

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE
STATE TREASURY BUILDING



8-8: JD

LANSING
MICHIGAN 48918

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Gregory K. Merryman
Appellate Practice & Research
General Motors Building
3044 W. Grand Boulevard
Detroit, Michigan 48202

Dear Mr. Merryman:

This is in response to your request for a declaratory ruling concerning applicability of the lobby act (the "Act"), 1978 PA 472, to the following set of facts.

If it is determined that General Motors Corporation is not in compliance with the Air Pollution Act, 1965 PA 348, as amended, or a rule promulgated thereunder, the company may enter into "discussions" with civil servants employed by the Department of Natural Resources Air Quality Division (DNR-AQD). These discussions, which at times include representatives of the Attorney General's office, "may culminate in proposed consent orders." According to DNR-AQD personnel, if General Motors refuses to negotiate a consent order, the division will institute enforcement proceedings and request a formal administrative hearing.

If the parties reach an agreement, an Assistant Attorney General reviews the proposed consent order which is then presented to the Air Pollution Control Commission by a DNR-AQD staff member at the Commission's regular monthly meeting. If the negotiations are unsuccessful, DNR-AQD and General Motors each present a proposed order to the Commission. In either situation, General Motors employees are available to answer questions posed by the Commissioners and members of the public. When discussions are complete, the Commission votes on entry of an appropriate order.

Your first question relating to these facts is whether "the discussions and negotiations with the DNR-AQD staff and the Attorney General's office constitutes lobbying."

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."



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Thus, lobbying occurs only if two requirements are met. First, the communication must be with an "official in the executive branch" and second, the communication must attempt to influence "administrative action."

According to section 5(9) of the Act, "official in the executive branch" includes elected or appointed members of state boards or commissions but not members of the classified civil service. You indicate that in the first step of the settlement process, General Motors communicates only with DNR-AQD "staff members who are civil servants." Consequently, General Motors' discussions and negotiations with DNR-AQD employees are not lobbying. Similarly, if the Department of Attorney General's representatives are civil servants, General Motors' communications with them are not regulated by the Act.

Your second question is whether General Motors' participation in "discussions before the Air Pollution Control Commission constitute[s] lobbying." As noted previously, members of a state commission are officials in the executive branch who can be lobbied. Therefore, if General Motors communicates with the Commission for the purpose of influencing "administrative action," it is engaged in reportable lobbying.

"Administrative action" is defined in section 2(1) of the Act (MCL 4.412) as follows:

"Sec. 2. (1) 'Administrative action' means the proposal, drafting, development, consideration, amendment, enactment, or defeat of a non-ministerial action or rule by an executive agency or an official in the executive branch of state government. Administrative action does not include a quasi-judicial determination as authorized by law."

Section 6(3) of the Act (MCL 4.416) provides that "nonministerial action" requires the exercise of personal judgment. Clearly, the Air Pollution Control Commissioners are exercising personal judgment when deciding whether a particular consent order should be implemented. Therefore, General Motors' communications with the Commission are lobbying unless the quasi-judicial exemption found in section 2(1) is applicable.

Consent orders such as you describe are entered into pursuant to section 8 of the Air Pollution Act (MCL 336.18). Sections 9 and 10 of that Act (MCL 336.19 and 336.20) provide that if a voluntary agreement is not reached within a reasonable time, a complaint may be filed, and any hearing held shall be in accordance with and subject to the contested case provisions of the Administrative Procedures Act (the "APA"), 1969 PA 206, as amended.

Section 78 of the APA (MCL 24.278) provides for the disposition of contested cases by stipulation, agreed settlement, consent order or other mutually acceptable methods. Thus, it appears that the Air Pollution Act, while expressing a preference for settlement agreements, merely incorporates the APA's contested case procedures. (The Air Pollution Act was amended subsequent to enactment of

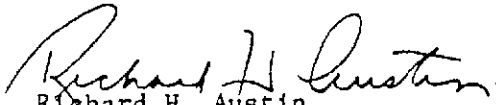
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the APA.) It must therefore be concluded that consent orders approved by the Air Pollution Control Commission are part of the contested case process authorized by the Air Pollution Act and the APA.

Contested cases fall squarely within the quasi-judicial exemption established in section 2(1) of the lobby act. Thus, in answer to your question, General Motors' communications with the Air Pollution Control Commission regarding proposed consent orders are not lobbying under the Act.

This response is a declaratory ruling relating to the specific facts and questions you have presented.

Very truly yours,


Richard H. Austin
Secretary of State

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