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September 18, 2007

Esther J. Cox, Chair,  
Alaska Board of Education and Early Development  
7705 Highlander Drive  
Anchorage, AK 99518

Re: Request for Advisory Opinion: Conflicts of Interest  
AGO File No. 661-07-0014

Dear Ms. Cox:

This letter responds to your request for an advisory opinion under AS 39.52.240(a) of the Executive Branch Ethics Act providing general guidance to members of the Board of Education and Early Development (Board) regarding disclosure of potential conflicts of interests and the procedures for addressing those conflicts.

**I. Requirements of the Executive Branch Ethics Act**

**A. General Requirements**

The Executive Branch Ethics Act is intended to ensure that public officers will not base their official decisions and actions upon their own personal or financial interests.<sup>1</sup> A purpose of the Act is to ensure that “public officers conduct the public’s business in a manner that preserves the integrity of the governmental process and avoids conflicts of interest.”<sup>2</sup>

The Act acknowledges, however, that “in a representative democracy, the representatives are drawn from society and, therefore, cannot and should not be without

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<sup>1</sup> AS 39.52.010.

<sup>2</sup> AS 39.52.010(a)(4).

personal and financial interests in the decisions and policies of government.”<sup>3</sup> Accordingly, “people who serve as public officers retain their rights to interests of a personal or financial nature” and “standards of ethical conduct for members of the executive branch need to distinguish between those minor and inconsequential conflicts that are unavoidable in a free society, and those conflicts of interests that are substantial and material.”<sup>4</sup>

The Ethics Act mandates disclosure when a Board member may potentially violate the Act, if he or she participates in the actions of the Board.<sup>5</sup> Violations of the Act may occur when a public officer takes official action that may affect the officer’s own personal or financial interests or those of an immediate family member or provides an unwarranted benefit to another.<sup>6</sup> The definition of “official action” means more than “vote.” Under the 2007 amendments to the Ethics Act, the new definition reads: “[A]dvice, participation, or assistance, including, for example, a recommendation, decision, approval, disapproval, vote, or other similar action, including inaction.”<sup>7</sup>

Also, the Ethics Act speaks principally to actual conflicts of interest, not the appearance of conflict alone.<sup>8</sup> It requires individual determinations regarding potential conflicts of interest on a case by case basis.<sup>9</sup> If a substantial potential conflict exists, steps must be taken to avoid the conflict.

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<sup>3</sup> AS 39.52.110(a)(1).

<sup>4</sup> AS 39.52.110(a)(2) & (3).

<sup>5</sup> AS 39.52.220(a).

<sup>6</sup> AS 39.52.120.

<sup>7</sup> AS 39.52.960(14)(2007).

<sup>8</sup> 9 AAC 52.010; *1993 Inf. Op. Att’y Gen.* (Jan. 1; 663-93-0113), 1993 WL 595769 (Alaska A.G.) at \*2-3, 5. While we evaluate potential violations of the Ethics Act based on the actual facts, we nevertheless advise public officers to be sensitive to the appearance of conflicts of interest to protect the integrity of their actions and ensure that the public correctly understands the basis of official actions.

<sup>9</sup> *1999 Inf. Op. Att’y Gen.* (Sept. 23; 663-99-0232), 1999 WL 1454824 (Alaska A.G.).

To determine whether an identified conflict of interest is substantial and material, the Act's enforcement guidance requires consideration of both (1) the significance of an officer's personal or financial interest in a matter, and (2) how the officer's official action may affect that matter:

Unethical conduct is prohibited, but there is no substantial impropriety if, as to a specific matter, a public officer's

(1) personal or financial interest in the matter is insignificant, or of a type that is possessed generally by the public or a large class of persons to which the public officer belongs; or

(2) action or influence would have insignificant or conjectural effect on the matter.<sup>[10]</sup>

These general principles of the Ethics Act guide application of the Act's specific prohibitions.

## **B. Specific Prohibitions**

To determine whether a Board member has a conflict of interest that impacts his or her ability to take official action in a matter, we consider the Ethics Act's specific prohibitions in light of the above general principles. We note below three provisions of the Act that may impact a member's ability to participate in a particular Board action.

First, the Ethics Act bars misuse of a public officer's position.<sup>11</sup> Among other prohibitions, Board members may not use or attempt to use their public position for personal gain, intentionally secure or grant an unwarranted benefit for another person, or take official action that affects their own personal or financial interests or those of immediate family members.<sup>12</sup> A member avoids violation of this section by following established procedures for the award of benefits and abstaining from participation in

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<sup>10</sup> AS 39.52.110(b).

<sup>11</sup> AS 39.52.120.

<sup>12</sup> AS 39.52.120(a) & (b)(4). "Unwarranted benefit or treatment" includes deviation from normal procedures to award a benefit and award of a benefit to a person who is substantially less qualified than another, "if the award is based on improper motivation." 9AAC 52.040. "Improper motivation" means motivation not related to the best interests of the state, including giving primary consideration to a person's kinship, relationship or financial association with the public officer, the potential for conferring a future benefit on the officer or the person's political affiliation. 9 AAC 52.990(b)(4).

matters that may result in personal gain or in which he or she has a personal or financial interest.

Another provision of the Ethics Act precludes a public officer from having or attempting to have a personal or financial interest in a state grant, contract, lease, or loan “if the public officer may take or withhold official action that affects the award, execution, or administration of the state grant.”<sup>13</sup> The prohibition applies whether or not the public officer actually takes official action and has been uniformly interpreted to mean that the officer cannot cure the conflict by abstaining. If a Board member has a prohibited interest in any of these matters, his or her options are either to resign from the Board or to disassociate with the entity applying for the state contract, grant, lease or loan. Alternatively, the private entity must refrain from applying for the state benefit.<sup>14</sup>

Finally, the Ethics Act precludes a public officer from representing another person before the administrative unit that the officer serves in certain circumstances.<sup>15</sup> However, unlike other public officers, a non-salaried board member may represent his or her own interests or represent, advise, or assist another in a matter in which the member has a personal or financial interest regulated by the board on which the member serves, so long

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<sup>13</sup> AS 39.52.150(a). There are two exceptions. The strict bar does not apply to contracts awarded by competitive sealed bidding or substantially similar procedures, unless the public officer is employed by the administrative unit awarding the contract or actually takes official action regarding the contract. AS 39.52.150(b). The bar also does not apply to loans if the public officer does not take official action that affects the award, execution or administration of the loan, the loan is generally available to members of the public and the loan is subject to fixed eligibility standards. AS 39.52.150(c).

<sup>14</sup> See 1999 *Inf. Op. Att’y Gen.* (Sept. 23; 663-99-0232); 1999 WL 1454824 (Alaska A.G.) citing to 1997 *Inf. Op. Att’y Gen.* (May 30; 663-97-0400). We have concluded that “the severe remedy of total exclusion from public service of AS 39.52.150 must apply only to those substantial and material conflicts occasioned by an officer’s direct interest in a grant which is administered by the officer’s board.” A “direct interest” includes either (1) direct employment or membership by the board member in the grant recipient organization or (2) direct reference in the grant documents or grant process to the Commission member’s commercial enterprise to which the grants will flow. We found that indirect interests were more reasonably dealt with on a case-by-case basis under the terms of AS 39.52.120. We said that “the legislature did not intend to exclude [the member] and like situated business owners from public service on boards, commissions, and councils based on such indirect interests in state grants.” *Id.* at \*3-4.

<sup>15</sup> AS 39.52.160(a).

as the member declares a conflict and abides by the determination of the chair or the entire board regarding participation in the matter.<sup>16</sup> We are not familiar with the extent to which your Board members may have the opportunity to appear before the Board representing themselves or outside interests. Each circumstance should be reviewed on a case-by-case basis. Absent unusual circumstances, it seems readily apparent that such representation would create an actual conflict requiring the member to refrain from participation.<sup>17</sup>

There may be other provisions of the Ethics Act triggered by Board member's interests in particular circumstances.

## II. Ethics Act Procedures for Addressing Conflicts of Interest

The procedural requirements for disclosures are set out in AS 39.52.220 and 9 AAC 52.120. Under the statute, Board members must declare potential conflicts of interest and other matters that may violate the Ethics Act on the public record and in writing. This requirement provides to the members the opportunity to seek review of conflicts in advance of taking action to ensure that actions taken will be consistent with the Act.

### A. Disclosure on the Public Record.

Each Board member must identify actual and potential conflicts orally at the Board's public meetings in advance of participating in deliberations or taking any official action on a matter. A Board member may always choose to refrain from voting, deliberations or other participation regarding a matter, if the member believes he or she has a conflict.<sup>18</sup> If a member is uncertain whether participation or action on a matter

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<sup>16</sup> AS 39.52.160(c); AS 39.52.220.

<sup>17</sup> *1993 Inf. Op. Att'y Gen.*(Jan. 21; 663-93-0259), 1993 WL 595764 (Alaska A.G.)(representation of Native corporation on subsistence matters is "glaring conflict" with participation on board); *1998 Inf. Op. Att'y Gen.* (April 21; 663-88-0429), 1988 WL 249449 (Alaska A. G.)(board member may be retained as expert by doctors insured by board so long as member does not represent doctors in disputes before board).

<sup>18</sup> In most, but not all, situations, refraining from participation ensures that a violation of the Ethics Act does not occur. Abstention does not cure a conflict with respect to a significant direct personal or financial interest in a state grant, contract, lease, or loan because the Ethics Act prohibition applies whether or not the public officer

would result in a violation of the Ethics Act, the member should disclose the circumstances on the public record and seek a determination from the chair of the board. When the chair discloses a conflict, participation is addressed by the entire board.

**B. Determination by the Chair or Board.**

The chair of the Board, as designated ethics supervisor, or the Board itself must make a determination regarding the propriety of the disclosing member's participation on the record. Alaska Statute 39.52.220 prescribes the following procedure for addressing conflicts disclosed on the public record:

- ◆ The chair states a determination whether the member may participate based on the disclosure.
- ◆ Any other member may then object to the chair's determination.
- ◆ If an objection is made, the members present, excluding the member who made the disclosure, vote on the matter.
- ◆ Exception: A chair's determination that is made consistent with advice provided by the Attorney General may not be overruled.
- ◆ If the chair, or the members by majority vote, determines that a violation will exist if the disclosing member participates or takes other official action on a matter, the member must refrain from voting, deliberating or participating in the matter.

When the Board chair identifies a potential conflict, the members present, except for the chair, vote on the matter. If a majority determines that a violation of the Ethics Act will occur if the chair continues to participate, the chair shall refrain from voting, deliberating or participating in the matter.

Following the correct procedures is important. A Board member who takes action in accordance with a determination of the chair or vote of the Board is not liable if the action is later found to violate the Ethics Act. There must be full disclosure of the facts reasonably necessary to the determination and the attorney general must not have previously advised that the action violates the Act.<sup>19</sup>

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actually takes official action. These conflicts should be addressed with the appropriate designated ethics supervisor in advance, if possible.

<sup>19</sup> 9 AAC 52.120(b).

### **C. Disclosure in Writing.**

In addition to an oral disclosure on the public record at a board meeting, the Ethics Act requires that a disclosure also be in writing.<sup>20</sup> However, if the meeting is recorded, a tape or transcript of the meeting is preserved and there is a method for identifying the declaration in the record, an oral disclosure may serve as the written disclosure.<sup>21</sup> Alternatively, the Board member may note the conflict on a Notice of Potential Violation disclosure form and the chair must record the determination.<sup>22</sup>

A member may also disclose the existence of a conflict of interest in writing prior to a meeting based on a meeting agenda permitting the chair to make a determination in advance of the meeting. The member may use either a Notification of Potential Violation or Request for Ethics Determination form. In such a situation, the member would still need to state the conflict and the chair note the determination on the public record of the meeting where the matter is being addressed..

### **D. Disclosure to Attorney General**

The Ethics Act also requires that conflicts be reported to the attorney general.<sup>23</sup> This is accomplished when the chair reports all disclosures and determinations in the Board's quarterly ethics report to the attorney general, attaching the notice of potential violation and determination forms, if used.

## **III. Conflict of Interest Disclosures at Work Sessions**

You also asked that we address whether the disclosures mandated by the Ethics Act must be made at public work sessions of the Board, where no votes or other action on Board business are typically taken.

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<sup>20</sup> AS 39.52.220.

<sup>21</sup> 9 AAC 52.120(a).

<sup>22</sup> The Notice of Potential Violation form and a sample determination form are found along with other forms on the ethics web page at the Department of Law website (<http://www.law.state.ak.us/doclibrary/ethics.html>).

<sup>23</sup> AS 39.52.220(a).

The Ethics Act requires disclosure of potential violations by a board member “who is involved in a matter that may result in a violation ... on the public record.” The chair is to make a determination or, if there is an objection, “the members present at a meeting, excluding the involved member, shall vote on the matter.”<sup>24</sup> As noted above, the amended definition of “official action” as it applies under the Ethics Act includes “participation,” although the definition, even prior to the amendment, was broader than voting or other final action on a matter. There is nothing in the language of the Ethics Act that limits the need for disclosure to public meetings where the Board takes action on Board business.

In addition, it is our understanding that the Board’s public work sessions are taped and the Board Secretary takes notes. We also understand that there is no other impediment to considering ethics disclosures at public work sessions or voting on them and that in the past, conflicts of interest have been voiced and determinations regarding participation made.

Therefore, we conclude that the Ethics Act requires conflict of interest disclosures at public work sessions. In the event that such a disclosure is made, the Board Secretary should make a note so that the disclosure may be located on the tape record of the meeting and ensure that both the tape and notes are preserved.<sup>25</sup>

In conclusion, there is a presumption that public officers conduct their official duties honestly and impartially.<sup>26</sup> However, an officer’s personal interests in a matter may be so significant that they overcome that presumption. Individual Board members may have to refrain from participation in some matters coming before the Board because the member’s particular private personal or financial interest, activity or relationship creates a substantial conflict of interest with their public service. The Ethics Act has established procedures requiring disclosure and determinations to assist a member to avoid violation of the Act.

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<sup>24</sup> AS 39.52.220(a).

<sup>25</sup> 9 AAC 52.120(a).

<sup>26</sup> See *Bruner v. Petersen*, 944 P.2d 43, 49 (Alaska 1997) (agency personnel and procedures presumed to be honest and impartial absent showing of actual bias or prejudice); *Earth Resources Co. of Alaska v. State, Dep’t of Rev.*, 665 P.2d 960, 962 n.1 (Alaska 1983) (same) (citing *Withrow v. Larkin*, 421 U.S. 35, 47-48 (1975)).



Please call if you have any questions regarding this advisory opinion.

Sincerely,

TALIS J. COLBERG  
ATTORNEY GENERAL

By

Julia B. Bockmon  
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cc: Barbara Thompson