

# Report in Support of

## Chapter 350

## Division 014

### Conflict of Interest

This report covers division 14 as amended on [DATE]. See [cite final rulemaking notices] and Oregon and Washington statutes as of the end of the 2024 legislative sessions.

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#### Context and Background

This report summarizes contextual and background information on Commission Rule chapter 350, division 14, including the legal requirements for the division, the adoption and amendment history of the division, significant court decisions and attorneys general opinions concerning the division, and discussion of the numbering and publication of the division.

This report also explains which sections of division 14 are derived from which statutory provisions of Oregon or Washington law. This report is adopted as an explanation why the

Gorge Commission chose one state's statutory provision over the other state's corresponding provision.

## Legal Requirements for Commission Rule 350-014

The National Scenic Area Act, 16 U.S.C. § 544c(b), requires in relevant part:

“For the purposes of providing a uniform system of laws, which, in addition to sections 544 to 544p of this title, are applicable to the Commission, the Commission shall adopt regulations relating to \* \* \* conflicts-of-interest, \* \* \* consistent with the more restrictive statutory provisions of either State.”

There are no court decisions providing guidance on what constitutes “the more restrictive statutory provisions of either state.” In a letter from the Washington Attorney General Office to Sen. Jim Honeyford, re informal opinion whether the Gorge Commission must comply with Washington or federal public records disclosure laws (Dec. 27, 2000) the Washington Attorney General Office wrote:

“There are numerous difference in the structure of the two state's public disclosure laws. No court has compared the two states' public records section of Washington's Public Disclosure Act, RCW 42.17.250-348, and Oregon's Public Records Act, O.R.S. 192.001-505. Which state has enacted the more restrictive public disclosure law remains an open question. No court has identified any principled basis upon which to decide whether RCW 42.17.260 and .280 are more or less restrictive than their Oregon counterparts or, conversely, whether O.R.S. 192.410, .420, .440, .501, and .502 are more or less restrictive than their Washington counterparts.”

Generally, the Gorge Commission interprets “the more restrictive statutory provisions” to mean the state law provision that specifies a broader range of Gorge Commission actions that must satisfy this division; that provides more transparency of Gorge Commission decision-making or . . . than the corresponding provision in the other state's law provision or silence in the absence of a corresponding provision in the other state's law.

However, the Gorge Commission deviates from this general interpretation where necessary to fully implement the National Scenic Area Act, where necessary to create a cohesive administrative procedure rule, or where the acts conflict with the National Scenic Area Act. For example, . . .

## Applicable State Statutory Provisions

ORS chapter 244 contains Oregon's statutory provisions relating to conflicts of interest and chapter 42.52 RCW contains Washington's statutory provisions relating to government ethics and conflicts of interest for state agencies and officials and chapter 42.23 RCW contains Washington's statutory provisions for ethics and conflicts of interest for municipal officials. Division 14 uses chapter 42.52 RCW because Gorge Commissioners serve on a bi-

state commission. 42.23.010 defines municipality, which does not include bi-state entities and 42.23.020(2) says municipal officers include appointed persons exercising the powers and functions of a municipal officer, which gorge commissioners do not. The Gorge Commission did not consider statutes uniquely governing specific agencies.

## Rulemaking Actions for Commission Rule 350-014

The Gorge Commission maintains a rulemaking file for this division that includes copies of past rulemaking notices and past versions of this division. The following table is the adoption, amendment, and publication history of this division.

| <b>Rule Action and Effective Date <sup>1</sup></b> | <b>Oregon Bulletin Notices</b> | <b>Washington State Register Notices</b> |
|--|--------------------------------|--|
| Temp./Emergency Rule<br>Effective Sept. 10, 1987   |                                |  |
| Notice of Adopted Rule                             | September 10, 1987             | WSR 87-19-017                            |
| Initial Permanent Rule<br>Effective Dec. 8, 1987   |                                |  |
| NOPR   | October 30, 1987               | WSR 87-22-049                            |
| Notice of Adopted Rule                             | December 3, 1987               | WSR 88-01-013                            |
| Temp./Emergency Rule<br>Effective Nov. 17, 1988    |                                |  |
| Notice of Adopted Rule                             | November 17, 1988              | WSR 88-23-074                            |
| Amendment<br>Effective Nov. 24, 1998               |                                |  |
| NOPR   | April 20, 1998                 | WSR 98-09-069                            |
| Notice of Adopted Rule                             | October 22, 1998               | WSR 98-22-012                            |
| Amendment<br>Effective Dec. 2, 2002                |                                |  |
| NOPR   |                                | WSR 02-17-076                            |
| Notice of Adopted Rule                             | October 16, 2002               | WSR 02-21-074                            |
| Corrected Notice                                   |                                | WSR 02-22-007B                           |
| Amendment<br>Effective                             |                                |  |
| NOPR   |                                |  |
| Notice of Adopted Rule                             |                                |  |

## Court Decisions Related to Commission Rule 350-014

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<sup>1</sup> The effective dates for some rules differ in Oregon and Washington records because of different filing dates (dates received by the Oregon Secretary of State and Washington State Register) and different default effective dates after filing.

The following court decisions involving the Gorge Commission directly relate to the application, implementation, or interpretation of Commission Rule 350-014. Other court decisions relating to the application of state law and the available remedies against the Gorge Commission are also relevant.

*ZP#5 v. Columbia River Gorge Comm'n*, No. 20-2-02402-06 (Clark Cnty. Super. Ct. Mar. 24, 2023). In this decision, the court concluded that the Washington Open Public Meetings Act does not directly apply to the Gorge Commission. The court did not explain its conclusion, but the Gorge Commission's briefing argued that the Gorge Commission is not a public agency as defined in the Washington Open Meetings Act like the states' attorneys general had opined in prior letters regarding the Washington and Oregon public records disclosure laws, and that Congress made a deliberate choice to have the Gorge Commission adopt its own open meetings rules rather than require the Gorge Commission to directly apply state law like Congress had done in its consent to other interstate compacts. This decision is directly relevant because the same federal statute, 16 U.S.C. § 544c(b), governs conflicts of interest and open public meetings for the Gorge Commission.

*Zimmerly v. Columbia River Gorge Comm'n*, 663 F. Supp. 3d 1213, 1219 (W.D. Wash. 2023). In this decision, the court concluded that the Oregon and Washington public records disclosure laws do not directly apply to the Gorge Commission because the Gorge Commission is not a state agency as defined in those laws. This decision is directly relevant because the same federal statute, 16 U.S.C. § 544c(b), governs conflicts of interest and public records disclosure for the Gorge Commission.

## **Attorneys General Letters and Opinions Related to Commission Rule 350-014**

The following Oregon and Washington Attorney General letters and opinions involving the Gorge Commission relate to the application, implementation, or interpretation of Commission Rule 350-014:

Letter from Oregon Department of Justice to Lex Loeb, re Petition for Public Records Disclosure Order (Feb. 25, 1992) (concluding that the Gorge Commission is not a public body subject to the Oregon Public Records Law, that the Compact did not preserve the application of the Oregon Public Records Law, and the Gorge Commission's regulations on public records disclosure govern disclosure of the Gorge Commission's records).

Letter from Oregon Department of Justice to David Sauter, re Petition for Public Records Disclosure Order (Aug. 18, 2000) (restating reasoning in letter to Lex Loeb and stating, "we find no basis for changing our earlier conclusion").

Letter from Washington Attorney General Office to Sen. Jim Honeyford, re informal opinion whether the Gorge Commission must comply with Washington or federal public records disclosure laws (Dec. 27, 2000) (concluding, "The Commission is not made subject to the public records disclosure laws of either Oregon or Washington but rather to the regulations adopted to be consistent with the more restrictive state law.").

These AG letters regarding public records disclosure are directly relevant because the same federal statute, 16 U.S.C. § 544c(b), governs conflicts of interest and public records disclosure for the Gorge Commission.

## **Numbering and Terminology of Commission Rule 350-014**

Initially, the Gorge Commission’s rules used only two digits (*e.g.*, 14, not 014) for rule division numbers and three digits for the rule number (*i.e.*, 350-00-000). In the 1990s, Oregon began using three-digit division numbers and four-digit rule numbers (*i.e.*, 350-000-0000). As of 2024, Washington continues to use a two-digit division number and three digit rule number. The Gorge Commission began using Oregon’s three and four-digit format in 2021, and the Washington Code Reviser has accepted the Gorge Commission’s rules for filing in Oregon’s format.<sup>2</sup>

Oregon and Washington use different numbering of sections and subsections and different terminology to refer to rule divisions (Washington term is “chapters”) sections and subsections of administrative rules. The Gorge Commission’s rules use Oregon’s numbering and terminology as specified in the Oregon Attorney General’s Administrative Law Manual, App. B (2019).

Chapter-Division-Rule

(1) Section

(a) Subsection

(A) Paragraph

(I) Subparagraph

## **Publication of Commission Rule 350-014**

The Gorge Commission publishes its rules on its website. The versions on the website are the official rules.

The Oregon Secretary of State chooses to publish the Gorge Commission’s rules in the Oregon Administrative Rule compilation even though the rules are not Oregon rules. The Gorge Commission’s rules in the Oregon Administrative Rules compilation available on the Secretary of State website may differ from the Gorge Commission’s adopted rules. In the past, the Secretary of State changed the outlining of the Gorge Commission’s adoption to fit Oregon’s numbering convention and some of the rule text was not provided, rather the

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<sup>2</sup> Email from Jennifer Meas to Jeff Litwak, RE: Questions about CR-102 (Aug. 23, 2021).

Secretary of State provided a notice stating “Text available via filing PDF that is stored in ORMS” or similar.

The Washington Code Reviser advised the Gorge Commission that it cannot publish the Gorge Commission’s rules in the Washington Administrative Code compilation because the rules are not Washington rules.

## Section-by-Section Discussion of Commission Rule 350-014

### **350-014-0010. Definitions for Commission Rule 350-014**

*Corresponding State Statutory Provisions:* RCW 42.52.010; ORS 244.020

The definitions in ORS 244.020 are generally more specific than the definitions in RCW 42.52.010 and thus the definitions in this rule are principally based on Oregon law. The definitions based on Oregon law incorporate elements of Washington law. Some of the definitions are based on Washington law; these relate to provisions in this division that derive from Washington law.

(8) Discussion of why the Gorge Commission’s definition of “gift” comes from Oregon law is below in the discussion of 350-014-0100.

### **350-014-0020. Application**

*Corresponding State Statutory Provisions:* As noted below

(1) This section is added for clarity and is not adapted from either state’s law.

(2) This section is adapted from ORS 244.390(3). This provision of the ORS seems a bit out of place. It is within an enforcement section for the Oregon Government Ethics Commission, but applies more generally to “this chapter” of the ORS (meaning ORS chapter 244).

(3) This section is adapted from RCW 42.52.060. There is no corresponding provision in ORS chapter 244.

(4) There are many limitations and exceptions to limitations on former public officials in RCW 42.52.080, RCW 42.52.090, ORS 244.040, and ORS 244.045, and the application of those limitations may vary depending on the location of the former official, the location of their actions, and specific situations. This rule thus refers former public officials to seek their own legal advice rather than try to address the different situations.

### **350-014-0030. Activities incompatible with official duties**

*Corresponding State Statutory Provisions:* RCW 42.52.020; RCW 42.23.030; ORS 244.040

(1) this section adapts RCW 42.52.020

(2) this section adapts ORS 244.040(1)

**350-014-0040. Financial interests in transactions**

*Corresponding State Statutory Provisions:* RCW 42.52.030; RCW 42.23.030; ORS 244.040

(1) This section adapts RCW 42.52.030(1).

(2) This section adapts RCW 42.52.030(2).

(3) This section comes from RCW 42.52.070(1).

(4) This section adapts ORS 244.040(3).

**350-014-0050. Assisting in transactions**

*Corresponding State Statutory Provisions:* RCW 42.52.040; ORS 244.040

The entirety of this rule adapts RCW 42.52.040. ORS 244.040(6) is a similar prohibition, but less specific.

**350-014-0060. Confidential Information – Improperly concealed records**

*Corresponding State Statutory Provisions:* RCW 42.52.050; ORS 244.040

The entirety of this rule adapts RCW 42.52.050, but also makes the prohibitions in that statute applicable to former public officials as provided in ORS 244.040(4) and (5).

**350-014-0070. Compensation for official duties or nonperformance.**

*Corresponding State Statutory Provisions:* RCW 42.52.110; ORS 244.040

This rule adapts RCW 42.52.110. The phrase “an official compensation package as determined by” is from ORS 244.040(2)(a).

**350-014-0080. Compensation for outside activities.**

*Corresponding State Statutory Provisions:* RCW 42.52.120; ORS 244.040(2)(a).

This rule adapts RCW 42.52.120. Ssection (5) of the statute specifies that it does not apply to “officers and employees who, in accordance with the terms of their employment or appointment, are serving without compensation from the state of Washington or are receiving from the state only reimbursement of expenses incurred or a predetermined allowance for such expenses.” This exclusion includes the appointed members of the Gorge Commission. All other persons that could be “officers and employees” are employees of the Gorge Commission thus the Gorge Commission’s rules only use the term “employee.”

### **350-014-0090. Honoraria.**

*Corresponding State Statutory Provisions:* RCW 42.52.130; ORS 244.042

This rule adapts RCW 42.52.130. RCW 42.52.130 applies to public officials; ORS 244.042 prohibits honoraria to members of the public official's household and thus this rule also prohibits honoraria to members of the public official's household.

RCW 42.52.130 allows an agency to authorize honoraria, but not in circumstances where persons offering an honoraria have or would have a contractual relationship with, are regulated by or would oppose legislative or rulemaking by the agency. This generally captures the limitation in ORS 244.042 that honoraria may not be connected with the official duties of the public official. The exceptions in ORS 244.042(3)(a) and 244.042(4)(b) are equivalent to exceptions to the gifts rule under Washington law and are listed in 350-014-0100(3), and the exception in ORS 244.042(3)(b) is suggested in RCW 42.52.130(2).

### **350-014-0100. Gifts.**

*Corresponding State Statutory Provisions:* RCW 42.52.150; ORS 244.025; 244.040

RCW 42.52.150(1) defines gift and contains a list of items that the definition of "gift" does not include. RCW 42.52.150(2) prohibits any gift if it could reasonably be expected to influence a public official's vote or action. RCW 42.52.150(3) only allows gifts that do not exceed \$100 from a single source. In calculating this \$100 limit, the value of gifts to family members and guests are generally attributed to the public official.. RCW 42.52.150(4) contains a list of items that are presumed not to influence and are not subject to the \$100 limit.

ORS 244.020(7) defines gift like RCW 42.52.150(1) and contains a similar list of items that the definition of "gift" does not include. Oregon law does not include the consideration whether a gift could reasonably be expected to influence a public official's vote or action. Instead, ORS 244.025(1) considers whether the donor could reasonably be known to have a legislative or administrative interest (a defined term). Washington's focus on whether a gift could reasonably be expected to influence seems to presume a legislative or administrative interest yet could allow gifts from persons who have a legislative or administrative interest that Oregon law does not allow. ORS 244.025(1) specifies a \$50 gift limit, which is lower than Washington, and similarly aggregates gifts to family. Some of the exemptions to the definition of "gift" in Oregon law are treated as an item that presumably is not intended to influence under Washington law; and some of the exemptions to the definition of "gift" in Washington law are more specific than Oregon law. On balance, the two statutory laws concerning gifts are similar, except that ORS 244.025(1) is more restrictive in terms of the aggregate value of gifts and considering whether a donor could have a legislative or administrative interest. Blending the exemptions of the definitions of "gift" in the states' laws would create a complicated rule; and the list of items presumed not influence does not apply in Oregon's approach. For these reasons, the Gorge Commission has adapted Oregon's conflicts of interest law concerning gifts instead of Washington's law.

### **350-014-0110. Use of person, money or property for private gain**

*Corresponding State Statutory Provisions:* RCW 42.52.160; ORS 244.020(1), (3), (7), (13).

(1) This rule is adapted from RCW 42.52.160(1). The corresponding restrictions in Oregon law are embedded in the definitions in ORS 244.020 and requirements for and restrictions on actual and potential conflicts of interest, “business with which the person is associated,” and gifts. The specificity in Washington law refines the more general approach in Oregon law, although application of either state’s statutory provisions would result in substantially similar outcomes. The Gorge Commission chooses to use Washington’s law relating to use of person, money or property for private gain for its specificity.

(2) This subsection blends RCW 42.52.160(2) and (4).

### **350-014-0120. Declaration of Potential Conflicts – Methods of Handling Potential Conflicts**

*Corresponding State Statutory Provisions:* ORS 244.120

Oregon law requires disclosure of potential conflicts of interest. There are no corresponding Washington statutory provisions for potential conflicts. This rule adapts Oregon’s requirement for disclosing potential conflicts.

### **350-014-0130. Recording of Notice of Conflict**

*Corresponding State Statutory Provisions:* ORS 244.130

Oregon law requires recording disclosures of actual and potential conflicts of interest in Commission records (in practice, in the minutes of Gorge Commission meetings and final orders). There is no corresponding Washington statutory provision requiring such recording of disclosures for state officials, even though RCW 42.23.030(12) and 42.23.040 have this requirement for municipal officers. Thus, this rule adapts Oregon’s requirement for recording conflicts.

### **350-014-0140. Ex Parte Communications, Bias, and Appearance of Fairness**

This rule refers to division 16 of the Gorge Commission’s rules for handling ex parte communications, bias and appearance of fairness matters.

## **Attachments**

Commission Rule 350-014 as adopted on [DATE]

RCW 42.52

ORS 244.\_\_\_\_

Three AG letters regarding application of public records law to the Gorge Commission  
Copy of *Zimmerly* (fed. Ct.) decision holding that the state’s statutory provisions do not directly apply.

Email from Jennifer Meas to Jeff Litwak, RE: Questions about CR-102 (Aug. 23, 2021).