



From the Desk of  
Senator Brian Boquist

STATE OF OREGON  
LEGISLATIVE COUNSEL COMMITTEE

March 11, 2015

Senator Brian Boquist  
900 Court Street NE S305  
Salem OR 97301

Re: ORS 162.005 and campaign donations

Dear Senator Boquist:

You requested an opinion examining Oregon's laws prohibiting public officials from accepting bribes. You have asked how receipt of campaign donations in exchange for votes compares with ethics laws related to receipt of gifts by public officials. You have asked how Oregon's exemption of campaign donations from anti-bribery laws relates to federal cases in which public officials were charged with honest services fraud. Finally, you have asked whether a law limiting campaign donations in exchange for votes would raise constitutional concerns. We summarize the answers to your first two questions below. The short answer to your third question is that a law limiting public officials' receipt of campaign contributions in exchange for votes is unlikely to violate the Oregon or United States Constitution, but it may be challenging, if not impossible, to enforce. We discuss our answer to this question in more detail below as well.

Brief Summary of Oregon Ethics Laws

Prior to each regular legislative session, the Office of Legislative Counsel facilitates mandatory ethics training for all members of the Legislative Assembly. Oregon government ethics laws apply to all public officials—those who serve the state or a public body as an elected official, appointed official, employee or agent, whether paid or volunteer—and their relatives and members of household.<sup>1</sup> Public officials are prohibited from using or attempting to use their official positions to obtain financial gain, including receipt of gifts, or avoid financial detriment in ways not otherwise available but for public office. The government ethics laws specifically prohibit public officials from soliciting or receiving, and prohibit others from offering to a public official, a promise of future employment in exchange for the public official's vote, official action or judgment.<sup>2</sup>

A gift is something of economic value given to a public official without valuable consideration of equivalent value, or for less consideration than that required from others who are not public officials.<sup>3</sup> Public officials must not receive gifts valued at more than \$50 per year from each source with a legislative or administrative interest.<sup>4</sup> The government ethics laws provide some exceptions to this prohibition, including the public official's compensation package

<sup>1</sup> See ORS chapter 244.

<sup>2</sup> ORS 244.040 (3).

<sup>3</sup> ORS 244.020 (6)(a).

<sup>4</sup> ORS 244.025 (1).

and specific exceptions to the term "gifts."<sup>5</sup> Some gift exceptions include gifts from family members, unsolicited tokens worth less than \$25, waivers or discounted registration fees for continuing education and professional licensing requirements, contributions to the public official's legal expense trust fund and entertainment, food or beverages that are incidental to an event or ceremony attended by the public official.<sup>6</sup> Public officials who violate government ethics laws related to receipt of gifts face a maximum civil penalty of \$5,000, plus an amount equal to twice the amount by which the public official benefited from the violation.<sup>7</sup> The Oregon Government Ethics Commission may also issue a written letter of reprimand, explanation or education.

Campaign contributions are specifically exempt from the definition of "gift," so that the annual gift receipt limit does not apply to them.<sup>8</sup> A public official may use campaign contributions for campaign expenditures or expenses incurred in connection with the public official's duties or may transfer the contributions to a charitable corporation or a national, state or local political committee.<sup>9</sup> Unlike gifts and other pecuniary benefits, public officials may not use campaign contributions for personal use.<sup>10</sup> Additionally, under Oregon criminal law, a public servant commits the crime of bribe receiving if the public servant solicits or agrees to accept a pecuniary benefit in exchange for the public servant's vote, opinion, judgment, action, decision or exercise of discretion.<sup>11</sup> It is important to note that ORS 162.005 specifically exempts campaign contributions from the definition of "pecuniary benefit." Accordingly, while Oregon anti-bribery statutes certainly prohibit receipt of gifts, economic gain, future employment and other pecuniary benefits, public officials may accept campaign contributions in exchange for a promise to take a specific stance on a policy or measure.

#### Federal Prosecution for Receipt of Campaign Contributions for Official Acts

Federal law also prohibits public officials from demanding payment as inducement for the promise to perform, or not to perform, an official act.<sup>12</sup> Due to enforcement difficulties, receipt of campaign contributions is not typically the catalyst for federal bribery or extortion cases against public officials. "Campaign contributions will not be authorized as the subject of a . . . prosecution unless they can be proven to have been given in return for the performance of or abstaining from an official act."<sup>13</sup> For example, Alaska legislator Peter Kott was investigated for receiving funds, promise of future employment and a political poll from an oil company in exchange for Kott's support for legislation that would directly benefit the oil company. Kott's indictment included charges for extortion, bribery and honest services fraud, but Kott faced no charges under federal campaign finance law.<sup>14</sup> Because public officials are expected to support legislation that favors their constituents, more stringent prosecution for receipt of campaign

<sup>5</sup> ORS 244.020 (6)(b).

<sup>6</sup> ORS 244.020 (6)(b)(B), (C), (E), (G), (J).

<sup>7</sup> ORS 244.350 (1), 244.360.

<sup>8</sup> ORS 244.020 (6)(b)(A).

<sup>9</sup> ORS 260.407 (1)(a).

<sup>10</sup> ORS 260.407 (1)(b).

<sup>11</sup> ORS 162.025.

<sup>12</sup> "Whether described familiarly as a payoff or with the Latinate precision of *quid pro quo*, the prohibited exchange is the same: a public official may not demand payment as inducement for the promise to perform (or not to perform) an official act." *United States v. Dozier*, 672 F.2d 531, 537 (1982) as cited in *McCormick v. United States*, 500 U.S. 257, 273 (1991).

<sup>13</sup> *McCormick v. United States*, 500 U.S. 257, 273 (1991).

<sup>14</sup> See *U.S. v. Kott*, 625 F. Supp. 2d 854, 855-856 (D. Alaska 2007).

contributions in exchange for legislative action would allow almost any campaign contribution to constitute a violation.<sup>15</sup>

Instead, public officials can face federal prosecution for extortion, bribery and honest services fraud for soliciting or accepting pecuniary benefit or promise of future employment in exchange for the public official's vote or support.<sup>16</sup> Honest services fraud is included in the definition of "scheme or artifice to defraud" and relates to depriving another of the intangible right of honest services.<sup>17</sup> The honest services fraud law is unique among federal anti-bribery laws because it is enforceable against public officials at the state and local level for bribes of any amount.<sup>18</sup> In 2010, the United States Supreme Court decided *Skilling v. United States*<sup>19</sup> along with two companion cases, including the case against Alaska state legislator Bruce Weyhrauch<sup>20</sup> for soliciting future employment from a company that would directly benefit from legislation then before the Alaska legislature.<sup>21</sup>

In *Skilling*, the court narrowed the reach of the honest services fraud statute by holding that it applies only to "bribery and kickback schemes," not to "undisclosed self-dealing by a public official or private employee."<sup>22</sup> The Supreme Court vacated the convictions and remanded all three cases for further proceedings because in each case the defendant's conduct lay outside the bribery and kickback "heartland."<sup>23</sup> On remand, the Ninth Circuit held that, because nondisclosure of a conflict of interest is no longer a basis for prosecution under the honest services fraud statute, the government was precluded from offering evidence to prove that Weyhrauch made "a knowing concealment of a conflict of interest."<sup>24</sup> The United States District Court for the District of Alaska ultimately dismissed the case against Weyhrauch.<sup>25</sup>

Following *Skilling*, bribery and kickbacks are punishable under the honest services statute only where a fiduciary duty exists. But *Skilling* offers little to no guidance to identify the existence of qualifying fiduciary duties.<sup>26</sup> Some circuits have held that state law determines the existence of a fiduciary duty.<sup>27</sup> Other circuits have held that public officials always owe a fiduciary duty to the public.<sup>28</sup> The Ninth Circuit has yet to weigh in on this question.

### Limiting Campaign Contributions in Exchange for Votes

You have asked whether a law limiting campaign contributions accepted by a public official in exchange for votes would pass constitutional muster. Please note that ORS 171.756 (2) prohibits lobbyists from attempting to influence members' votes with the promise of

<sup>15</sup> *McCormick v. United States*, 500 U.S. 257, 273 (1991).

<sup>16</sup> See 18 U.S.C. 1951(a) (interference with commerce by extortion under color of official right), 18 U.S.C. 666(a)(1) (bribery concerning programs receiving federal funds), 18 U.S.C. 371 (honest services fraud).

<sup>17</sup> 18 U.S.C. 1346.

<sup>18</sup> 18 U.S.C. 1346; compare with 18 U.S.C. 201 and 666(a)(1)(B); see also *Skilling*, 561 U.S. 358, 413 n.45.

<sup>19</sup> 561 U.S. 358 (2010).

<sup>20</sup> The accusations against Weyhrauch also involved Alaska legislators Peter Kott and Victor Kohring, who faced similar charges.

<sup>21</sup> See *Weyhrauch v. United States*, 561 U.S. 476 (2010).

<sup>22</sup> *Skilling v. United States*, 561 U.S. 358 (2010).

<sup>23</sup> *Id.*

<sup>24</sup> *United States v. Weyhrauch*, 623 F.3d 707, 708 (9th Cir. 2010).

<sup>25</sup> *United States v. Weyhrauch*, 2011 U.S. Dist. LEXIS 27827, 1 (D. Alaska Mar. 15, 2011).

<sup>26</sup> *Skilling v. United States*, 561 U.S. 358, 365-376 (2010).

<sup>27</sup> See, for example, *United States v. Brumley*, 116 F.3d 728 (5th Cir. 1997); *United States v. Murphy*, 323 F.3d 102 (3d Cir. 2003).

<sup>28</sup> E.g., *United States v. Sorich*, 523 F.3d 702, 712 (7th Cir. 2008); *United States v. Walker*, 490 F.3d 1282, 1297, 1299 (11th Cir. 2007); *United States v. Sawyer*, 239 F.3d 31, 41-42 (1st Cir. 2001).

campaign contributions, or by threatening to provide financial support to the members' opposition, in a future election.<sup>29</sup> Though we are hampered in opining about the constitutionality of a law or measure without more details, the law prohibiting lobbyists from influencing members through campaign contributions indicates that a law regulating candidates' acceptance of campaign contributions would be constitutionally sound.

That said, enforcement of a law limiting public officials' acceptance of campaign contributions in exchange for votes would require the prosecuting agency to prove beyond a reasonable doubt that the public official voted or acted in a certain way as quid pro quo for the campaign contribution. Legislative Assembly members represent constituents and are apt to support measures and policies according to their constituents' will. As such, it may be prohibitively difficult to distinguish between votes in representation of constituents and votes as quid pro quo for campaign contributions.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

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By  
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<sup>29</sup> ORS 171.756 (2).