

MICHIGAN DEPARTMENT OF STATE

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SECRETARY OF STATE

STATE TREASURY BUILDING



LANSING

MICHIGAN 48918

December 7, 1983

Honorable Ed Fredricks
Michigan State Senate
State Capitol
Lansing, MI 48909

Dear Senator Fredricks:

This is in response to your request for an interpretation of the lobby act (the "Act"), 1978 PA 472, as it relates to employees of the legislature who serve in non-clerical or policy-making capacities.

"Lobbying" is defined in section 5(2) of the Act (MCL 4.415) as "communicating directly with an official in the executive branch of state government or an official in the legislative branch of state government for the purpose of influencing legislative or administrative action."

Pursuant to section 5(10), "official in the legislative branch" includes both state legislators and certain legislative employees. Specifically, section 5(10) provides:

"Sec. 5(10) 'Official in the legislative branch' means a member of the legislature, a member of an official body established by and responsible to the legislature or either house thereof, or employee of same other than an individual employed by the state in a clerical or nonpolicy-making capacity." (emphasis added)

Thus, employees of the legislature or an official body established by the legislature, who do not function in clerical or nonpolicy-making roles, are officials in the legislative branch capable of being lobbied.

In order to identify these and other officials, the Department of State is compiling a list of persons who can be lobbied under the Act. To assist in this endeavor, the Department has asked each member of the legislature to provide the names of employees serving on his or her staff who function in non-clerical, policy-making roles. Before responding, you have asked for clarification of the distinction between "policy-making" and "nonpolicy-making capacities."

The United States Supreme Court, in declaring unconstitutional the dismissal of nonpolicy-making government employees based upon their political affiliation, made the following relevant observation:

"No clear line can be drawn between policy-making and nonpolicy-making positions. While nonpolicy-making individuals usually have limited responsibility, that is not to say that one with a number of responsibilities is necessarily in a policy-making position. The nature of the responsibilities is critical. Employee supervisors, for example, may have many responsibilities but those responsibilities may have only limited and well-defined objectives. An employee with responsibilities that are not well defined or are of broad scope more likely functions in a policy-making position. In determining whether an employee occupies a policy-making position, consideration should also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals." Elrod v Burns, 427 US 347, 367-368; 96 S Ct 2673, 2687; 49 L Ed 2d 547, 562 (1976)

While the line may be difficult to draw, it is clear the distinction between policy-making and nonpolicy-making employees depends upon the nature of the employee's duties. For purposes of the Act, the employee's responsibilities must also be examined with reference to the type of action which, if lobbied for or against, subjects a lobbyist or lobbyist agent to the Act's restrictions.

As noted previously, lobbying includes direct communication with an official in the legislature, including a non-clerical, policy-making employee, for the purpose of influencing legislative action. "Legislative action" is defined in section 5(1) of the Act as follows:

"Sec. 5.(1) 'Legislative action' means introduction, sponsorship, support, opposition, consideration, debate, vote, passage, defeat, approval, veto, delay, or an official action by an official in the executive branch or an official in the legislative branch on a bill, resolution, amendment, nomination, appointment, report, or any matter pending or proposed in a legislative committee or either house of the legislature. Legislative action does not include the representation of a person who has been subpoenaed to appear before the legislature or an agency of the legislature."

When read together, subsections (1) and (10) of section 5 indicate that a legislative employee serves in a policy-making capacity if the employee's responsibilities include discretion or authority in matters involving legislative action. For example, if an aide has authority to commit a legislator to sponsor a bill or engage in a particular course of legislative action, the aide would be a policy-making employee and thus an official in the legislative branch capable of being lobbied. However, the drafting by an aide, at the direction of the legislator, of amendatory language for a bill under consideration, does not of itself constitute policy-making by the aide.

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To summarize, the distinction between an employee who serves in a policy-making capacity and one who functions in a nonpolicy-making role depends upon the nature of the employee's duties and responsibilities. If those duties are without specified boundaries and include discretion or authority in matters involving legislative action as defined in the Act, the employee serves in a policy-making capacity. On the other hand, if an individual's responsibilities are limited or involve discretion in matters not related to legislative action, the individual is a nonpolicy-making employee for purposes of the Act.

This response is for information and explanatory purposes only and does not constitute a declaratory ruling.

Very truly yours,



Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/jep