



STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

April 14, 2022

Senator Floyd Prozanski, Co-Chair
Senator Chuck Thomsen, Co-Chair
Senate Committee on Conduct
900 Court Street NE
Salem OR 97301

Re: Complaint against Senator Lawrence Spence

Dear Senator Prozanski and Senator Thomsen:

You asked us to review the March 9, 2022, complaint (Complaint) against Senator Akasha Lawrence Spence alleging violations of ORS 244.120 and Senate Rule 3.33. We have reviewed the Complaint and the factual circumstances underlying the allegations made in the Complaint. While some uncertainty exists, and under the Oregon Constitution the Senate itself is the only entity authorized to determine whether a violation has occurred, we believe it is more likely than not that Senator Lawrence Spence violated ORS 244.120 and Senate Rule 3.33 by failing to declare a potential conflict of interest before voting on Senate Bill 1579 (2022).

Conflicts of Interest

ORS 244.120 requires members of the Legislative Assembly to announce actual or potential conflicts of interest before taking "action." By practice and custom, a member only takes action on a bill for purposes of this statute when the member votes on the bill in committee or on the House or Senate floor. This understanding is memorialized in ORS 244.120 (1)(a), which directs members to declare conflicts of interest "pursuant to rules of the house of which the public official is a member[.]" In turn, the rules of the Senate adopt the statutory definitions of actual and potential conflicts of interest (ORS 244.020) and require members to announce conflicts on the Senate floor or in committee prior to voting on the issue giving rise to the potential conflict.¹

ORS 244.020 defines both "actual conflict of interest" and "potential conflict of interest." For a member of the Legislative Assembly, an actual conflict of interest occurs when a vote is certain to result in a financial benefit or detriment for the member, the member's relative or a business with which the member or a relative of the member is associated. A potential conflict of interest exists when a vote might have a financial impact on the member, relative or business.

However, ORS 244.020 (13)(b) provides an exception to the requirement that conflicts of interest be announced when an official action affects all members of a "class" to the same degree. In other words, if a public official takes an action that would have a financial effect on the official, a relative of the official or a business with which the official or a relative is associated, and a significant number of other persons or entities are also "affect[ed] to the same

¹ See Senate Rule 3.33.

degree” by the action, the official is exempt from conflict of interest requirements because of the statutory class exception.²

Relevant Procedural History of Senate Bill 1579

On February 22, 2022, the Joint Committee on Ways and Means Subcommittee on Transportation and Economic Development (Subcommittee) held a work session on Senate Bill 1579 and both adopted the -4 amendments to Senate Bill 1579 and moved the amended bill to the full Joint Committee on Ways and Means with a “do pass” recommendation. Senator Lawrence Spence served as Co-Chair of the Subcommittee and voted both to adopt the amendments and to move the adopted bill with a do pass recommendation. She did not declare a conflict of interest before casting these votes.

On February 28, 2022, the Senate voted to approve the A-engrossed version of Senate Bill 1579. Senator Lawrence Spence was the carrier of the bill on the Senate floor and, while Senator Lawrence Spence explicitly noted in her comments of Senate Bill 1579 that she was “the founder and president of a community development firm,”³ she did not declare a conflict of interest before voting in favor of the bill.

Potential Ability of Fifth Element LLC to Receive a Pecuniary Benefit under Senate Bill 1579

Based on the information we have been able to gather⁴, we believe that Fifth Element LLC (Fifth Element) would likely be eligible to apply for a grant under the Economic Equity Investment Program enacted in Senate Bill 1579. The requirements under Senate Bill 1579 for an organization to receive grant moneys break down into two groups. The first group involves the essential, ongoing characteristics of the organization:

- An organization must provide *culturally responsive services* to support economic stability, self-sufficiency, wealth building and economic equity among disadvantaged individuals, families, businesses and communities in Oregon.⁵ “Organization” and “disadvantaged” are not defined in the bill.
- Senate Bill 1579 defines “culturally responsive services” as services provided by an organization: “(a) Whose founding mission and goals are aligned with the culture of the individuals, families, businesses and communities receiving the services; and (b) That demonstrates intimate knowledge of the lived experience of the individuals, families, businesses and communities receiving the services.”⁶

The other group of requirements involves the contingent, one-time characteristics of the proposal an organization submits under the Economic Equity Investment Program:

- Organizations may receive grant moneys only for proposals to provide outreach, support and resources to individuals, families, businesses or communities whose future is at risk because of any combination of two or more *economic equity risk factors* in order to improve economic equity as measured by: (a) Ownership of land, principal residences

² See Oregon Government Ethics Commission Advisory Opinion 19-240A (November 22, 2019).

³ Senate Floor Session (February 28, 2022), at 2:51:24,

<https://olis.oregonlegislature.gov/liz/mediaplayer/?clientID=4879615486&eventID=2022021300>.

⁴ For the purposes of this opinion we were limited to publicly available information, which consisted primarily of Fifth Element’s website and Fifth Element’s filings with the Secretary of State.

⁵ Enrolled Senate Bill 1579, section 2 (1).

⁶ *Id.*, section 1 (1).

and other real property; (b) Entrepreneurship; (c) Business development; (d) Workforce development; and (e) Intergenerational wealth building, such as savings, investments and real property equity.⁷

- Senate Bill 1579 defines “economic equity risk factor” as: “(a) Experience of discrimination because of race or ethnicity; (b) English language proficiency; (c) Citizenship status; (d) Socioeconomic status; or (e) Residence or operation in a rural location.”⁸

This second group of contingent requirements is involved only to the extent that, in order to be awarded a grant, Fifth Element would have to demonstrate a *proven* ability to provide the kind of services for which grants may be awarded under section 2 (3) of the bill.⁹

Based on this analysis, we believe that to be eligible to receive a grant under Senate Bill 1579, an organization must:

1. Provide services to support economic equity through wealth building among disadvantaged persons;
2. Have a founding mission and goals aligned with the culture of its service recipients; and
3. Demonstrate intimate knowledge of the lived experience of its service recipients.

The Complaint essentially alleges that Fifth Amendment is both a “business with which” Senator Lawrence Spence is associated and eligible to receive a grant under Senate Bill 1579.¹⁰ We agree.

While the word “organization” is not defined in the bill, we believe it is virtually certain that based on its plain language meaning Fifth Element would be considered an organization by any court. Regarding whether Fifth Element would likely meet the requirements listed in points 1 to 3 above, we have located the following evidence from the Fifth Element website:

- The website describes Fifth Element as “a conscientious real estate developer fortifying small businesses through property ownership.”¹¹
- The portion of the website dedicated to Fifth Element’s “Initiatives” describes the Oregon Cannabis Equity Act initiative as investing “in communities disproportionately impacted by overpolicing and cannabis criminalization and [providing] equal opportunity for Black, Indigenous, and Latinx ownership in the growing cannabis industry.”¹²
- In the “Initiatives” portion under the heading “Equity & Access to Capital,” the website contains a link to two publications: a report based on a national survey related to access to capital among minority business enterprises¹³ and a Stanford Institute for Economic Policy Research discussion paper entitled “Black and White: Access to Capital among Minority-Owned Startups.”¹⁴

⁷ Id., section 2 (3).

⁸ Id., section 1 (2).

⁹ Id., section 2 (2)(b).

¹⁰ The business entity data for Fifth Element LLC on the Secretary of State’s Business Registry website lists Senator Lawrence Spence as the company’s agent, member and manager. See [Business Registry Business Name Search \(state.or.us\)](#); Complaint at 1-2.

¹¹ [FIFTH ELEMENT — Your Site Title \(https://fifthelement.studio\)](https://fifthelement.studio).

¹² [INITIATIVES — Your Site Title \(https://fifthelement.studio\)](https://fifthelement.studio).

¹³ [National-Access-to-Capital-Survey15.pdf \(nmsdc.org\)](#).

¹⁴ [17-003.pdf - Google Drive](#).

Taken together, this suggests that Fifth Element provides services to support economic equity among persons disadvantaged in the sense of two of the economic equity risk factors set forth in Senate Bill 1579, i.e., experience of discrimination because of race or ethnicity and socioeconomic status. The organization seeks to accomplish this goal by assisting disadvantaged persons to acquire real property interests. In addition, the missions and goals of Fifth Element are addressed to economic equity issues affecting racial and ethnic minorities and thus are aligned with the culture of service recipients that are in this sense disadvantaged. Finally, the initiative studies on the Fifth Element website can be seen as demonstrating the organization's intimate knowledge of the lived experience of their service recipients.¹⁵ Thus, there is evidence to support the contention in the Complaint that Fifth Element meets the statutory requirements to be eligible to receive grants under the Economic Equity Investment Program established under Senate Bill 1579.¹⁶

Senator Lawrence Spence's Duty to Declare a Conflict of Interest Prior to Voting on Senate Bill 1579

For the reasons detailed above, we believe that Fifth Element likely qualifies under ORS 244.020 (3) as a business with which Senator Lawrence Spence is associated and that there is the potential for Fifth Element to receive a direct pecuniary benefit from the passage of Senate Bill 1579. Consequently, we believe Senator Lawrence Spence was likely required to declare a potential conflict of interest before voting on Senate Bill 1579 unless an exception to this requirement exists. The only potential exception we are aware of is the "class exception" set forth in ORS 244.020 (13)(b). Under the class exception, there would be no requirement to declare a conflict of interest if Senate Bill 1579 would affect Fifth Element "to the same degree" as "a class consisting of all inhabitants of the state, or a smaller class consisting of an industry, occupation or other group[.]"

The key points in determining the applicability of the class exception are whether a sufficient class exists (i.e., whether Fifth Element is part of an "industry, occupation or other group") and whether Senate Bill 1579 would affect all members of the class to the same degree as Fifth Element.¹⁷ As interpreted by the Oregon Government Ethics Commission (GEC), the phrase "other group" is "restricted to the same type of things as the preceding list of 'industry' or 'occupation.'"¹⁸ Similarly, the phrase "to the same degree" means "that all members of the class would have to be affected exactly equally, or at least proportionately, in order for the class exception to apply. For example, a class exception would apply where a public official votes to approve a 2% cost-of-living raise for all employees, an action that would affect all members of the class of employees to the same proportionate degree."¹⁹

¹⁵ We note that it is not possible at this point in time to conclusively determine whether Fifth Element has a "proven" ability to offer such services, as our analysis is limited to facts gleaned for the limited research undertaken for purposes of this opinion and not any possible information that might be presented to the Economic Equity Investment Program or any court.

¹⁶ In this regard, we further note that as Senate Bill 1579 does not define "organization," the term cannot be read as excluding for-profit organizations like Fifth Element. Had the bill been intended to limit grant recipients to nonprofit organizations, this limitation would have needed to have been made explicit, as is the case in numerous other statutory provisions that apply only to nonprofit corporations.

¹⁷ While ORS 244.020 (13)(b) and 244.290 (3)(a) generally grant the GEC the exclusive ability to define the parameters of the class exception and determine whether it applies to a particular case, for the reasons detailed below, the GEC does not have jurisdiction over interpreting whether a conflict of interest exists (including whether an exception applies) for members of the Legislative Assembly acting in their official capacity.

¹⁸ Oregon Government Ethics Commission Advisory Opinion 19-240A, at 4 (November 22, 2019).

¹⁹ Id.

While the Legislative Assembly has authorized the GEC to adopt administrative rules that “limit the minimum size of, or otherwise establish criteria for or identify, the smaller classes that qualify under the class exemption,”²⁰ the GEC has not yet adopted any such administrative rules and there is currently “no minimum size requirement or established criteria for what constitutes a ‘class.’”²¹ Consequently, the GEC currently determines on a “case by case basis” whether a class exists,²² with “the number of persons affected to the same degree as the public official [helping] to determine whether this exception applies.”²³

As the GEC has not adopted generally applicable administrative rules to identify whether the class exception applies and we are not aware of any prior decision by the GEC that could definitively answer whether Fifth Element is part of a class, any analysis we conduct on this issue has a significant degree of uncertainty. Despite this caveat, based on our analysis of prior GEC opinions we believe it is unlikely that the class exception would apply.

In identifying a potential “class” for Fifth Element, the most likely options appear to be either every entity that could qualify as an “organization” under Senate Bill 1579 or every entity that both qualifies as an organization under the bill and provides services to support economic equity through wealth building among disadvantaged persons.²⁴ However, even assuming that sufficient numbers of relevant organizations exist to qualify as a class, it does not appear that Senate Bill 1579 would affect all members of the class to the same degree. This is because, as detailed above, in order to be eligible to receive a grant under the bill, an organization that provides services to support economic equity through wealth building among disadvantaged persons must also: (1) have a founding mission and goals aligned with the culture of its service recipients; and (2) be able to demonstrate intimate knowledge of the lived experience of its service recipients.

The ability of organizations within either potential class to meet these two additional criteria will likely vary significantly. In this regard, we believe the situation is not dissimilar to when the GEC held that the class exception does not apply in a case of a city council making a decision on regulations governing the short-term rental of property because those proposed regulations would have varying effects on different property owners and, therefore, city councilors who also owned property could not be said to be part of a class of property owners affected to the same degree as other members of the class.²⁵

Determination of Whether a Conflict of Interest Violation Occurred Is Vested with the Senate

Finally, we note that Oregon law prohibits the GEC from enforcing conflict of interest laws with respect to members of the Legislative Assembly. Even though ORS 244.120 requires members of the Legislative Assembly to declare conflicts of interest pursuant to the rules of the house of which the person is a member, the Attorney General has opined that the Debate Clause of the Oregon Constitution prevents the GEC from imposing sanctions on members of the Legislative Assembly regarding announcements of conflicts of interest.²⁶ The Attorney General said that under Article IV, section 9, of the Oregon Constitution, each chamber of the

²⁰ ORS 244.290 (3)(a).

²¹ Oregon Government Ethics Commission Advisory Opinion 19-240A, at 5 (November 22, 2019).

²² Id.

²³ Oregon Government Ethics Commission Public Official Guide, at 14, <https://www.oregon.gov/ogec/Documents/2021%20PO%20Guide%20Final%20Adopted.pdf>.

²⁴ While neither of these groups is an “industry” or “occupation,” we believe these groups are those most likely to be considered as falling within an “other group,” as interpreted by the GEC. See Oregon Government Ethics Commission Advisory Opinion 19-240A, at 4 (November 22, 2019).

²⁵ Oregon Government Ethics Commission Advisory Opinion 16A-1001 (May 20, 2016).

²⁶ See 49 Op. Att’y Gen. 167 (1999).

Legislative Assembly has the exclusive authority to adjudicate a member of that chamber for speech that takes place within the performance of the member's legislative function, including the member's failure to make a required disclosure of potential or actual conflicts of interest. Further, the Attorney General said that this authority has not been delegated to any other body, including the GEC.

In response to the Attorney General's opinion, the Legislative Assembly amended ORS 244.260 to add language requiring the GEC to dismiss a complaint made against a member of the Legislative Assembly if the commission determines that the alleged violation involves conduct protected by the Debate Clause of the Oregon Constitution.²⁷

Conclusion

Under the Oregon Constitution, it is the Senate itself, rather than the GEC, that is responsible for determining whether Senator Lawrence Spence was required to declare a conflict of interest prior to voting on Senate Bill 1579.

While uncertainty exists, we believe that, based on existing GEC guidance, it is more likely than not that Senator Lawrence Spence violated ORS 244.120 and Senate Rule 3.33 by failing to declare a conflict of interest prior to voting on Senate Bill 1579 in either the Subcommittee or on the Senate floor.

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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²⁷ See ORS 244.260 (5)(a).