

April 1, 1992

Mr. Gary G. Fay  
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529 Main Avenue E.  
Twin Falls, ID 83303

**THIS CORRESPONDENCE IS A GUIDELINE OF THE  
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Dear Mr. Fay:

You recently requested an opinion from this office regarding your activities in conjunction with your insurance agency, Anderson, Blake & Fay, and your previous role as a member of the Idaho State Board of Education. Your insurance agency provides insurance services to the College of Southern Idaho (CSI) and did so while you were a member of the State Board of Education. Your concern is whether your business relationship with CSI while a member of the State Board of Education constituted a "conflict of interest" within the meaning of the Ethics in Government Act of 1990, Idaho Code § 59-701, *et seq.*

**BACKGROUND INFORMATION**

In order to analyze this question, it is important to understand the relative roles of the College of Southern Idaho, the State Board of Education and your role as CSI's insurance agent. From the description you provided, it is my understanding that your insurance agency has provided property and casualty insurance to CSI from the establishment of CSI as a junior college district in the 1960s. This relationship was established prior to your joining the firm in 1971. You were assigned this account in 1971 and, in this capacity, you answer questions and make recommendations to CSI concerning their insurance needs. In 1987 you were appointed to the State Board of Education for a five-year term; however, in November of 1991 you resigned from the board.

CSI is a two-year community college, originally established pursuant to an election in 1965. CSI first received state funds for academic programs in the 1967-68 state biennium budget. The day-to-day governance of community colleges rests with a five-member board of trustees whose members are elected to serve six-year terms. Idaho Code § 33-2101, *et seq.* The local board of trustees has the specific authority to enter into contracts, employ various professionals, and to hold and dispose of real and personal

property. Idaho Code § 33-2101. In short, the CSI Board of Trustees is the entity authorized to enter into insurance agreements between CSI and your agency.

The State Board of Education has general supervisory authority "of all entities of public education supported in whole or in part by state funds." Idaho Code § 33-107(3). CSI generates its annual operating budget through a combination of taxes and fees generated locally and through state appropriations. The State Board of Education conducts budget hearings in which all the public institutions, including CSI, are afforded an opportunity to propose an amount for the board's consideration. However, although CSI and North Idaho College (NIC), the two public community colleges in this state, are allowed to make separate presentations at these hearings, the board makes a combined lump sum budget recommendation for these institutions to the Division of Financial Management (DFM) and the Legislative Budget Office. DFM makes recommendations to the governor who, in turn, submits his annual budget request to the legislature. The legislative budget office transmits the board's recommendations to the Joint Finance and Appropriations Committee. The Joint Finance and Appropriations Committee has the authority to reject or modify either the board's recommendations or the governor's recommendations. Additionally, the legislature as a whole may approve or reject the appropriation bill offered by the Joint Finance and Appropriation Committee.

Appropriation bills for the community colleges are passed as a lump sum with CSI and NIC combined. For example, community colleges were appropriated a total \$8,823,100.00 for fiscal year 1992 to be allocated by the State Board. S.B. 1199, Session Laws. The actual allocation is then made pursuant to an agreement between CSI and NIC that is based upon historical factors. For the fiscal year 1992 NIC received \$4,528,550.00 and CSI received \$4,294,550.00. It is my understanding that the agreement to divide the lump sum appropriation was devised in an effort to avoid uncertainty and lobbying before you joined the State Board of Education. It is my understanding that this agreement was worked out between the presidents of CSI and NIC and that the State Board of Education did not play a significant role in this process.

In addition to the budget recommendations described above, the State Board of Education also assembles a list of project priorities for the institutions of higher education, including the community colleges and other agencies under the board's jurisdiction. This list is submitted to the Permanent Building Fund Advisory Council and the Joint Finance and Appropriations Committee. Whether a particular project is funded in any given year is decided by the legislature.

Another area in which the State Board has authority with respect to community colleges is in the approval of new academic courses and programs, if the credits from such courses and programs are intended to be transferable to other state institutions and counted toward a baccalaureate degree. Idaho Code § 33-107(8).

## ETHICS IN GOVERNMENT ACT

Initially, we note that the Ethics in Government Act applies to members of the State Board of Education. Idaho Code § 59-703(10) defines "public official" for purposes of the act. Idaho Code § 59-703(10)(c) provides:

"Public official" means any person holding public office in the following capacity:

.....

(c) As an appointed public official meaning any person holding public office of a governmental entity by virtue of formal appointment as required by law; .....

Public office is defined as "any position in which the normal and usual duties are conducted on behalf of a governmental entity." Idaho Code § 59-703(9). Clearly, a member of the board that supervises "all entities of public education" must be considered a public officer within the scope of this act. The Ethics in Government Act of 1990 was enacted well after the creation of your firm's business relationship with CSI and your appointment to the State Board of Education. Nonetheless, the act would have had application to you as a public official from July 1, 1990, until your resignation in November, 1991.

The scope of the Ethics in Government Act is set forth in Idaho Code § 59-704:

A public official shall not take any official action or make a formal decision or formal recommendation concerning any matter where he has a conflict of interest and has failed to disclose such conflict as provided in this section.

The operative term for the act is "conflict of interest" as defined in Idaho Code § 59-703(4):

"Conflict of interest" means any official action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit of the person or a member of the person's household, or a business with which the person or a member of the person's household is associated, .....

The issue that must be addressed is whether as a member of the State Board of Education you took any action, or made any recommendation or decision that created a pecuniary benefit for you or your business. There is no question that your business's contract with CSI for insurance coverage provides a pecuniary benefit to you and your business. However, from our understanding of the mechanics of financing CSI, your role as a member of the State Board of Education provided no opportunity for you to take any action or make any recommendation that would have created the contract or pecuniary benefit. The State Board of Education does recommend a level of funding for both Idaho's junior colleges. That recommendation, however, does not determine whether CSI will insure and, more importantly, with whom. The decision to carry insurance and to contract with a particular agency to provide the coverage is made on a local level by CSI's board of trustees without input or oversight by the State Board of Education.

In our opinion, the State Board of Education's role in the budgeting process for junior colleges is too remote to be able to conclude that the action of one board member had any impact on the independent judgment of CSI's board of trustees in making contractual decisions. The Ethics in Government Act of 1990 provides no real guidance in determining the prohibitive degree of causal relationship between the action taken and the actual benefit; and, no court in Idaho has had the opportunity to construe the act. There must be, however, some identifiable and reasonable link between the official action and the benefit derived before it can be said that a conflict of interest exists. In this instance, it is important that there was no real link between the State Board of Education and the board of trustees for CSI in relation to CSI service contracts. Without such a link, there can be no conflict of interest as defined by Idaho Code § 59-703(4).

### **IDAHO CODE § 59-201**

The same analysis would apply to an Idaho statute that forbids a public official from entering into a private contract with the public body served. Idaho Code § 59-201 provides:

Members of the legislature, state, county, city, district and precinct officers, must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members.

Contracts made in violation of this section are voidable and the party violating Idaho Code § 59-201 could be criminally punished. Idaho Code §§ 59-203, 59-208.

The relationships described above between Anderson, Blake & Fay and CSI, and between CSI and the State Board of Education clearly indicate that the State Board of Education plays no part in the contractual relationship between CSI and its insurance carrier. It therefore follows that, as a member of the State Board of Education, you were

not entering into a contract in your official capacity when providing insurance coverage for the College of Southern Idaho and Idaho Code § 59-701 was not violated.

Very truly yours,

FRANCIS P. WALKER  
Deputy Attorney General