March 20, 1996

Ms. Margot H. Knight, Executive Director
Idaho Commission on the Arts
The Alexander House
304 W. State Street
Boise, ID 83720

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

Re: Request for Opinion

Dear Ms. Knight:

This letter is in response to your inquiry in which you ask a series of questions related to personnel issues.

CONFLICT OF INTEREST

Your first four questions deal generally with conflict of interest and nepotism concerns. Specifically, you set forth the following four questions:

1a. Is it permissible for the Commission to hire spouses or other family members of current employees? Could you clarify state law on this issue?

1b. Is it permissible for the Commission to contract with spouses or other family members of employees for short-term periods? Would the situation be different for family members of Commissioners? If permissible in either case, what documentation ought to be in our files?

1c. Should the legal guidance given to us May 30, 1989, by Patrick J. Kole, Chief of Legislative and Public Affairs Division, continue to serve as our guideline regarding grants to spouses of employees and Commissioners?

1d. Is it a conflict of interest for the Idaho Commission on the Arts to purchase questions on the Boise State University Annual Public Policy Survey? (The Director of the Social Science Research Center [my spouse] is a salaried employee of BSU; his pay is unaffected by

the purchase of questions. We do not work directly together on the project—my contact is with two of his employees.)

1. General Background

This area of law is governed by the Ethics in Government Act of 1990, codified as Idaho Code §§ 59-701 *et seq.*, by the Bribery and Corrupt Influence Act, codified as Idaho Code §§ 18-1359 through 18-1362, and by Idaho Code § 59-201.

a. Ethics in Government Act

The Ethics in Government Act provides that "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." Idaho Code § 59-704. "Public official" includes all state officials from elected public officers to state employees. Idaho Code § 59-703(10). A "conflict of interest" occurs when "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 . . . ." Idaho Code § 59-703(4). The definition of "members of the household" includes spouses, dependent children and any persons whom the public official is legally obligated to support. Idaho Code § 59-703(7).

In the event an appointed or employed state public official has a conflict of interest, he or she "shall prepare a written statement describing the matter to be acted upon and the nature of the potential conflict, and shall deliver the statement to his appointing authority." Idaho Code § 59-704(3). Then, if the appointing authority feels it necessary, it may seek advice of legal counsel and act on such advice.

The key to compliance with the Ethics in Government Act is full disclosure. If the public official fully discloses the nature and extent of the conflict of interest to his or her appointing authority, then the public official has satisfied the requirements of this act.

b. The Bribery and Corrupt Influence Act

Idaho Code §§ 18-1359 through 18-1362 put further limits on the activities of public servants.

(1) No public servant shall:

(a) Without the specific authorization of the governmental entity for which he serves, use public funds or property to obtain a pecuniary benefit for himself.

(b) Solicit, accept or receive a pecuniary benefit for services, advice, assistance or conduct customarily exercised in the course of his official duties. This prohibition shall not include trivial benefits not to exceed a value of fifty dollars ($50) incidental to personal, professional or business contacts and involving no substantial risk of undermining official impartiality.

(c) Use or disclose confidential information . . . with intent to obtain a pecuniary benefit for himself or any other person or entity in whose welfare he is interested . . . .

(d) Be interested in any contract made by him in his official capacity, or by any body or board of which he is a member, except as provided in § 18-1361, Idaho Code.

(e) Appoint or vote for the appointment of any person related to him by blood or marriage within the second degree, to any clerkship, office, position, employment or duty, when the salary, wages, pay or compensation of such appointee is to be paid out of public funds or fees of office, or appoint or furnish employment to any person whose wage, salary, pay or compensation is to be paid out of public funds or fees of office, and who is related by either blood or marriage within the second degree to any other public servant when such appointment is made on the agreement or promise of such other public servant or any other public servant to appoint or furnish employment to anyone so related to the public servant making or voting for such appointment. Any public servant who pays out of any public funds under his control or who draws or authorizes the drawing of any warrant or authority for the payment out of any public fund of the salary, wages, pay or compensation of such ineligible person, knowing him to be ineligible, is guilty of a misdemeanor and shall be punished as provided in this chapter.

Idaho Code § 18-1359.[1]

Under these sections, it is unlawful for public servants to use public funds for private gain, to solicit personal pecuniary benefit, to use any official information for his or her own pecuniary benefit, to be interested in any contract made in his or her official

capacity and to employ any person related within the second degree for any public employment.

c. Idaho Code § 59-201

Idaho Code § 59-201 provides that state 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." As this office has noted in the past, "the Idaho case law dealing with Idaho Code § 59-201 is absolute in enforcing the prohibition. There is simply no room for compromise or attempted justification." 1991 Idaho Att'y Gen. Ann. Rpt. 202.

With this statutory background in mind, I will address each of your questions in turn.

2. Hiring Spouses of Current Employees

Your first question, 1a., is whether the Commission may hire spouses or family members of current employees. The answer to your question depends on whose spouse is the prospective employee. Since, under Idaho Code § 18-1359(1)(e), it is unlawful for any person to appoint, or vote for the appointment, of his or her spouse, the spouses of anyone having the authority to employ, or vote for employment, would be ineligible as employees. Thus, the spouses of the Commissioners are ineligible for employment. Further, under Idaho Code § 67-5604, the Executive Director of the Commission has the authority to "employ and remove any consultants, experts or other employees as may be needed." Thus, the spouse of the Executive Director is also ineligible for employment. If, under the Commission's rules or operating procedures, any other person has the authority to appoint employees or vote for an employee's appointment, then the spouse of that person would also be ineligible.

Moreover, since an employment relationship in Idaho is contractual in nature, the prohibition regarding interests in contracts, as related below, may also apply.

3. Contracts with Family Members

Your next question, 1b., asks whether the Commission may contract with family members of employees for short term projects.[2]

First, under Idaho Code § 18-1359(1)(d) a public official may not be interested in the contract if made in his or her official capacity or by the body of which he or she is a member. Thus, the Commissioners and the Executive Director are prohibited from being interested in such contracts. Idaho Code § 18-1360 provides criminal penalties for such

contracts, and Idaho Code § 59-201 provides a civil prohibition for such contracts and renders the contracts voidable.

Idaho Code §§ 32-901 *et seq.* set forth the Idaho community property laws which state generally that the income to one spouse is the community property of both spouses.[3] Thus, if a Commissioner's spouse, or the Executive Director's spouse, has a contract with the Commission, both spouses would be interested in the contract as defined under Idaho Code § 18-1359(1)(d). Thus, unless the very narrow exception provided for in Idaho Code § 18-1361 applies, no spouse of a Commissioner or of the Executive Director, or of any other person who has decision making authority or influence for contracts with the Commission, may be awarded a contract with the Commission.[4] If such exception applies, the public officer must still comply with the requirements of the Ethics in Government Act.

4. Grants to Family Members

Your third question, 1c., deals with grants to spouses of employees and Commissioners and the informal guideline issued to you on May 30, 1989.

The Ethics in Government Act was passed by the Idaho Legislature in 1990. Also, former Idaho Code §§ 59-701 *et seq.* were reformed and codified as the Bribery and Corrupt Influence Act, Idaho Code §§ 18-1359 through 18-1362 in 1990. Thus, the guideline issued to you on May 30, 1989, was based on prior law.

To comply with the current statutes, when granting public funds to family members of Commissioners or the Commission's employees, the Commission should follow the same guidelines as set forth above in answer to your question 1b. regarding contracts. Any time the Commission is paying public funds to any person, compliance with Idaho Code § 18-1359 and the Ethics in Government Act is required.

5. Contract for Public Policy Survey Questions

Your fourth question, 1d., is whether the Commission's purchase of questions from the Boise State University Annual Public Policy Survey constitutes a conflict of interest. The facts, as you related them to me, include that the Director of the Social Science Research Center is your spouse, and he receives no compensation from the purchase of the questions.

Idaho Code § 18-1359(1)(d) does not provide a definition for the term "interested." In interpreting this section, we must give force and effect to the legislature's intent and purpose. Davaz v. Priest River Glass Company, Inc. 125 Idaho 333, 870 P.2d 1292 (1994). The express purpose of Idaho Code § 18-1359 was to

prohibit "use of government property for private gain." House Bill 881, Statement of Purpose, 1990. Thus, the term "interested" means that your husband must receive some private gain from the contract. Also, under Idaho Code § 59-203(4), a conflict of interest would occur if your decision to purchase the questions created a private pecuniary benefit to your husband.

Since your husband receives no monetary gain from the purchase of the questions,[5] there is no statutory violation by purchasing questions on the survey. The fact that the Commission purchases questions on an annual public policy survey does not appear to have any effect on the impartiality of your service as a public official nor does the situation fit within the definition of conflict of interest.[6] Thus, no violation of Idaho Code § 18-1359(d) occurs based on your fact situation.[7]

PERSONNEL PRACTICES

The second section of your letter requests information regarding the Idaho Code § 67-5604 staff-related powers of the Executive Director. You have stated that the general practice is for the Executive Director to "hire, fire and set compensation levels for employees under the general direction of the Commission. In FY96, the Commission adopted the Hay Plan. Each year the Executive Director sets staff compensation levels, shares them with the Executive Committee and the whole Commission approves of the Commission's budget (including the personnel line) for the coming year." You then ask "is our practice in conformance with the Code or is it necessary for the Code (or our practice) to be changed?"

Idaho Code § 67-5604 provides that the Commission chairman "shall, subject to the approval of the Commission, set the compensation for all exempt employees, within the amounts available for such purposes." The same statute provides that the Executive Director "may, subject to the approval of the Commission, employ and remove any consultants, experts or other employees as may be needed." Thus, while the Executive Director has the authority to hire and fire employees, such power is subject to the approval of the Commission. Further, the compensation for exempt employees is set by the chairman and is also subject to the approval of the Commission.

All employees of the Commission are non-classified employees.[8] As non-classified employees, the employees' salaries are not set by the Idaho Personnel Commission. Thus, it is up to the Commission to set its employees' salaries. According to the information you provided, in prior years the Executive Director has set the staff compensation in the budget for the Commission's approval. This practice is in compliance with Idaho Code § 67-5604. It is proper for the Executive Director to do the administrative work of setting the salaries and then have the same approved by the Chairman and the Commission. However, this should be properly documented to show

compliance with the statute. In other words, the Chairman should specifically approve of the annual salaries and the Commission should note its assent. If the full Commission does not approve, it may overrule the Chairman's decision.

However, in fiscal year 1996, the Commission adopted the Hay Plan. Under the Hay Plan, the salaries of the Commission's employees are set in the same manner as classified state employees. The Hay Plan adoption is also in compliance with Idaho Code § 67-5604. If properly adopted by the Chairman, and approved by the full Commission, then the use of the Hay Plan is in compliance with the statute. Note, however, that nothing prohibits the Chairman from changing the decision to use the Hay Plan except that his or her decision is subject to the approval of the full Commission. In other words, the Chairman, and the Commission, can change the salaries of the Commission's employees at any time.

This issue also arises in the Administrative Rules of the Commission on the Arts published at IDAPA 40.01.01.300.02. This rule states that "salaries of all other employees of the Commission shall be established by the Executive Director and shall, in general, be in accordance with those set in the classification and pay plan under the State of Idaho merit system law." With this rule, the Commission has set compensation for the Commission's employees by ordering the Executive Director to pay employees according to the Hay Plan classifications. This is not contradictory to Idaho Code § 67-5604. Thus, the Chairman and the Commission have chosen the method for setting the compensation for the Commission's employees.

Finally, the Commission's ultimate power in this area is the fact that the Executive Director serves at the pleasure of the Commission and can be removed at the will of the Commission.

CONCLUSION

As related above, there are many concerns regarding the Commission's employment of family members, contracting with family members and related activity. Strict compliance with the Bribery and Corrupt Influence Act, Idaho Code §§ 18-1359 through 18-1362, and compliance with the Ethics in Government Act is required in such situations. As to compensation for employees of the Commission on the Arts, the ultimate authority for setting such compensation rests with the Chairman, subject to the approval of the Commission. However, the Commission has broad discretion in choosing the method of setting such compensation. Thus, adopting the Hay Plan, allowing the Executive Director to set salaries, or setting the compensation directly by the Commission are all acceptable methods for compliance with the statutory directive.

I trust this letter answers your inquiries. If you have any further questions regarding this, please do not hesitate to contact me.

Very truly yours,

KEVIN D. SATTERLEE
Deputy Attorney General
Contracts & Administrative Law Division

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[1] The very narrow exception to self interested contracts is contained in Idaho Code § 18-1361 which states that if there are less than three (3) suppliers of the good or service within a fifteen (15) mile radius, it is not a violation for a public servant to contract with the public body of which he is a member if it is necessary to respond to disaster or if four provisions have been followed. First, the contract must be competitively bid and the public servant has submitted the low bid. Second, the public servant must take no part in the preparation of the contract, bid specifications or voting for approval of the contract or bid specifications. Third, the public servant must make full disclosure, in writing, to the governing body of his interest and intent to bid. Fourth, a public servant cannot violate any provision of Idaho law pertaining to bidding or the improper solicitation of business. Idaho Code § 18-1361.

[2] In addition to any other requirements, you must also insure that you are fully in compliance with Idaho's statutory purchasing requirements. Idaho Code § 67-5718 and related statutes. You should contact the Division of Purchasing regarding your authority in this area.

[3] *See* Suter v. Suter, 97 Idaho 461, 546 P.2d 1169 (1976), and Houska v. Houska, 95 Idaho 568, 512 P.2d 1317 (1973) holding that income and property earned by either spouse is community property, and Hansen v. Blevins, 84 Idaho 49, 367 P.2d 758 (1962), holding that each spouse has a vested interest in the community estate.

[4] Note, there is an apparent conflict between the absolute prohibition of Idaho Code § 59-201 and the exception found in § 18-1361. Since § 18-1361 was enacted in 1990 and amended in 1991, the legislature enacted it with full knowledge of § 59-201, and the case law interpreting such section. Watkins v. Family Messenger, 118 Idaho 537, 799 P.2d 1355 (1990). Thus, § 18-1361 provides a very narrow exception to § 18-1359(1)(d) and § 59-201.

[5] Although there is some argument that your husband receives some minimal personal benefit through purchase of the questions, as a salaried state employee such benefit, if any, is too remote to qualify as a pecuniary interest.

[6] A conflict of interest can also exist if a member of the public official's household is associated with a "business" which receives pecuniary benefit from the contract. Under Idaho Code § 59-703(2) a business is defined as an undertaking operated for economic gain. Since Boise State University is not operated for economic gain, and is in fact another state entity, no conflict of interest under the Ethics in Government Act appears to exist.

[7] However, as noted above, this does not relieve the Commission of any public bidding requirements as required by the Division of Purchasing.

[8] *See* Idaho Code § 67-5303(c), which makes all employees under the Office of the Secretary of State non-classified, and Idaho Code § 67-5602, which creates the Commission within the Office of the Secretary of State.