

M I C H I G A N D E P A R T M E N T O F S T A T E

RICHARD H. AUSTIN

SECRETARY OF STATE

STATE TREASURY BUILDING

LANSINGMICHIGAN 48918

November 1, 1984

Mr. William M. Brodhead
Plunkett, Cooney, Rutt, et al.
Attorneys and Counsellors at Law
900 Marquette Building
Detroit, Michigan 48226

Dear Mr. Brodhead:

This is in response to your request for a declaratory ruling concerning the applicability of the lobby act (the "Act"), 1978 PA 472, to communications between your client, an accounting and management consulting service, (the "vendor") and the State of Michigan.

The issue which concerns you is whether the Act is applicable to direct communications with public officials by persons attempting to sell services to the state on a contract basis. If the Act is applicable, then the vendors or potential vendors will be required to register and report pursuant to the Act. In addition, section 11(1) of the Act (MCL 4.421) makes it a crime for a person to be compensated for lobbying when the compensation is contingent on the outcome of administrative or legislative action.

Your three part question is set out below:

" . . . one, do communications concerning the sale and provision of services to the State of Michigan constitute lobbying as defined in Section 5(2) of Act No. 472, Public Acts of 1978? Two, do contacts made in the course of carrying out an existing contract and which contacts include mention of other services which could be provided to the State constitute lobbying as defined in Section 5(2) of Act No. 472, Public Acts of 1978? Three, if it is determined that direct communications with public officials concerning the sale of services to the State do constitute lobbying, and if the State has agreed to contract with a specific company for some services, do communications between that company and public officials for the purpose of negotiating the specific terms of the contract constitute lobbying as defined in Section 5(2) of Act No. 472, Public Acts of 1978?"

The Department is unable to provide a specific answer to your question without additional information. However, the following discussion is provided for your guidance.

Pursuant to section 5(2) of the Act (MCL 4.415), "lobbying" includes "communicating directly with an official in the executive branch of state government . . . for the purpose of influencing . . . administrative action." Thus, two matters must be considered to determine whether lobbying occurs: who is the object and what is the subject of the communication. Your question implies the object of the vendor's communications concerning the sale of its services is an "official in the executive branch." Therefore, lobbying takes place only if the decision to purchase a specific product or service is an "administrative action."

According to section 5(9) of the Act, "official in the executive branch" means an elected state officeholder, a member of any state board or commission, or an unclassified employee serving in a policymaking capacity. "Administrative action", as defined in section 2(1) (MCL 4.412), includes only "nonministerial action." "Nonministerial action" in turn is defined in section 6(3) (MCL 4.416) as action taken "without the exercise of personal judgment regarding whether to take the action."

The Secretary of State and the Attorney General argued in their successful defense of the statute in Pletz v Secretary of State, 125 Mich App 335 (1983), that given the above definitions, the lobby act applies only to communications with policymakers which are intended to influence policy matters. Therefore, if the decision to purchase specific products or services requires the formation of policy or a judgment concerning the manner in which a particular policy should be applied, communications regarding these potential purchases are lobbying and subject to the Act. However, if no policy decision is required communications concerning a purchase are not lobbying and do not qualify a vendor as a lobbyist.

The State of Michigan has, through the years, developed a system of centralized purchasing for most supplies, equipment, and services. This system is provided for in various statutes. It is elaborated in a publication by the Department of Management and Budget known as the Administrative Manual. It is a comprehensive scheme which is designed to limit the discretion of those charged with purchasing for the State.

Selling to the State is usually a matter of fitting one's prices, products and services to the specifications, rather than an effort at persuading a public official to take an administrative action or make a policy decision. A vendor's communications with a public official under these circumstances would not constitute lobbying under the Act.

Consequently, whether lobbying is taking place during a vendor's communication with a public official concerning a sale, a discussion of a future contract

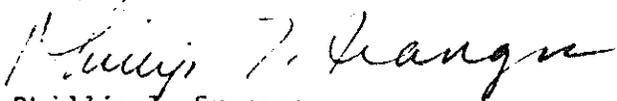
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during the course of an existing contract or negotiations for specific terms, depends on whether the public official can, through the exercise of discretion, enter into an agreement with the vendor. If the communications are lobbying, then section 11(1) renders the payment of a commission unlawful because it is "compensation contingent . . . upon the outcome of an administrative or legislative action." Violation of this provision is punishable as a felony.

Enclosed is a letter to Julia D. Darlow issued August 27, 1984. This letter covers many of the issues you raise. In particular, it provides some guidance with respect to communications undertaken in the course of performing a contract.

This letter is informational only and does not constitute a declaratory ruling.

Very truly yours,



Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw

Enc.

