



Oregon

Tina Kotek, Governor

Government Ethics Commission

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Sent via email and USPS

Brian Boquist
17080 Butler Hill Road
Dallas, Oregon 97338

Dear Senator Boquist:

As a follow-up to our previous correspondence, I wanted to provide further clarification regarding the authority of the Oregon Government Ethics Commission (OGEC) with respect to the issues you raised.

You have asked whether OGEC has authority to open a case against a member of the Legislative Assembly and whether the provisions in the Oregon Constitution, Article IV, Section 9 (known as "the Debate Clause"), would limit that authority, either substantively or temporally. Separately, you have asked if OGEC has authority to address, either in a case or in advice, whether a member of the Legislative Assembly may hold two lucrative positions.

Debate Clause Protections

Article IV, Section 9, of the Oregon Constitution provides:

Section 9. Legislators free from arrest and not subject to civil process in certain cases; words uttered in debate. Senators and Representatives in all cases, except for treason, felony, or breaches of the peace, shall be privileged from arrest during the session of the Legislative Assembly, and in going to and returning from the same; and shall not be subject to any civil process during the session of the Legislative Assembly, nor during the fifteen days next before the commencement thereof: Nor shall a member for words uttered in debate in either house, be questioned in any other place.

In my December 27, 2022, letter, I explained that when a matter involves a member of the Legislative Assembly, ORS 244.260 requires that I determine whether the alleged violation involves conduct protected by the Debate Clause. If the matter involves conduct protected by the Debate Clause, ORS 244.260(5)(a) requires the Commission to either dismiss the complaint or rescind the Commission's motion to take action, notify the member of the Legislative Assembly of the dismissal or rescission, and cease further action unless a new and different complaint is filed or the Commission takes action on its own motion based on different conduct.



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Because I determined that the violation you alleged involved conduct protected by the Debate Clause, I did not address the temporal question you raised involving the civil process protections of the Debate Clause.

OGEC Cases and Civil Process Protections of the Debate Clause

The Debate Clause protects a member of the Legislative Assembly from “civil process” when the Legislative Assembly is in session or fifteen days before the commencement of a session. It is unclear whether merely notifying a member of the Legislative Assembly that an ethics complaint has been filed, as required under ORS 244.260(2)(a), qualifies as “civil process” prohibited under the Debate Clause. Regardless, the Attorney General has opined that a civil process which cannot be served during the legislative session may nonetheless be served on a member of the Legislative Assembly once the Debate Clause protection is no longer in effect. (See Letter of Advice to Governor Victor Atiyeh, at 6-7 (OP-4575) (January 29, 1979)). In other words, “civil process” protections under the Debate Clause do not apply when: (1) the Legislative Assembly is *not* in session; or (2) *prior to* fifteen days before the session commencement. Thus, except for conduct protected by the Debate Clause, OGEC has authority to open a case against a member of the Legislative Assembly for alleged violations of ORS Chapter 244 and may provide notifications at any time. OGEC may also conduct “civil process” when the Legislative Assembly is not in session or at least 16-days before session commencement.

Constitutional Limit on Dual Lucrative Offices

The other issue you raise involves questions regarding OGEC’s authority to determine whether a member of the Legislative Assembly is holding two lucrative offices in violation of Article II, section 10 of the Oregon Constitution. As I explained in my prior letter, such an allegation involves both Article II, section 10 and Article III, section 1 of the Oregon Constitution, neither of which OGEC has authority to enforce. You rightly point out that OGEC has previously issued advice to you and other public officials that mentioned the policy statement of the Legislative Assembly contained in ORS 244.010(4) and directed public officials to look to the Oregon Constitution. ORS 244.010(4) does not, however, grant OGEC authority to determine whether a member of the Legislative Assembly is holding two lucrative offices in violation of the Oregon Constitution. The authority to make such a determination would presumably belong to the Legislative Assembly or to the courts.

In drafting this advice, we consulted with the Commission’s legal counsel at the Oregon Department of Justice, and this letter has been reviewed by that counsel. If you have further questions regarding this matter, please feel free to contact me directly.

Sincerely,



Ronald A. Bersin
Executive Director

RAB/sm