)]
- When public officials travel together inside the state to an event bearing a relationship to the office held and the public official appears in an official capacity, a public official may accept the travel related expenses paid by the accompanying public official. [ORS 244.020(6)(b)(K)]
- Payment of reasonable expenses if a public official is scheduled to speak, make a presentation, participate on a panel or represent a government agency at a convention, conference, fact-finding trip or other meeting. The paid expenses for this exception can only be accepted from another government agency, Native American Tribe, an organization to which a public body pays membership dues or not-for-profit organizations that are tax exempt under 501(c)(3). [ORS 244.020(6)(b)(F) and see definition of terms for this exception in OAR 199-005-0020]
- Payment of reasonable food, lodging or travel expenses for a public official, a relative of the public official or a member of the public official’s household or staff may be accepted when the public official is representing the government agency or special district at one of the following: [ORS 244.020(6)(b)(H) and see definition of terms for this exception in OAR 199-005-0020]
 - Officially sanctioned trade promotion or fact-finding mission; [ORS 244.020(6)(b)(H)(i)]
 - Officially designated negotiation or economic development activity when receipt has been approved in advance. [ORS 244.020(6)(b)(H)(ii)]

[NOTE: How and who may officially sanction and officially designate these events is addressed in OAR 199-005-0020(2)(b).]

- Payment of reasonable expenses paid to a public school employee for accompanying students on an educational trip. [ORS 244.020(6)(b)(P)]

- Food and beverage when acting in an official capacity in the following circumstances: *[ORS 244.020(6)(b)(I)]*
 - In association with a financial transaction or business agreement between a government agency and another public body or a private entity, including such actions as a review, approval or execution of documents or closing a borrowing or investment transaction; *[ORS 244.020(6)(b)(I)(i)]*
 - When the office of the Treasurer is engaged in business related to proposed investment or borrowing; *[ORS 244.020(6)(b)(I)(ii)]*
 - When the office of the Treasurer is meeting with a governance, advisory or policy making body of an entity in which the Treasurer's office has invested money. *[ORS 244.020(6)(b)(I)(iii)]*

GIFTS AS AN EXCEPTION TO THE USE OF OFFICE PROHIBITION IN ORS 244.040

Since ORS 244.040 was amended in 2007, the acceptance of gifts that comply with ORS 244.020(6) and ORS 244.025 is excluded from the prohibition on public officials' use or attempted use of an official position to gain financial benefits. If a public official or relative accepts a lawful gift, or a lawful financial benefit that qualifies as an exception to the definition of a gift, ORS 244.040(1) does **not** prohibit the acceptance.

The discussion below is intended to assist public officials in understanding this distinction. There are more focused discussions of gifts starting on page 26 and the use of position or office starting on page 9. It should be understood this section may paraphrase information discussed more comprehensively in those areas of this guide. Also, the application of the gift provisions to candidates is not part of this discussion because, unless the candidate also qualifies as a public official on another basis, candidates are not public officials; therefore, the use of an official position prohibited by ORS 244.040(1) would not apply to a candidate who is not also a public official.

Oregon Government Ethics law does not prohibit public officials from accepting gifts [ORS 244.040(2)(e), (f) and (g)], but it does place on each individual public official the direct and personal responsibility to understand there are circumstances when the aggregate value of gifts may be restricted. Public officials are also prohibited from using or attempting to use a position held by the public official to obtain a prohibited financial benefit. These provisions of Oregon Government Ethics law often converge and require public officials to analyze and determine whether the opportunity to obtain financial benefits represents the use of an official position prohibited by ORS 244.040(1) or a gift addressed with other provisions in ORS Chapter 244 [ORS 244.020(6), ORS 244.025 or ORS 244.040(2)(e),(f) and (g)].

Is it a gift?

Public officials must understand the operative definition of a "gift" when deciding whether a gift may be accepted by a public official or candidate. The following is a paraphrase of the definition taken from ORS 244.020(6)(a):

Gift: "Something of economic value" given to a public official, a relative of the public official or a member of the public official's household for which the recipient either makes no payment or makes payment at a discounted price. The opportunity for the gift is one that is **not available to members of the general public**, who are not public officials, **under the same terms and conditions as** those that apply to the gift offered to **the public official**, the relative or a member of the household.

If something of economic value is received by a public official from the government agency employer or the public body represented by the public official, that financial benefit is not considered a gift, it is a financial benefit addressed by ORS 244.040 and it is either allowed or prohibited.

Sources of gifts are private individuals, businesses, organizations or government agencies, but **not the agency represented by or employing the public official**. Sources may also be co-workers or representatives of the same public body who have purchased a gift with their **personal** resources.

Gifts may be accepted by a public official, if the source does not have a legislative or administrative interest in the votes or decisions of the public official. Specific gifts may be accepted, if the conditions of the offer exclude the gift from being defined as a gift [ORS 244.020(6)(b)(A) through (P)]. Gifts that are not excluded from the definition may be accepted from a source as long as the aggregate value of gifts from that source does not exceed \$50 in a calendar year. For additional assistance, see the discussion beginning on page 37 titled, "What if I am offered a gift?"

Is it a prohibited use of position?

Unlike gifts, which come from outside sources, ORS 244.040(1) focuses on the public official's own actions. ORS 244.040(1) prohibits the **use or attempted use of the position** held by the public official to obtain benefits which are only available because of that position.

The prohibited financial benefits might take several forms. A public employee might have access to job related resources, business opportunities, or information, and might want to take financial advantage of this access. The financial benefit might be the avoidance of a personal expense, acquiring something of economic value, gaining extra income from private employment, or creating a new employment opportunity.

Although this "use of position" applies to situations where something of value is obtained, or there is an attempt to obtain something of value, **the Commission applies Oregon Government Ethics law to "something of economic value" offered to a public official that meets the definition of "gift," it will be addressed as a gift in the analysis and application of the law.** The following are some examples to illustrate the Commission's approach:

NOTE THAT IN THE FOLLOWING EXAMPLES, THE SOURCES OF THE FINANCIAL BENEFITS HAVE A LEGISLATIVE OR ADMINISTRATIVE INTEREST IN THE DECISIONS OR VOTES OF THE PUBLIC OFFICIALS.

That is important to remember because if there were no legislative or administrative interest the public officials may be allowed to accept the offers without restrictions. [ORS 244.040(2)(f)]

- A salesperson from a software company offers to take the county's information technology manager out to lunch. Because the manager has purchasing authority, the salesperson has an administrative interest in the manager. The meal would be a gift and, if accepted, the value would be included in the aggregate value of gifts, which cannot exceed \$50 from a single source in one calendar year. [ORS 244.025(1)] If the meal cost less than \$50, the manager may accept it, but should

keep a record of the gift and should be careful in future situations not to accept additional gifts from this source if the value would exceed \$50 total for the year. Of course, if the lunch costs more than \$50, the manager may not accept it in any case.

- A city manager attends a work-related conference paid for by the city. When the city manager checks out of the hotel, she is offered a coupon for two nights of free lodging at any hotel in the nationwide chain. Because the city manager is in charge of her own travel arrangements, the hotel has an administrative interest in her future hotel-booking decisions. If accepted and used for personal lodging, it would be a gift and the value would be included in the aggregate value of gifts, which cannot exceed \$50 from a single source in one calendar year. *[ORS 244.025(1)]* Note that if the city had adopted an official compensation package (as defined in OAR 199-005-0035) that included a provision allowing the city manager to use “loyalty program” benefits for personal use, the coupon could have been accepted.
- A county finance officer attends a work-related conference paid for by the county. When arriving at the conference the finance officer, as with others in attendance, is offered a gift basket containing assorted goods from the organization hosting the conference. Because the organization sells goods or services the finance officer has the authority to purchase, the source of the gift has an administrative interest in the finance officer. Typically, such a gift basket would be a “gift” and, if accepted, the value would be included in the aggregate value of gifts, which cannot exceed \$50 from a single source in one calendar year. *[ORS 244.025(1)]* However, the law does not prohibit accepting things that are made available to a significant portion of the general public under the same terms and conditions. If the conference was open to members of the general public, and the attendees included a wide range of public and private participants, the baskets would not be considered gifts.
- A state employee is sent by his agency to attend a two-day training conference. A salesperson is near the conference registration table and offers a collection of gifts valued at over \$100 to all registrants. As in the last example, because the employee has the authority to purchase goods or services sold by the salesperson, the source of the gifts has an administrative interest in the state employee. Let’s also assume that the conference is only open to government employees. Under these circumstances the offered items would be gifts and any accepted could not exceed the \$50 limit on aggregate value from a single source in one calendar year. *[ORS 244.025(1)]*
- During the same conference, the state employee is going out to dinner after the conference adjourns for the day. While passing through the hotel lobby, he stops to speak with the salesperson who offered the gifts during the conference registration. The salesperson asks to join the state employee for dinner and offers to pay for the meal. The value of the meal would be included with the value of any gifts accepted earlier in the aggregate value of gifts, which cannot exceed \$50 in one calendar year. *[ORS 244.025(1)]*

- A city mayor goes out to lunch in a local city restaurant. During lunch a well known developer approaches the mayor and offers to pay for the mayor's meal. The developer has a legislative or administrative interest in decisions the mayor could make on his construction projects. The value of the meal, if accepted, would be included in the aggregate value of gifts from a source, which cannot exceed \$50 from a single source in one calendar year. [ORS 244.025(1)]
- A chief deputy who manages procurement for a county sheriff's office attends a conference on newly developed equipment for law enforcement agencies. Upon arrival, the deputy purchases with personal funds several "raffle tickets" each representing a chance to win a shotgun from the manufacturer valued at \$500. The opportunity to buy the tickets is only available to those attending the conference. During the final session of the conference the "raffle" ticket drawing is held and the chief deputy wins the shotgun. As explained above, if the conference was only open to public officials, or if few non-public employees were in attendance, the shotgun would be a gift and, if accepted, the value would be included in the aggregate value of gifts, which cannot exceed \$50 from a single source in one calendar year. [ORS 244.025(1)]

When the Commission applies Oregon Government Ethics law to a financial benefit obtained by a public official by using or attempting to use an opportunity that would not otherwise be available but for the position or office held, ORS 244.040(1) will be used in the analysis and application of the law. The following are some examples to illustrate the Commission's approach:

- A city recorder has overseen the installation and implementation of a new software program to manage the city's financial records. The distributor of this software has a training event scheduled for employees who work for other cities' governments. The city recorder has been asked to participate as a trainer at the events and the distributor has offered to provide compensation and pay any expenses for food, lodging and travel. If the city recorder accepted this offer, it could constitute the use of the official position to gain a financial benefit because the opportunity for the compensation and paid expenses would not be available but for holding the position and performing the duties as the city recorder. [ORS 244.040(1)]
- A deputy fire chief, who is in charge of procuring equipment for fire stations in the district, locates a vendor that offers the make and model of an extension ladder to replace obsolete ladders in the district's stations. To increase the fire district's discount on each ladder, the deputy fire chief adds several extra ladders to the order. The deputy fire chief and two relatives take personal possession of the extra ladders and pay the fire district the amount the district paid for the ladders. The deputy fire chief would violate ORS 244.040(1) because the discounted price to the deputy fire chief and the relatives represents the use of position to avoid a financial detriment (discount) that is prohibited.

- A city council has scheduled a public council meeting in a room at a local restaurant. Before the scheduled meeting the councilors plan to use city funds to purchase dinner for councilors, the councilor's spouses and members of the city's staff attending the scheduled meeting. The councilors, who are accompanied by a spouse, would violate ORS 244.040(1) because the cost of the meal for the spouse would represent the use of position to avoid a financial detriment that is prohibited.

The responsibility for judgments and decisions made in order to comply with the various provisions in Oregon Government Ethics law rests with the individual public official who faces the circumstances that require a judgment or decision. That is true of questions regarding gifts, use of an official position, announcing the nature of conflicts of interest and the many situations addressed in ORS Chapter 244.

What if I am offered a gift?

First, insure you know the identity of the source of the gift. Remember, the source of a gift is the person or entity that made the ultimate payment for the gift's expense [See page 27].

Second, determine if the source of the gift has an economic interest in decisions or votes you make in your official capacity as a public official. If that economic interest is distinct from the interest held by members of the general public it is a legislative or administrative interest [See page 27].

- If the source does not have a legislative or administrative interest, gifts from that source are not prohibited or limited as to value or quantity.
- If the source has a legislative or administrative interest, you must answer the following questions:
 1. Is the gift offered under the conditions that would allow you to accept the gift because it is excluded from what is defined as a "gift"? These exclusions are found in ORS 244.020(6)(b) and described on pages 30 - 32 of this guide.
 2. What is the value of the gift? Remember, you can accept gifts [not excluded from the definition of "gift".] from a single source when the aggregate value of gifts from that source does not exceed \$50 in a calendar year. [ORS 244.025]

ANNUAL VERIFIED STATEMENT OF ECONOMIC INTEREST

There are approximately 5,500 Oregon public officials who must file an **Annual Verified Statement of Economic Interest (SEI)** form with the Oregon Government Ethics Commission by **April 15 of each calendar year**.

The **public officials who are required to file reports are specified in ORS 244.050**. Please refer to that section of the law to see if your specific position requires you to file these forms. In general, public officials who hold the following positions are required to file:

- State public officials who hold elected or appointed executive, legislative or judicial positions. This includes those who have been appointed to positions on certain boards or commissions.
- In counties, elected officials, such as commissioners, assessors, surveyors, treasurers and sheriffs must file, as do planning commission members and the county's principal administrator.
- In cities, all elected officials, the city manager or principal administrator, municipal judges and planning commission members must file.
- Administrative and financial officers in school districts, education service districts and community college districts must file.
- Some members of the board of directors for certain special districts must file.
- Candidates for some elected public offices are also required to file.

The Commission staff has identified the positions held by public officials who must file the SEI form and has them listed by jurisdiction. Each jurisdiction [city, county, executive department, board or commission, etc.] has a person who acts as the Commission's point of contact for that jurisdiction [OAR 199-020-0005(1)].

The **contact person** for each jurisdiction has an important role in the annual filing of the SEI forms. It is through the contact person that the Commission obtains the current name and address of each public official who is required to file. When there is a change, through resignation, appointment or election, in who holds a position, the contact person notifies the Commission. If there is a change in the filer's mailing address, it is the contact person who notifies the Commission.

As with other provisions in Oregon Government Ethics law, it is each public official's personal responsibility to ensure they comply with the requirement to complete and submit the SEI form by April 15. Those public officials who must file a SEI form are well served if the contact person ensures that the Commission has the correct name and address of the public official.

Beginning in January of each year the Commission prepares a list by jurisdiction of each public official required to file the SEI form. A list for each jurisdiction is sent to the contact person. The contact person is required to review the list for accuracy. After entering the necessary changes, the contact person must return the list that has been reviewed and corrected to the Commission by February 15. [OAR 199-020-0005(2)]

The contact person from each jurisdiction should ensure that each filer has been advised of the reporting requirements. Each filer should also receive information as to the procedures the jurisdiction follows to assist the filer in meeting the SEI filing requirement.

Based on the information provided by each of the jurisdictions' contacts, the Commission sends an annual SEI form directly to each individual public official required to file the form.

Again, the requirement to file the SEI is the personal responsibility of each public official. Each public official should comply and file timely, as the civil penalties for late filing are \$10 for each of the first 14 days after the filing deadline and \$50 for each day thereafter until the aggregate penalty reaches the maximum of \$5,000. [ORS 244.350(4)(c)]

SEI Form

When the forms are distributed in March of each year, the instructions and definitions are also included to assist the filer in completing the forms. The information needed to complete the form pertains to the previous calendar year.

NOTE: Only public officials who hold a position that is required to file, and who holds the position on April 15 of the year the SEI is due, must complete the form.

The following is a brief description of the information requested in the SEI form:

- Name and address of each business in which a position as officer or director was held by the filer or member of the household. [ORS 244.060(1)]
- Name and address of each business through which the filer or member of the household did business. [ORS 244.060(2)]
- Name and address and brief description of the sources of income for the filer and members of the household that represent 10 percent or more of the annual household income. [ORS 244.060(3)]
- Ownership interests held by the filer or members of the household in real property, except for the principal residence, located within the geographic boundaries of the governmental agency in which the filer holds the position or seeks to hold. [ORS 244.060(4)(a) and (b)]
- Honoraria or other items allowed by ORS 244.042 that exceed \$15 in value given to the filer or members of the filer's household. Include a description of the honoraria or item

and the date and time of the event when the item was received [ORS 244.060(7)]. Remember that honorarium cannot exceed \$50. [ORS 244.042(3)(a)]

- Name of each lobbyist associated with any business the filer or a member of the household is associated, unless the association is through stock held in publicly traded corporations. [ORS 244.090]
- If the public official received over \$50 from an entity to participate in a convention, fact-finding mission, trip, or other meeting as allowed by ORS 244.020(6)(b)(F), list the name and address of the entity that paid the expenses. Include the event date, aggregate expenses paid, purpose for participation a copy of the notice of aggregate value paid. [ORS 244.060(5) and ORS 244.100(1)] [Not required for candidates]
- If the public official received over \$50 from an entity to participate in a trade promotion, fact-finding mission, negotiations or economic development activities as allowed by ORS 244.020(6)(b)(H), list the name and address of the person that paid the expenses. Include the event date, aggregate expenses paid and nature of the event. [ORS 244.060(6)] [Not required for candidates]

The following is required if the information requested relates to an individual or business that has been or could reasonably be expected to do business with the filer's governmental agency or has a legislative or administrative interest in the filer's governmental agency:

- Name, address and description of each source of income (taxable or not) that exceeds \$1,000 for the filer or a member of the filer's household. [ORS 244.060(8)]
- Name of each person the filer or member of the filer's household has owed \$1,000 or more. Include the date of the loan and the interest rate. Debts on retail contracts or with regulated financial institutions are excluded. [ORS 244.070(1)]
- Business name, address and nature of beneficial interest over \$1,000, or investment held by the filer or a member of the household in stocks or securities over \$1,000. Exemptions include mutual funds, blind trusts, deposits in financial institutions, credit union shares and the cash value of life insurance policies. [ORS 244.070(2)]
- Name of each person from whom the filer received a fee of over \$1,000 for services, unless disclosure is prohibited by a professional code of ethics. [ORS 244.070(3)]

OREGON GOVERNMENT ETHICS COMMISSION

The Governor appoints all seven members of the Commission and each appointee is confirmed by the Senate. The commissioners are recommended as follows [ORS 244.250]:

- 1 Recommended by the Senate Democratic leadership
- 1 Recommended by the Senate Republican leadership
- 1 Recommended by the House Democratic leadership
- 1 Recommended by the House Republican leadership
- 3 Recommended by the Governor

No more than four commissioners with the same political party affiliation may be appointed to the Commission to serve at the same time. The commissioners are limited to one four year term, but if an appointee fills an unfinished term they can be reappointed to a subsequent four year term.

The Commission members select a chairperson and vice chairperson annually. The Commission is administered by an executive director, who is selected by the Commission. Legal counsel is provided by the Oregon Department of Justice.

The Commission staff provides administration, training, guidance, issues written opinions, and conducts investigations when complaints are filed with the Commission.

Training:

The Commission has designated training as one of its highest priorities. It has two staff positions to provide training to public officials and lobbyists on the laws and regulations under its jurisdiction. Training is provided through presentations at training events, iLearnOregon, informational links on the website, topical handouts and guidance offered when inquiries are received.

Advice:

All members of the Commission staff are cross-trained in the laws and regulations under the Commission's jurisdictions. Questions regarding the Commission's laws, regulations and procedures are a welcome daily occurrence. Timely and accurate answers are a primary objective of the staff. Guidance and information is provided either informally or in written formal opinions. The following are available:

- Telephone inquiries are answered during the call or as soon as possible.
- E-mail inquiries are answered with return e-mail or telephone call as soon as possible.
- Letter inquiries are answered by letter as soon as possible.

- Written opinions on specific circumstances can also be requested.

Requests for written opinions must describe the specific facts and circumstances that provide the basis for questions about how the Oregon Government Ethics law may apply. The facts and circumstances may define a proposed transaction and may be hypothetical or actual. If the circumstances indicate that a violation may have occurred, the staff cannot provide an opinion because to do so could compromise the Commission's objectivity if a complaint were to be filed. The written opinions will be in one of the following formats, as requested:

Staff Advice

ORS 244.284 provides for informal staff advice, which may be offered in several forms, such as in person, by telephone, e-mail or letter. In a letter of advice, the proposed, hypothetical or actual facts are restated as presented in the request and the relevant laws or regulations are applied. The answer will conclude whether a particular action by a public official comports with the law.

If the Commission determines that a respondent violated provisions of law within its jurisdictions and the respondent received staff advice offered under the authority of ORS 244.284, in sanctioning the violation, the Commission may consider whether the public official committed the violation when relying on the staff advice [ORS 244.284(2)].

For staff advice to be a factor in the sanction phase, it is important to understand that the circumstances the respondent described in the request must have been an accurate description of what occurred when the respondent committed the violation. The actions of the respondent must have been those recommended or described in the staff advice. The Commission is not prevented from finding a violation in these circumstances, but the sanction imposed could be affected.

Staff Advisory Opinion

ORS 244.282 authorizes the executive director to issue a staff advisory opinion upon receipt of a written request. The opinion is issued in a letter that restates the proposed, hypothetical or actual facts presented in the written request and identifies the relevant statutes. The letter will discuss how the law applies to the questions asked or raised by the fact circumstances presented in the request. The Commission must respond to any request for a staff advisory opinion within 30 days, unless the executive director extends the deadline by an additional 30 days.

If the Commission determines that a respondent violated provisions of law within its jurisdictions and the respondent received a staff advisory opinion under the authority of ORS 244.282, in sanctioning the violation, the Commission may consider whether the public official committed the violation when relying on the staff advisory opinion [ORS 244.282(3)].

For the staff advisory opinion to be a factor in the sanction phase, it is important to understand that the circumstances the respondent described in the request must have been an accurate description of what occurred when the respondent committed the violation. The actions of the respondent must have been those recommended or described in the staff advisory opinion. The Commission is not prevented from finding a violation in these circumstances, but whether the sanction is imposed or its severity could be affected.

Commission Advisory Opinion

ORS 244.280 authorizes the Commission to prepare and adopt by vote a Commission Advisory Opinion. This formal written opinion also restates the proposed, hypothetical or actual facts presented in a written request for a formal opinion by the Commission. The opinion will identify the relevant statutes and discuss how the law applies to the questions asked or raised by the fact circumstances provided in the request. These formal advisory opinions are reviewed by legal counsel before the Commission adopts them. The Commission must respond to any request for a Commission Advisory Opinion within 60 days, unless the Commission extends the deadline by an additional 60 days [ORS 244.280(1) and (2)].

The Commission may not impose a penalty on a person for any good faith action taken by the person while relying on a Commission Advisory Opinion, unless it is determined that the person who requested the opinion omitted or misstated material facts in the opinion request [ORS 244.280(3)].

For the Commission Advisory Opinion to be a factor in preventing the imposition of a penalty, it is important to understand that the circumstances described in the request must have been an accurate description of what occurred when the respondent committed the violation. The actions of the respondent must have been those recommended or described in the Commission Advisory Opinion. The Commission is not prevented from finding a violation in these circumstances, but could be prevented from imposing a sanction.

If a person requests, receives or relies on any of the advice or opinions authorized by ORS 244.280 through ORS 244.284, does that person have what is referred to as “safe harbor” protection from becoming a respondent to a complaint filed with or initiated by the Commission?

There is no “safe harbor,” if the term is understood to mean that any person who relies on any advice or opinions offered by the Commission or the staff is protected from being a respondent to a complaint, from being found in violation of laws within the jurisdiction of the Commission, or from receiving a penalty for a violation.

There is, however, specific and conditional protection for any person who has requested and relied upon advice or an opinion from the Commission or its staff. The conditions and protection is as follows:

- The fact circumstances described in the request must not misrepresent, misstate or omit material facts.
- Reliance on the advice or opinion means that the action or transactions of the person were those described or suggested in the advice or opinion.
- The protection applies only during the penalty phase, after the Commission has determined that a violation has occurred. If there was reliance on staff advice or a Staff Advisory Opinion, the Commission may consider the reliance during the penalty phase. If reliance was on a Commission Advisory Opinion, the Commission may not impose a penalty.

Any person who has not requested advice or an opinion must be cautious when trying to apply advice or opinions offered to others. The advice and opinions given are based on and tailored to the specific fact circumstances presented in a request. Fact circumstances vary from one situation to another and they vary from one public official to another. If a person reviews an opinion or advice issued to another for circumstances the person believes similar to those now met and relies on that advice, the person must ensure the similarity is sufficient for the application of law to be the same.

It is important to remember that the provisions of law apply to the individual actions of the person or public official. There are events or occasions when more than one public official may be present and participating in their official capacities. Depending on the circumstances and conditions for an event or transaction, the law may have a different application for one public official than for other public officials.

Compliance:

The Commission has a program manager who oversees the management and administration of the various reports that are filed with the Commission. There are approximately 2,000 lobbyists and employers of lobbyists who file quarterly lobbying activity expense reports. Each of the nearly 1,000 lobbyists must file or renew their lobbying registrations every two years. There are approximately 5,500 public officials who must file the Annual Verified Statement of Economic Interest form each April 15.

Complaint Review Procedures:

Investigations are initiated through a complaint procedure [ORS 244.260]. Any person may file a signed, written complaint alleging that there may have been a violation of Oregon Government Ethics law, Lobbying Regulation or the executive session provisions of Oregon Public Meetings law. The complaint must state the person's reason for believing that a violation may have occurred and must include any evidence that supports that belief. The executive director reviews the complaint and if additional information is needed, the complainant is asked to provide that information.

If there is reason to believe that there has been a violation of laws within the jurisdiction of

the Commission, an investigation will be initiated. The Commission may also initiate an investigation on its own complaint by motion and vote. Before approving such a motion, the public official against whom the action may be taken is notified and given an opportunity to appear before the Commission at the meeting when the matter is discussed or acted upon.

When a complaint is accepted, the public official against whom the allegations are made is referred to as the respondent. The respondent is notified of the complaint and provided with the information received in the complaint and the identity of the complainant. Whether based on a complaint or a motion by the Commission, the initial stage of the Commission procedure is called the Preliminary Review Phase. The time allowed for this phase is limited to 135 days and the Commission must act on the complaint within that period.

If there is a pending criminal matter related to the same circumstances or actions to be addressed in the Preliminary Review, the time period is suspended until the criminal matter is concluded.

There may be a variety of reasons for a respondent to ask for additional time before the Commission determines whether there is cause to investigate the issues raised in the complaint. With the consent of the Commission, a respondent may request a waiver of the 135 day time limit. If a complaint is made against a candidate within 61 days of an election, the candidate may request a delay.

During the Preliminary Review Phase, the Commissioners and staff can make no public comment on the matter other than acknowledge receipt of the complaint. It is maintained as a confidential matter until the Commission ends the Preliminary Review Phase. Under most circumstances, the Commission will end the Preliminary Review Phase by either dismissing the complaint or finding cause to conduct an investigation. The Commission meets in executive session to conduct deliberations and vote on the finding of cause or to dismiss. After the close of the Preliminary Review Phase, the case file is open to public inspection.

If the complaint is dismissed, the matter is concluded and both the respondent and complainant are notified. If cause is found to investigate, then an Investigatory Phase begins. The investigatory phase is limited to 180 days.

During each phase, information and documents are solicited from the complainant, respondent, and other witnesses and sources that are identified. Before the end of the 180 day investigatory period, the Commission will consider the results of the investigation. Normally, the Commission will either dismiss the complaint or make a preliminary finding that a violation of Oregon Government Ethics law was committed by the respondent. The preliminary finding of a violation is based on what the Commission considers to be a preponderance or sufficient evidence to support such a finding.

If a preliminary finding of violation is made, the respondent will be offered the opportunity to request a contested case hearing. At any time, the respondent is also encouraged to

negotiate a settlement with the executive director, who represents the Commission in such negotiations. Most cases before the Commission are resolved through a negotiated settlement, with the terms of the agreement described in a Stipulated Final Order.

The Commission has a variety of sanctions available after making a finding that a violation occurred. Sanctions range from letters of reprimand to civil penalties and forfeitures. The maximum civil penalty that can be imposed for each violation is \$5,000, except for violations of the executive session provisions in ORS 192.660 where the maximum is \$1,000. Any financial gain that a respondent realized from a violation is subject to a forfeiture of twice the gain. Any monetary sanctions imposed and paid are deposited into the State of Oregon General Fund.

INDEX

A

Actual conflict of interest	6, 7, 10, 14, 16, 21, 22, 23, 24, 37
Administrative interest	26, 27, 28, 29, 34, 35, 36, 37, 40
Advisory Opinion, Commission	43, 44
Advisory Opinion, Staff.....	42, 43, 44
Annual Verified Statement of Economic Interest (SEI)	3, 8, 12, 29, 38, 39, 40, 44
Assistant Attorney General.....	18
Awards for professional achievement.....	12, 13

B

Beverage	31, 32
Boards, members of	5, 6, 8, 17, 19, 21, 22, 23, 28, 38
Business.....	3, 6, 7, 8, 9, 10, 11, 16, 17, 21, 22, 23, 24, 28, 30, 31, 32, 34, 39, 40
Business agreement.....	32
Business, associated.....	3, 7, 8, 9, 10, 16, 21, 22, 23, 39, 40

C

Candidates	7, 26, 27, 30, 31, 33, 38, 40, 45
Campaign contributions.....	2, 30
Ceremonial	30, 31
Certificate	30
Civil penalty	46
Class exception	22, 23
Client of lobbyists	1, 29, 44
Commemorative token	30
Commission Advisory Opinion	43, 44
Commissions, members of.....	5, 6, 17, 19, 22, 28, 38
Compensation package.....	6, 7, 10, 11, 16, 35
Complaint process.....	11, 13, 25, 41, 42, 43, 44, 45, 46
Confidential information.....	9, 16, 17, 18, 19, 45
Conflict of interest	3, 6, 7, 10, 14, 16, 21, 22, 23, 24, 37
Conflict of interest, exceptions	22, 23
Contact person	38, 39
Contested case hearing	45
Continuing education.....	30

D

Decision	3, 23, 26, 27, 28, 29, 34, 35, 36, 37
Department of Consumer and Business Services	17, 18
Department of State Police	19, 20
Deputy Attorney General.....	18
Division of Finance and Corporate Securities	18

<u>E</u>	
Economic development	31, 40
Economic interest.....	3, 8, 12, 26, 27, 28, 29, 34, 35, 36, 37, 38, 40, 44
Education, continuing	30
Educational trip	31
Employment, subsequent.....	16, 17, 18, 19, 20, 34
Employment, of a relative.....	6, 7, 8, 9, 10, 14, 15
Employers of lobbyists	1, 29, 44
Entertainment.....	1, 30
Entertainment, ceremonial purposes.....	30, 31
Entertainment, incidental.....	30
Exceptions, conflict of interest.....	22, 23
Executive session.....	1, 2, 44, 45, 46

<u>F</u>	
Fact-finding mission	31, 40
Fee, appearance for.....	9
Financial detriment, personal	6, 7, 9, 11, 16, 17, 21, 22, 23, 28, 36, 37
Financial gain, use of office.....	1, 3, 6, 7, 9, 10, 11, 16, 28, 33, 34, 36, 37, 46
Financial transaction	32
Food and beverage	31, 32
Food, beverage and admission	31
Food, lodging and travel.....	1, 31
Forfeiture.....	46

<u>G</u>	
Gift.....	3, 6, 7, 12, 13, 26, 27, 28, 29, 30, 33, 34, 35, 36, 37
Gifts allowed as exclusions	30, 31, 32, 33, 34, 35, 36, 37

<u>H</u>	
Honoraria or honorarium	12, 29, 39, 40

<u>I</u>	
Incidental.....	30, 31
Insurance Division.....	18
Investigative Phase	41, 43, 44, 45

<u>J</u>	
Judges.....	22, 38
Jurisdiction	1, 2, 38, 39, 41, 42, 43, 44

<u>L</u>	
Legal Expense Trust Fund	13, 25, 30
Legislative or administrative interest	26, 27, 28, 29, 34, 35, 36, 37, 40
Legislative Assembly	15, 20, 21, 22, 27, 28
Letter of advice.....	41, 42, 43, 44

Letter of reprimand.....	46
Lobbyist.....	1, 18, 19, 20, 29, 40, 41, 44
Lodging	1, 31

M

Member of household.....	8, 9, 10, 14, 15, 16, 26, 30, 31, 33, 39, 40
Members of boards or commissions	5, 6, 8, 17, 19, 21, 22, 23, 28, 38
Mementos, unsolicited desk and wall	30

N

Native American tribal gaming	19, 20
Native American Tribe.....	19, 20, 31
Negotiation	18, 31, 40, 46
Nepotism	14, 15

O

Official capacity	15, 16, 19, 30, 31, 32, 37
Official duties.....	6, 9, 11, 15, 25, 29, 30
Officially designated	31
Officially sanctioned	31
Oregon Liquor Control Commission	18
Oregon State Lottery	18, 19, 20

P

Plaque	30
Plaque, unsolicited	30
Potential conflict of interest	16, 21, 22, 23, 24, 37
Preliminary Review Phase	45
Private employment.....	7, 16, 17, 18, 19, 20, 21, 22, 23, 30, 34
Professional achievement, awards for.....	12, 13
Public official	1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13
Public Utility Commission	18
Publications.....	1, 30

R

Reception	31
Reimbursement of expenses.....	10, 11, 12
Relative	3, 6, 7, 8, 9, 10, 14, 15, 16, 21, 22, 23, 26, 30, 31, 33, 36
Representative	9, 18, 20, 34
Representing government agency.....	31
Reprimand, letter of.....	46

S

Safe Harbor.....	43, 44
SEI, Annual Verified Statement of Economic Interest	3, 8, 12, 29, 38, 39, 40, 44
Senator.....	20

Source, single 1, 26, 27, 28, 29, 30, 34, 35, 36, 37
 Speak 31
 Staff advice 42, 44
 Staff Advisory Opinion 42, 43, 44
 State Police, Department of 19, 20
 Stipulated Final Order 46
 Subscriptions 30
 Subsequent employment 16, 17, 18, 19, 20, 34

I

Tokens, unsolicited 30
 Trade promotion 31, 40
 Training 3, 41
 Travel expenses, paid 11, 31
 Treasurer, State 18, 32
 Treasurer, Chief Deputy 18
 Trophy, unsolicited 30

U

Use of office or position 9, 10, 11, 12, 13, 33, 34, 35, 36, 37

V

Volunteers 5, 6, 9, 10, 15, 16, 22, 30
 Vote 16, 21, 22, 23, 26, 27, 28, 29, 34, 37, 43, 45

Agenda Item Number 3.0

**SOCIAL MEDIA LEGAL ISSUES AND
MANAGEMENT**

Metro Council Work Session
Tuesday, April 5, 2011
Metro Council Chambers

METRO COUNCIL

Work Session Worksheet

Presentation Date: April 5, 2011 Time: 1:45 p.m. Length: 30 minutes

Presentation Title: Social media legal issues and management

Service, Office, or Center: Office of Metro Attorney, Communications

Presenters (include phone number/extension and alternative contact information): Alison Kean Campbell, 1511; Lisa Cohen Greenfield, 1531; Jim Middaugh, 1505

ISSUE & BACKGROUND

Several individual Councilors and several departments are using various forms of social media. Use of social media has the potential to improve public awareness of and engagement in Metro's work.

Because there is a strong desire to expand social media tools we will discuss with the Council a number of legal and management issues associated with those tools. Examples of legal issues include, but are not limited to, public meetings law, records retention, and public forum doctrine.

Management issues include, but are not limited to, who should be allowed to speak for Metro via social media, employee and Councilor personal use of social media, review and approval of social media content, review and approval of responses to inquiries submitted via social media, and adequate staffing to support effective use of social media.

OPTIONS AVAILABLE

There are many options available to address social media legal and management issues. Staff seeks general guidance and a sense from the Council about which options should be investigated and developed for additional Council decision making.

IMPLICATIONS AND SUGGESTIONS

Use of social media presents a number of implications for Metro, including public records requests, First Amendment issues, job classifications, staffing, technology needs and more.

We suggest that the Council engage in a general conversation with staff about these implications. Based on the conversation staff will develop more specific recommendations for Council consideration.

QUESTION(S) PRESENTED FOR CONSIDERATION

1. What is the scope of the technologies referred to as "social media"?
2. Who can speak for Metro? In what contexts? Is there a need for policies or guidelines for professional and or personal use of social media?
3. Should social media be used to solicit and/or receive public comments and/or to moderate public discussion of Metro's work?
4. What type of information can/should be distributed using social media?
5. Should there be a policy/guidelines for linking to other sites?

LEGISLATION WOULD BE REQUIRED FOR COUNCIL ACTION __Yes XNo

Agenda Item Number 4.0

**PROCUREMENT AND CONTRACT
POLICY UPDATES**

Metro Council Work Session
Tuesday, April 5, 2011
Metro Council Chambers

METRO COUNCIL

Work Session Worksheet

Presentation Date: April 5, 2011 Time: 2:15 PM Length: 20 minutes

Presentation Title: Procurement and Contract Policy Updates

Service, Office, or Center:

FRS – Procurement Services

Presenters (include phone number/extension and alternative contact information):

Darin Matthews, Procurement Officer, 797-1626

ISSUE & BACKGROUND

Metro Code 2.04 establishes agency policy for purchasing and contracting. Recent changes to the Contracting Code have improved the areas of MWESB (minority, women and emerging small businesses) and sustainability.

These latest changes will offer improvements to the Code in other areas, including bonds, special procurements, contract amendments, and appeals.

They have been drafted in partnership with the Office of Metro Attorney.

OPTIONS AVAILABLE

- Support the proposed revisions to the Metro Contracting Code.
- Make changes and/or deletions to the proposed revisions.
- Leave the current Code intact.

IMPLICATIONS AND SUGGESTIONS

The Metro Council, acting as the public contract review board, supports and approves the revisions to the Contract Code by ordinance.

QUESTION(S) PRESENTED FOR CONSIDERATION

Are the proposed changes reasonable and acceptable to the Council?

Is the Council comfortable with the contract amendment thresholds proposed?

LEGISLATION WOULD BE REQUIRED FOR COUNCIL ACTION X Yes ___ No
DRAFT IS ATTACHED X Yes ___ No

5. This Ordinance being necessary for the health, safety, and welfare of the Metro area, an emergency is declared to exist and this Ordinance shall take effect immediately, pursuant to Metro Charter Section 39(1).

ADOPTED by the Metro Council this _____ day of April, 2011.

Tom Hughes, Council President

Attest:

Approved as to Form:

Kelsey Newell, Recorder

Alison Kean Campbell, Acting Metro Attorney

Exhibit A

2.04.052 Public Contracts -- Public Improvement Contracts

(a) Procedural Requirements.

- (1) The procedures for sealed competitive bidding, sealed competitive proposals, and all other methods of procurement of public contracts used by Metro shall comply with all requirements that are generally applicable to local governments as set forth in ORS Chapters 279A and 279B.
- (2) The procedures for competitive bidding of all Metro public improvement contracts shall comply with all requirements that are generally applicable to local governments as set forth in ORS Chapter 279C.
- (3) Notwithstanding the provisions of subsections (a)(1) and (a)(2), and pursuant to ORS 279A.065(5), the model rules adopted by the Oregon Attorney General shall not apply to Metro.
- (4) The Chief Operating Officer may establish by executive order detailed procedural requirements consistent with this chapter and state law. In so doing, the Chief Operating Officer may adopt in whole or in part the model rules of procedure established by the Oregon Attorney General pursuant to ORS 279A.065.

(b) Substantive Requirements.

- (1) All Metro public contracts shall contain all provisions required of local contracting agencies by ORS Chapters 279A and 279B and shall be construed to be consistent with all provisions of ORS Chapters 279A and 279B.
- (2) All Metro public improvement contracts shall contain all provisions required of local contracting agencies by ORS Chapter 279C and shall be construed to be consistent with all provisions of ORS Chapter 279C.

(c) Rejection of Bids and Proposals. The Chief Operating Officer may reject any bid, proposal or response not in compliance with all prescribed procedures and requirements and may, for good cause, reject any or all bids, proposals or procurement responses for personal service contracts and public contracts in accordance with the provisions of ORS 279B.100 and may reject all bids or proposals for public improvement contracts in accordance with the provisions of ORS 279C.395.

(d) Bonds. Unless the Board shall otherwise provide, bonds and bid security requirements are as follows:

- (1) Bid security not exceeding 10 percent of the amount bid for the contract is required unless the contract is for ~~\$50,000.00~~ \$100,000.00 or less.
- (2) For public improvements, a labor and materials bond and a performance bond, both in an amount equal to 100 percent of the contract price are required for contracts over ~~\$50,000.00~~ \$100,000.00.
- (3) Bid security, labor and material bond and performance bond may be required even though the contract is of a class not identified above, if the Chief Operating Officer determines it is in the public interest.

(e) Disadvantaged Business Program. All public contracts are subject to the Metro Disadvantaged Business Enterprise Program for Federally-Funded Contracts, Metro Women Business Enterprise Program, and the Metro Minority Business Enterprise Program provisions of this chapter.

Exhibit B

2.04.053 Special Procurements

(a) Pursuant to ORS 279B.085, the following public contracts are approved as classes of special procurements based on the legislative finding by the Metro Contract Review Board that the use of a special procurement will be unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts and will result in substantial cost savings to Metro or the public or will otherwise substantially promote the public interest in a manner that could not practicably be realized by complying with the requirements that are applicable under ORS 279B.055, ORS 279B.060, ORS 279B.065, ORS 279B.070:

- (1) All contracts estimated to be not more than \$100,000.00 provided that the procedures required by Metro Code Section 2.04.056 are followed.
- (2) Food for zoo animals, the Purchase purchase and sale of zoo animals, feed for zoo animals, and the purchase of zoo gift shop retail inventory and resale items.
- (3) Contracts for management and operation of food, parking or similar concession services at Metro facilities provided that procedures substantially similar to the procedures required for sealed competitive Request for Proposals used by Metro for personal services contracts are followed.
- (4) Emergency contracts provided that the provisions of ORS 279B.080 are followed. An emergency contract must be awarded within 60 days of the declaration of the emergency unless the Board grants an extension.
- (5) Purchase of food items for resale at facilities owned or operated by Metro.
- (6) Contracts for warranties, including but not limited to computer software warranties, in which the supplier of the goods or services covered by the warranty has designated an authorized provider for the warranty service.

- (7) Contracts for computer hardware ~~7~~ or computer software.
- (8) Contracts under which Metro is to receive revenue by providing a service.
- (9) Contracts for the lease or use of the convention, trade, and spectator buildings and facilities operated by the Metro Exposition-Recreation Commission.
- (10) Public contracts by the Metro Exposition-Recreation Commission in an amount less than \$100,000.00, which amount shall be adjusted each year to reflect any changes in the Portland SMSA CPI, provided that any rules adopted by the commission which provide for substitute selection procedures are followed.
- (11) Contracts for equipment repair or overhaul, but only when the service and/or parts required are unknown before the work begins and the cost cannot be determined without extensive preliminary dismantling or testing.
- (12) Contracts in the nature of grants to further a Metro purpose provided a competitive Request for Proposal process is followed.
- (13) The procurement of utilities or any other services whose price is regulated by any governmental body, including but not limited to telephone service, electric, natural gas, and sanitary services, provided that if competition is available, a Request for Proposal process is followed.
- (14) Contracts for goods or services when the provider of the procured goods or services is required by the federal government or by the state of Oregon.
- (15) Contracts for co-operative procurements permitted under ORS 279A.220 to 279A.225.
- (16) The procurement of art and art related production and fabrication provided that a Request for Proposal process is followed.

- (17) Sponsorships which are identified and approved in the proposed budget and are not designated by Council as having a significant impact as outlined in Section 2.04.026 need not follow a competitive bidding or proposal process. In order to be eligible for this exemption the sponsorship shall provide Metro with event advertising and/or media releases.
- (18) Sponsorship contracts, provided that quotes are obtained from at least three potential sponsors or that good faith efforts to obtain such quotes are documented. A sponsorship contract is any contract under which the sponsor's name or logo is used in connection with a facility's goods, buildings, parts of buildings, services, systems, or functions in exchange for the sponsor's agreement to pay consideration, including money, goods, services, labor, credits, property or other consideration.
- (19) Contracts for projects that are not public improvements as defined in Metro Code Section 2.04.010(n) in which a contractor provides a material and substantial portion of the funding for such project.
- (20) Contracts with any media outlet for the purchase of classified advertising, display advertising or the placement of public notices to publicize legal notices of public meetings and procurements.

(21) Any contract exempt from competitive bidding under any statute of the state of Oregon.

(b) Description of procurement procedures for class special procurements: Procurements for each of the class special procurements described in subsection (a) shall be performed by means of procedures chosen by the Chief Operating Officer as an appropriate method tailored to and in light of the demands, circumstances and market realities associated with obtaining each of the enumerated goods and services. Such procurement procedures may include but shall not limited to direct negotiations with individual or multiple vendors or

suppliers; negotiations with ranked proposers; competitive negotiations; or multiple tiered competitions.

(c) Specific contracts not within the classes described in subsection (a) may be procured by special procurements subject to the requirements of ORS 279B.085.

Exhibit C

2.04.058 Public Contract Amendments

(a) The Chief Operating Officer may execute amendments to public contracts, provided that any one of the following conditions are met:

- (1) The original contract was let by a formal competitive procurement process, the amendment is for the purpose of authorizing additional work for which unit prices or alternates were provided that established the cost for the additional work and the original contract governs the terms and conditions of the additional work; or
- (2) The amendment is a change order that resolves a bona fide dispute with the contractor regarding the terms and conditions of a public contract or public improvement contract ~~for a public improvement~~ and the amendment does not materially add to or delete from the original scope of work included in the original contract; or
- (3) The amendment is for a public improvement contract and increases the total obligation of the contract by no more than 20 percent. ~~contract amendment to a contract for a public improvement does not increase the contract amount more than \$25,000 if the amount of the aggregate cost resulting from all amendments authorized pursuant to this subsection does not exceed five percent of the initial contract.~~ In computing the dollar amount of any amendment for the purpose of this subsection, the amount of original contract obligation shall be used. In addition, only the amount of additional work or extra cost shall be considered and such work or cost may not be offset by the amount of any deletions; amendments made under subsection (1) or (2) are not included in computing the aggregate amount under this subsection; or
- (4) The amount of the aggregate cost increase resulting from all amendments to a public

contract does not exceed 20 percent of the initial contract if the face amount is less than or equal to \$1,000,000.00 or 10 percent if the face amount is greater than \$1,000,000.00; amendments made under subsection (1) or (2) are not included in computing the aggregate amount under this subsection; or

~~(5) The amendment is for a change order for additional work if the original contract was let by a formal competitive procurement, the amendment is for the purpose of authorizing additional work for which unit prices or bid alternates were provided that established the cost for the additional work and the original contract governs the terms and conditions of the additional work; or~~

(65) The amendment is for a change order to a public improvement contract in order to meet an emergency; or

(76) The Metro Contract Review Board has authorized the extension of the contract amendment.

(b) No public contract may be amended to include additional work or improvements that are not directly related to the scope of work that was described in the competitive process utilized to award the contract.

Exhibit D

2.04.070 Notice of Award and Appeals

(a) At least seven (7) days prior to the execution of any public contract over ~~\$50,000.00~~ \$100,000.00 for which a competitive bid or proposal process is required, Metro shall provide a notice of award to the contractor selected and to all contractors who submitted unsuccessful bids or proposals.

(b) Bid/Request for Proposals Appeal Procedures. The following procedure applies to aggrieved bidders and proposers who wish to appeal an award of a public contract or a personal services contract above ~~\$150,000.00~~ \$100,000.00. The appeal process for bids is the same as for a Request for Proposals. In the case of a Request for Proposal(s), disagreement with the judgment exercised in scoring by evaluators is not a basis for appeal.

- (1) All appeals shall be made in writing and shall be delivered to the Procurement Officer at Metro's main office within seven (7) working days of the postmarked date on the notice of award. The written appeal must describe the specific citation of law, rule, regulation, or procedure upon which the appeal is based.
- (2) The Procurement Officer shall forthwith notify the appropriate Department Director and the Chief Operating Officer of the appeal. In the case of an appeal of an award by a Commission or the Metro Auditor, the appeal shall be forwarded to the Commission or Metro Auditor. Within 10 working days of the receipt of the notice of appeal, the Chief Operating Officer, Commission or Metro Auditor shall send a notice of rejection of the appeal or a notice of acceptance of the appeal, as applicable, to the appellant. The appellant may appeal the Chief Operating Officer's, Commission's, or Metro Auditor's decision to reject the appeal in writing to the Board within five (5) working days from the postmarked date on the notice of rejection.
- (3) The Board will review the grounds for appeal, all pertinent information, and the Chief Operating

Officer's, Commission's or Metro Auditor's recommendation, and make a decision. The decision of the Board is final.

- (4) No contract, which is the subject of a pending appeal, may be executed unless the Board shall have given its approval. The Chief Operating Officer, Commission or Metro Auditor may request the Board to determine a matter without waiting for the expiration of the time periods provided for herein.
- (5) In the event Council authorization of execution of the contract is required under Section 2.04.026 of this Code, the appeal shall be heard before the Council considers authorization of the contract.

(c) Appeals from Debarment or Denial of Prequalification

- (1) The Board shall hear all appeals from any person who is disqualified by Metro as a bidder. The basis for the appeal shall be limited to the following grounds:
 - (A) Debarment of bidders and proposers pursuant to ORS 279B.130.
 - (B) Denial of prequalification to bid pursuant to ORS 279B.120 and 279B.125.
- (2) Any person who wishes to appeal debarment or denial of prequalification as a bidder shall, within three (3) business days after receipt of notice of disqualification, notify in writing the Metro Attorney that the person appeals the disqualification. The Metro Attorney shall promptly notify the Board of the appeal by providing notice to the Council President.
- (3) Promptly upon receipt of notice of appeal, the Council President shall notify the appellant and the Metro Attorney of the time and place of the appeal proceeding.
- (4) The Board shall conduct the appeal proceeding in accordance with the provisions of ORS 279B.425

and decide the appeal within 30 days after receiving notification of the appeal from the Metro Attorney. The Board shall set forth in writing the reasons for the decision.

(5) Appeal Proceeding.

(A) The Council President shall preside over the appeal proceeding. The general order shall be as follows:

(i) Presentation by Metro of documentation and testimony supporting the disqualification.

(ii) Presentation by the appellant of documentation and testimony opposing the disqualification.

(B) Members of the Board shall have the right to ask both Metro and the appellant questions and to review documentation referred to and presented by the parties.

(C) Formal court rules of evidence shall not apply.

(D) The Board shall consider de novo the notice of debarment or denial of prequalification, and record of investigation made by Metro and any evidence provided by Metro and the appellant prior to or at the appeal proceeding. There shall be no continuance or reopening of the appeal proceeding to offer additional evidence unless the appellant can demonstrate to the Council President that the additional evidence was not known to the appellant at the time of the proceeding or that with reasonable diligence the appellant would not have discovered the evidence prior to the appeal proceeding.

(E) A tape recording will be made of the appeal proceeding which shall be made available to the appellant upon payment of costs to Metro of making the tape.

(F) The Board shall render a decision which shall be reviewed only upon petition in the Circuit Court of Multnomah County. The petition must be filed within 15 days after the date of the decision in accordance with the provisions of ORS 279B.425.

(6) Metro may reconsider its determination with regard to the debarment or denial of prequalification at any time prior to the appeal proceeding.

(d) Appeals of contract awards and decisions of the Auditor shall be made directly to the Contract Review Board.

STAFF REPORT

FOR THE PURPOSE OF AMENDING METRO CODE CHAPTER 2.04.052 THROUGH 2.04.070 IN ORDER TO STRENGTHEN METRO'S CONTRACT POLICIES

Date: March 15, 2011

Prepared by:

Darin Matthews
Procurement Officer
797-1626

BACKGROUND

Metro Code 2.04.052 through 2.04.070 sets forth the agency's policies on the procurement of goods and services for the agency. These policies are in accordance with the Oregon Public Contracting Code (ORS 279A, B and C) and are consistent with public agency practices on competitive bidding.

The Metro Council, acting as the local contract review board, in accordance with ORS 279A.060, has elected to establish its own rules with regard to public contracting. While the Oregon Attorney General's Model Public Contract Rules serve as a resource for Metro, the AG's rules are not applicable to the agency.

Recent Code Changes

During 2010, the Metro Council approved certain revisions to the Metro contract policies. These changes strengthened the Code with regard to sustainable procurement (2.04.500) as well as the use of minority, women and emerging small businesses (2.04.100). Metro Contracting Code in these areas now represents current and leading practices for public agencies.

The latest proposed changes are intended to improve the Metro Contracting Code with regard to contract amendments and special procurements, as well as to align certain thresholds for bonds and appeals with the established threshold for formal procurements.

Bonds

Currently Metro Code requires bid security for contracts of \$50,000 or more. Bid security is normally in the amount of five percent (5%) of the bid amount and is provided by the bidder in the form of a bond or cashier's check. This assures that the bidder, if selected, will honor their offer to Metro.

Since the established threshold for formal procurement at Metro is \$100,000, it is reasonable that the bid security requirement be consistent with this amount. Contracts under this amount are referred to as intermediate procurements and can be handled informally by email or facsimile. Not requiring bid security in these instances would help speed up the procurement process.

Additionally, this would make it easier for MWESB contractors to submit bids to Metro on intermediate procurements. The cost of bid bonds can be a challenge for small businesses and has been identified as a barrier for MWESB's in the public contracting process.

Special Procurements

Currently Metro exempts certain types of purchases from traditional competitive bidding. In accordance with the Oregon Contracting Code, Metro has identified several categories of special procurements that include emergency contracts, repair contracts, sponsorships, and art work that are deemed impractical for competitive bidding.

Certain purchases for the Oregon Zoo are currently exempted from competitive bidding. These include the purchase of zoo animals, retail inventory for the Zoo gift shop, and items for resale.

The Metro Procurement Officer is proposing that animal food for the Oregon Zoo be added to the list of special procurements. Due to the specialized nature of this food and the unique dietary requirements of the animals, it is often impractical to purchase these items through a competitive low-bid process. Recent experiences have confirmed that it would be in the best interest of the agency to exempt animal food. Best value would be obtained by leveraging existing contracts, considering product quality and past performance, and negotiating directly with proven suppliers.

Additionally, all contracts that are already exempted by the Oregon Contracting Code should also be exempted by Metro and treated as a special procurement.

Contract Amendments

The Metro Code currently limits contract amendments and change orders for its contracts. A summary of these limits are as follows:

- Personal services contracts can be increased up to 100 percent of their original value.
- Public contracts for goods and services can be increased up to 20 percent of their original value.
- Public improvement contracts can be increased up to 5 percent of their original value.

The Metro Procurement Officer believes that the current limit for public improvement contracts is impractical and much lower than industry standards. Public improvement contracts are for construction, reconstruction or major renovation. The current threshold of 5 percent requires many change orders that are routine and justifiable to be approved by the Metro Council. Therefore, it is suggested that the Council consider raising this threshold to 20 percent.

In determining the proposed limitation of contract amendments, Metro reviewed other area agencies that procure public improvement contracts. The following represents a summary of their respective rules:

<u>Agency</u>	<u>Public Improvement Amendment Threshold</u>
City of Portland	25%
Multnomah County	20%
Washington County	20%
State of Oregon	20%

It is believed that a threshold that is consistent with other area agencies would be in the best interest of Metro. This would put the agency in line with other similar organizations and would increase efficiency in the contracting process.

Contract Appeals

The Metro Contract Code currently allows bidders and proposers the opportunity to challenge the agency's contracting decisions through an appeal process. Within seven (7) days of Metro's notice of intent to award a contract, aggrieved bidders can submit a written appeal to the Procurement Officer, who then works with the Chief Operating Officer, Metro Attorney and Department Director in responding to

the appellant. If the matter cannot be resolved, then the bidder can appeal to the Metro Council acting as the contract review board.

The thresholds in the current Code are \$50,000 for the notice of award and \$150,000 for the appeal process. It is believed that aligning these amounts with Metro's formal procurement threshold of \$100,000 would establish consistency and clarity in the appeal process.

Summary

The Metro Procurement Officer has reviewed best contracting practices of other area public agencies and consulted with the Office of Metro Attorney. It is believed that the proposed changes in this legislation will increase efficiency in the contracting and procurement process and are in the best interest of Metro.

The proposed revisions to this section of the Metro Code are attached to the ordinance as Exhibits A, B, C and D.

ANALYSIS/INFORMATION

1. **Known Opposition** None known.
2. **Legal Antecedents** Metro Code 2.04.052 through 2.04.070, ORS 279A, B, and C.
3. **Anticipated Effects** Metro Contract Code will be strengthened in the areas of bonds, special procurements, contract amendments and contract appeals.
4. **Budget Impacts** Minimal impact to budget as changes to policies and forms would be accomplished through current staff resources.

RECOMMENDED ACTION

Metro Council approves the proposed revisions to Metro Code 2.04 in order to strengthen the agency's Contract Program.

Materials following this page were distributed at the meeting.

Metro Contracting Code Propose Revisions

Finance and Regulatory Services
Procurement Services

Background

- Metro procurement and contracting activities governed by Metro Code 2.04
- Consistent with ORS 279 A, B, and C (Oregon Public Contracting Code)
- Oregon Attorney General's Model Rules do not apply to Metro
- 2010 changes to Metro Code
 - Strengthen the MWESB Program
 - Established new Sustainable Procurement Policy

Bonds

- Current Code requires bid bonds for contracts over **\$50,000**
- Proposed increase to **\$100,000** to align with formal procurement threshold
- Contracts under **\$100,000** (intermediate procurements) can be electronically bid and make bid bonds impractical
- Bonding is an additional cost and is an obstacle to small business participation

Special Procurements

- Classes of purchases that do not require competitive bidding
- Examples include emergencies, repairs, sponsorships and art work
- Proposed addition of animal food to current Zoo purchases of animals and retail inventory

Contract Amendments

- Contract amendment (or change order) is a change to an existing contract, commonly increases cost
 - Personal services 100% of original value
 - Public contracts 20% of original value
 - Public improvements 5% of original value
- Proposed increase of 20% for public improvements contracts

Contract Appeals

- Bidders and proposers can appeal Metro contract decisions within 7 days of notice of award
- Notice of award required at **\$50,000** (current)
- Contract appeal threshold at **\$100,000** (current)
- Recommend aligning notice of award and contract appeals at **\$100,000** (formal procurement threshold)