STATE OF MICHIGAN
JOCELYN BENSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

August 8, 2024

Robert LaBrant
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Dear Mr. LaBrant:

The Department of State (Department) acknowledges receipt of your letter dated May 14, 2024, in which you sought a declaratory ruling or interpretive statement under the Michigan Lobby Registration Act (Lobby Act or Act), 1978 PA 472, MCL 4.411, *et seq.*

In accordance with publication and public comment period requirements, the Department posted your request on its website and informed email subscribers of the deadline to file written comments. MCL 169.215(2). The Department received three public comments during the initial public comment period. On May 17, 2024, the Department received an initial comment from you, which was revised via a second submission on May 22, 2024. In your comments, you reiterated the arguments of your request, drawing parallels between the Lobby Act and the Michigan Campaign Finance Act (the MCFA). Within your comments, you frame the transaction presented as a contract, asking whether the parties can agree to enter into a contract to receive items valued over the gift limit. You also call for enforcement actions by the Department to ensure the ruling issued by this request is enforced.

The Department also received a comment from Honigman LLP on May 29, 2024. The Honigman LLP comment urged the Department to reject the statutory interpretation proposed by your request, and argued it contradicts both statute and current practice as shown through the plain language of the Act. Referring to the definition of a "gift" under the Act, the comment stated the "text contemplates: (1) that an exchange of consideration may occur, and (2) the payment of consideration may reduce the value of the putative gift below the monetary threshold." Honigman LLP at 2. The comment then noted prior Departmental rulings on the value of a gift did not contemplate reimbursement by a public official and are therefore distinguished from the question currently before the Department.

The Department issued its preliminary response on July 26, 2024, and posted it for public comment in accordance with requirements in the Lobby Act and the Administrative Procedures Act (APA), 1969 PA 306, MCL 24.201 *et seq*. The Department also notified email subscribers of the preliminary response and the deadline to file public comments. The Department received two public comments within 5 business days after the preliminary response was made available to the

public. MCL 4.429. Your public comment, received July 22, 2024, largely echoes the positions put forth in your original request and subsequent initial comments.

The Department received an additional public comment from Lasky Fifarek, P.C. in a letter dated July 25, 2024. Writing on behalf of an unnamed client, the Lasky Fifarek comment questioned the timing of the ruling in relation to the fall sports season, highlighting concerns regarding upcoming events where tickets have already been allocated, though not yet used. The comment also questions the Department's reliance on the fair market value of a gift, rather than the face value, specifically noting the challenge inherent in price fluctuations which can be found on the open market.

The Act and Administrative Procedures Act (APA), 1969 PA 306, MCL 24.201 *et seq*., require the Department to issue a declaratory ruling if an interested person submits a written request that presents a question of law and a reasonably complete statement of facts. MCL 4.429, 24.263. If the Department declines to issue a declaratory ruling, it must instead offer an interpretive statement "providing an informational response to the question presented[.]" MCL 4.429(1). An "interested person" is specifically defined as a "lobbyist, lobbyist agent, or other person upon whom a requested declaratory ruling is legally binding and whose course of action is directly affected by the ruling." R. 4.411(1)(f). As you are no longer a registered lobbyist and have provided no information detailing how a ruling from the Department will directly affect you, you do not meet the definition of an "interested party." Therefore, the Department is unable to grant your request for a declaratory ruling and instead offers the following interpretive statement in response to your request.

In your request, you ask whether "a lobbyist or lobbyist agent, or someone acting for the lobbyist or lobbyist agent, may provide to a public official, as public official is defined in the Michigan Lobby [Act], a gift of tickets … over $76.00, as long as the public official reimburses the lobbyist or lobbyist agent for the value of the 'gift' over $76.00." You argue that such reimbursement is in violation of the Act and should be disallowed.

In support of your position, you draw heavily from previous guidance issued relating to reimbursement under the MCFA. You state that as a "sister law to Michigan's Lobby Law," the MCFA practices regarding reimbursement should be applied similarly under the Lobby Act. Request at 2. Relying on a 2006 Attorney General opinion addressing the question of automatic payroll deductions for a political action committee, you argue the MCFA has been interpreted to disallow reimbursements of any sort. OAG, 2006, No. 7187. In addition, you argue that under the plain language of the statute, a gift cannot be a loan unless it is made in the ordinary course of business by a financial institution. Within your argument, you reference decisions made by the Michigan Court of Appeals and the Michigan Supreme Court when presented with the question of whether a reimbursement could negate contribution found unlawful under the MCFA. Both courts found "'nothing in the plain language of the MCFA that indicates reimbursement negates something that otherwise constitutes an expenditure.'" *Mich Ed Ass'n v Secretary of State*, 489 Mich 194, 217 (2011), quoting *Mich Ed Ass'n,* 280 Mich App 477, 486 (2008). Finally, you reference the Department's 2006 declaratory ruling in which the Department ruled lobbyist agents could not split the cost of a gift (in this case a round of golf) in order to keep the cost under the gift limit. *(Declaratory Ruling to LaBrant and Robison, 2006*).

As is customary, the Department starts with the plain language of the Act. In interpreting a statute, the goal is to '"ascertain and give effect to the intent of the Legislature."' *People v Gardner*, 482 Mich 41, 50 (2008), quoting *People v Pasha*, 466 Mich 378, 382 (2002). '"To do so, we begin with the language of the statute, ascertaining the intent that may reasonably be inferred from its language. When the language of a statute is unambiguous, the Legislature's intent is clear and judicial construction is neither necessary nor permitted."' *Odom v Wayne County*, 482 Mich 459, 467 (2008), quoting *Lash v Traverse City*, 479 Mich 180, 187 (2007). "The Legislature is presumed to have intended the meaning it plainly expressed." *Watson v Mich Bureau of State Lottery*, 224 Mich App 639, 645 (1997).

The Michigan Lobby Act defines a "gift" as a "payment, advance, forbearance, or the rendering or deposit of money, services, or anything of value, the value of which exceeds $25.00[1], as adjusted under section 19a, in any 1-month period, unless consideration of equal or greater value is received therefor." MCL 4.414(1). The Act subsequently defines what is not considered to be a gift, including a loan made in the normal course of business by the entities identified in statute. MCL 4.414(1)(b). A loan is further defined as "a transfer of money, property, or anything of ascertainable value in exchange for an obligation, conditional or not, to repay in whole or in part." MCL 4.414(3). If a business entity offers credit to a public official under the same terms as members of the general public, it is not considered to be a gift or loan. R 4.472.

It is indisputable that is it a violation of the Lobby Act for a lobbyist or lobbyist agent to provide a gift to a public official which exceeds the value of the current statutory limit. The question presented to the Department then becomes whether the value of the gift may be offset by a payment from the public official. To fully answer this question, the Department must address three scenarios. The first is whether a lobbyist or lobbyist agent may gift a public official tickets[2] worth more than $76.00[3] with the understanding that the public official will reimburse them at a later date for the differential cost of the tickets exceeding $76.00. The second question is whether such a gift is allowable if the public official pays the differential cost of the tickets exceeding $76.00 at or before the time the gift is accepted. Finally, the third question the Department must consider is whether an offering of tickets is allowed under the Lobby Act if the public official reimburses the lobbyist or lobbyist agent for the full price of the tickets prior to taking possession of the gift.

To answer the first question, the Department considers the initial scenario presented by this request. As described, the gift of tickets is provided with the understanding that the government official shall reimburse the lobbyist for any cost exceeding $76.00 at a later date. This promise of

[1] As required by law, the Department adjusts the gift threshold each year according to the Detroit Consumer Price Index. MCL 4.429a(2). For 2024, the Department has determined that the applicable gift threshold is $76.00.

[2] While the Department refers to ticket(s) within this ruling, the considerations and tests within shall be applied to any gift under the Act.

[3] The Department does not address gifts which fall within the definition of a gift under MCL 4.414(1) as adjusted pursuant to MCL 4.429a(2).

future payment falls within the definition of a loan as described in Section 4(3), offering an item of ascertainable value in exchange for an obligation to repay the difference. In a 1984 declaratory ruling, the Department considered whether it was permissible for Chrysler Corporation to offer short term vehicle loans to public officials. Using the plain language of the Act, the Department found there is "no 'ordinary course of business' exception for lobbyists or lobbyists agents who are not in the business of lending money to creditworthy applicants." (*Declaratory Ruling to T.E. Metevier, 1984*). This offering of tickets is not a loan offered in in the normal course of business by a banking institution as defined in the Act, and as found in *Metevier*, the Act does not provide an ordinary course of business exemption for lobbyists and or their agents. Such an exchange must be categorized as a loan under the Act and is therefore impermissible. MCL 4.421(2).

The Department must next consider whether a gift is allowable if a public official pays the difference between the cost of the tickets and the gift limit at or before the time the tickets are received. This contemporaneous exchange eliminates the future consideration necessary for a loan, and so the Department's analysis must instead consider the definition of a gift and prior rulings. As defined in the Act a gift is a "payment, advance, forbearance, or the rendering or deposit of money, services, or anything of value, the *value of which* exceeds $25.00, as adjusted under section 19a, in any 1-month period, unless consideration of equal or greater value is received therefor." MCL 4.414(1) (emphasis added). The Act, and previous Departmental interpretation, contemplates the total *value of the gift* offered, not each party's individual share. While previous Departmental analyses have addressed the question of allocation exclusively from the lobbyist perspective (*Interpretive Statement to Holcomb-Merill, 1992; Declaratory Ruling to LaBrant and Robison, 2006*), the same considerations apply when the proposed allocation is spread across a lobbyist and public official. Allowing the cost of a gift to be allocated across multiple parties, be they lobbyists or public officials, cannot circumvent the gift ban and in doing so would frustrate the purposes of the Lobby Act.

A plain language review of the Act supports this analysis. As written, the Act contemplates the *value of* the item being gifted to the public official and provides no analysis or method for changing the value of the item. A reimbursement as contemplated for the value exceeding $76.00 does not in itself reduce the *value of the gift* but rather changes the value conferred onto the public official. Had the Legislature intended for the value of a gift to be changeable, a method for doing so would be included in the language of the Act.

Finally, the Department must consider whether a public official may accept tickets worth over $76.00 from a lobbyist or lobbyist agent if the public official pays the full cost of the tickets before taking ownership of the tickets, and whether the opportunity value of having access to the tickets must be considered. Once again, the Department turns to the plain language of the Act. Within the definition, the Act provides a gift shall be considered a gift: "*unless consideration of equal or greater value is received therefor*" (emphasis added). MCL 4.414(1). Once such a payment is received, the transaction becomes a purchase and is no longer controlled by the Act. In determining whether consideration of equal or greater value has been received, the Department has previously found value shall be determined by the value of the proposed gift on the open market, rather than by the face value of the item. *Interpretive Statement to Mickelson,1984; Interpretive Statement to Hallan, 1984.* Only if the lobbyist receives compensation equal to or greater than the fair market value of the item shall the gift become a

purchase. While the opportunity value of having access to purchase an item has not been explicitly addressed by the Department's prior interpretations of the Act, the potential opportunity value has been effectively addressed by the previous analyses stating the value of a gift is determined by the fair market value of the item at the time the gift is given, and the price fluctuations that accompany a fair market value analysis, not by its face value.

When considering fair market value, it is important to note that in addition to serving as the Department standard for analysis of gifts under the Act for 40 years, the MCFA, which is also enforced by the Department, specifies that in-kind contributions and expenditures must be reported at fair market value. MCL 169.226(1)(b). Utilizing the same valuation across the Lobby Act and the MCFA ensures consistency in both application and enforcement. The fair market value standard also ensures fairness amongst those subject to the Act. A lobbyist or lobbyist agent representing a client responsible for setting the face value of an item must not be given an advantage over a lobbyist required to purchase the potential gift on the fair market. In addition, while your request speaks specifically to tickets, the Department's fair market value analysis can be applied to all gifts, including those without a specific face value.

In summary, in response to your question of whether a "lobbyist or lobbyist agent, or someone acting for the lobbyist or lobbyist agent, may provide to a public official, as public official is defined in the Michigan Lobby [Act], a gift of ticket(s) … over $76.00, as long as the public official reimburses the lobbyist or lobbyist agent for the value of the 'gift' over $76.00," the Department concludes such an exchange is prohibited under the Lobby Act.

The foregoing constitutes an interpretive statement with respect to the questions presented in your May 14, 2024, letter.

Sincerely,

s/ Christina Hildreth Anderson

Christina Hildreth Anderson
Chief of Staff