

MICHIGAN DEPARTMENT OF STATE

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RICHARD H. AUSTIN

SECRETARY OF STATE

STATE TREASURY BUILDING



LANSING

MICHIGAN 48918

November 21, 1984

Richard A. Groop, Captain
Commanding Officer, Executive Division
Department of State Police
714 S. Harrison Road
East Lansing, Michigan 48823

Dear Captain Groop:

This is in response to your letter of April 19, 1984, to Susan K. Clark, Supervisor, Campaign and Lobby Records Division, which answered her request "for verification of public officials within the Department of State Police." I understand that in November, 1983, you originally submitted a list which included "executive secretaries and designated member's alternates or designees where applicable." In your review of the list included with Ms. Clark's letter of April 11, you noted executive secretaries were still included, and you wonder if they are in fact public officials. You also ask whether a person designated by a department director, who is a member of a body, to act in the latter's place on the board, council, or commission, becomes a public official for purposes of the lobby act (the "Act"), 1978 PA 472. The boards and commissions with which you are concerned are:

Michigan Emergency Preparedness Council
Michigan State Safety Commission
Law Enforcement Information Network Policy Council
Michigan Law Enforcement Officers Training Council
Fire Fighters Training Council
State Fire Safety Board
Municipal Fire Services Classification Board

In a letter to Messrs. Conrad Mallett, Jr. and Brian P. Henry, dated April 6, 1984, it was pointed out that the test in determining whether or not a member of a commission is a public official for the purposes of the Act "is the non-policy making, non-administrative nature of the commission's activity." Another element in making this evaluation is whether or not the authority of the entity is advisory in nature. In a letter to Senator John M. Engler, dated March 1, 1984, it was pointed out that:

"An entity with only advisory authority is 'nonpolicymaking, or nonadministrative' in nature. The function of such bodies is to advise a public official of proposals or proposed actions. Lobbying under the Act consists of direct communication with a public official for the purpose of influencing legislative or administrative action (MCL 4.415). Reading the Act to include communications with advisory groups would expand the Act to encompass indirect lobbying. Such a reading would broaden the Act beyond its parameters and might subject it to a challenge on constitutional grounds."

A review of the legislation creating the seven entities you enumerate indicates that only two appear to have been given purely advisory authority by the enabling legislation. The Michigan Safety Commission was created by 1941 PA 138, and is "composed of the following officials ex officio: . . . the commissioner of the state police" (MCL 256.561). The commission is empowered to hold monthly meetings and to:

"consult and cooperate with all departments of state government in regard to traffic safety; to promote uniform effective programs of safety on streets and highways; to interchange information among the . . . departments of . . . state government for more effective safety conditions; to cooperate with . . . the United States government and with local governments in regulating highway traffic, and to encourage safety education in this state." MCL 256.562

The Emergency Preparedness Act (1976 PA 390) creates the Emergency Preparedness Council, which is to be appointed by and serve at the pleasure of the governor, and which is to "advise the governor and the director (of the department of State Police or his authorized representative) in the development of plans for the utilization of the resources and facilities of the state for the purposes set forth in this Act" MCL 30.415(1)

The other five entities all have policymaking functions and are therefore more than purely advisory groups. For example, the Michigan Law Enforcement Officers Training Council Act of 1965 (1965 PA 203, as amended) creates an eleven member council with the authority to do such things as "visit and inspect" police training schools, "issue certificates to police training schools qualifying under the rules of the council" (and thus the authority to promulgate such rules), and require a state examination for police officers. MCL 28.611 This act, mirrored in large measure in the Firefighters Training Council Act of 1966 (1966 PA 291) involves the council in deciding issues of policy, both for the council and ultimately for the state. Similar duties may be found concerning the State Fire Safety Board (which is to promulgate rules pertaining to fire safety requirements in schools and dormitories, and to the handling of hazardous materials, among other things, and which may also "act as a hearing body" to rule on various issues - MCL 24.3c), the Municipal Fire Service Classification Board (which is to "submit rules for public hearing . . . which set forth a method of evaluating fire service delivery systems," review each municipality's

fire safety delivery system" and grade it - MCL 28.656) and the Law Enforcement Information Network Policy Council (which is to "establish policy and promulgate rules regarding the operational procedures to be followed by agencies using the . . . system," - MCL 28.214).

Groups which do not make policy need not appear in such a list as you have provided. However, it would appear that each individual entity must be reviewed to resolve the first issue. As a general matter, however, if the activities of the entity may be described as "nonpolicymaking, or nonadministrative," or the entity has only advisory authority, members of that council, commission or board would not be considered public officials simply because of service on the particular council, commission or board. In addition, even though a board may have policymaking authority, a person whose relationship to the board is clerical or nonpolicymaking would not be a public official. A closer examination of the duties and powers of the executive secretaries is necessary to determine their status under the Act. Conversely, a member of a particular council, board or committee becomes a "public official" for purposes of the Act if the activities include establishing or defining policies of an entity which has more than advisory authority.

The other issue you raise, which concerns surrogates or substitutes who are designated to act in the place of the member, is more problematic than it would appear. A number of considerations must be analyzed to resolve this issue. For example, does the legislation which creates the entity provide that a specific person shall serve in that entity (i.e., "the director . . . shall serve on the . . . commission")? Does it provide that "a representative of the department . . . shall serve"? Or, does it state that "a person appointed by . . . shall serve"?. In actual practice, is a specific person designated to attend all meetings or is the task rotated through an office in no particular order? Is the discretion of the surrogate unfettered or does the substitute do only what he or she is asked to do by the actual member? Does the substitute express his or her own positions or reflect positions held by the member?

In discussing this issue it should be first noted that, as a general proposition, membership in a particular entity is personal to the individual named in the enabling legislation. This is similar to the public official exemption from the inclusion as a lobbyist/lobbyist agent created by section 5(7)(b) of the Act (MCL 4.415) which was discussed in a letter to Mr. Ted Vlieg dated June 11, 1984. That letter was from an administrative assistant to a school superintendent who assumes the duties of the superintendent in his absence and who inquired if, in assuming those duties, he also assumed the 5(7)(b) exemption. In response it was pointed out that the superintendent is the only appointed school administrator qualifying for the exemption because "The exemption for public officials is personal to the individual occupying the office and does not extend to other individuals."

With respect to the entities you mention, membership in some is limited to the "commissioner (or director) of state police or his (or her) designated represen-

tative" - MCL 28.603, MCL 29.366, MCL 28.651. In the case of the L.E.I.N. Policy Council, while the Attorney General "or his designated representative" is a member, the statute also provides for "three representatives of the department of State Police, to be appointed by the director of the department . . ." (MCL 28.212). Members of the Emergency Preparedness Council are appointed by and serve at the pleasure of the governor (MCL 30.415(2)) while membership on the State Safety Commission includes the "following officials ex officio: . . . the commissioner of the state police (MCL 256.561). The 16 members of the Fire Safety Board are determined by statute to include 3 representatives of organized fire departments in the lower peninsula, 1 from an organized fire department in the upper peninsula, a representative of hospital administration, a registered professional engineer, a registered architect, a representative of the nursing home industry and others specified by MCL 29.3b.

A person who is appointed to be a member of a state board or commission is clearly a public official. Similarly, when the enabling statute provides for a "designated representative," or an "alternate" these individuals also become public officials. Lobbyists or lobbyist agents communicating with such individuals in an effort to influence their votes on the board or commission must report expenditures made for such communications.

On the other hand, a person who occasionally participates on a board or commission as a substitute for the actual member does not become a public official by virtue of such activity. In such situations the public official retains the policymaking authority inherent in the public office. Each case would depend on the specific facts.

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

Very truly yours,



Phillip T. Frangos
Director
Office of Hearings and Legislation

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