



## STATE ETHICS COMMISSION

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### FORMAL ADVISORY OPINION – EDITED FOR PUBLICATION

November 28, 2007<sup>1</sup>

Re: Educational Meeting and Public Event Gift Ban Exemptions  
AO-L-07-0003

Dear Requester:

You requested a formal advisory opinion giving you guidance on determining and developing criteria for an “educational dinner” that you were coordinating for a designated group of legislators and a particular company (“company”). You also presented issues and questions as to who could pay for this dinner for these legislators based on the new Lobbying Law, Chapter 120C, and the new State Government Ethics Act, Chapter 138A. The State Ethics Commission (“Commission”) has authorized its staff to issue formal written advisory opinions (“formal advisory opinions”) pursuant to G.S. 120C-102 and G.S. 138A-13 upon the receipt of a proper request.

G.S. 120C-102 applies to written requests for a formal advisory opinion from certain individuals, including lobbyists and lobbyist principals. G.S. 120C-102 requires the request for a formal advisory opinion to be in writing and relate to real or reasonably anticipated fact settings and circumstances. All opinions are based on the particular facts presented and only have prospective application. G.S. 120C-102(a). Once issued, a formal advisory opinion confers limited civil immunity upon the requester if the advice given is followed. Good faith reliance by the requester on the Commission’s issued formal advisory opinion immunizes the requester from (1) investigation by the Commission regarding the specific facts and circumstances addressed in the Commission’s formal advisory opinion and (2) any adverse action by a legislator, legislative employee, or public servant’s employing entity regarding the same. In addition, good faith reliance by the requester upon a formal advisory opinion issued by the Commission on or after August 9, 2007, also grants civil immunity to

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<sup>1</sup> Note: This formal advisory opinion was initially issued on February 8, 2007; approved by the Commission on February 22, 2007, subject to modification as directed by the Commission; revised on October 29, 2007, to incorporate (1) a brief discussion of the Commission’s “educational meeting” criteria and (2) recent amendments to relevant parts of the Ethics Act and Lobbying Law; approved as revised on November 9, 2007, subject to slight modification; and revised and reissued on November 28, 2007.

the requester from investigation by the Secretary of State's Office.<sup>2</sup> Prior to August 9, 2007, the immunity granted by the Commission's formal advisory opinions did not include investigations or enforcement by the Secretary of State's Office. The Commission's formal advisory opinions do not confer immunity from any other investigative or enforcement agency; nor do they include immunity from criminal investigation or prosecution. Requests for advisory opinions, the opinions themselves and all materials related thereto are confidential and not a matter of public record, although the Commission is required to publish redacted copies of its formal advisory opinions annually. G.S. 120C-102(d).

The Commission adopted my initial formal advisory opinion. However, because you had asked for guidance on how to determine what was an educational meeting under G.S. 138A-32(e)(3)(i), the Commission suggested that I incorporate into the advisory opinion a brief discussion regarding the Commission's adoption of some non-exclusive factors that will be considered when determining what is an "educational meeting" under G.S. 138A-32(e)(3)(i). The initial formal advisory opinion was revised on October 29, 2007, to include such discussion and to include applicable amendments made to Chapter 138A and Chapter 120C pursuant to House Bill 1111 (Session Law 2007-348). On November 9, 2007, the Commission adopted the revised formal advisory opinion subject to a specific and approved second revision to include a reference to the need to identify sponsoring "interested persons" as described in G.S. 138A-32(d). Your formal advisory opinion was so revised on November 28, 2007. This second revised formal advisory opinion supersedes all prior formal or informal opinions on this matter.

In your letter you stated that you were interested in coordinating an "educational" dinner for a designated group of legislators in the Senate and the House and the company. You then asked the Commission to develop criteria for you to follow for this "meeting." This part of your letter was not a request for an advisory opinion. You, not the Commission or its staff, must determine how you wish to plan, organize and conduct your meetings.

In the remaining sections of your letter you presented issues and questions that appear to be related to an event that you stated you were "hoping to host." In your letter you did not state specifically whether the company is a lobbyist principal or whether you are a lobbyist authorized to represent the company. In addition, you did not state who was going to pay for this dinner event or for each of the legislator's dinners.

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<sup>2</sup> House Bill 1111 (Session Law 2007-348) was signed into law on August 9, 2007. Section 10 of HB 1111 amended subsection (a) of G.S. 120C-102 and broadened the immunity granted to the requester by a written advisory opinion issued by the Commission on or after August 9, 2007, to include investigations by the Secretary of State. Section 10 of HB 1111 also amended subsection (d) of G.S. 120C-102. Pursuant to the amended subsection (d), as of August 9, 2007, and forward, the Commission is *required* to provide the Secretary of State with an unedited copy of each written advisory opinion it issues pursuant to G.S. 120C-102(a) at the time such advisory opinion is issued to the requester. The staff of the Office of the Secretary of State is required to treat the information as confidential and it is not a public record. Subsection (d) was also amended to allow the Commission to share all information related to a request made for a formal written advisory opinion pursuant to G.S. 120C-102(a) with the staff of the Office of the Secretary of State. If the Commission shares such information with the staff of the Office of the Secretary of State, such staff is required to treat the information as confidential, and it is not a public record. Section 10 of HB 1111 went into effect on August 9, 2007.

For the purposes of this advisory opinion, I assumed that the company was a lobbyist principal and that you were a lobbyist authorized to represent the company. In addition, I assumed that the company, the lobbyist principal, was the “person” that was planning on paying for this dinner event and for each legislator’s dinner. Based on these above assumptions, this gift of food and beverage at this “legislative” dinner event was prohibited under G.S. 120C-303(a) and 138A-32(c), unless it met an exemption to the gift ban pursuant to G.S. 138A-32(e).

In your letter you initially referred to this dinner event as an “educational” dinner for a designated group of legislators. There is a gift ban exemption under G.S. 138A-32(e)(3)(i) for certain “reasonable actual expenditures,” including food and beverage expenditures, of a legislator incurred at an “educational” meeting if certain requirements are met. The statute does not define “educational,” and at the time I issued my formal advisory opinion it was unclear how the Commission would define “educational meeting.” However, the Commission did address this issue and adopted some non-exclusive factors to be used as criteria for determining what is an “educational meeting” under G.S. 138A-32(e)(3)(i) (“Criteria”).<sup>3</sup>

Even with the Commission establishing these Criteria as the general guidelines for determining what is an educational meeting under the gift ban exemption of G.S. 138A-32(e)(3)(i), whether a particular meeting, conference or event will be deemed to be an educational meeting will depend on the specific facts. Your letter did not provide sufficient details about the legislative dinner to enable me to address all the questions presented in the Criteria adopted by the Commission to determine if it would have qualified under the G.S. 138A-32(e)(3)(i) gift ban exemption. For example, I would need to know the identity of the speaker(s) and the general nature of each speaker’s presentation, as well as the overall agenda for the entire dinner meeting.

An exemption to the gift ban that may have allowed the company’s gift of food and beverages is G.S. 138A-32(e)(1). G.S. 138A-32(e)(1) pertains to food and beverages for immediate consumption provided at a “public event.” Public event is defined in G.S. 138A-3(29).<sup>4</sup> Prior to the passage of House Bill 1111 (Session Law 2007-348) on August 9, 2007, the definition of “public event” had two separate subsections, one for legislators and legislative employees, and another for public servants. Each of these subsections stated requirements that had to be met, including who must be invited to the organized gathering, to qualify as a public event for each of these types of covered

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<sup>3</sup> Attached to this formal advisory opinion is a copy of these non-exclusive factors titled “Criteria for Determining an ‘Educational Meeting’ under G.S. 138A-32(e)(3)(i).” For your information and reference, the Commission has applied these Criteria in a formal advisory opinion issued in response to another requester. *See* AO-L-07-0012.

<sup>4</sup> Section 24 of HB 1111 amended the definition of “public event” under G.S. 138A-3(29) and eliminated the two separate subsections, one for legislators and legislative employees, and another for public servants. Pursuant to Section 24 of HB 1111, there are now five definitions of “public event” under G.S. 138A-3(29), and if the sponsoring person and their/its event meet all of the requirements of any one of these five definitions, the event is a public event for legislators, legislative employees, and public servants.

individuals. G.S. 138A-3(29)a.2 had a two-pronged test.<sup>5</sup> The first prong is that the “person” (person is broadly defined under G.S. 138A-3(27) and includes business entities and associations) sponsoring the event must invite either the entire membership of the House of Representatives or of the Senate, or the entire membership of one of the statutorily listed legislative subgroups, which includes legislative committees or standing subcommittees.

The committee or standing subcommittee referenced in G.S. 138A-3(29)a.2 must be an existing and recognized committee or standing subcommittee established during the 2007 Session of the North Carolina General Assembly (“GA”) pursuant to the rules of the Senate or House. Recognized standing committees and subcommittees of the 2007 GA are those established in accordance with Senate Rule 32 and House Rule 26 of the 2007 GA, and by resolution of the Senate or House. When the GA adjourns the 2008 Regular Session *sine die*, these committees will no longer exist.

The Commission’s staff has determined that invitations under the Ethics Act and the Lobbying Law must be in writing (e-mails are included as a written invitation), be sent out at least ten (10) days in advance of the event, state the date, time and location of the event, identify the event, and list the names of the sponsors of the event. Based on the content required in the invitation, the sponsoring lobbyist principals, lobbyists, and “interested persons”<sup>6</sup> must be identified and known prior to the event occurring.

After meeting this first prong, a second prong must also be met. This second prong of G.S. 138A-3(29)a.2<sup>7</sup> can be met in three ways, depending on who/what is determined to be the “person” holding the organized gathering. The three ways are as follows:

- (I) at least 10 individuals associated with the person actually attend the organized gathering, other than the legislator or their immediate family;
- (II) all shareholders, employees, board members, officers, members or subscribers of the person located in North Carolina are notified and invited to attend the organized gathering; or
- (III) the person is a governmental body and the organized gathering is subject to the open meetings

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<sup>5</sup> The definition of “public event”, as amended by section 24 of HB 1111, resulted in G.S. 138A-3(29)a.2 being renumbered as G.S. 138A-3(29)b. The two-pronged test contained in G.S. 138A-3(29)a.2 remains under 138A-3(29)b.

<sup>6</sup> “Interested person” is a non-statutory term used by Commission staff to describe those persons set out in G.S. 138A-32(d), as amended by sections 36 and 37 of HB 1111, and as expanded by the definition of “person” in G.S. 138A-3(27), as amended by section 23 of HB 1111. An “interested person” is a person who (1) is doing or seeking to do business of any kind with the employing entity of the public servant who is being offered or given the gift; (2) is engaged in activities that are regulated or controlled by the employing entity of the public servant being offered or given the gift; **or** (3) has financial interests that may be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of the official duties of the public servant who is offered or given the gift. A public servant can only accept a gift, directly or indirectly, from an “interested person” if the gift meets a gift ban exemption listed in G.S. 138-32(e).

<sup>7</sup> G.S. 138A-3(29)a.2 is now G.S. 138A-3(29)b.

law.

Your letter stated that you planned to “invite a designated group of legislators, who were members of a specific Senate or House committee” to this dinner. At the time I issued my formal advisory opinion, the specific standing committees you referenced in your letter had been established by rule in both the Senate and the House. However, at that time no legislators had been formally appointed as members to any of the Senate or House standing committees. Once members were appointed to the Senate and House standing committees referenced in your letter, the company’s invitation to its dinner event to the entire membership of this particular standing committee of either the Senate or House would have resulted in the company’s dinner event meeting one of the initial requirements of G.S. 138A-3(29)a.2. In addition to meeting an initial requirement stated in G.S. 138A-3(29)a .2, the company also had to meet either subsection (I) or subsection (II) of G.S. 138A-3(29)a.2<sup>8</sup> for the gift ban exemption for food and beverages for immediate consumption at a public event to apply to legislators.

Your letter did not state specifically who the company was planning on inviting in addition to the designated group of legislators; however, you did ask several questions that seem to be based on the requirements stated in subsections (I) and (II) of G.S. 138A-3(29)a.2. Specifically, in your letter you asked whether an employee of the person, in this case the company, would be deemed to be associated with the person. Yes, an employee of the company would be an individual associated with the company for the purposes of meeting the requirement of the gift ban exemption under G.S. 138A-3(29)a.2.I.<sup>9</sup>

You also asked whether members of advocacy groups would qualify as “individuals associated with the person.” Whether an individual is “associated with the person” will often be determined by the Commission on a case-by-case basis depending on the facts of the connection with the person to which the gift ban applies. Again, your letter did not contain the necessary details for the Commission to make a determination as to whether members of an unnamed and unidentified advocacy group would be deemed to be “individuals associated with the company.” Accordingly, the Commission could not determine whether the attendance of at least 10 members of an advocacy group at the company’s legislative dinner would meet the subsection (I) requirements.

Your final question appeared to be asking if the company invited all of its employees located in North Carolina to this legislative dinner, would this satisfy the requirement of the gift ban exemption under G.S. 138A-3(29)a.2.II.<sup>10</sup> Assuming that the company had invited all of the appointed members of the referenced Senate or House standing committee, thus meeting the first prong of G.S. 138A-3(29)a.2, then if the company formally notified and invited (as specified above in this formal advisory opinion) all of its employees located in North Carolina to this legislative dinner, the company’s proposed legislative dinner would have met the G.S. 138A-3(29)a.2.II gift ban exemption and the company could have provided food and beverages for immediate consumption to the invited legislators.

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<sup>8</sup> The Company was not a governmental body; therefore, subsection III of G.S. 138A-3(29)a.2, now renumbered as G.S. 138A-3(29)b.3, was not applicable.

<sup>9</sup> G.S. 138A-3(29)a.2.I is now renumbered as G.S. 138A-3(29)b.1.

<sup>10</sup> G.S. 138A-3(29)a.2.II is now renumbered as G.S. 138A-3(29)b.2.

In the future, please provide the Commission with the actual or reasonably anticipated details of your planned event, such as who is actually being invited, rather than giving hypothetical invitees. G.S. 120C-102 requires such and your providing these details will assist the Commission in answering your questions in a more direct and thorough manner while expediting the Commission's response time. In addition, the limited civil immunity granted by the Commission from investigation by the Commission is exclusively tied to the specific facts and circumstance addressed and answered by the Commission in the formal advisory opinion. Therefore, any questions or issues raised that the Commission could not address, including those that lacked sufficient detail, are not covered by this formal advisory opinion.

## Educational Meeting Exception

### **Criteria for Determining an “Educational Meeting” Under §138A-32(e)(3)(i)**

While there is an exception to the gifts ban for expenditures associated with “educational meetings,” the statute does not define that key term. So the Commission and its staff are left with the task of determining **what is “an educational meeting”?**

Without a statutory definition, and until the Commission attempts to define “educational meeting” through formal or informal rulemaking, our best option is to apply various non-exclusive factors or criteria to the specific situations with which we are presented. Determining what is or is not an “educational meeting” involves applying these non-exclusive factors or criteria on a fact-specific, case-by-case basis. To aid that fact-specific determination, the Commission has adopted the following criteria. Again, the list is non-exclusive, and the Commission may modify it as necessary in the future.

**Remember that an “educational meeting” must be for purposes primarily related to the public duties and responsibilities of the public servant, legislator, or legislative employee.**

In applying these factors, the focus of the Commission will be on the intent of the donor and the recipient’s knowledge of that intent. The determination as to whether a meeting is “educational” will vary according to the facts and circumstances of each meeting.

I. Is the educational content of the meeting related to a specific public duty or responsibility of the public servant, legislator, or legislative employee?

If so, what specific duty or responsibility?

- for legislators and legislative employees, this will be interpreted very broadly;
- for public servants, less so because of the scope of their public duties.

If the content of the meeting is not primarily related to a specific duty or responsibility of a public servant, legislator, or legislative employee, then it does not qualify as an education meeting under this section.

II. Is the primary purpose of the meeting educational?

A. If the meeting’s *primary* purpose is to *influence* a public servant, legislator, or legislative employee with respect to executive or legislative action (rather than educate them on a legitimate subject), the meeting is not “educational.” A meeting primarily intended to promote learning for self-improvement relative to the public duties of a person is “educational,” not a meeting intended to curry favor concretely.

Meetings intended to influence rather than educate may include meetings that are directly related to an upcoming official vote, recommendation, or other action that the public servant, legislator, or legislative employee may take, such as the discussion of a legislative or executive agenda or specific concerns with respect to a matter that would require legislative or executive action to remedy.

In determining the purpose of the meeting, the Commission will consider whether the entity holding the meeting:

- has legislation pending before the General Assembly or intends to request legislative action;
- is seeking, or seeding to impact, North Carolina legislative or executive action at the time of the meeting;
- can be impacted by the actions or decisions of the public servant, legislator, or legislative employee; or
- if the facts demonstrate that the entity’s purpose in holding the meeting is to advocate on behalf of legislative or executive action.

B. What is the nature of the entity holding the meeting?

- Is the entity a State agency or governmental entity?
  - Is the entity an educational institution?
  - Is the entity an organization that routinely sponsors meetings with educational content?
  - Is the entity holding the meeting a Lobbyist Principal?
- C. Is the Lobbyist Principal paying for the meeting also sponsoring the meeting?
- Is the source of the funding (gift) the same as the source of the education (as opposed to a Lobbyist Principal paying to send a public servant, legislator, or legislative employee to *another* entity's meeting)?
- D. What is the complete agenda of the meeting?
- What proportion of the individual events scheduled at the meeting have a speaker, roundtable discussion, or other educational content that is directly related to the public duties of the public servant, legislator, or legislative employee?
  - What proportion of those sessions is held in the absence of a meal or entertainment?
  - What proportion of the meeting agenda includes meals or entertainment with formal educational content?
  - Does the agenda cover a wide range of topics or have a very limited, industry-specific focus?
  - Would the meeting take place regardless of whether the invited public servant, legislator, or legislative employee attends?
  - Who are the speakers?
  - Are they associated with the Lobbyist Principal or its Lobbyist?
  - Are they outside experts in their field?
- E. Is the location of the meeting directly related to the meeting's educational content?
- Is there a reason for holding the meeting in a location other than where the attendees live or work?
  - Is it necessary to the meeting's educational purpose that an individual travel in connection with the meeting?
  - Is the meeting sponsored by a state, national, or international organization for the benefit of its state, national, or international membership?
  - Is the location of the meeting otherwise integral to the educational content of the meeting?
  - Would an individual be capable of obtaining a comparable degree of educational information through other means that would not require travel?
- F. Is the length of the educational meeting reasonably necessary to fulfilling the educational purpose of the trip?
- G. What degree of personal benefit does the individual gain from attendance at the meeting?
- Does the personal benefit outweigh the public benefit gained by the educational value of the meeting?
- H. Are there *other factors* that would support the conclusion that the meeting is educational?