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Jane F. Kelly, Executive Director
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Advisory Opinion No. 03-1992

Dear Ms. Kelly:

The Commission has directed me to issue this response to your recent request for an advisory opinion. You have asked two questions concerning reporting under the “Legislative Activities Disclosure Act of 1971,” N.J.S.A. 52:13C-19 et seq., as amended by chapters 243 and 244 of the Laws of 1991 (hereafter, the “Lobbying Act”).

You write that the New Jersey Utilities Association (hereafter, the Association) is the trade association for the State’s investor-owned electric, gas, water, telecommunications, and sewerage public utilities. The Association filed with the Commission an Annual Report of Lobbying Activity for 1991, indicating on that report that it is a lobbyist organization subject to the reporting requirements under the “Lobbying Act.”

Initially, the Commission notes that the questions presented state that the members of the Association (rather than the Association itself) are the sponsors of the events you describe. However, since your inquiry does not identify any particular member, or group of members, as the sponsoring entity, and further since your inquiry has been submitted on behalf of the Association as an existing lobbyist organization, the Commission is treating this inquiry as if the Association is the sole sponsor. Individual members acting as co-sponsors may have lobbying filing requirements independent of the Association’s requirements, but the reporting requirements of any individual member, or group of members, are not presented in this inquiry, and therefore the scope of this opinion is limited solely to the lobbying reporting requirements of the Association.

Question 1

You state that periodically the Association sponsors events intended “to showcase a particular issue” confronting the utility industry. You write that such events are not intended to influence legislation or regulations, and are attended by local officials, industry representatives, or other private citizens. The Commission infers that you are using the term “sponsor” to mean that the Association is paying expenses related to an Association event, such as a meeting or conference. Although you have not specified what expenses might be incurred, the Commission presumes that typical expenses for such an event might include a rental fee for a meeting room, speaker’s fees, and other similar costs. You do specifically allude to an expense for food and beverage. You state the event is not intended to influence legislation or regulations. The Commission nevertheless infers that sponsorship of such a conference or meeting by the Association will result in communications promoting the policy or entrepreneurial interests of the Association.

You have asked whether the appearance of a legislator at such an event, whether invited by the Association or attending in the absence of any invitation, results in any reporting consequences to the Association under the “Lobbying Act” and, if so, what those reporting requirements are.

For the reasons set forth below, the Commission finds that if the Association has actual or constructive notice of the presence of an official covered by the Act, it must report on its Annual Report the cost of any benefits it provided to that official and a portion of the communication costs it incurred in sponsoring the event.

Initially, the Commission wishes to observe that the subject matter content of the conference or meeting is not the factor which determines whether or not an intent to lobby exists. The Lobbying Act was specifically amended on August 5, 1991, to bring within its reporting requirements expenditures undertaken by a lobbyist organization “... for the purpose of communication with or providing benefits to . . . (a State legislator or other official covered by the Act);” see N.J.S.A. 52:13C-22.1, as amended by L.1991, c. 243, section 5. These amendments removed the qualifying words “direct, express and intentional” that had previously modified the word “communication” to limit which communications were reportable, and the amendments also removed the word “expressly” which had previously excluded the reporting of expenditures that were unaccompanied by any communication on specific legislation. In other words, the 1991 amendments recognized that expenditures made for “good will” or promotional communications by a lobbyist organization to a legislator are subject to disclosure as a lobbying expense even in the absence of accompanying communications on specific legislative or regulatory objectives.

However, notwithstanding the statutory deletion of “expressly” accomplished by the 1991 amendments to the Lobbying Act, in the absence of any actual or constructive knowledge on the part of a lobbyist organization that it has made a communication to, or passed a benefit to, a legislator or other official covered by the Lobbying Act, the lobbyist organization is not subject to any lobbying reporting consequence.

In regard to the lack of a prior invitation to a legislator who attends such an event, the Commission is unable to judge without a more complete fact record whether or not the absence of a specific invitation compels the conclusion that no lobbying reporting obligation arose for the Association. There are fact scenarios under which the Association might quite reasonably be held responsible for lobbying reporting for expenditures pertinent to an uninvited legislator. For example, if the “sponsored event” is a meeting of a relatively small number of persons in a relatively confined area, and a legislator who is known to Association participants appears and remains to participate or observe, the Commission believes the Association should report expenses it incurred to communicate, or pass a benefit, to that legislator notwithstanding the fact the legislator was not specifically invited to attend prior to the commencement of the event. Conversely, if the “sponsored event” is a conference for a substantial number of persons, conducted in a meeting hall or arena open to the public, the facts surrounding the sponsorship of this event by the Association may support a reasonable conclusion that the Association had neither actual or constructive knowledge of the legislator’s presence, and therefore no reporting obligation.

In the absence of a more specific factual setting, the Commission can only observe that the lack of a prior invitation to a legislator would be one indication of lack of actual or constructive knowledge on the part of the lobbyist organization, but would not in itself be conclusive.

Assuming that the Association acquired a reporting obligation under the Lobbying Act for expenses related to a conference, you have asked the Commission to explain how such expenses should be reported on an Annual Report (Form L-1). You have specifically inquired about food provided to the legislator.

Costs for food and beverages provided to an official are included within the definition of the phrase “expenditures providing a benefit” appearing at N.J.S.A. 52:13C-20(g), a definition added by Section 3 of chapter 243 of the Laws of 1991. An “expenditure providing a benefit” to a specific official covered by the Act that exceeds \$25.00 in a day (or \$200 in a calendar year when aggregated with other benefits provided to that official) must be reported in the Annual Report by providing the name of the official, the amount, and to whom the benefit is provided; see N.J.S.A. 52:13C-22.1. If the expenditure for the benefit is less than \$25.00, the amount of the expenditure must be included in the total figure reported by the Association on its Annual Report for all food and beverage expenditures in the calendar year, but the name of the recipient and the other ancillary information is not required. The same requirements would exist for any other benefit provided to the official, such as a gift or souvenir.

The Commission also believes that some portion of the communication costs associated with the sponsorship of the event must be reported in the Annual Report. For example, assume such sponsorship resulted in expenditures for rental of a room or auditorium, speaker fees, and other overhead costs. While these costs are not “expenditures providing a benefit” to the attending official because they did not provide any tangible goods or services to that official as contemplated in the statutory definition cited above, the conference resulted in communications being delivered to the official, and the costs of sponsorship were to some extent incurred to effectuate those communications. Reasonable costs associated with making communications to officials at such an event are reportable lobbying expenditures, and therefore those costs, to the extent they can be identified, must be included in the total reported lobbying expenditures for the calendar year appearing in the Annual Report; Furthermore, if the lobbying expenditures for the event in the aggregate are in excess of \$100.00, the Annual Report must disclose the date and type of expenditure, the amount of the expenditure, and the identity of the payee; see N.J.S.A. 52:13C-22.1.

The Commission believes that inclusion of the entire cost of the conference described in your inquiry would overstate and inflate the Association’s lobbying expenditures because the official would apparently be a small part of the audience that you described. Most of the audience in your fact submission consisted of local officials (not subject to lobbying disclosure), industry representatives, and other private citizens. Therefore, one methodology that suggests itself for identifying the lobbying portion of the rental, speaker, and other communication expenses (excluding food and beverage and other benefit-passing expenses) is to divide the aggregate communication expenses by the total number of all attendees, and multiply the resulting sum by the number of officials who attended. For example, if the aggregate cost was \$10,000, and 100 persons in total attended, and there were five officials covered by the Lobbying Act participating, the reportable lobbying figure is \$500.00 ($\$10,000 \div 100 \times 5 = \500.00). Such a formula would isolate that portion of the total cost that was dedicated to lobbying communication with officials covered by the Lobbying Act. By suggesting this approach, the Commission does not mean to preclude other methodologies for identifying that portion of a total expense that can be reasonably attributed to lobbying communication, and therefore subject to reporting. If the Association wishes to submit more specific facts, the Commission will extend consideration to alternative methods for evaluation that might be more appropriate.

Question 2

You have also asked if the requirements of the Lobbying Act are affected if the State requests the Association to undertake the sponsorship of such an event as that described in Question 1 for an outside organization.

If a lobbyist organization incurs lobbying expenditures to conduct an event at which it makes communications, or provides benefits to officials covered under the Lobbying Act, the fact that the Association was encouraged to do so by an agency of State government is irrelevant to its reporting obligations. The Lobbying Act requires reporting of lobbying expenditures, regardless of the impetus for spending by the lobbyist organization.

The Commission notes that during the testimony it received on its proposed lobbying regulations, some commenters suggested that costs of lobbying communications that were made in response to a State suggestion or initiative should be exempted from reporting; see Summary of Comments and Agency Responses, 24 N.J.R. 289-290 (January 21, 1992). The Commission disagreed with that comment on the grounds that it is frequently difficult if not entirely elusive to determine which party initiates a lobbying dialogue. Further, the expenditure of substantial resources by a lobbyist organization resulting in communication or benefits to officials should be publicly disclosed if for no other reason than that such an expenditure would be beyond the resources of an average citizen communicating with the State. It is incontestable that underwriting the expense of a social event attended by State officials will have a beneficial "good will" impact on those officials, particularly if a State agency solicited the expenditure.

The facts you have provided, however, suggest that an outside organization, not the Association itself, will conduct the actual event. There is considerable ambiguity in your inquiry about the role the Association might therefore play. If the Association is providing funds to an outside organization without any specific expectation that those funds will be employed to assist the Association in communicating or providing benefits to officials, and in fact the outside organization does not communicate or provide benefits to officials on behalf of the Association, no reportable lobbying expenditure has been made. Conversely, if the Association receives identification as the provider or sponsor of some benefit, perhaps a buffet table, or the Association circulates literature or makes communications to attending officials covered under the Lobbying Act, lobbying reporting would be required. Since this inquiry does not contain enough submitted factual background for the Commission to assess the potential communication or benefit passing activity the Association may or may not undertake, it cannot express any determination on reporting consequences.

Thank you for this inquiry.

Very truly yours,

ELECTION LAW ENFORCEMENT
COMMISSION

By: GREGORY E. NAGY
Legal Director

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