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SECRETARY OF STATE

STATE TREASURY BUILDING



LANSING

MICHIGAN 48918

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The Honorable Gary M. Owen
Speaker of the House
State Capitol Building
Lansing, Michigan 48909

Dear Representative Owen:

This is in response to your request for a clarification and interpretation of issues concerning the lobby law (the "Act"), 1978 PA 472. Since you ask several questions, they will be answered as presented.

I.

"Lobbyists, from time to time, because of their expertise in a given field, may be called upon by a public official to provide technical assistance or research. The question is:

Is research and technical material having a value exceeding \$25, that is compiled by a lobbyist at the behest of a public official, to be used in deciding the propriety of legislation, a gift within the meaning of section 4 of the Act?"

Lobbying is in part defined in section 5(2) of the Act (MCL 4.415) as ". . . communicating directly with a public official . . . for the purpose of influencing (legislation) . . ." Subsection (3) of section 5 defines influencing to include ". . . the providing of . . . information, statistics, studies, or analysis." Pursuant to the legislative mandate of section 16 (MCL 4.426) this office has promulgated rule 1(1)(d)(iv) (1981 AACS R4.411) which defines expenditures for lobbying to include:

"(iv) An expenditure for providing or using information, statistics, studies or analysis in communicating directly with an official that would not have been incurred but for the activity of communicating directly."

The Michigan Court of Appeals in Pletz v Secretary of State, 125 Mich App 335, 369 (1983) in upholding this rule adopted the statement:

"To eliminate the 'but for' rule, 1(d)(iv), is to eliminate information on a major expenditure. With today's complex society and better educated and more sophisticated public officials, it is information, statistics, studies, and analysis that are major tools for the lobbyists and lobbyist agents' art. When the expenditure for the information, statistics, studies, or analyses would not have been incurred but for the direct communication, the expenditure is as much a part of the direct communication as eyeball to eyeball communication."

Thus it is quite clear that providing information as contemplated by your question is lobbying and its cost is an expenditure and not a gift.

II.

"Many conflicts may arise between a public official and long-time personal friends or family members who may also be 'lobbyists,' or 'lobbyist agents,' as defined by the Act. The following are a series of questions to help clarify allowable activity within those relationships.

- May a 'lobbyist,' 'lobbyist agent,' etc., give a gift or present to a public official and his/her spouse that exceeds \$25.00 on the occasion of:
- (a) a wedding of the public official?
 - (b) a wedding involving a member of the public official's immediate family?
 - (c) an anniversary (wedding or otherwise) of a public official?
 - (d) a birthday of a public official?
 - (e) a catastrophic event such as a terminal illness within a public official's family? and
 - (f) a foundation or charitable trust set up in honor, or at the behest of, the public official?"

The issues raised in this question fall into four distinct categories. These categories would involve gifts or presents that would be made (a) to a public official (b) to a public official's immediate family, (c) to more than one person including a public official, and (d) to a foundation or charitable trust set up in honor or at the behest of the public official. Three different provisions must be read together to answer your question: the definition of gift in section 4(1) (MCL 4.414), the prohibition against the making of gifts by lobbyist and lobbyist agents in section 11(2) (MCL 4.421), and the clarification that lobbyists and lobbyist agents may give gifts to people who are not public officials in rule 71 (1981 AACS 4.471). The Michigan Court of Appeals in Pletz specifically viewed section 11(2) as prohibiting gifts by lobbyist or lobbyist agents to public officials only:

"Contrary to plaintiffs' position on this issue, the above-quoted sec-

tion of the act does not prohibit a lobbyist or lobbyist agent from making a gift to an individual who is not in the category of public official. It would defy credulity to believe that the Legislature intended to forbid lobbyists from making gifts to relatives, friends, or any other non-public official. A reasonable interpretation of this section is that only loans and gifts made by lobbyists or lobbyist agents to public officials are regulated. This section must be read in conjunction with the act's related provisions. In so doing, we interpret the statute to exclude from coverage gifts by lobbyists or lobbyist agents to non-public officials." 125 Mich App 335, 358

Under this interpretation only gifts to public officials are specifically prohibited by the Act. Thus, in answer to your specific inquiry, gifts would be prohibited under the circumstances listed in subpart (d) of your question. An immediate question arises in the event a gift is given to the public official's immediate family by a lobbyist or lobbyist agent. Care must be taken by the public official that he/she does not receive benefit from the gift, "anything of value (exceeding) \$25.00 in any 1-month period." With this caveat in mind a gift to a member of the public official's immediate family is permissible, as in subparts (b) and (e) of your question. Where a gift is given to more than one person which includes a public official, i.e., a public official and spouse, then the gift will be deemed to be shared equally among all members of the group and the "share" of the public official must not be of value exceeding \$25.00 in any 1-month period. Thus gifts as outlined in subparts (a) and (c) would be allowed as just described as long as the value of the gift did not exceed \$50.00.

The final part of your question involving foundations or trusts must be looked at again with the criteria set forth in the Act. It is clear that a lobbyist or lobbyist agent may make a gift to a foundation or charitable trust where no benefit prohibited by the Act goes to the public official either now or in the future. For example, a lobbyist may make a donation to the American Cancer Society in any amount in the name of the public official. Thus, the answer to subpart (f) of your question is a qualified yes.

In the area of gifts, the public official must always keep in mind the intent of the Act. He/she must not accept " . . . a payment, advance, forbearance, or the rendering or deposit of money, services, or anything of value . . ." in violation of the Act. Gifts that are given to a non-public official where the intent is to benefit the public official are not permitted. Gifts to another person in any amount are allowed if it appears from all the facts that there is no intention to circumvent the Act.

III.

"Many questions have arisen regarding the interpretation of 'Honorarium' as found in Rule 4.473. The Rule reads as follows:

'An honorarium paid directly to a public official by a lobbyist or lobbyist agent shall be considered a gift within the meaning of section 11 of the act when it is clear from all of the surrounding circumstances that the services provided by the public official do not represent equal or greater value than the payment received.'

The questions regarding this provision are as follows:

1. What is meant by the phrase ' . . . clear from all of the surrounding circumstances . . . '? In other words, what circumstances will be looked upon by your office when making this determination?
2. (a) Are expenses, such as meals, travel arrangements and lodging accommodations included in the term honorarium?
(b) If not, then are they considered 'gifts' within the meaning of section 4 of the Act?
3. What amount of money, or anything of value, will be considered unreasonable as an honorarium for:
(a) one speech?
(b) more than one speech?
(c) one seminar?
(d) weekend participation in a conference?
4. What criteria will be used when determining whether the travel and lodging expenses of a public official are reasonable?

That is, will such criteria as location of the conference or convention be taken into account? Whether the public official travels first class or coach, or whether the average of all charges of lodging accommodations in the area must be taken into account before deciding upon a motel/hotel?"

The definition of "gift" in section 4(1) of the Act would include honoraria, "unless consideration of equal or greater value is received therefor." The Department's rules address honoraria in rules 1(1)(e) and 73 (1981 AACS R4.411, R4.473):

"Rule 1(1)(e) 'Honorarium' means a payment for speaking at an event, participating in a panel or seminar, or engaging in any similar activity. Free admission, food, beverages, and similar nominal benefits provided to a public official at an event at which he or she speaks, participates in a panel or seminar, or performs a similar service, and a reimbursement or advance for actual travel, meals, and necessary accommodations provided directly in connection with the event, are not payments.

. . .

"Rule 73. An honorarium paid directly to a public official by a lobbyist or lobbyist agent shall be considered a gift within the meaning of section 11 of the act when it is clear from all of the surrounding circumstances that the services provided by the public official do not represent equal or greater value than the payment received."

Section 11(2) and rule 71 prohibit a lobbyist or lobbyist agent from giving a gift to a public official.

Rule 1(1)(e) clearly specifies travel expenses, meals, and necessary lodging, as long as they are actual expenses, are not payments and, therefore, are not honoraria. All actual travel, meal, and necessary lodging expenses advanced or reimbursed by a lobbyist or lobbyist agent are excluded from honoraria.

A lobbyist or lobbyist agent must report any advance payment or reimbursement given to a public official for meals as food and beverage expenditures. The cost of food and beverage provided directly to the public official at the meeting or seminar must also be reported by the lobbyist or lobbyist agent. In general, when the total of the travel expense, lodging expense, and honoraria paid to the public official is \$500.00 or more, the lobbyist or lobbyist agent must also report the total as a financial transaction pursuant to section 8(1)(c) (MCL 4.418).

With respect to using a standard mileage rate for automobile travel, actual expenses are excluded. However, actual automobile expenses can be difficult to compute if insurance, depreciation, tire wear, etc. are included. Therefore, the Department will assume the mileage rate paid Legislators when reimbursed with state funds (currently \$0.295 per mile) is not more than the actual cost of automotive travel. Any greater figure must be supportable by the actual costs to operate the vehicle driven.

Section 11(2) and Rule 73 both indicate payment for an honorarium does not violate the Act if it does not exceed the value of the speech provided by the public official. In determining the value of a speech, the public official must look at what other similar speakers in similar circumstances receive for a similar speech. The facts in a particular situation will determine the "all surrounding circumstances" as mandated in Rule 73 and must be judged as these situations arise.

To the extent that an honorarium exceeds the value received by a lobbyist or lobbyist agent paying the honorarium, a gift is made in violation of the Act. If the excessive honorarium is paid by a person who is not a lobbyist or lobbyist agent, the Act does not apply to the transaction, unless the excess is a payment made to influence legislative or executive action. Should the excess be paid by a non-lobbyist or non-lobbyist agent to influence legislative or executive action, the amount of the excess would be counted towards the person's \$250.00 and \$1,000.00 thresholds.

IV.

"The following question concerns the reporting requirements imposed upon lobbyists. As you know, some lobbyists serve many clients, otherwise known as multi-client lobbyists. The question is:

If a lobbyist provides food and beverage for immediate consumption and the lobbyist has many clients and many employees, who must report expenditures made for the provision of food or beverage on behalf of a public official?

- (a) client of lobbyist?
- (b) lobbyist?
- (c) lobbyist agent or employee?"

Section 8(1) of the Act requires that lobbyists and lobbyist agents file reports as prescribed by the Act. Section 5(6)(a) includes in the definition of "representative of the lobbyist" an employee of the lobbyist or lobbyist agent. Section 8(1)(b) includes in reports to be filed by a lobbyist or lobbyist agent the expenditures made by a representative of the lobbyist. Under rule 23(3) (1981 AACS R4.423) an employee of a lobbyist agent may also become a lobbyist agent and may also have to file reports under section 8, if he/she exceeds the \$250.00 threshold amount established in section 5. The terms client or client of a lobbyist are not defined in the Act but in the context of your question it is assumed that by those terms you mean a person who makes expenditures for lobbying. Such a "client" under the provisions of the Act would be a lobbyist and be required to make the necessary reports. A "multi-client lobbyist" is a lobbyist agent under the Act and also is required to make reports.

Much of the confusion surrounding the terms lobbyist agent results from the Act establishing definitions which are different from commonly understood meanings in use prior to the Act. Under the Act, for example, where manufacturing company, ABC, Co. hires XYZ, Inc. to further its interests before the Legislature then ABC, Co. is a lobbyist and XYZ, Inc. is a lobbyist agent. If XYZ, Inc. has among its personnel J. Smith, who regularly communicates directly with public officials, J. Smith is also a lobbyist agent. When J. Smith purchases food or beverage for a public official with his/her own money or credit card, J. Smith would report the expenditure in the food and beverage category. If either ABC, Co. or XYZ, Inc. reimburse J. Smith for the food and beverage, that person would report the reimbursement as an all other lobbying expense. If XYZ, Inc. reimburses J. Smith and ABC, Co. reimburses XYZ, Inc., each would report its own reimbursement as an all other lobbying expense. When J. Smith purchases food or beverage for a public official with a credit card or tab charge in the name of ABC, Co., the food and beverage expense would be reported by ABC, Co. If the credit card or tab charge is in the name of XYZ, Inc., the expense would be reported by XYZ, Inc. If ABC, Co. then reimburses XYZ, Inc., then ABC, Co. would report the reimbursement as an all other lobbying expense.

XYZ, Inc. may also employ D. Brown who is a clerical person in its office and who is occasionally reimbursed by XYZ, Inc. for lobbying or food and beverage expenses, but he/she does not reach the Act's threshold amounts. D. Brown would be an employee of the lobbyist agent and those expenditures would be reported by XYZ, Inc. If ABC, Co. reimburses XYZ, Inc. for D. Brown's expenses, then ABC, Co. would also report the expenditure as an all other lobbying expense. On the other hand, if ABC, Co. pays the restaurant for the meal (for instance, D. Brown uses ABC, Co.'s credit card) or reimburses D. Brown directly for the meal (rather than reimbursing XYZ, Inc.), D. Brown would be a representative of the lobbyist. Under these circumstances, ABC, Co. would report the expenditure or reimbursement as a food and beverage expense, and XYZ, Inc. would not report the cost of the meal.

Where a person under any of the defined groups described above is required to report expenditures for food and beverage, the reporting category is determined by whether the payment is reported by another party. If a lobbyist or lobbyist agent pays for the food and beverages directly to the restaurant or other business that has provided the comestibles, the expenditure would be reported as "Food and Beverage" on the lobby registration schedule A. Any person who reimburses these expenditures would report the expenditures in the category "all other expenditures", unless the person being reimbursed is not a lobbyist agent who is reporting the meal as a food and beverage expense. This insures that each meal is reported as food and beverage only once.

V.

"The next two questions deal with public officials who are also members of organizations which engage in lobbying activity, e.g., Chamber of Commerce, National Organization of Women.

1. If a public official is a member of an organization which meets the lobbying requirements according to the Act, and that public official is provided travel and expense money for the purpose of furthering the goals of that organization, is that public official:
 - (a) in violation of section 11 of the Act?
 - (b) solely acting as a member of that organization?
 - (c) receiving a gift as a public official?

2. If a public official is reimbursed for his/her expenses when seeking to influence legislation while in the course of his/her official duties, must that public official comply with the registration and reporting requirements which apply to lobbyists?"

For purposes of your question the discussion here will be limited to Legislators. The inclusion or exclusion of other public officials will be

decided as the particular facts of their circumstances arise. Section 11(4) provides that:

"(4) A public official, other than an individual who is appointed or elected to a board or commission and is not an ex officio member or prohibited by law from having other employment, shall not accept compensation or reimbursement, other than from the state, for personally engaging in lobbying. A person who violates this subsection is guilty of a misdemeanor and shall be punished by a fine of not more than \$1,000.00, or imprisoned for not more than 90 days, or both."

This section makes it quite clear that a Legislator cannot have his/her expenses reimbursed by anyone other than the state. A Legislator who engages in activities that would normally be considered lobbying does not have to report his/her salary or state reimbursed expenses since a Legislator cannot be a lobbyist or lobbyist agent under section 5(7)(b). Where that Legislator is a member of an organization that engages in lobbying and the Legislator is furthering the goals of that organization which are not of a lobbying nature, the Act does not prohibit the payment of travel and expenses by the organization. Reimbursement of actual expenses would not be a gift since the organization would receive value equal to the reimbursement. But where the Legislator engages in lobbying activities for the organization of which he/she is a member, section 11 would prohibit payment for these activities. Since payment for these activities is unlawful, the reporting requirements of the Act are inapplicable.

VI.

"The Secretary of State has gone on record as saying that if a lobbyist makes an expenditure of \$150 or more on any one public official in a calendar year, the name and title of the public official must be included in the report the lobbyist prepares for the Secretary of State.

Given the fact that there is a \$25-per-month exemption from reporting for food and beverage that is meant for immediate consumption that is provided a public official, and that there are two reports to be issued annually by the lobbyist to the Secretary of State, should not the exemption for a calendar year be \$300 instead of \$150 (12 months x \$25 = \$300)?

Instead of \$150 per calendar year, should it not be \$150 per reporting period (12 months x \$25 = \$300)? Three hundred dollars divided by two reporting periods equals \$150 per reporting period."

Rule 56 (1981 AACS 4.456) provides that:

"Rule 56. (1) A lobbyist or lobbyist agent filing a statement or report under section 8 of the act shall, in determining the total

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amount expended for the category termed food and beverage for public officials, report 1 amount reflecting all expenditures for food and beverage provided to public officials during a reporting period, regardless of amount.

(2) The itemized information required by section 8(2) of the act shall be reported in each applicable case."

Section 8(2) establishes threshold amounts that determine whether reports of expenditures for food and beverage provided a public official need identify the public official by name. These amounts are a twofold test (a) \$25.00 in any month or (b) \$150.00 during a calendar year. Under this test if the covered expenditures for example, exceed \$25.00 in May of 1984, reporting would occur in the report that covers the period December 31, 1983 to July 31, 1984. In further example, if there were expenditures in April, May, July, August, September, November and December 1984, none of which exceeded \$25.00 but in aggregate exceeded \$150.00 then the expenditures would have to be reported in the report covering the calendar year 1984. Where the \$25.00 or \$150.00 threshold amounts are exceeded and reported in the first reporting period, they are again reported as part of a cumulative total in the report covering the calendar year.

Very truly yours,



Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw