



STATE ETHICS COMMISSION

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FORMAL ADVISORY OPINION – EDITED FOR PUBLICATION

April 24, 2009

RE: Executive Action and Executive Lobbying
Interpretation of G.S. 120C-100(a)(3) and 120C-100(a)(9)
AO-L-09-005

Dear Requester:

This formal advisory opinion addresses the application of Chapter 120C of the North Carolina General Statutes (“G.S.”), the Lobbying Law, to the services you described and was adopted by the State Ethics Commission (“the Commission”) at its April 24, 2009, meeting.¹

I. Brief Conclusion.

When contacts with public servants or their immediate family members involve attempts to promote, oppose, or otherwise influence the outcome of an executive agency decision and the attorney is being paid for his or her services, the attorney making such contacts is a lobbyist and is lobbying for executive action. Based on the facts presented, which are summarized below, the Commission determined that some of the services that you described qualify as lobbying for executive action. Therefore, you are required to register and report as a lobbyist with the Secretary of State’s Office for each client on whose behalf you perform those services. In addition, each of the clients on whose behalf you are lobbying is required to register and report as a lobbyist principal with the Secretary of State’s Office. The Lobbying Law also establishes certain restrictions and prohibitions on lobbyists and lobbyist principals, including a gift ban.

II. The Facts.

You are a practicing attorney. You represent various clients. You provide a variety of services to your clients and you are paid for those services. They include representing clients in court proceedings or hearings. You also provide other services to your clients, including contacting,

¹ Please see the enclosure entitled “Formal Advisory Opinions Issued by the State Ethics Commission” for further information regarding the protections offered to individuals receiving those opinions.

scheduling meetings, and meeting with state officials and state employees, many of whom are “public servants,” referred to as “designated individuals” under the Lobbying Law.

In your letter, you describe certain contacts with state officials and state employees made on behalf of your clients. These include inquiries about a penalty or to assert a claim. These contacts may also be for the purpose of introducing your client to the individual in charge of a state project or who is responsible for the award of a state contract, in order to facilitate a discussion between your client and the decision maker regarding your client’s product. You indicate that you may also contact those individuals regarding the status of an award once the bids are submitted or concerning the potential renewal of a contract, although you do not provide further details regarding those contacts.

III. Applicable Statutory Provisions.

A. Definition of a Contract Lobbyist.

G.S. 120C-100(a)(10) defines a contract lobbyist as an individual who engages in lobbying and:

(b) Represents another person or governmental unit, but is not directly employed by that person or governmental unit, and receives payment for services....

or

(c) Contracts for economic consideration for the purpose of lobbying.

G.S. 120C-100(a)(11k) defines “payment for services” as any money, thing of value, or economic benefit paid to a lobbyist for the purpose of lobbying. Reimbursement for actual travel, administrative expenses, and subsistence is not “payment for services.” G.S. 120C-100(a)(11k).

G.S. 120C-100(a)(9) defines “lobbying” to include two types of lobbying: “direct lobbying” and “goodwill lobbying.” “Direct lobbying” is “influencing or attempting to influence legislative or executive action, or both, through direct communications or activities with a designated individual or that individual’s immediate family.” G.S. 120C-100(a)(9)a. “Goodwill lobbying” is “developing goodwill through communications or activities, including the building of relationships with a designated individual or that individual’s immediate family members with the intention of influencing current or future legislative or executive action, or both.” G.S. 120C-100(a)(9)b. “Designated individuals” include legislators, legislative employees and public servants. G.S. 120C-100(a)(2). “Public servants” include most elected and appointed state officials and a broad range of state employees, some of whom have decision making authority regarding policies, guidelines, procedures, regulations, rules, and requests for proposals.² G.S. 138A-3(30).

B. Definition of Executive Action.

G.S. 120C-100(a)(3) defines “executive action” as:

² A list of “public servants” is on the Commission’s website, www.ethicscommission.nc.gov.

The preparation, research, drafting, development, consideration, modification, amendment, adoption, approval, tabling, postponement, defeat, or rejection of a policy, guideline, request for proposal, procedure, regulation, or rule by a public servant purporting to act in an official capacity.

Ministerial functions, public or written comments made in connection with an open meeting, and certain internal administrative functions are excluded from this definition. The following are also specifically excluded from the definition and not deemed “executive action:”

- a. Present, prior, or possible proceedings of a contested case hearing under Chapter 150B of the General Statutes, of a judicial nature, or of a quasi-judicial nature.
- b. A public servant’s communication with a person or another person on that person’s behalf with respect to any of the following:
 1. Applying for a permit, license, determination of eligibility, or certification.
 2. Making an inquiry about or asserting a benefit, claim, right, obligation, duty, entitlement, payment, or penalty.
 3. Making an inquiry about or responding to a request for a proposal made under Chapter 143 of the General Statutes.
 4. Ratemaking.

G.S. 120C-100(a)(3).

IV. Discussion.

A. Executive Branch Lobbying.

Applying the law to the facts you have presented, some of the activities or communications you have described are excluded from the definition of executive action, but others qualify as executive action. For example when you contact a public servant on behalf of a client solely to inquire about a penalty or assert a claim for a right or entitlement, such activities are excluded from the definition of executive action. G.S. 120C-100(a)(3)(b)2. Therefore, such contacts are not considered “lobbying” under G.S. Chapter 120C. Also, when you contact a public servant to simply inquire about or respond to a request for proposal, or to determine the status of a contract renewal, you are not seeking executive action, and therefore you are not engaged in executive branch “lobbying.” G.S. 120C-100(a)(3)b.3.

However, in those circumstances where you contact or meet with a public servant who is in charge of a state project or responsible for awarding a state contract in order to introduce your client and discuss your client’s product in relation to the project or contract, you are attempting to influence executive action. Such activities constitute direct executive branch lobbying. Also, if a

client currently has a contract with the state that is up for renewal or to be re-bid, and you contact a public servant and attempt to influence that award, you are lobbying for executive action.³

B. Registration and Reporting Requirements.

A lawyer must register and report as a lobbyist if he or she is providing paid services for a client that qualify as lobbying for executive or legislative action. G.S. 120C-200 and G.S. 120C-402. The client on whose behalf the lawyer is lobbying is the lobbyist principal and must register and report with the Secretary of State's Office as a lobbyist principal. G.S. 120C-206 and G.S.120C-403.

³ G.S. 120C-100(a)(3)a., which excludes certain administrative, judicial and quasi-judicial proceedings from the definition of executive action, is inapplicable to the type of circumstances and activities described in this paragraph.

Formal Advisory Opinions of the State Ethics Commission
Issued Pursuant to the Lobbying Law

Upon the written request of any person, State agency, or governmental unit affected by G.S. Chapter 120C (“the Lobbying Law”), G.S. 120C-102 (a1) authorizes the State Ethics Commission (“Commission”) to issue formal advisory opinions “on the meaning and application” of the Lobbying Law and “that person’s, State agency’s or any other governmental unit’s compliance therewith.” All opinions have prospective application only, are limited to the particular facts presented, and confer limited civil immunity upon a requester who follows the advice given. G.S. 120C-102(a) and (a1).

Once issued by the Commission, formal advisory opinions are published in a redacted format on the Commission’s website within 30 days of issuance. G.S. 120C-102(c). Requests for advisory opinions, the opinions themselves, and all materials related to the opinions are confidential and are not public records. G.S. 120C-102(d). However, the Commission is required to send an unedited copy of each formal advisory opinion to the Secretary of State’s Office at the time the formal advisory opinion is issued to the requester, and the Secretary of State is required to treat the formal advisory opinion as confidential and not a matter of public record. G.S. 120C-102(d1). In addition, Commission staff is specifically authorized to share all information and documents related to requests for formal advisory opinions with the Secretary of State’s Office. The Secretary of State’s Office is required to treat any such information and documents in its possession as confidential and not a matter of public record. G.S. 102(d1).