



Oregon

Tina Kotek, Governor

Government Ethics Commission

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July 5, 2023

Sent via email and USPS

Eric B. Mitton, City Attorney
City of Medford
411 W 8th Street
Medford, Oregon 97501

Dear Mr. Mitton:

This staff advisory opinion is provided in response to your request to the Oregon Government Ethics Commission (Commission) received on May 16, 2023, regarding whether it would violate the Oregon Government Ethics laws in ORS Chapter 244 for a city attorney to assist an elected official in responding to an ethics complaint filed against them with the Commission. This staff advisory opinion is issued pursuant to ORS 244.282. The Executive Director of the Commission extended the 30-day period for this staff advisory opinion, as authorized by ORS 244.282(2).

OREGON GOVERNMENT ETHICS COMMISSION STAFF ADVISORY OPINION NO. 23-156S

STATED FACTS: You have posed a hypothetical in which an elected official in a city has received notice that an ethics complaint alleging potential violations of ORS Chapter 244 has been filed against them with the Commission. The city attorney for the elected official's city has information related to the allegations in the ethics complaint and believes it could show the complaint was filed in bad faith to harass the elected official and not for any actual wrongdoing.

For civil suits against elected officials, ORS 30.265 would require the City Attorney's Office to defend and indemnify an elected official with limited exceptions; however, you understand that provision applies to civil suits, and not to an individual elected official's ethics cases before the Commission.

RELEVANT STATUTES AND ADMINISTRATIVE RULES: The following Oregon Revised Statutes (ORS) and Oregon Administrative Rules (OAR) are applicable to the issues that are addressed in this opinion:



ORS 244.040 Prohibited use of official position or office; exceptions; other prohibited actions. (1) Except as provided in subsection (2) of this section, a public official may not use or attempt to use official position or office to obtain financial gain or avoidance of financial detriment for the public official, a relative or member of the household of the public official, or any business with which the public official or a relative or member of the household of the public official is associated, if the financial gain or avoidance of financial detriment would not otherwise be available but for the public official's holding of the official position or office.

(2) Subsection (1) of this section does not apply to:

(a) Any part of an official compensation package as determined by the public body that the public official serves.

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OAR 199-008-0005 Definitions of terms in ORS Chapter 244 (1) The purpose of this rule is to define certain terms and to clarify substantive provisions of ORS Chapter 244.

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(3) The term "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.

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QUESTION: You have asked whether it would violate any of the laws in ORS Chapter 244 if a public official, facing an ethics case before the Commission, requests or allows the city attorney to assist them in responding to the ethics complaint.

ANSWER AND ANALYSIS:

Cases brought by the Commission are against public officials individually, not against the public body or the governing body. Generally, the government ethics laws in ORS Chapter 244 address situations where public officials take actions for their personal financial benefit, or that of their relatives, household members, or businesses. A public official who violates the government ethics laws acts contrary to their official government duties. Thus, when the Commission opens an ethics case against a public official, it is against that public official in their individual and personal capacity.

In your request, you mention that ORS 30.265 would require the City Attorney's Office to defend and indemnify an elected official in civil actions, but that you understand this provision does not apply to a public official's ethics case. The Commission does not provide advice in interpreting the Oregon Tort Claims Act and encourages you to review the relevant case law to determine for yourself those duties. See, e.g., *City of Tualatin v. City-County Ins. Serv. Trust* 129 Or. App. 198, 878 P.2d 1139 (1994). Instead, this advice will focus on how the laws in ORS Chapter 244, in particular ORS 244.040(1), would apply to a public official using the City Attorney's Office to assist them in responding to an ethics case before the Commission.

As provided in ORS 244.040(1), a public official may not use their official position to obtain a financial benefit or avoid a financial detriment if that financial benefit or avoidance of detriment would not otherwise be available but for holding their official position. In the scenario you describe, if a public official were to request or accept the assistance of the city attorney – to respond to the ethics complaint or to represent the public official before the Commission in defense an ethics complaint – that public official would be using their office or position to avoid a financial detriment, i.e., the cost of hiring a private attorney. Additionally, the public official would have access to the city attorney's services only because the public official holds their official position or office. Members of the public could not obtain the services or assistance of the city attorney for their personal cases. Thus, it would violate ORS 244.040(1) for a public official to utilize the services of the city attorney respond to, or represent the public official in defense of, an ethics complaint before the Commission.

There are certain exceptions to the prohibition in ORS 244.040(1). One in particular, ORS 244.040(2)(a), provides that a public official may accept any part of an official compensation package without violating ORS 244.040(1). The Commission has adopted an Administrative Rule that defines an official compensation package to include wages and benefits that 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 are generally applicable to employees or other public officials. [OAR 199-008-0005(3)]. An official compensation package could include personnel policies that provide coverage for certain legal expenses, either through an insurance policy or as a reimbursable expense. Such policies could authorize the City Attorney's Office to provide its services to employees and/or elected officials for specified ethics matters. If the public body has formally adopted a personnel policy authorizing the city attorney to provide services in defense of ethics complaints, as part of a public official's official compensation package, the public official could accept the benefits under those personnel policies without violating the prohibitions in ORS 244.040(1). It should also be noted that a public body considering the adoption of an official compensation policy that includes authorizing the City Attorney's Office to provide personal legal services in defense of ethics complaints may create actual

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or potential conflicts of interest for the public officials recommending or voting on such a policy. Those public officials would need to comply with ORS 244.120.


In the absence of a formally adopted policy authorizing the City Attorney's Office to defend ethics complaints on behalf of employees and elected officials, if a public official facing an ethics case before the Commission requests or allows the city attorney to assist the public official in responding to an ethics complaint or represent the public official before the Commission, it could violate ORS 244.040(1).

Notwithstanding this prohibition, if the city attorney, or any other public official, has information that is relevant to a case before the Commission, they may provide that information to the Commission. If authorized by the city, the city attorney may provide a statement on a city's behalf, rather than on the public official's behalf, to explain the position of the city with respect to the ethics complaint filed against the public official. If the city attorney is representing only the city and provides an official response on the city's behalf, the public official would not be using the services of the city attorney in that case and ORS 244.040(1) would not apply. In any response to the Commission, the city attorney should clearly indicate that the city attorney is representing only the city, not representing the individual public official subject to the ethics complaint, and is providing the response on behalf of the city.

THIS RESPONSE ADDRESSES ONLY THE APPLICATION OF ORS Chapter 244 TO THE FACTS STATED HEREIN. ANY RELEVANT INFORMATION, WHICH WAS NOT INCLUDED BY THE REQUESTER OF THIS OPINION IN THE STATED FACTS, COULD COMPLETELY CHANGE THE OUTCOME OF THIS OPINION. OTHER LAWS OR REQUIREMENTS MAY ALSO APPLY. THIS IS NOT A FORMAL ADVISORY OPINION PURSUANT TO ORS CHAPTER 244.280. THIS OPINION DOES NOT EXEMPT A PUBLIC OFFICIAL FROM LIABILITY UNDER ORS CHAPTER 244 FOR ANY ACTION OR TRANSACTION CARRIED OUT IN ACCORDANCE WITH THIS OPINION. THIS OPINION IS ISSUED PURSUANT TO ORS 244.282 AND IS ONLY MY PERSONAL ASSESSMENT AS THE EXECUTIVE DIRECTOR OF THE OREGON GOVERNMENT ETHICS COMMISSION.

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

Sincerely,



Ronald A. Bersin
Executive Director