

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE
STATE TREASURY BUILDING



9-84-LD

LANSING
MICHIGAN 48918

August 27, 1984

Julia D. Darlow
Dickinson, Wright, Moon, VanDusen and Freeman
121 East Allegan Street
Lansing, Michigan 48933

Dear Ms. Darlow:

This is in response to your letter requesting a declaratory ruling regarding applicability of the lobby act, 1978 PA 472 (the "Act"), to the activities of Ross Roy, Inc., in the performance of its contract with the State of Michigan.

Ross Roy, Inc., has entered into a contract with the State of Michigan through the Department of Management and Budget to coordinate the "Say Yes to Michigan!" promotion program. The Department of Commerce is the agency with primary responsibility for administering the advertising campaign. However, the Request for Proposals ("RFP") which solicited bids on the contract makes it clear that "the program serves a cross-section of State government." Specifically, the RFP indicates the "promotion plan . . . is comprehensive, cutting across programs within departments of state government, between departments, and reaching out to the private sector."

Ross Roy's duties under the contract are summarized in your letter as follows:

"Ross Roy's advertising responsibilities include, but are not limited to, things such as developing an annual plan; recommending and conducting market research studies; media planning, purchasing and evaluation; preparation and participation, plus providing advice and counsel, in presentations to the executive branch, the legislature and citizens' groups. Publicity includes conducting analyses of news and public affairs coverage of tourism and economic development related promotion programs, identifying promotion opportunities, preparation of articles and background materials, and placement in national business and consumer media. Marketing services include development of specialized marketing plans and production of materials, assistance in training staff of Department of Commerce in sales presentation and consultation techniques, evaluation of target presentation and consultation techniques, evaluation of target industry sales efforts, and

assistance in logistics of planning, placement and maintenance of all tourism, industrial and agricultural exhibits at trade shows."

In the course of carrying out these duties, Ross Roy's employees engage in direct communications with public officials in a number of agencies. You request the issuance of a declaratory ruling in response to three questions, which are set out below.

"(1) Would any contacts Ross Roy may have with public officials in the Department of Commerce and the Office of Management and Budget with respect to matters relating to extension of its Contract constitute lobbying, and would Ross Roy thereby qualify as a lobbyist?"

The Department is unable to provide a specific answer to this 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 indicates the object of Ross Roy's communications concerning its contract extension is an "official in the executive branch." Therefore, lobbying takes place only if the decision to extend or modify the contract, i.e., the subject of the communication, 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 "an action other than an action which a person performs in a prescribed manner under prescribed circumstances in obedience to the mandate of legal authority, 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 extend Ross Roy's contract requires the formation of policy or a judgment concerning the manner in which a particular policy should be applied, communications regarding the contract's extension are lobbying and subject to the Act. However, if no policy decision is required, communications concerning renewal of the contract are not lobbying and do not qualify Ross Roy as a lobbyist.

Questions 2 and 3 relate to communications in the course of performing the contract and will be treated together.

"(2) Do Ross Roy's communications with public officials in the Department of Commerce in performance of its Contract duties constitute lobbying, and does Ross Roy thereby qualify as a lobbyist agent for the Department of Commerce?

(3) Do Ross Roy's communications with public officials outside of the Department of Commerce and the Office of Management and Budget in performance of its Contract duties constitute lobbying, and does Ross Roy thereby qualify as a lobbyist agent for the Department of Commerce?"

Section 5(5) of the Act provides that a "lobbyist agent" is a "person who receives compensation or reimbursement of actual expenses, or both, in a combined amount in excess of \$250.00 in any 12-month period for lobbying." The issue raised by your second and third questions is whether an independent contractor who is required to communicate with public officials to fulfill its contractual obligations is a person who is compensated or reimbursed for lobbying.

The Department has consistently interpreted "lobbying" to exclude communications between state employees and the public officials for whom they work. As explained in a letter to Senator John Engler, dated March 1, 1984, the Act was not intended to interfere with open and frank communications which an employee is expected to engage in as part of the employment contract. Thus, employee-employer communications are not reportable under the Act. However, a state employee who attempts to influence policy by communicating with a public official in another department or autonomous agency (including an agency within the employee's own department) is lobbying and subject to the Act's requirements.

An independent contractor such as Ross Roy is similar to a state employee in that it communicates with public officials not by choice but to fulfill its legal obligations under an existing contract. Any benefit resulting from a subsequent policy decision accrues to the State rather than to Ross Roy. Unlike a traditional lobbyist, Ross Roy is not attempting to further its own interests by communicating with policymakers about policy matters.

It must therefore be concluded that communications by a contractor with public officials in the course of carrying out the terms of its contract are not lobbying regulated by the Act. Requiring registration and reporting of such communications may interfere with the performance of the contract, a result the legislature could not have intended. Moreover, as you point out, disclosure regarding details of the contract and payments made to the contractor remains available under the Freedom of Information Act.

You indicate that while Ross Roy's contract is administered by the Department of Commerce, it is actually an agreement with the State which serves a cross-section of state government and not a single agency. As such, the "public officials for whom [Ross Roy] works" include officials in each department or agency

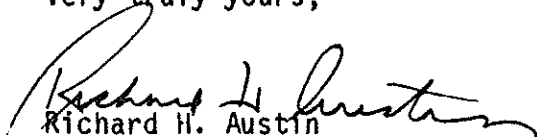
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and not simply those charged with administering the Department of Commerce. Therefore, in answer to your second and third questions, Ross Roy does not qualify as a lobbyist agent by communicating in the performance of its contract with public officials in either the Department of Commerce or officials outside of that Department.

This interpretation does not apply to the situation in which a state agency employs a contractor to engage in lobbying on behalf of the agency. Like employees who are compensated for lobbying, a contractor who is paid or reimbursed for lobbying is subject to the registration and reporting provisions of the Act.

The response to questions 2 and 3 is a declaratory ruling relating to the specific facts you have presented. However, the response to question 1 is informational only because the underlying statement of facts was not clear, concise and complete as required by rule 3, 1981 AACR R4.413.

Very truly yours,


Richard H. Austin
Secretary of State

RHA/cw

Enc.