

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN

SECRETARY OF STATE

STATE TREASURY BUILDING



LANSING

MICHIGAN 48918

November 9, 1989

John D. Pirich
 Timothy Sawyer Knowlton
 Honigman Miller Schwartz and Cohn
 1400 Michigan National Tower
 Lansing, Michigan 48933

Dear Messrs. Pirich and Knowlton:

This is in response to your request for an interpretive statement under the lobby act (the "Act"), 1978 PA 472, as amended. You indicate that you provide legal services to several clients who at times become involved in pending legislation or rules which may involve complex technological principles and applications. Your clients occasionally arrange tours for public officials to view structures, factories, equipment or areas which are directly pertinent to pending legislation or rules. The purpose of these tours is to enable public officials to acquire technical information useful to them in the discharge of their public duties.

These tours are often scheduled in out-of-state locations because a particular technology may be used in only one or two facilities nationwide. Your clients wish to provide air transportation to public officials to go on these tours. It is your opinion that providing transportation to public officials does not necessarily constitute a gift within the meaning of section 4 of the Act (MCL 4.414) if there is no intent to give a gift and if the provision of transportation is strictly controlled. You ask whether providing transportation to public officials to enable them to attend fact finding tours is an illegal gift under the Act.

"Gift" is defined in section 4 of the Act as "a payment, advance, forbearance, or the rendering or deposit of money, services, or anything of value, the value of which exceeds \$25.00 in any one-month period, unless consideration of equal or greater value is received therefor." (Effective January 1, 1989, the value must exceed \$33.00 to be deemed a "gift".) The actual cost of air transportation to attend a fact finding tour will undoubtedly exceed \$33.00. However, other provisions of the Act must be considered to determine whether providing transportation in order to give a public official technical information required to discharge the public official's duties is a "gift" and therefore prohibited under the Act.

The Act specifically contemplates that information may be given to public officials as a means of influencing legislative or executive action. Lobbying is defined in section 5(2) of the Act (MCL 4.415(2)) to include "communicating directly with a public official . . . for the purpose of influencing legislative or executive action." Pursuant to section 5(3), "influencing" includes "the providing or use of information, statistics, studies, or analysis." Rule 1(1)(d)(iv) of the administrative rules promulgated to implement the Act, 1981 AACS R4.411 et seq., further states:

"Rule 1.(1) As used in the act or these rules:

* * *

(d) 'Expenditures related to the performance of lobbying' and 'expenditures 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."

In an interpretive statement issued to former Speaker of the House Gary M. Owen, dated February 7, 1984, the Department indicated that providing information in the form of research and technical material with a value exceeding \$25.00 to a public official for use in assessing proposed legislation is an expenditure for lobbying and not a gift. However, your inquiry goes beyond the propriety of giving tangible technical material to a public official and concerns an intangible -- transportation-- which enables the official to acquire information needed to fulfill his or her duties.

Rule 1(1)(d)(iv) is not limited to providing tangible material. The rule expressly pertains to expenditures for "providing or using information." While information may be reduced to a tangible written form, the information itself is intangible. When an expenditure is made to transport a public official to a facility which incorporates advanced technology so as to provide that official with information and influence his or her decision on a pending legislative or administrative matter, that expenditure is for the purpose of "providing . . . information . . . in communicating directly with an official" and is permissible under the Act if certain other conditions are met.

To be deemed an "expenditure for lobbying," Rule 1(1)(d)(iv) further requires that the expenditure "would not have been incurred but for the activity of communicating directly" with a public official. The "but for" language of the rule ensures that expenditures made for transportation are truly for the purpose

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of providing information to be used in an attempt to influence legislative or administrative action, rather than an effort to disguise an illegal gift. If the expenditure for transportation would have been incurred in any event, and if the value of this transportation exceeded \$33.00, the transportation would be within the meaning of sections 4(1) and 11(2) of the Act. If, on the other hand, the transportation expense would not have been incurred but for the desire to communicate directly with the public official about a pending legislative or administrative matter after that official had acquired the information provided through the tour, the transportation costs may properly be considered "expenditures for lobbying."

The Department has emphasized the underlying legislative intent of the Act in rendering past interpretive statements. For instance, the interpretive statement issued to Mr. Owen states at page 3:

"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." (emphasis in original)

In Pletz v Secretary of State, 125 Mich App 335 (1983) plaintiffs contended the "but for" language in Rule 4.411(1)(d)(iv) was beyond the scope of the Secretary of State's rulemaking authority. Plaintiffs argued that the Act does not apply to the expenditures of lobbyists incurred in preparing information or studies that are subsequently communicated to a public official. In responding to this argument, the Michigan Court of Appeals adopted the following statement which appeared in the brief supporting the authority of the Secretary of State to adopt this rule:

"To eliminate the 'but for' rule, 1(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 of 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."

The provision of information is a major tool of the art of lobbying. The Act was intended to require lobbyists to disclose information about expenditures they make for lobbying, including expenditures related to providing information to public officials. There is nothing which suggests the Act was intended to preclude lobbyists from providing pertinent information to officials in the

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legislative or executive branches. The public is best served when public officials possess as much information as possible upon which to base their judgments. It may be that the best or, indeed, only means of providing information to public officials may require transporting those officials to a particular location to observe facilities incorporating advanced technology.

It therefore appears that the Act does not prohibit a lobbyist or lobbyist agent from furnishing transportation to a public official in connection with an informative tour if the surrounding circumstances indicate there is no intention to circumvent the Act and give an illegal gift. Transportation costs would appear to be an "expenditure for lobbying," rather than a gift, only when the following criteria are met. First, there must be actual operations at the tour site which demonstrate unusual advanced technologies. Second, when there are several sites where the advanced technologies can be observed, the tour site must be the location closest to Lansing. Third, the tours must be planned so that arrival and departure schedules permit no free periods for personal or recreational activities. Fourth, the tour sponsor, rather than the public official, must select the means and times of transportation. Fifth, in accord with Rule 1(1)(d)(iv), the transportation costs would not have been incurred but for the activity of communicating directly with the public official. That is, the real purpose of the transportation costs must be to provide public officials with information in connection with direct communication and not as a subterfuge to give a gift.

Your letter indicates that your clients contemplate using both private and commercial aircraft to provide transportation in connection with informational tours. In the case of private craft, you state that your clients would control both arrival and departure times, and the period between arrival and departure would be limited so that there would be no time for personal recreational activities to occur while on the trip. In the case of a commercial aircraft, a representative of your clients would handle all of the tickets of the public officials involved with the tour to ensure that such an official could not substitute a return ticket for a later flight and engage in personal activities in the vicinity of the tour. When used, commercial flights would be selected with the idea of ensuring that public officials would not have time to engage in personal recreational activities in the vicinity of the tour site. Assuming that there is, in fact, real informational value in the tour, that the tour site is the closest location to Lansing where the operations sought can be seen, and that the tour is not merely a ruse to give public officials a pleasure trip, providing transportation as set forth in this paragraph would be a legitimate "expenditure for lobbying" and not a prohibited "gift."

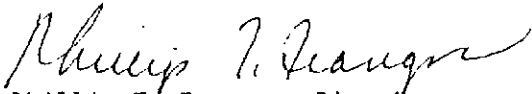
In conclusion, it must be emphasized that not every instance in which transportation is provided to a public official may be deemed a lawful "expenditure for lobbying" rather than an illegal "gift." If the strict criteria

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set forth in this letter are satisfied, however, paying for transportation to provide information to public officials constitutes an "expenditure for lobbying" rather than a "gift" and is permissible under the Act.

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

Very truly yours,



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