



STATE ETHICS COMMISSION

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FORMAL ADVISORY OPINION – EDITED FOR PUBLICATION

November 14, 2008

RE: Reporting Requirements of G.S. 120C-402 and 120C-403(b)(3)
AO-L-08-004

Dear Requester:

You sent the State Ethics Commission (“Commission”) e-mails in which you requested a formal advisory opinion concerning the Commission’s interpretation of North Carolina General Statutes (“G.S.”) 120C-403(b)(3). You asked specific questions regarding what obligations G.S. 120C-403(b)(3) placed upon a lobbyist principal and a lobbyist, and what obligations G.S. 120C-402 placed upon a lobbyist pertaining to their estimation of the portion of their salary, fee or retainer that is reasonably allocated to payment for lobbying services. This is the formal advisory opinion you requested.

I. Formal Advisory Opinions of the State Ethics Commission.

G.S. 120C-102 establishes the requirements for the Commission’s issuance of formal advisory opinions to certain individuals, including lobbyists and lobbyist principals. G.S. 120C-102 requires that a request for a formal advisory opinion be in writing and “relate to real or reasonably anticipated fact settings and circumstances.” All opinions are based on the particular facts presented and have prospective application only.

Once issued, a formal advisory opinion confers limited civil immunity upon the requester if the Commission’s advice is followed. Good faith reliance by the requester on the Commission’s formal advisory opinion immunizes the requester from (1) investigation by the Commission regarding the specific facts and circumstances addressed in the opinion and (2) any adverse action by a legislator, legislative employee, or public servant’s employing entity. In addition, good faith reliance by the requester on a formal advisory opinion grants civil immunity to the requester from investigation by the Secretary of State’s Office regarding the specific facts and circumstances addressed in the opinion. The Commission’s formal advisory opinions do not confer immunity from any other investigative or enforcement agency or immunize the requester 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 an edited copy of formal advisory opinions within 30 days of issuance. G.S. 120C-102(c) and (d).

The Commission is authorized to share all information related to formal advisory opinion requests pertaining to G.S. Chapter 120C with staff of the Office of the Secretary of State, which must treat such information as confidential and not a public record. The Commission must forward an unedited copy of each formal advisory opinion issued under G.S. 120C-102 to the Secretary of State at the time the opinion is issued. Those unedited opinions are confidential and not a public record. G.S. 120C-102(d1).

II. G.S. 120C-403(b)(3) and Estimates of Payments Attributable to Lobbying.

A. Facts

You represent a number of lobbyist principals. Those principals are obligated to file a quarterly report of any “payment for services” made to each lobbyist. With respect to payments made to individuals who engage in non-lobbying activities, those principals are required by G.S. 120C-403(b)(3) to allocate the amount of payments attributable to lobbying activities. You seek guidance as to the circumstances under which a lobbyist principal may rely upon a lobbyist’s estimated allocation and what supporting documentation, if any, must be provided or maintained with respect to that allocation.

B. Relevant Statutory Provisions

Lobbyist principals are persons “on whose behalf a lobbyist lobbies.” G.S. 120C-100(a)(11). An employee of a lobbyist principal may be assigned other duties in addition to his or her lobbying responsibilities. In addition, a contract lobbyist may be retained to perform a variety of services in addition to lobbying services.

Article 4 of G.S. Chapter 120C imposes certain reporting responsibilities on lobbyists and lobbyist principals. G.S. 120C-403 specifies the content of the lobbyist principal’s report. G.S. 120C-403(b)(3), as revised by Session Law 2008-213, requires a lobbyist principal to report payments made for lobbying services during that quarter as follows:

If a lobbyist is a full-time employee of the principal, or is paid by means of an annual fee or retainer, the principal shall estimate and report the portion of the salary, fee or retainer that is reasonably allocated for the purpose of lobbying. A lobbyist principal may rely upon a statement by the lobbyist estimating the portion of the salary, fee, or retainer that is reasonably allocated for the purpose of lobbying.

C. Circumstances Where Lobbyist Principals May Rely Upon Lobbyist Estimate.

In those circumstances in which a lobbyist is (1) a full-time employee, or (2) a contract lobbyist paid by fee or retainer that also performs non-lobbying services, G.S. 120C-403(b)(3) requires that the lobbyist principal report the actual payments attributable to lobbying activities, or an estimate of the portion of the salary, fee, or retainer paid to each of its lobbyists, that is reasonably allocated for the purpose of lobbying.

Session Law 2008-213 revised G.S. 120C-403(b)(3) to clarify that a principal may rely upon a statement by its lobbyist estimating the portion of the salary, fee, or retainer that “is reasonably allocated as payment for lobbying services.” This revision is retroactive to January 1, 2007, and applies to reports filed on or after that date. Accordingly, if the lobbyist principal paid the lobbyist for providing lobbying and non-lobbying services, the principal may rely upon the lobbyist’s estimate of the portion that is “reasonably allocated” to lobbying services. That provision does not require that a lobbyist principal report the entire amount of the lobbyist’s salary, annual fee, or retainer unless it is attributable to lobbying duties and responsibilities.

Although the recent change to G.S. 120C-403(b)(3) is subject to differing interpretations, it is clear that the lobbyist’s estimate need not be an exact calculation or determination. Moreover, there are a variety of circumstances that would support a conclusion that an estimate would be “reasonably allocated.” But, as long as the estimate appears reasonable on its face, the lobbyist principal does not have to investigate the lobbyist’s statement.

One method for ensuring that an estimate is reasonably allocated would be to ensure that it: (1) specifies the portion of the lobbyist’s salary, fee, or retainer that is estimated to be in payment for lobbying services (*e.g.* “25%,” not “under 40%” or “10-30%”); (2) includes payment for all lobbying services the lobbyist provided to the principal during that quarter, including direct and “goodwill” lobbying for legislative action, executive action, or both; and (3) appears to be made in good faith and consistent with the known facts and circumstances underlying the employment terms or compensation agreement between the principal and the lobbyist. However, if the lobbyist principal has a reasonable basis to question the lobbyist’s allocation, the principal should not rely upon the lobbyist’s statement for estimating the portion of the lobbyist’s salary for reporting purposes under G.S. 120C.

There are civil sanctions for failing to properly report. Therefore, the estimate of the portion of the lobbyist’s payment that is allocated for the purpose of lobbying should be verifiable in some manner in the event the allocation is questioned. See G.S. § 120C-602(b). One way to estimate the reportable portion or amount of a lobbyist’s payment that is reasonably allocated to lobbying services is to multiply the lobbyist’s entire salary, fee, retainer, or payments by the percentage of time the lobbyist spent on lobbying, including all duties and responsibilities related to lobbying.

D. Specific Questions

What follows are responses to specific questions to which the foregoing analysis is applied:

- 1. Does G.S. 120C-403, as revised by Session Law 2008-213, require a lobbyist principal to obtain and retain detailed underlying invoices of billing records from its registered lobbyists in order to estimate the portion of the lobbyist’s salary, fee, or retainer that is reasonably allocated for the purpose of lobbying?**

No. However, the estimate of the portion of the lobbyist’s payment that is allocated for the purpose of lobbying should be verifiable in some manner in the event the allocation is questioned.

- 2. Do G.S. 120C-402 and 120C-403 require the production of attorney billing records to substantiate a percentage estimate or dollar estimate of the portion of**

the lobbyist's salary, fee, or retainer that is reasonably allocated for the purpose of lobbying?

No. Billing records that specifically refer to time or charges attributable to lobbying activities would be one of several reliable methods of verifying the reasonableness of an allocation, but production of those billing records is not the only means of verification.

- 3. If no written records are required or available, may a lobbyist principal rely upon an oral representation or statement from its lobbyist stating the portion of his or her salary, fee, or retainer allocated for the purpose of lobbying is a reasonable allocation?**

Yes, if the underlying facts make the reliance upon an oral representation or statement reasonable. G.S. 120C-403 does not state that the lobbyist's estimation must be in writing in order for the lobbyist principal to rely upon it. For example, in the event that a lobbyist principal is following its customary and usual business practice in accepting oral billing statements in lieu of written documentation, an oral estimate could be a "reasonable allocation."

- 4. Does G.S. 120C-403 require a lobbyist to maintain and keep detailed underlying invoices or billing records of time in order to estimate the portion of the lobbyist's salary, fee, or retainer that is reasonably allocated for the purpose of lobbying?**

No. However, the lobbyist should be prepared to substantiate that the estimate is a reasonable allocation.

- 5. In response to a request by a state agency, does G.S. Chapter 120C require a lobbyist or lobbyist principal to provide access to or provide copies of all documents, correspondence, notes, records, invoices, billing records of time, internal memorandum, or work product to the state agency?**

G.S. Chapter 120C does not address how a lobbyist or lobbyist principal should respond to a state agency's request for access to or copies of documentation.