

MEMORANDUM

State of Alaska

Department of Law

TO: Sarah Palin
Governor

DATE: February 7, 2007

FILE NO.: 661-07-0012

TEL. NO.: 269-5279 or 465-2133

FROM: Talis J. Colberg 
Attorney General

SUBJECT: Advisory Opinion Addressing
Ethics Disclosure of Spouse's
Employment with BP Exploration
Alaska and Steps to Ensure
Compliance With the Executive
Branch Ethics Act.

CONFIDENTIAL

You requested an ethics determination and advice regarding the steps you should take to ensure that you comply with the Executive Branch Ethics Act in light of your husband's employment with BP Exploration Alaska, Inc. (BP).

The Ethics Act requires individual determinations regarding potential conflicts of interest on a case by case basis. In this advisory opinion, we have addressed the gas pipeline negotiation specifically and other types of matters that may require your action as governor generally. We have concluded that your decisions and actions in the pipeline negotiations and in most other matters will very likely have no effect on your husband's job or earnings, or have an effect that is so speculative that it does not require you to refrain from participation. Whenever a new matter comes to you for review or action that could affect BP, you should consider whether your interest in BP through your husband suggests a significant potential violation of the Ethics Act, and, if it does, refrain from involvement and seek further advice on what action, if any, must be taken to avoid the potential conflict.

Below we outline the factual circumstances of the potential conflict, provide guidance on relevant sections of the Ethics Act and discuss how those provisions apply to your circumstances.

I. FACTUAL BACKGROUND

You have advised that your husband Todd Palin works as a production operator on the North Slope. His job is technical in nature and does not involve management responsibilities or advising management on matters other than those relating to his duties as a production operator. He is paid hourly. His work does not involve submitting applications for permits or seeking other action from the state.

As governor, you will necessarily be involved in matters that relate to or may impact BP or related BP entities. BP is a company engaged in exploring for and producing oil and gas in the state. In addition to negotiations relating to the anticipated gas pipeline project, we understand generally that you may be involved in other negotiations or contracts regarding BP operations in the State of Alaska, the proposal of legislation on oil and gas matters, the signing or vetoing of legislation, the adoption or revision of statewide regulations that affect all operators, including BP, and decisions with respect to administrative proceedings or litigation relating to environmental enforcement, tax enforcement or other matters.

II. GENERAL PRINCIPLES FOR APPLYING THE ETHICS ACT

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.¹ 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."² The Act also acknowledges that public officers should be free to pursue personal and financial interests, and are valued for those interests, as long as the interests do not interfere or conflict with the officers' public responsibilities. Alaska Statute 39.52.110 addresses the scope of the ethics code established by the Act as follows:

(a) The legislature reaffirms that each public officer holds office as a public trust, and any effort to benefit a personal or financial interest through official action is a violation of that trust. In addition, the legislature finds that, so long as it does not interfere with the full and faithful discharge of an officer's public duties and responsibilities, this chapter does not prevent an officer from following other independent pursuits. The legislature further recognizes that

¹ AS 39.52.010.

² AS 39.52.010(a)(4).

(1) in a representative democracy, the representatives are drawn from society and, therefore, cannot and should not be without personal and financial interests in the decisions and policies of government;

(2) people who serve as public officers retain their rights to interests of a personal or financial nature; and

(3) 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.

(b) 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.

The Ethics Act requires that we be guided by these statements defining the scope of the ethics code when evaluating a potential conflict of interest.³ The Act speaks principally to actual substantial conflicts of interest, not the appearance of conflict alone.⁴ It requires individual determinations regarding potential conflicts of interest on a case by case basis.⁵ Under AS 39.52.110(b), set out above, if a particular circumstance may result in a violation, we also consider whether there would be no substantial impropriety if the public officer participated in the matter. Where a potential conflict exists and the terms of AS 39.52.110(b) do not permit participation, steps must be taken to avoid the conflict.

³ AS 39.52.110(c).

⁴ 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.

⁵ 1999 *Inf. Op. Att'y Gen.* (Sept. 23; 663-99-0232), 1999 WL 1454824 (Alaska A.G.).

III. APPLICABLE ETHICS ACT STANDARDS

In this section of this memorandum, we provide general guidance on sections of the Ethics Act relevant to the potential conflicts arising as a result of your husband's employment with BP.

A. Misuse of Official Position: AS 39.52.120

As you recognize, there will be matters relating to BP that require your action. Alaska Statute 39.52.120 list types of actions that are not permissible under the Ethics Act. Where a potential violation of AS 39.52.120 is presented, a public officer must refrain from participating in the matter that is the subject of the potential violation.⁶

The subsections of AS 39.52.120 that may relate to your husband's BP employment include subsection (a), which states, in part, that "a public officer may not use, or attempt to use, an official position for personal gain." "Gain includes actual or anticipated gain, benefit, profit or compensation."⁷ Therefore, if you are presented with a matter related to your husband's employment with BP that could result in "personal gain" to you, you must refrain from participation, unless AS 39.52.110(b) applies.

Subsection (a) also states that "a public officer ...may not intentionally secure or grant unwarranted benefits or treatment for any person." "Benefit" is anything that is to a person's advantage or self-interest, or from which the person profits regardless of financial gain, including transfer of money, contracts, patronage, or advantage, among other things.⁸ "Unwarranted benefits or treatment" means "a deviation from normal procedures for the award of a benefit, regardless of whether the procedures were established formally or informally, if the deviation is based on improper motivation."⁹ "Improper motivation" means "a motivation not related to the best interests of the state, and includes giving primary consideration to a person's kinship or relationship with a public officer," or "financial association with a public officer."¹⁰ Therefore, if there were a matter presented to a state agency, board or commission that may result in a particular benefit to BP or your husband, the matter must be handled in a manner consistent with

⁶ 1999 *Inf. Op. Att'y Gen.* (Sept. 23; 663-99-0232), 1999 WL 1454824 (Alaska A.G.) at *2.

⁷ AS 39.52.960(10).

⁸ AS 39.52.960(3).

⁹ 9 AAC 52.040(a)(1).

¹⁰ 9 AAC 52.990(b)(4)(A)-(B).

normal procedures for award of the benefit. Other provisions of the Ethics Act would likely prohibit you from acting with respect to any matter significantly benefiting your husband and may similarly prohibit you from acting on some matters benefiting BP, depending on the circumstances.

Alaska Statute 39.52.120(b) states in pertinent part that a public officer may not "take or withhold official action in order to affect a matter in which the public officer has a personal or financial interest." "Official action" is "a recommendation, decision, approval, disapproval, vote, or other similar action, including inaction, by a public officer."¹¹ "Personal interest" is defined as "an interest held or involvement by a public officer, or the officer's immediate family member or parent, including membership, in any organization ... from which, or as a result of which, a person or organization receives a benefit."¹² "Financial interest" means "an interest held by a public officer or an immediate family member, which includes an involvement ... in a business, including ... a professional relationship, that is a source of income, or from which, or as a result of which, a person has received or expects to receive a financial benefit."¹³ "Immediate family member" includes a "spouse."¹⁴ Therefore, because your husband's interests in BP are, by definition, your interests, if you are presented with a new matter related to BP that may affect your husband's personal or financial interests in BP, you must refrain from taking "official action," unless AS 39.52.110(b) applies.

**B. Improper Influence in State Grants, Contracts, Leases or Loans:
AS 39.52.150**

We anticipate most grants, contracts, leases or loans between the state and BP are executed and administered by one of the executive branch agencies and that you would not take official action on those matters. Nevertheless, as governor, you have authority to take action and give specific direction to subordinate agencies regarding many matters, including state grants, contracts, leases and loans. Under AS 39.52.150(a), a public officer may not attempt to acquire, receive, apply for, be a party to, or 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, contract, lease or loan." The purpose of this provision is to prevent public officials from using their public positions for personal gain where the gain is from state grants,

¹¹ AS 39.52.960(14).

¹² AS 39.52.960(18).

¹³ AS 39.52.960(9)(A).

¹⁴ AS 39.52.960(11)(A).

contracts, leases, loans or benefits that those same officials have discretionary authority to approve.¹⁵ 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.¹⁶ Consequently, in such cases, you would have to delegate your authority to act, unless we concluded under AS 39.52.110 that no substantial impropriety would occur if you took action.

Alaska Statute 39.52.150(b) states an exception to the prohibition in subsection (a) for competitively solicited contracts, unless the public officer is employed by the administrative unit awarding the contract or actually takes official action regarding the contract. For the exception to apply, the contract must be awarded by competitive sealed bidding or substantially similar procedures.

Under AS 39.52.150(c), the prohibition in subsection (a) 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.

C. Improper Use or Disclosure of Information: AS 39.52.140

The Ethics Act also restricts the use or disclosure of information you may gain during the course of your official duties. Specifically, AS 39.52.140 provides that a "current or former public officer may not disclose or use information gained in the course of, or by reason of, the officer's official duties that could in any way result in the receipt of any benefit for the officer or an immediate family member, if the information has not also been disseminated to the public."¹⁷ For purposes of this restriction, "information has been disseminated to the public if it has been published through newspaper publication; broadcast media; a press release; a newsletter; a legal notice; a nonconfidential court filing; a published report; a public speech; or public testimony before the legislature, a board, or a commission."¹⁸

¹⁵ 1986 *Inf. Op. Att'y Gen. Op.* (Nov. 13; 663-87-0150), 1986 WL 81216 (Alaska A.G.).

¹⁶ For example, if a commission member has a prohibited financial interest in a grant application, his or her options are either to resign from the commission or to disassociate with the entity applying for the grant. Alternatively, the entity must refrain from applying for the state grant. 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).

¹⁷ AS 39.52.140(a).

¹⁸ 9 AAC 52.070.

Also, public officers “may not disclose or use, without appropriate authorization, information acquired in the course of official duties that is confidential by law.”¹⁹

Although we are confident that you would not intentionally reveal undisseminated or confidential information, you should be cautious of inadvertently revealing information regarding BP matters that may result in some benefit or advantage to your husband.

IV. ANALYSIS OF THE SIGNIFICANCE OF POTENTIAL CONFLICTS

A. Discussion of Standard

As stated above, the definitions of both “financial interest” and “personal interest” encompass the interests of immediate family members, including a spouse.²⁰ As a BP employee, your husband has both financial and personal interests in the company and therefore under the Ethics Act you are considered to have such interests. You generally must refrain from taking action on matters that may affect those interests.

However, the Ethics Act recognizes that public officers are drawn from society and retain their rights to interests of a personal or financial nature. Thus, the Act distinguishes between those “minor and inconsequential” conflicts that are unavoidable in a free society and those conflicts of interests that are substantial and material.²¹ Where a potential violation of the Ethics Act arises, we must also consider whether the standards in AS 39.52.110(b), set out above, indicate that there would be no substantial impropriety, if you participated in the matter.²² Under this section, we undertake a two-part analysis to evaluate whether an official’s interest is “insignificant.” We consider both the value of the interest and whether the official’s action will likely increase or decrease that value.²³ The specific facts and circumstances involved in a particular

¹⁹ AS 39.52.140(b).

²⁰ AS 39.52.960(11)(D).

²¹ AS 39.52.110(a)(3).

²² Your proposed ethics bills and those introduced by various legislators in both the Alaska Senate and the House would amend this provision, principally with respect to the significance of business interests.

²³ 2005 *Inf. Op. Att’y Gen.* (Mar. 24; 663-05-0191), 2005 WL 1198705 (Alaska A.G.) at *5 and opinions discussed therein.

matter determine whether or not your husband and you, have a significant personal or financial interest at stake.

Here, the dollar value of your husband's earnings, plus benefits, is undoubtedly significant and his ability to support your family has significance not measured in dollars. However, matters of the type described generally in Section I above, which you may be involved in, would not be expected to affect your husband's compensation, benefits, working conditions, continued employment or promotion or other personal or financial interest. Your decisions and actions in these matters will very likely have no effect on your husband's job or earnings, or have an effect that is so speculative that it does not require you to refrain from participation. If there is no potential effect or only speculative effect on your or your husband's interests, then there is no substantial impropriety.

One might argue that the second prong of AS 39.52.110(b)(1) – the exception for interests possessed generally by the public or a large class of persons to which you belong – may apply because the group of family members of BP employees is arguably a large class. If so, we would still consider whether your action would result in any effect on your husband's employment and interests unique from the effects on the interests of other BP employees and their family members.²⁴

B. Application of Standard to Particular Matters

We caution that application of the Ethics Act standards is always specific to the circumstances. At this time, we can make the following determinations.

1. Gas Pipeline Negotiations.

BP has interests in the gas pipeline negotiations because it is a North Slope lessee with gas interests as well as a potential gas line builder or subscriber of gas line capacity. The gas pipeline negotiations have been and will continue to be a complex matter involving the state, multiple oil and gas production companies, such as BP, and other participants. The negotiations are anticipated to lead to a detailed contract for the construction of a gas pipeline and terms governing later production, which will require legislative approval. There will be significant input and involvement by numerous professionals regarding the terms of the resulting project before any agreement is reached. It is extremely unlikely that your decisions regarding the state's policy positions or details of the project during the negotiations would result in a benefit to your husband in his current position as a production operator or affect his current position. In addition,

²⁴ See 1994 *Inf. Op Att'y Gen.* (Oct. 25, 1993; 663-94-0185), 1993 WL 667346 (Alaska A.G.).

there is no evidence to suggest that BP would risk insolvency in the foreseeable future as a result of the negotiations and resulting project. Even if BP were to encounter severe financial difficulties as a result of the gas pipeline negotiations, the fact that the company owns valuable assets, leases and natural resources in Alaska and has a substantial presence outside Alaska suggests that it would be highly conjectural to conclude that the viability of the company would be threatened by your actions in such a way as to impact your husband's position.

The Ethics Act does not bar you from participating in the gas pipeline negotiations.

2. Legislation

You will be involved in proposing legislation and acting on bills that pass the state legislature. We assume that this legislation may address issues relating to oil and gas exploration and production impacting BP and other companies and will not address the terms and conditions of employment of BP or other operators' employees. We also assume that with respect to most legislative proposals, you will provide general policy guidance that your legislative staff will turn into specific language. In most circumstances, it would be highly speculative to conclude that decisions you make relating to legislative proposals addressed to the oil and gas industry generally could affect your husband's interests. Similarly, it would also be speculative in most circumstances to suggest that your decisions to sign or veto specific bills impacting the oil and gas industry would impact your husband's position. Therefore, we conclude that you generally are not precluded by your interest in BP from taking action on legislation related to the oil and gas industry. However, we can not necessarily anticipate the subject of all legislative matters that come to your attention and therefore we caution that if you have questions regarding a particular matter, you should refrain from action and seek further advice.

3. Promulgation of Regulations

During your tenure as Governor, the state may promulgate regulations that affect BP. As with legislation, we anticipate that most regulations will address a matter of general applicability to BP and others in the oil industry and will not provide a vehicle by which you could impact your husband's position at BP, assuming you were asked to take some official action. If a regulatory matter comes before you that suggests a link to your husband's interests, please refrain from acting and seek a further determination from us.

4. Administrative Proceedings and Litigation

You may be asked to make decisions regarding whether to proceed with specific administrative enforcement or other action against BP, to intervene in cases involving BP or to file suit against BP. Absent a specific link to your husband's job, it would be speculative to conclude that you could impact his interests by these decisions.²⁵ You are not precluded generally from participating in the decision-making on these types of matters. But again if a matter comes to your attention that suggests an impact on your husband's position, please refrain from acting and seek further review.

5. Other Negotiations, Contracts and Matters

As we advised, the application of the Ethics Act requires individual determinations regarding potential conflicts of interest on a case by case basis.²⁶ We first determine whether a particular circumstance will give rise to a potential violation of the Act if you take action in the matter. If so, under AS 39.52.110(b), we also consider whether, under the circumstances, there would be no substantial impropriety if you participated in the matter. If there are other BP related matters that come to you for action or in which you will have influence on the outcome, please consider whether your interest in BP through your husband gives rise to a potential violation of the Ethics Act, and, if it does, refrain from involvement and seek our advice on what action, if any, must be taken to avoid the potential conflict.

V. PROCEDURE TO SEEK FURTHER GUIDANCE

If you need further guidance on any matter, please forward to me as your designated ethics supervisor a memorandum detailing the facts and circumstances giving rise to the potential violation of the Act and refrain from taking any official action until we provide a written determination regarding the conflict and any action necessary to avoid a violation.²⁷

If you have any questions regarding this advice, please don't hesitate to contact me.

TJC/jb/dj

²⁵ For example, if faced with a decision that would shut down production in the North Slope field in which your husband works, you must refrain from participation and seek a determination from us.

²⁶ *1999 Inf. Op. Att'y Gen.* (Sept. 23; 663-99-0232), 1999 WL 1454824 (Alaska A.G.).

²⁷ AS 39.52.210.