

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

September 8, 1986

James P. Ludwig, President
Ecological Research Services, Inc.
P.O. Box 9
Boyer City, Michigan 49712

Dear Mr. Ludwig:

You have asked for information regarding the applicability of the Lobby act (the Act), 1978 PA 472, as amended, to Ecological Research Services, Inc. (ERS). You describe the services performed by ERS as follows:

"We are a consulting company. In a nutshell, we are hired for our ability to give advice, make scientific studies, and analyses of problems for a wide circle of clients including government agencies, private firms, foundations, individuals, and combinations of these groups. We stay in business because ERS is often retained to gather data and develop an analysis that clients can use, or direct to be used, in decisions to grant or deny permits or set policy."

You then ask a series of questions concerning the Act's impact upon you and ERS. Before addressing your specific questions, it may be useful to review the Act's general requirements.

Pursuant to section 5(4) of the Act (MCL 4.415), a "lobbyist" is any person whose expenditures for lobbying are more than \$1,150 in a 12 month period, or more than \$300 if the amount is expended on lobbying a single public official. According to section 5(5), a "lobbyist agent" is a person who receives compensation or reimbursement in excess of \$300 in any 12 month period for lobbying. (The threshold amounts were originally \$1,000 and \$250. These amounts have been changed to reflect the increase in the consumer price index in Detroit pursuant to section 19a of 1986 PA 83. A list of the current threshold, fee and penalty amounts is enclosed for your convenience. These numbers will be revised again on January 1, 1987, and every year thereafter as required by section 19a of the amendatory act.)

"Lobbying" is defined in section 5(2):

"Sec. 5. (2) 'Lobbying' means 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. Lobbying does not include the providing of technical information by a person other than a [lobbyist agent] or an employee of a [lobbyist agent] when appearing before an officially convened legislative committee or executive department hearing panel. As used in this subsection, 'technical information' means empirically verifiable data provided by a person recognized as an expert in the subject area to which the information provided is related."

Other definitions significantly narrow the Act's regulatory reach. As indicated above, a communication is lobbying only if it is made directly to a public official and is intended to influence legislative or administrative action. "Administrative action" and "legislative action" are defined in section 2(1) (MCL 4.412) and section 5(1), respectively, 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.

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."

Subsections (9) and (10) of section 5, when read in conjunction with the above definitions, indicate that officials in the executive and legislative branches are persons who possess policymaking authority. As you know, the Department has compiled a list of individuals who are considered public officials for purposes of the Act. A copy of the most recent list is enclosed for your convenience. This list was compiled after the enactment of 1986 PA 83, which significantly reduced the number of persons who can be lobbied in the executive branch by removing members of most state boards and commissions from the definition found in section 5(9).

Thus, in general, ERS is subject to the Act's registration and reporting requirements only if it 1) makes expenditures of more than the threshold amount 2) to communicate directly with an official in the executive or legislative branch 3) for the purpose of influencing legislative or administrative action. Similarly, you and other ERS employees must register and file reports as lobbyist agents only if you are compensated or reimbursed more than \$300 for directly attempting to influence public officials. Communications with persons in state government who are not public officials are outside the scope of the

Act.

This general overview provides a basis for discussing your specific questions, which are set out below in bold print. The discussion following each question is strictly limited to the information provided.

"I. A private client interested in obtaining a permit to construct a marina enclosing public waters comes to ERS requesting this firm to prepare an Environmental Impact Assessment (EIA) of the proposed action. Once prepared, the assessment is submitted to the DNR staff or Michigan Environmental Review Board as part of permit supporting documents. The EIA includes data, interpretation of these data, and conclusions about the project vis a vis the applicability of the state law (PA 346 of 1972). Later the client requests twice that I meet with him and DNR permitting and policy staff to serve as a resource person to explain data, interpretations, or other opinions germane to the question of granting a permit to build the marina as proposed and modified."

"a) Does the preparation and submission of an EIA or EIS document constitute lobbying? Is the cost to prepare the document to be reported? If so, should the report come from ERS or the applicant for the permit?"

There is no mention in your hypothetical of an "EIS" document. According to the facts provided, an Environmental Impact Assessment (EIA) was prepared for and delivered to a private client and not to a public official. Therefore, ERS' preparation and submission of the document is not lobbying because ERS did not directly communicate with a public official.

Your remaining questions cannot be answered without additional information. In general, the permit applicant would not be subject to the Act unless: 1) the EIA was given directly to a public official (according to section 5(9) and the enclosed list, members of the Michigan Environmental Review Board are not public officials), and 2) the purpose of submitting the report was to influence the official's administrative action.

It should be noted that pursuant to section 2(1), "administrative action" does not include quasi-judicial determinations. The Department has previously stated that whenever an adversarial administrative matter has been commenced and is slated for resolution through the administrative hearing process, the exemption found in section 2(1) applies. If DNR's permit application process is quasi-judicial in nature, the Act would not apply to communications between the applicant and agency officials.

Finally, you should be apprised of rule 1(1)(d)(iv) of the administrative rules promulgated to implement the Act (1979 AC R4.411). This rule provides:

- "Rule 1. (1) As used in the act or these rules:
(d) 'Expenditures related to the performance of lobbying' and 'ex-

penditures for lobbying' includes all of the following expenditures of a lobbyist or lobbyist-agent:

(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."

Pursuant to this rule, if your client is engaged in lobbying, it would have to report the amount paid to ERS for compiling the EIA only if a decision to lobby had been made prior to commissioning the study. If the EIA was initially prepared for a non-lobbying purpose, no reporting is required. Thus, in the circumstances you describe, costs associated with preparing the EIA would have to be reported - if at all - by the permit applicant and not by ERS.

"b) If the client requests my presence as a resource person during meetings that may influence the decisions reached on either permits or policies, is this lobbying? If so, do I report only the time spent in these meetings that the client paid for? Or does this ipso facto convert the EIA into a lobbyist (sic) document making all those expenditures lobbying expenses? Should our client be the one reporting these items rather than ERS?"

Again, lobbying occurs only if you directly communicate with an official in the executive branch for the purpose of influencing administrative action. You are subject to regulation under the Act if, as a resource person, you are compensated or reimbursed more than \$300 to communicate with an official in an effort to influence administrative action as defined in section 2(1). The fact that you are invited to participate in the meeting is immaterial.

The \$300 threshold is calculated pursuant to rule 22 (1979 AC R4.422) which provides:

"Rule 22. For the purpose of determining whether a person receives compensation or reimbursement for actual expenses, or both, in a combined amount in excess of [\$300.00] in any 12-month period for lobbying, the following compensation and reimbursement shall be combined:

(a) Reimbursement for expenditures made on behalf of a public official for the purpose of influencing legislative or administrative action.

(b) Reimbursement for expenditures, other than travel expenses, made to influence legislative or administrative action.

(c) Compensation received for that portion of time devoted to lobbying.

If it is determined that you meet the threshold amount, section 8 of the Act (MCL 4.418) requires you to file disclosure statements on January 31 and August 31 of each year. Copies of section 8 and a disclosure statement are enclosed for your convenience.

In general, a lobbyist agent must report any expenditures he or she makes in the following categories: 1) expenditures for food and beverage provided to public officials; 2) advertising and mass mailing expenses directly related to lobbying; and 3) all other expenditures for lobbying. A lobbyist agent is not required to report the amount of compensation or reimbursement received for lobbying. That amount is reported by the lobbyist (the permit applicant, if in fact lobbying occurs) as an expenditure for lobbying.

Issues relating to the EIA are addressed in the response to your first question. As stated previously, the permit applicant may be required to report the amount paid to ERS for preparing the document if certain conditions are met. However, your presence at a meeting does not, in and of itself, convert the EIA into a "lobbyist document."

"c) Suppose the client does not request our presence in meetings but the agency staff does because they want to know what we think about a permit or policy question. Is this lobbying? If so, do we have responsibility to report the contact, or do the state employees who asked for our opinions? A related question is whether service on an advisory board with state officials constitutes lobbying if the person so serving is paid a salary, per diem, or travel to serve on the board by a third party employer?"

The lobby act regulates direct communications which are intended to influence public officials. "Influencing" is defined in section 5(3) of the Act as "promoting, supporting, affecting, modifying, opposing or delaying by any means, including the providing of or use of information, statistics, studies, or analysis."

The Act makes no distinction between communications which are freely initiated and those initiated by executive branch officials. If you are paid to communicate with an agency staff member who is a public official and your purpose is to influence the official's administrative action, you are engaged in reportable lobbying activity.

You should be aware, however, that according to section 5(2), set out fully on the first page, "lobbying" does not include the providing of technical information by a person who is not a lobbyist agent or an employee of a lobbyist agent when appearing before an officially convened executive department hearing panel. This exception may exclude some of your communications with officials in the executive branch from the Act's reporting requirements.

If lobbying occurs, any compensation or reimbursement you receive for the activity must be reported by ERS, if ERS is a lobbyist, or included in determining whether ERS has reached the \$1,150 or \$300 lobbyist threshold. A public official who asks for your opinion has no reporting obligations under the Act.

The responsibilities of an employer whose employee serves on an advisory board were discussed in an interpretive statement issued to Conrad L. Mallett, Jr., and Brian P. Henry, dated April 6, 1984. As explained more fully in the

enclosed statement, members of an advisory board are not considered public officials and, in general, are not engaged in lobbying when carrying out their duties on the board.

"II. ERS is approached by a state agency which wants a controversial topic studied. ERS staff conduct the study for a fee including data, analysis, and expert opinion. The use of the study is controlled by state officials who decide if or how to modify public policy by choosing a course of action that may refer to our studies. Is this lobbying? If so, who should report it?--ERS or the agency that paid for the work?"

In a declaratory ruling issued to Julia D. Darlow on August 27, 1984, the Department considered the Act's impact upon an advertising company hired to develop and administer an advertising campaign supervised by the Department of Commerce. A copy of this ruling is enclosed for your use. The Department expressed its view that an independent contractor functions in a manner similar to that of a state employee, i.e., the contractor communicates with public officials not by choice but to fulfill its obligations under an existing contract. Therefore, a contractor who communicates with public officials in the course of carrying out the terms of a contract is not engaged in regulated lobbying activity.

It appears the Darlow analysis may be applicable to the situation you describe. However, further information is needed to provide a more definite response.

"III. The Natural Resources Commission is considering a question of policy. Although ERS has been paid in the past for work by persons or companies who are vitally concerned with the (impact of) the policy in question on their business, no company asks, retains, or pays ERS staff to go and appear to solicit changes in the policy. Even so, ERS staff believe strongly that they have scientifically competent opinion to offer to the discussion and request an opportunity to speak to the NRC which is granted. ERS staff are paid an annual salary from ERS regardless of what projects they work on. The unsolicited testimony is offered and ERS pays its people their normal salary. Is this lobbying? Is this lobbying if the staff member involved takes a leave of absence (no pay) to appear and makes the appropriate disclaimer at the start of the presentation that he or she is only representing personal views?"

Pursuant to section 5(9) of the Act, members of the Natural Resources Commission are public officials who can be lobbied under the statute. However, the Act applies only to paid communications with public officials. As such, regulated lobbying does not occur if an ERS staff person takes a leave of absence and does not receive any compensation or reimbursement for communicating with the Commission.

Other issues raised by your hypothetical are similar to those addressed in the enclosed interpretive statements to Joseph P. Bianco, Jr., dated February 3,

1984, and Rossi Ray Taylor, dated July 13, 1984. As stated in the letter to Mr. Taylor:

"An employer does not engage in direct, express and intentional communications which are specifically intended to influence a public official's actions simply by paying employees for time which the employees may spend lobbying on behalf of independent associations or organizations. Reportable lobbying occurs only if the employer directs or controls the employee's lobbying activity. Whether the employer exercises direction or control depends upon a variety of factors. For example, paying the employee's membership dues for an organization suggests the employer may have some control over the employee's communication for lobbying."

Although you do not suggest that the ERS employees in your hypothetical are lobbying on behalf of an independent group, the direction and control test described in Taylor appears to be applicable to ERS and its employees. Therefore, in order to answer your questions, communications between salaried ERS employees and the Natural Resources Commission must be examined on a case by case basis to determine whether the communication was directed or controlled by the company. In addition, as stated in the letter to Mr. Bianco, the extent to which the communication affects ERS' interests must be considered to determine whether reportable lobbying occurs.

"IV. ERS staff in the course of their work build up unique and valuable expertise in an area of controversy or changing policy (e.g. wetland or sand dune ecology). ERS staff sense an unidentified need for studies and research that will benefit agency staff in their roles of regulation development, enforcement and development of policies, and issuance of permits. Is the act of submitting an unsolicited proposal a form of lobbying? Does it become lobbying if the proposal is accepted? Is it lobbying if the state agency pays a fee for the work?"

This hypothetical is, again, too general to provide a specific response. You may wish to review the principles discussed above to determine whether, in these circumstances, the activities of ERS' staff are within the purview of the Act.

Certain points are worthy of emphasis, however. As stated previously, the Act regulates communications with public officials for the purpose of influencing legislative or administrative action. Thus, submitting an unsolicited proposal to a public official with the intent to influence his or her action is a form of lobbying.

It is immaterial whether the public official is persuaded to act in accordance with the lobbyist or lobbyist agent's wishes. The Act focuses upon the intent of the communicator and not upon the effectiveness of the communication. Therefore, a proposal which is given to a public official with the requisite intent is lobbying whether or not the proposal is accepted.

A proposal submitted pursuant to the terms of a contract for which a fee is paid may be excluded from the Act's regulation. Issues relating to communications with public officials in the course of performing a contract are discussed in the response to your second hypothetical.

Your remaining questions arise out of the general relationship between ERS staff members and "policy setting or permit granting staff of state agencies," many of whom are friends or former colleagues. A summary of the salient points made above may assist you in determining the Act's applicability to communications between ERS employees and agency staff members in these circumstances.

First, a communication is subject to the Act only if it is directed towards a public official. According to section 5(9) and the enclosed list, the only public officials in the Department of Natural Resources are the Department director, assistant director and the executive assistant to the Natural Resources Commission. Members of the Natural Resources Commission, the Air Pollution Control Commission and the Water Resources Commission are also considered public officials for purposes of the Act.

Second, the communication must be for the purpose of influencing administrative or legislative action as defined in sections 2(1) and 5(1) of the Act. Administrative action does not include quasi-judicial determinations; most, if not all, permit processes are quasi-judicial in nature and thus are not subject to the Act's requirements. In addition, the provision of technical information by an expert who is not a lobbyist agent when appearing before an officially convened legislative committee or executive department hearing panel is excluded from the definition of "lobbying."

Third, an employee's communications with public officials are reportable only if the employee is compensated or reimbursed by either a third party or ERS. A communication by a salaried employee which is not directed or controlled by ERS is generally not attributable to the company, but it may be if the communication affects ERS' interests.

Fourth, the Act does not differentiate between communications initiated by public officials and those initiated by private individuals. Similarly, no distinction is made between effective and ineffective communications. Any paid communication with a public official which is intended to influence legislative or administrative action is subject to the Act's regulation.

Fifth, both a lobbyist and lobbyist agent are required to report expenditures in the following categories: 1) expenditures for food and beverage provided to public officials; 2) advertising and mass mailing expenses directly related to lobbying; and 3) all other expenditures for lobbying. Compensation or reimbursement paid to a lobbyist agent is reported by the lobbyist as an expenditure for lobbying and not by the lobbyist agent.

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Finally, it should be noted that unlike the other categories, there is no purpose test attached to food and beverage expenditures. If a lobbyist or lobbyist agent provides food and beverage to a public official for a non-lobbying purpose, the expenditure must be reported pursuant to section 8(2) of the Act.

This response is informational only and does not constitute a declaratory ruling. If you have further questions regarding the Act's reporting requirements, please contact the Department's Elections Division, Fourth Floor, Mutual Building, 208 N. Capitol, Lansing, Michigan 48918, (517) 373-2540.

Very truly yours,



Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/AC/cw

Enc.