



State of New Jersey

ELECTION LAW ENFORCEMENT COMMISSION

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June 24, 1992

John M. Lindemann
The Lindemann Concern
130 West State Street
Trenton, New Jersey 08608

Advisory Opinion No. 06-1992

Dear Mr. Lindemann:

The Commission has directed me to issue this response to your recent request for an advisory opinion. You have asked whether the representatives of four companies that operate waste-to-energy facilities in New Jersey who have been invited to serve on a mercury emission standards "task force" established by the State Department of Environmental Protection and Energy (DEPE) must register as legislative agents pursuant to the Legislative Activities Disclosure Act, N.J.S.A. 52:13C-18 et seq. (hereafter, the Lobbying Act).

By letters dated May 28, 1992 and June 9, 1992, you have written the Commission that you are the legislative agent for the Integrated Waste Services Association (IWSA), an association for companies operating waste-to-energy facilities in New Jersey. The DEPE has invited a representative from each of the four member companies of IWSA to serve on a "task force" that the DEPE has established to gather information that will be later used by the Department to develop mercury emission standards. The company representatives have also been invited to work with DEPE's enforcement division on other aspects of operating waste-to-energy facilities, an effort that you state could result in revisions to the Department's policies. You further state that the "task force" involvement combined with the communications made to the Department's personnel could result in each industry representative exceeding over 20 hours in a calendar year of communications to Department personnel. For purposes of this opinion, the Commission assumes that these communications will be made to DEPE employees who are "officers or staff members of the Executive Branch" as that term is used in N.J.A.C. 19:25-20.2 of the Commission's Regulations.

The four persons listed in your letter dated May 28, 1992 have job titles such as Director of Environmental Engineering, and Vice President for Environmental Quality Management, which titles suggest substantial management or policy-making responsibilities within their respective companies. In your correspondence dated June 9, 1992, one of these representatives is described as a person who, "... either directly or through his staff, provides the primary point interface between local, state, and federal regulatory agencies and the Company." However, you write that in the normal course of their business none of them "... specifically lobby for legislative or regulatory relief to various problems or serve as legislative agents."

Based on the fact record that you have submitted, the Commission believes for the reasons stated below that each of the four industry representatives is required to register as a legislative agent pursuant to the Lobbying Act.

The term "legislative agent" is defined by the Lobbying Act, and by the regulations promulgated under it, to mean any person who receives compensation to influence regulation by direct or indirect communications with an Executive Branch official covered under the Lobbying Act, or any person "... who incident to his or her regular employment engages in influencing legislation or regulation by such means"; see N.J.S.A. 52:13C-20(g).

The Commission believes that the four industry representatives you have cited in this inquiry are undertaking communications with Executive Branch employees covered by the Lobbying Act that are reasonably foreseeable to influence regulations of the DEPE. While these representatives may not normally pursue revisions or amendments to regulations as you have stated in your letter dated May 28, 1992, the Commission believes that the making of such communications by these company representatives as a result of their "task force" participation is incident to their regular employment as that phrase appears in N.J.S.A. 52:13C-20(g). Since you have indicated that each of the company representatives will spend more than 20 hours in a calendar year making such communications, the Commission concludes that each must register as a legislative agent for the respective company that employs him; see Commission Regulation N.J.A.C. 19:25-20.2, defining the term "legislative agent" to exclude a person making less than 20 hours of such communications in a calendar year.

The issue presented by this request requires the Commission to establish parameters for determining when a company employee is undertaking to influence regulations as part of his or her job responsibilities. The Commission does not possess any equation that can be applied with mathematical certainty. However, the Commission believes that some of the observations it made on January 21, 1992, when it promulgated its lobbying regulations are applicable; see 24 N.J.R. 289 et seq., containing a summary of comments received and agency responses.

Several commenters to the Commission's proposed regulations expressed concern that too many of their employees might come under the definition of "legislative agent." One public utility representative in particular, speculated that an all-day tour by State regulators of a nuclear facility might have the unintended consequence of compelling registration of over 100 of the technical employees of the utility as "legislative agents." The Commission responded by noting that not all communications, for whatever reasons, between a regulator and an employee are intended to count toward the 20-hour communication threshold contained in the definition of the term "legislative agent." The Commission made the following observations:

As defined in ELEC's regulation, a "legislative agent" is a person who is receiving compensation to influence regulation. Under normal circumstances, a technician-employee is principally receiving compensation for the purposes of providing his or her technical services to a public utility, not because of any perceived ability or responsibility to influence regulation. Such an employee is not required to register, but if in a calendar year more than 450 hours of that employee's time is ultimately expended to support the lobbying communication of a legislative agent, a portion of the employee's salary becomes subject to financial disclosure subject to N.J.A.C. 19:25-20.11(a)6.

The Commission recognizes that the distinction between an employee who is receiving compensation to influence lobbying, and one who is receiving compensation for providing some other services (including support of a legislative agent), may not always be clear and may to a degree be subjective. However, the test of reasonableness can be applied, and the Commission encourages commenters or other interested persons to pursue the factual parameters of this distinction by use of the advisory opinion process. (24 N.J.R. 290).

The four industry representatives described in this inquiry have responsibilities that extend beyond those of the "technician-employee" described in the above quotation who is principally receiving compensation for providing technical services to the employer. They have titles and job responsibilities that suggest that they have management and policy-making responsibilities. Further, the Commission infers that each of them has been selected by the DEPE as a "representative" of the company that employs them. Therefore, their involvement in the evolution of mercury emission standards, and ultimately possible mercury emission regulations, appears specifically intended to provide to State officials the views of the respective companies that employ them.

A scientific or other technical expert, even if in a management or policy-making position, may not wish to be perceived as a spokesperson for

his or her employer attempting to influence regulations, even if that employee is vitally involved in formulating communications that are reasonably foreseeable to influence regulations. As the Commission noted in its above quoted responses to a commenter at the time it promulgated lobbying regulations, such an employee can avoid meeting the definition of "legislative agent" by channeling his or her communication through the existing registered "legislative agent" of the employer. Such a channeling procedure will result in public disclosure of the employer's interest in this regulatory subject matter because the legislative agent must report it on the agent's registration statement or quarterly report; see N.J.S.A. 52:13C-21 and 52:13C-22. However, if an employee is permitted to deliver communications to regulators without registering and reporting as a legislative agent, or without channeling the communications through a legislative agent, there will be no disclosure of the employer's exertion of influence, or attempted influence, on the regulation process, and the public purposes of the Lobbying Act will be defeated.

The Commission notes that an employee who assists or otherwise supports a legislative agent may be deemed among "support personnel" of an employer for the purposes of lobbying reporting. Such "support personnel" do not have to register, or even be identified, but the employer must report on the employer's Annual Report the amount of compensation paid to such an employee if more than 450 hours in a calendar year of the employee's time was spent in support of lobbying communications; see N.J.A.C. 19:25-20.11(a)6.

For the purpose of this opinion, the Commission assumes that the DEPE has not formally proposed any regulations pertinent to mercury emissions at this point. However, even in the absence of a pending, formal rule proposal, the Commission believes that the Lobbying Act registration and reporting requirements are applicable where it is reasonably foreseeable that communications may influence future regulatory actions. The following response was made by the Commission at the time it promulgated its lobbying regulations to the suggestion that registration and reporting requirements of the Lobbying Act should be confined to only a rule that has been formally proposed in the New Jersey Register;

The Commission was not persuaded to narrow the definition (of the term "regulations") by limiting it to communications made only in the timeframe of a formal pending proposal, thereby excluding communications prior to publication in the New Jersey Register of a proposal, or pre-proposal, and also excluding communications made after adoption. The Commission believes it would be acting prematurely and without sufficient experience if at this early point in the existence of the new statutory amendments it so narrowed the scope of "regulation."

There may well be communications by employees, particularly in highly technical fields, that are not initially intended to result in regulation action but eventually motivate an administrative agency to undertake a regulation change. Under such fact circumstances, it may well be that a regulated enterprise could not be reasonably expected to monitor and report such communications. However, where a regulated enterprise undertakes a deliberate effort to make a communication it can reasonably foresee may influence a regulatory body to change or review a regulation, the provisions of the Legislative Activities Disclosure Act and these regulations become applicable. (24 N.J.R. 290, parenthetical material added).

In this inquiry, the Commission is persuaded that participation in the mercury emission "task force," as well as the communications with the DEPE enforcement personnel, are reasonably foreseeable as influencing the DEPE to propose, amend, or review regulations in these areas. Indeed, the very framework that has been established for these communications is for the ultimate purpose of regulatory review or enactments.

In regard to the presented fact that these communications have been undertaken at the suggestion of the DEPE, the Commission notes that at the time the Commission promulgated its lobbying regulations the Commission was asked to consider the possibility of excluding from the scope of the Lobbying Act agency-initiated communications. The Commission rejected this comment, making the following response:

However, often the evolving, give-and-take nature of exchanging ideas in a regulatory dialogue are incompatible with any meaningful determination of whether the agency or the regulated entity began the dialogue. Moreover, the expenditure of resources by such an entity should be public if for no other reason than the fact that such an expenditure would probably be beyond the resources of an average citizen. The Commission therefore is not satisfied that such an exemption would be workable or effective, and does not find any support for it in the 1991 amendments to the Legislative Activities Disclosure Act. (24 N.J.R. 290)

For the above reasons, the Commission submits that the fact that an invitation from a State regulatory agency to participate in a dialogue that may result in influencing regulations has been made is in itself not a reason to exclude communications from lobbying reporting. A communication delivered in response to such an invitation is no less influential, and arguably perhaps more influential, than one that is unsolicited.

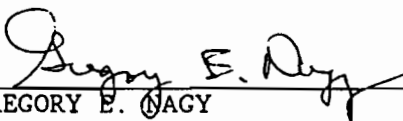
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Registration of legislative agents and reporting of lobbying communication expenditures could be eviscerated if covered State officials could effectively grant amnesty from lobbying registration and disclosure requirements by making such invitations, and meaningful disclosure of corporate or other influence would be irrevocably compromised.

Thank you for this inquiry, and your Association's interest in promoting lobbying compliance.

Very truly yours,

NEW JERSEY ELECTION LAW ENFORCEMENT COMMISSION

By: 
GREGORY E. NAGY
Legal Director

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