State of Minnesota

Campaign Finance and Public Disclosure Board

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THE FOLLOWING PUBLICATION DOES NOT IDENTIFY THE REQUESTER OF THE ADVISORY OPINION, WHICH IS NON PUBLIC DATA under Minn. Stat. § 10A.02, subd. 12(b)

RE: Lobbyist Registration and Reporting

ADVISORY OPINION 457

SUMMARY

Attorneys who represent clients by communicating with public or local officials are engaged in lobbying if that communication is intended to influence the official action of a political subdivision. Whether an action is an official action of a political subdivision is dependent upon whether the action must be approved by one or more public or local officials. Routine administrative tasks that need not be approved by a specific official or body of officials is not an official action.

FACTS

This advisory opinion from the Campaign Finance and Public Disclosure Board is based on the following facts, which were provided to the Board in a written request.

1. Some members of an association are unsure if the new definition of "official action of a political subdivision" may require the members who have interacted with political subdivisions in a way traditionally considered the practice of law may now need to register and report as a lobbyist.

2. The association requests that the Board provide general guidance on how attorneys can ensure that they are in compliance with lobbyist registration and reporting requirements, and provide advice on specific situations provided in the advisory opinion request.

INTRODUCTION

The determination of whether communication with government employees or officials is lobbying, and whether registration and reporting as a lobbyist is required for that communication, is determined by a number of factors. Although the requestor expresses specific concern over the definition of "official action of a political subdivision" the scenarios provided in the request require the Board to consider all of the following factors when providing the opinions within this advisory opinion. The factors are

described in terms of how they relate to attempting to influence the official action of a political subdivision. Because the request concerns statutory language that will be amended effective January 1, 2024, all references to statutory text within this opinion concern the language that will be in effect on that date, unless otherwise noted.

Purpose of the communication – Lobbying occurs when the communication is for the purpose of attempting to influence the official action of a political subdivision. The communication may be directly with public or local officials, but also occurs indirectly by asking other individuals to contact public or local officials to request an official action.[1] Communication that is a request for information is, by itself, not an attempt to influence an official action, and is therefore not lobbying.[2] In responding to this request, the Board understands that the attorney's "representation" of a client involves some action to attempt to influence action by the political subdivision. In situations where that is not the case, for example where an attorney merely observes without communicating for or against an action, the attorney's actions do not fall within the definition of lobbyist.

Who are public and local officials – The definition of public official is specific, and includes county commissioners, members of a watershed management organization, and supervisors of a soil and water conservation district.[3] The list of local officials is less definitive.[4] Local officials include all individuals who hold an elective position in a political subdivision, and individuals who are appointed to or employed in a public position by a political subdivision in which the person has authority to make, to recommend, or to vote on as a member of the governing body, major decisions regarding the expenditure or investment of public money. The term "major decision" is not defined in Chapter 10A, and may be applied differently by the various political subdivisions. In the opinions below the Board provides that negligible expenditures of public funds are clearly not a "major decision," but the Board recognizes that providing greater clarity on what constitutes a major decision through administrative rule or statutory update would be beneficial to individuals who are trying to comply with lobbyist registration and reporting requirements.

Official action of a political subdivision – As noted by the requestor, the definition of "official action of a political subdivision" is new. The definition is provided in Minnesota Statutes section 10A.01, subdivision 26b:

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[1] Minn. Stat. § 10A.01, subd. 21, (a) 1 (i). *See also* Minn. R. 4511.0100, subp. 3. The Board intends to replace the term "metropolitan governmental unit" with the term "political subdivision" within its administrative rules in order to reflect changes to various statutes that will take effect on January 1, 2024.

[2] *See* Findings and Order in the Matter of the Complaint by Karl Bremer regarding The Conach Group and Mike Campbell (Aug. 16, 2011). The Board notes that in certain circumstances Minnesota Statutes section 10A.01, subdivision 21, provides that consulting or providing advice for a lobbying effort, or attempting to influence the official action of a political subdivision for more than 50 hours in any month while employed as a local official or employee of a political subdivision, may also make an individual a lobbyist, but those conditions do not apply to the scenarios provided in the opinion request.

[3] Minn. Stat. § 10A.01, subd. 35.

[4] Minn. Stat. § 10A.01, subd. 22.

> "Official action of a political subdivision" means any action that requires a vote or approval by one or more elected local officials while acting in their official capacity; or an action by an appointed or employed local official to make, to recommend, or to vote on as a member of the governing body, major decisions regarding the expenditure or investment of public money.

Although the definition is new, it reflects the preexisting definition of who is a local official. The definition can be read as having two parts. The first part of the definition applies only to elected local officials. Any matter before an elected public official that requires a vote of members of the governing body of the political subdivision, or any subcommittee of the governing body of the political subdivision, is an official action of the political subdivision. Further, any action that requires "the approval" of the elected local official is an official action of the political subdivision. In the Board's view, routine administrative tasks that are done through the office of a local elected official, and do not require the elected official to personally approve the action, are not official actions. An action that requires the elected public official to personally use their discretion to approve or not approve an action is an official action of the political subdivision.

The second part of the definition applies only to individuals who are local officials because they hold appointed positions or are employed in positions within political subdivisions with the authority to make major decisions regarding expenditures or investments of public money. An action by a non-elected local official that does not relate to a major expenditure or investment of public funds is not an official action of a political subdivision. Therefore, attempting to influence the action of a non-elected local official that does not require a major expenditure or investment of public funds is not lobbying of a political subdivision. The determination of whether a decision is a major decision regarding the expenditure or investment of public funds is fact-specific, and additional information could change the determination. For the purpose of this opinion, the Board finds that expenditures of public funds on infrastructure projects will qualify as a major decision on the expenditure of public funds.

Compensation – An individual who is not compensated for attempting to influence legislative action, administrative action, or the official action of a political subdivision is not required to register or report as a lobbyist unless the individual spends more than $3,000 of their own money in a calendar year in support of those attempts (not including the cost of travel expenses or membership dues related to that effort).

An individual who is compensated for attempting to influence legislative action, administrative action, or the official action of a political subdivision is required to register and report as a lobbyist only when the compensation exceeds $3,000 from all sources in a calendar year. It is important to note that registration and reporting as a lobbyist for a client may be required even if the compensation from that client is less than $3,000 if other compensation for lobbying in aggregate exceeds $3,000.

The scenarios provided in this advisory opinion do not indicate if an individual is being compensated for representing an individual or association, or what is the individual's

aggregate compensation for the year from lobbying. For all of the opinions provided in this request the Board assumes that the individual is being compensated for representing the individual or association, and that the lobbying compensation received from all sources within the calendar year exceeds $3,000.

An individual who is determining if they must register and report as a lobbyist must consider all of these factors, and not just the definition of official action of a political subdivision.

ISSUE

Do the following situations constitute lobbying?

1. Conveying proposed amendments to a comprehensive plan or zoning ordinance to city officials, even if the city requested comments from the local bar association.

   Opinion: The proposed amendments to a comprehensive plan or zoning ordinance are an attempt to influence an official action of elected officials of the city, and therefore conveying the amendments is lobbying. The fact that a city either generally or specifically requested comments on the plan or ordinances does not change the purpose of the proposed amendments provided in response to the request. Although the scenario does not indicate that the individual or local bar association was paid by the city to provide testimony on the plan or ordinances, the Board notes that the definition of lobbyist specifically excludes an individual who is "a paid expert witness whose testimony is requested by the body before which the witness is appearing, but only to the extent of preparing or delivering testimony".[5]

2. Conveying objections to an interim ordinance prohibiting some or all development of land for a one-year period, taking the position on behalf of a real estate developer that the moratorium was adopted to impede a single project.

   Opinion: The Board assumes that the objections of the real estate developer are an attempt to modify or repeal the ordinance, and that action on the ordinance will require a vote of elected local officials. Communicating the objections to the political subdivision on behalf of the real estate developer is lobbying of a political subdivision.

3. Contacting the county auditor on behalf of a property owner to request a single parcel identification number for adjoining parcels.

   Opinion: Counties have the option to make the position of county auditor either

[5] Minn. Stat. § 10A.01, subd. 21 (b) (8).

elected or appointed. For the purpose of this opinion the Board assumes that the county auditor was elected to their office. The Board also assumes that assigning a single parcel identification number for adjoining parcels is a discretionary decision for the county auditor, and not an administrative task which is automatically performed upon the completion of required forms and/or the payment of a fee. Requesting a discretionary action by the county auditor under those circumstances is lobbying. If the county auditor was appointed to their position, then the request would not be lobbying because the decision to assign a single identification number does not require a major expenditure of public funds.

4. Representing a real estate developer before a city or county planning commission, seeking approval of a subdivision plat.

   Opinion: For the purpose of this opinion the Board assumes that the planning commission has final authority to approve or reject the subdivision plat. The Board further assumes that approval of the subdivision plat will obligate the city or county to pay for public infrastructure costs in support of the subdivision, and therefore at some point the city or county will be required to make a major decision regarding an expenditure of public funds. If the membership of the planning commission includes elected officials, then the request for approval is lobbying because approval of the subdivision plat will require a vote by one or more elected officials. If the planning commission has the authority to make a decision regarding a major expenditure of public funds to support the subdivision, then the members of the commission are local officials, and the request for approval of the plat is lobbying. In a scenario where the planning commission membership does not include elected officials, and the commission does not have the authority to make a major decision regarding the expenditure of public funds on the subdivision, then the request for approval of the plat is not lobbying. In a scenario where the planning commission is requested to communicate with the city council or county board in support of the subdivision, the request is lobbying.

5. Representing a group of neighbors at a city planning commission meeting who object to the issuance of a short-term rental license.

   Opinion: For the purpose of this opinion, the Board assumes that issuing or revoking a short-term rental license will not require a major decision regarding the expenditure of public funds, and that the commission has the authority to issue or revoke the license. If the city planning commission includes elected local officials, then the representation is lobbying because elected local officials will vote on the issue. If none of the planning commission members are elected officials, then representing the group is not lobbying because approval or revoking the rental license does not

require a major decision on spending public funds. In a scenario where the planning commission is requested to communicate with the city council regarding the rental license, the request is lobbying.

6. Representing a real estate developer at a city council meeting seeking a variance in connection with a planned unit development.

   Opinion: Yes, representing the real estate developer is lobbying. The city council members are all elected local officials, and any vote on the variance is an official action of a political subdivision.

7. Representing a group of neighbors at a town board meeting who object to the grant of a conditional use permit for the operation of a gravel pit.

   Opinion: Town board members are elected officials of a political subdivision and are thereby local officials. Asking the town board to deny or revoke the conditional use permit is lobbying to influence an official action of a political subdivision.

8. Meeting with members of the city parking commission to discuss the construction of a new city parking ramp.

   Opinion: For the purposes of this opinion, the Board assumes that the city parking commission does not include elected officials and that the "meeting" with the commission does not involve urging the commission to advocate a position to the city council. Based on these assumptions, the attempt to influence parking commission members only falls within the definition of "lobbying" if construction of a new city parking ramp is a major decision regarding the expenditure of public funds. As stated earlier, in general the Board finds that public infrastructure projects, such as the parking ramp, will qualify as a major decision on the expenditure of public funds. Accordingly, if the "meeting with members of the city parking commission" is an attempt to influence the commission to act or not act on the construction of the new parking ramp, then the activity is lobbying.

9. Representing a group of local tennis players at a meeting of the parks and recreation commission, requesting that the city build new tennis courts.

   Opinion: Using the same assumptions as used in question 8, the determination as to whether construction of a new tennis courts is a "major decision regarding the expenditure of public funds" is fact-specific and additional information could change the determination. However, in general, the Board finds that expenditures of public funds on public infrastructure projects, such as park facilities, will qualify as a major decision regarding the expenditure of public funds. Accordingly, requesting that the city build

additional tennis courts is lobbying.

10. Representing a group of downtown business owners before the city heritage preservation commission, requesting that the commission recommend acquisition by the city of a downtown historic theatre.

    Opinion: Using the same assumptions about the authority of the members of the city heritage preservation commission to make expenditures or recommendations as described for the membership of the commission in question nine, the request for the commission to recommend that the city acquire the theater is lobbying.

11. Representing a local business at a meeting of the civil rights commission, to promote economic development in the form of economic assistance to LBTQIA+ businesses located in the city.

    Opinion: Using the same assumptions about the authority of members of the civil rights commission to make expenditures or recommendations as described for the membership of the commission in question nine, the request for economic assistance is lobbying.

12. Representing a real estate developer before a local zoning authority, seeking a rezoning to allow a residential group home.

    Opinion: Using the same assumptions about the members of the local zoning authority as described for the membership of the planning commission in question five, the request for rezoning to allow a residential group home is lobbying.

13. Negotiating a development contract with City or County planning staff on behalf of a real estate developer that requires the expenditure of public money on public infrastructure.

    Opinion: The Board assumes that expenditure of public funds needed for the infrastructure represents a major decision regarding the use of public funds. If the city or county planning staff are local officials, then the negotiations on the contract is lobbing. If the planning staff are not local officials, then the negotiations do not constitute lobbying. However, lobbying would occur if at the end of the negotiations the planning staff is urged to ask the city council or county board to approve the contract with the developer.

14. Meeting with the county planning director to review a proposed preliminary plat for development of multifamily housing that will receive a grant from HUD.

    Opinion: The Board assumes that the county planning director is a local official because the person in that position has authority to make or to recommend, major decisions regarding the expenditure of public money. The Board further

assumes that approval of the plat will require a major decision on spending public funds to provide infrastructure for the housing development. If the meeting is only for the purpose of collecting information on the specifics of the proposed preliminary plat, then the meeting is not lobbying. If the meeting is for the purpose of influencing the planning director on the content or approval of the preliminary plat, then the meeting is lobbying because the planning director is a local official and the decision to approve the plat will require a major decision regarding the use of public funds.

15. Speaking with the county surveyor about his objections to a proposed preliminary plat if a component of the project includes a business subsidy.

    Opinion: County surveyor is typically not an elected position, and for the purposes of this opinion, the Board assumes that the county surveyor is not elected. The Board further assumes that the business subsidy represents a major decision on the use of public funds. If the purpose of the meeting is only to gather information on the surveyor's objections to the proposed preliminary plat, then the meeting is not lobbying. If the purpose of the meeting is to change the surveyor's position on the preliminary plat, then the meeting is lobbying.

16. Participating in a meeting, on behalf of a real estate developer, with a county commissioner and other county officials to discuss a new development project that will require a zoning change.

    Opinion: All county commissioners are public officials. Regardless of the positions held by the other county officials, meeting with a public official regarding a decision that will require a vote of elected officials of a political subdivision is lobbying. The Board assumes that meeting with public officials "to discuss a new development project that will require a zoning change" will attempt to influence the approval of the needed zoning change, and is therefore lobbying.

17. Speaking on behalf of a group of neighborhood residents at a planning commission or city council meeting, objecting to a zoning change in their district.

    Opinion: The city council members are local officials. The Board assumes that at least some of the planning commission members are elected local officials, or that the commission members are being asked to encourage the city council to make or deny a requested zoning change. Therefore, in either case, appearing at a meeting to ask for or object to a change in zoning is lobbying.

18. Meeting with the city engineer to negotiate street improvements on behalf of local residents who object to their street assessment.

    Opinion: A city employee who has the authority to make major decisions regarding the expenditure of public funds falls within the definition of "local

official". Based on the description of the action requested, and the authority the city engineer apparently has to decide how much the city spends on street repairs, the Board assumes that the city engineer is a local official and that the decision on the street improvements is a major decision regarding the expenditure of public funds. Based on those assumptions, the meeting is lobbying.

19. Speaking at a town board meeting on behalf of an apple grower who objects to a petition for a cartway through his apple orchard.

    Opinion: Members of the town board are elected local officials. If an official action of the town board is needed to approve the requested cartway, then appearing at the town board meeting is lobbying.

20. Contacting the county surveyor to review and discuss the county surveyor's recommended changes to a proposed subdivision plat if the development agreement requires the county to expend any public money on infrastructure for the project.

    Opinion: If the meeting with the surveyor is solely for the purpose of gathering information on the surveyor's recommendations, then the discussion is not lobbying. If the surveyor is being asked to change the recommendations, and then urge the county board to accept the recommendations, then the discussion is lobbying. If the surveyor is being asked to change the recommendations and the surveyor is elected and is thereby a local official, then the discussion is lobbying.

21. Representing a group of parents of elementary school age children before the school board who object to the closure and razing of their neighborhood elementary school.

    Opinion: School districts are political subdivisions, and members of the school board are elected local officials. Asking the school board to reverse a decision regarding the closing of the school is lobbying.

22. Representing rural property owners who lack access to the internet at a town meeting, advocating for the installation of broadband throughout the township.

    Opinion: Members of the town board are elected local officials. The Board assumes that it will take an official action of the town board to install broadband, therefore advocating for that official action is lobbying.

23. Representing a resort owner in connection with the appeal of an alleged zoning violation.

    Opinion: The answer in this instance is dependent upon whom the appeal is made to, and the content of the appeal. If the appeal is made to a county or

municipal zoning board and the membership of the board includes elected officials, then the appeal is lobbying because accepting the appeal will require a vote by the elected officials. If the zoning board members are not elected officials, and are not being asked to communicate with public or local officials in support of the appeal, then the appeal is not lobbying. The Board understands that disputes over alleged zoning violations may result in court action. Representing a client in court on a zoning dispute is not lobbying.

24. Asking a city police department or county attorney for U visa certification.

    Opinion: Based on the limited information provided, the Board understands from this request that issuing a U visa certification does not involve a major decision regarding the expenditure of public funds. If issuing the U visa certification is an administrative act provided to any individual who has qualified for the certification, and does not involve a discretionary decision by the county attorney, then requesting the certification from the county attorney is not lobbying. Conversely, if issuing the certification is a discretionary official action by the county attorney, then the request is lobbying. A request made to a city police department is not lobbying because it does not involve a major decision regarding the expenditure of public funds.

25. Asking a non-federal official for a character letter for a noncitizen client.

    Opinion: Based on the limited information provided, the Board understands from this request that "non-federal official" is not elected, but is rather an appointed or employed position. Accordingly, the request for a character letter is not lobbying because the decision to issue a letter does not involve an expenditure of public funds.

26. Asking state and other local officials to contact federal officials on behalf of an immigration client.

    Opinion: If the officials contacted are employed by the state, then the request is not lobbying. The Board assumes that the local officials referred to are appointed or employed. Accordingly, the request for local officials to contact federal officials is not lobbying because the decision does not involve an expenditure of public funds.

27. Participating in the Minneapolis or Saint Paul immigration forums.

    Opinion: Based on the limited information provided the Board assumes that the attorney participating in the forum is not engaged for pay to influence the official action of either Minneapolis or Saint Paul, or any other political subdivision. Merely participating in a forum, without an attempt to influence the official action of a political subdivision, is not lobbying. Accordingly, participation in the forum is not lobbying.

Board Note

If the Board intends to apply principles of law or policy announced in an advisory opinion more broadly than to the individual or association that requested the opinion, then the Board must adopt the principal or policy in an administrative rule.[6] The Board notes that it is in the process of adopting and modifying administrative rules regarding lobbying, and that the issue of communications between an association and members of the association may also be addressed in the forthcoming administrative rules.

Issued: January 3, 2024

David Asp, Chair
Campaign Finance and Public Disclosure Board

[6] Minn. Stat. § 10A.02, subd. 12a.