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FORMAL ADVISORY OPINION – EDITED FOR PUBLICATION

July 12, 2007

Re: Gift to a Non-Covered Spouse of a Public Servant; “Indirect” Gifts; Reporting Requirements.
G.S. 138A-32 (c) & (d); 120C-100(a)(12), -400, -402, -403
AO-L-07-0007

Dear Requester:

You requested a formal advisory opinion on whether a North Carolina lobbyist principal could pay travel and meal expenses for a public servant’s spouse that were associated with a speaking engagement at a conference sponsored by the lobbyist principal. Previously, I issued an opinion stating that the public servant’s spouse may accept travel and meals in conjunction with the speaking engagement, but that the lobbyist principal would have to report the value of those gifts to the Secretary of State’s office. At its meeting on July 10, 2007, the State Ethics Commission (“the Commission”) approved this opinion with a modification as to the reporting requirement. The Commission agreed that the spouse may accept travel and meals in conjunction with the speaking engagement, but determined that the Lobbying Law did *not* require that it be reported. Therefore, the advice given in this final advisory opinion is slightly different from that provided earlier.

The Commission has authorized its staff to issue written advisory opinions pursuant to G.S. 120C-102 and G.S. 138A-13 upon the receipt of a proper request. All opinions are based on the particular facts presented. Once issued, formal advisory opinions confer limited civil immunity upon the requester if the advice given is followed. Reliance upon a requested formal advisory opinion on a specific matter immunizes the requester from investigations by the Commission. Opinions do not confer immunity from the Secretary of State’s office or from any 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 opinions annually. G.S. 120C-102(d).

In your letter and in our telephone conversation you provided the following facts. Your organization has hired a lobbyist and is therefore a lobbyist principal pursuant to Chapter 120C, the Lobbying Law. The organization is hosting a conference. You have invited a public servant’s spouse to be a speaker at this conference. As a result, the organization would like to pay or reimburse the public servant’s spouse for travel expenses (possibly including airfare) and meals in conjunction with this speaking engagement. The organization will not provide the spouse with any honorarium or other monetary payment. You have asked whether this is permissible under the new ethics and lobbying laws, and if so whether it must be reported.

Under these facts, you may provide, and the public servant's spouse may accept, travel and meals in conjunction with the speaking engagement. As stated above, the organization is a lobbyist principal. G.S. 120C-100(a)(11). As a general rule, lobbyist principals may not give, either directly or indirectly, gifts to "designated individuals," unless an exception applies. G.S. 120C-303(a). Designated individuals include "public servants." G.S. 120C-100(a)(2). Public servants include a broad group of public officials. G.S. 138A-3(30)a. On the other hand, public servants cannot accept gifts from lobbyist principals unless an exception applies. G.S. 138A-32(c).

Even though several exceptions to the general gift ban may apply in this situation, we do not need to discuss them as the public servant's spouse is not a covered public servant under the ethics or lobbying laws, and neither law directly extends the general gift ban to spouses. However, the gift ban does apply to *indirect* as well as direct gifts. Thus, the organization and the public servant must be mindful of any gifts to the public servant's spouse that a reasonable person would attribute to the public servant. That is not the case here. Reimbursement of the spouse's travel expenses and meals involved here cannot reasonably be construed to benefit the public servant. The greater risk in that regard would likely be tangible items of significant monetary value or gifts that would benefit the public servant, either solely or along with the his or her spouse.

The much more difficult question has to do with whether this "gift" to the public servant's spouse needs to be reported. I initially concluded that it did. However, after further consideration and research, staff determined, and the Commission agreed, that independent gifts such as these not for the purpose of lobbying, including "goodwill lobbying," did *not* need to be reported to the Secretary of State's office pursuant to the Lobbying Law.

As stated, the organization is a lobbyist principal and therefore subject to all applicable provisions of the Lobbying Law, including the obligation to report all "reportable expenditures made for the purpose of lobbying." G.S. 120C-400 and Article 4 as a whole. A "reportable expenditure" includes

Any advance, contribution, conveyance, deposit, distribution, payment, gift, retainer, fee, salary, honorarium, reimbursement, loan, pledge, or thing of value greater than ten dollars (\$10.00) per designated individual per single calendar day.

G.S. 120C-100(a)(12). Note that the definition of reportable expenditure encompasses much more than just "gifts" and does *not* say that these things have to be "for the purpose of lobbying." More significantly for present purposes, it also includes any of these "things of value" that are given, directly or indirectly, to the designated individual "or that individual's immediate family member." So under normal circumstances, reportable expenditures include gifts to immediate family members.

Section 120C-403 sets out the reporting requirements for lobbyist principals, and includes

- (1) All reportable expenditures made for the purpose of lobbying [and]

* * * * *

- (5) All reportable expenditures for gifts given under G.S. 138A-32(e)(1)-(9) and all gifts given under G.S. 138A-32(e)(10) with a value of more than two hundred dollars (\$200.00).

G.S. 120C-403(b)(1) & (5).¹ Thus, lobbyist principals must report the vast array of “reportable expenditures” listed in §120C-100(a)(12) *if* they are “made for the purpose of lobbying,” and comprehensive reporting in this situation makes perfect sense – virtually anything given for the purpose of lobbying should be reported. On the other hand, only one part of the spectrum of reportable expenditures must be reported under G.S. 120C-403(b)(5): *gifts* given under the 138A-32(e) exceptions.

“Gifts given under” the G.S. 138A-32(e) exceptions are, by definition, gifts given *to* certain delineated people (public servants, legislators, and legislative employees) *by* certain delineated people (lobbyists, lobbyist principals, or “interested persons”²). Thus, the gifts provisions of G.S. 138A-32(c), (d), & (e) do not apply to the giving of gifts to spouses or other family members, unless an indirect gift to the designated individual is implicated. *See* discussion above.

In this case, any gifts to the public servant’s spouse are in his/her own right, and he/she is not a covered person under the Ethics Law. As stated above, reimbursement of the travel expenses and meals involved here cannot reasonably be construed to benefit the covered public servant. Nor would a reasonable person conclude that the gift was for the purpose of lobbying. Consequently, the organization does *not* need to report these items to the Secretary of State’s office pursuant to G.S. 120C-403.³

In conclusion, the organization may provide, and the public servant’s spouse may accept, travel and meals in conjunction with the speaking engagement, and the organization does not have to report the value of these gifts to the Secretary of State’s office.

¹ This is almost identical to the reporting obligations of lobbyists as set forth in G.S. 120C-402, with the exception of the \$200 reporting threshold for G.S. 138A-32(e)(10) gifts given by lobbyist principals.

² G.S. 138A-32(d) prohibits public servants from accepting gifts from persons whom the public servant knows or has reason to know (1) are doing or seeking to do business with the public servant’s employing entity; (2) are engaged in activities that are regulated or controlled by the public servant’s employing entity; or (3) have financial interests that may be substantially and materially affected by performance of the public servant’s official duties. Commission staff calls these people “interested persons,” but that is not a statutory term.

³ It should be noted that this is a very fact-specific determination. It involves a non-covered person receiving gifts that are not for the purpose of lobbying (including “goodwill lobbying”) and which cannot be deemed an indirect gift to the covered person spouse.