

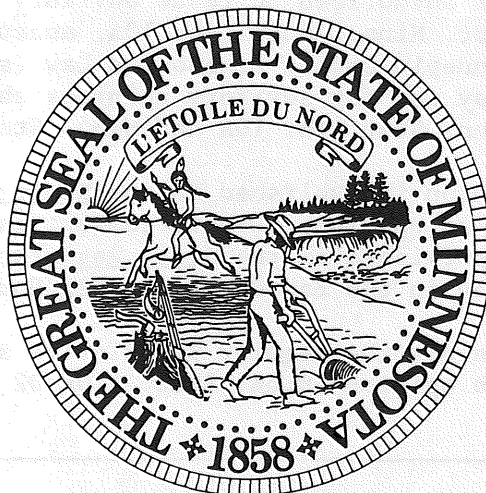
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A D V I S O R Y O P I N I O N S

(Under Minn. Stat. § 10A.02, Subds. 8 and 12)

July 26, 1990 - June 6, 1991

Numbers 105 - 111



J U N E , 1 9 9 1

MINNESOTA STATE ETHICAL PRACTICES BOARD

625 NORTH ROBERT STREET . ST. PAUL, MN 55101-2520 . (612) 296-5148

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ABOUT ADVISORY OPINIONS

- . The Ethical Practices Board is authorized to issue advisory opinions on the requirements of the Ethics in Government Act, Minn., Stat. ch. 10A, enacted in 1974, (see Minn. Stat. §10A.02, subd. 12) and the Hennepin County Disclosure Law (see Minn. Stat. § 383B.055). Individuals or associations may ask for advisory opinions about these laws to guide their actions in compliance with Minn. Stat. ch. 10A and Minn. Stat. §§ 383B.041 - 383B.058.
- . A request for an advisory opinion is published in the State Register before action is taken by the Board to approve an opinion. Public comment is invited. A summary of each approved advisory opinion is published in the State Register; full texts of opinions are available for public inspection in the Board office, 625 North Robert St. Paul, MN.
- . An advisory opinion lapses the day the regular legislative session adjourns in the second year following the date of the opinion (Minn. Stat. §10A.02, subd. 12).

ABOUT THE BOARD

Mission Statement

- . To promote public confidence in the state government decision making through development and administration of disclosure, public financing, and enforcement programs which will ensure public access to information filed with the Board.

Members

- . Six member citizen body;
- . Appointed by the governor; confirmed by a 3/5th vote of both houses of the legislature;
- . One former legislator of each major party;
- . Two individuals who have not been a public official or a political party officer in the last three years before appointment to the Board;
- . No more than three members of the same political party;
- . No lobbyists may be appointed to the Board.

An Advisory Opinion Index is available at the Board office.

Issued to:

Approved:

The Honorable Linda Scheid
83 State Office Building
St. Paul, MN 55155

July 26, 1990

RE: Matching Requirement

ADVISORY OPINION #105

SUMMARY

105. The term "otherwise eligible" in Minn. Stat. § 10A.25, subd. 10, does not include the filing of a matching funds affidavit, under Minn. Stat. § 10A.323, by an opponent who does not agree to be bound by spending limits.

FACTS

You are the chief author of HF 2666, which became Laws of 1990, Chapter 608. You cite questions raised about how Minn. Stat. § 10A.25, subd. 10, is related to or affected by Laws of 1990, Chapter 608, Article 3, section 25 (Minn. Stat. § 10A.323). You state that the requirement for matching funds was viewed in all committee and floor discussion as well as in the Conference Committee as another tool to better implement Minnesota's campaign finance system. You further state that at no time was there any intention or even suggestion that the establishment of a matching requirement as a condition of receiving a public subsidy would be viewed as a way to thwart the intent of Section 10A.25, subd. 10. You state that it is not incompatible to encourage holding down campaign spending and at the same time encourage candidates to be sincere about their candidacies and raise some money to match in part the public subsidy.

You ask the Board to interpret the phrase "otherwise eligible" in Section 10A.25, subd. 10, in relation to Laws of 1990, Chapter 608, Article 3, section 25.

PERTINENT STATUTES

Sec. 10A.25, subd. 10 (Minnesota Statutes 1988, as amended in Laws of 1990, Ch. 608, Art. 3, section 15): The expenditure limits imposed by this section apply only to candidates whose major political party opponents agree to be bound by the limits and who themselves agree to be bound by the limits as a condition of receiving a public subsidy for their campaigns in the form of an allocation of money from the state elections campaign fund.

A candidate of a major political party who agrees to be bound by the limits and receives a public subsidy, who has an opponent who: (1) is a candidate of a major political party; and (2) does not agree to be bound by the limits but is otherwise eligible to receive a public subsidy, is no longer bound by the limits, including those in section 10A.324, subd. 1, paragraph (c), but is still eligible to receive a public subsidy. (Emphasis added.)

Sec. 10A.323 (Laws of 1990, Ch. 608, Art. 3, section 25): In addition to the requirements of section 10A.322, to be eligible to receive a public subsidy from the state elections campaign fund a candidate shall file an affidavit with the board stating that during the calendar year the candidate has accumulated contributions, including unexpended balances from the year before, equal to 20 percent or more of the minimum amount that the board estimates, on August 15 of the general election

year, would be received by the candidate from the state elections campaign fund. The candidate or the candidate's treasurer shall submit the affidavit required by this subdivision to the board in writing by October 1 of the general election year. (Emphasis added.)

Sec. 645.16 (Minnesota Statutes 1988) provides, in part: When the words of a law in the application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.

In addition, Section 645.16 provides, in part: Every law shall be construed, if possible, to give effect to all its provisions.

Sec. 645.17 (Minnesota Statutes 1988) provides, in part: The legislature does not intend a result that is absurd, impossible of execution, or unreasonable.

OPINION

The phrase "to be eligible to receive a public subsidy" in the 1990 enactment of section 10A.323 is not clear and free from all ambiguity as to its application to section 10A.25, subd. 11. To interpret the filing of a matching funds affidavit, under section 10A.323, by an opponent who does not agree to spending limits as an "otherwise eligible" requirement under section 10A.25, subd. 10, leads to an absurd result and the ineffectiveness of section 10A.25, subd. 10.

In the opinion of the Board, the term "otherwise eligible" does not include the filing of a matching funds affidavit by an opponent who does not agree to spending limits.

Issued to:

Approved:

James L. Volling, Esq.
Regre & Benson
200 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402-3901

July 26, 1990

RE: Lobbyist Compensation

ADVISORY OPINION #106

SUMMARY

106. A company's payment of a bonus to an employee who is a lobbyist is not a "compensation which is dependent upon the result or outcome of any legislative ... action" within the meaning of Minn. Stat. § 10A.06, provided the payment was not contemplated or discussed with the lobbyist prior to the lobbyist's efforts to influence legislative action.

FACTS

You are an attorney representing a client who employs a full-time registered lobbyist who is compensated on a straight salary basis as a regular employee of your client and who performs lobbying services solely for the client.

The client wishes to award this individual a bonus, in addition to regular salary, in recognition of the individual's extraordinary efforts in connection with certain legislation passed during recent legislative sessions. The bonus would be awarded pursuant to a company-wide program whereby employees are rewarded for exceptional contributions. The payment of the bonus was not contemplated or discussed with the lobbyist prior to the passage of the relevant legislation, but was proposed only afterwards in recognition of the individual's superior achievements.

You ask the Board to answer this question:

Would the payment of such a bonus, which was neither contemplated nor discussed with the lobbyist prior to the passage of the pertinent legislation, constitute the prohibited "employ[ment] of a lobbyist for compensation which is dependent upon the result or outcome of any legislative . . . action" within the meaning of Minn. Stat. § 10A.06?

PERTINENT STATUTE

Sec. 10A.06 (Minnesota Statutes 1988): No person shall employ a lobbyist for compensation which is dependent upon the result or outcome of any legislative or administrative action. Any person who violates the provisions of this section is guilty of a misdemeanor.

OPINION

In order to be considered within the meaning of Minn. Stat. § 10A.06, compensation to a lobbyist which is dependent upon the result or outcome of legislative or administrative action must be offered and agreed to by the parties involved prior to the action.

The Board notes that in the present instance the payment of a bonus in recognition of the lobbyist's superior achievements was neither contemplated nor discussed with the lobbyist prior to the lobbyist's efforts on behalf of legislation. Therefore, the bonus is not "compensation which is dependent upon the result or outcome of any legislative . . . action", within the meaning of Minn. Stat. § 10A.06.

This opinion is limited to the specific circumstances outlined in this request.

Issued to:

Approved:

The Honorable John Marty
35 State Capitol
St. Paul, MN 55155

July 26, 1990

RE: Campaign Finance

ADVISORY OPINION #107

SUMMARY

107. A portion of the campaign committee's payment for campaign materials that are defective, and therefore, never disseminated or used may be deemed a "noncampaign disbursement" under certain circumstances.

FACTS

You are state senator with a principal campaign committee registered with the Board. You note that the definition of "campaign expenditure" provides that a "campaign expenditure" is "a purchase or payment of money or anything of value . . . made or incurred for the purpose of influencing the nomination or election of a candidate . . ."

Your request deals with the purchase of campaign literature which, due to a flaw in the print job, is never disseminated and therefore has no influence upon an election or nomination of a candidate.

You ask the Board to answer these questions:

1. Are the funds used to purchase the material, that was never used considered a campaign expenditure or a noncampaign disbursement under the definition in Minn. Stat. Ch. 10A?
2. If the brochure was reprinted by the same printer who printed the flawed literature, and the costs of the second printing were split by the campaign committee and the printer as part of a negotiated settlement (and the second printing is disseminated as campaign literature), are you correct in assuming that the total amount listed as a campaign expenditure from the two printings of the brochure should be the price paid for the first printing (the fair market value) and that the additional cost to the campaign committee for the second printing should be reported as a noncampaign disbursement? You supply the following statistics about the transaction:

Initial cost of print job:	\$1,080 (unused, due to printing flaws)
Additional cost of reprinting:	800
Presumed market value of brochure	1,080

OPINION

The treasurer of a candidate's principal campaign committee must report all campaign expenditures and itemize those campaign expenditures of more than \$100 paid to a vendor for goods or services to influence the nomination or election of the candidate Minn. Stat. § 10A.01, subd. 10.

A campaign expenditure is considered to be made in the year in which the goods or services for which it was made are used or consumed. Minn. Stat. § 10A.01, subd. 10.

A portion of the payment for goods that are defective and, therefore, never disseminated or used may be deemed a "noncampaign disbursement", within the meaning of Minn. Stat. § 10A.01, subd. 10c, provided the defective goods are destroyed.

In the opinion of the Board, under these circumstance, your treasurer should report the market value of the brochures as originally ordered as a campaign expenditure. Your treasurer may report the additional cost of reprinting, which you negotiated with the printer to replace the flawed brochures, as a "miscellaneous noncampaign disbursement" on the committee Report of Receipts and Expenditures covering these transactions.

This opinion is limited to the specific circumstances outlined in this request.

Issued to:

Susan A. Powers, City Clerk
City of Burnsville
100 Civic Center Parkway
Burnsville, MN 55337-3817

Approved:

March 8, 1991

RE: Local Officials

ADVISORY OPINION #108

SUMMARY

108. The governing body of a metropolitan governmental unit must designate the local official who will be responsible for administering economic interest and conflicts of interest disclosure by local officials serving therein. The determination of whether the holder of a public position is a "local official" within the meaning of Minn. Stat. § 10A.01, subd. 25 (1990), resides with the governing body of a metropolitan governmental unit.

FACTS

You state that because the final U. S. Census data for 1990 will likely indicate that the City of Burnsville's population is in excess of 50,000, the city is beginning to review the requirements of the Ethics Reform Act, Laws of 1990, Chapter 608, Article 2, so that the city is ready to comply on April 1, 1991.

On behalf of the city of Burnsville, a city located in the seven-county metropolitan area as defined in Minn. Stat. § 473.121, subd. 2, you ask the Board to

- 1) advise Burnsville what procedures to follow in order to meet the requirements of the cited law;
- 2) send a copy of any booklets and various forms that will be needed to be filed; and
- 3) provide clarification of compliance (i.e., city staff that must file).

PERTINENT STATUTES

"Local official" means a person who holds elective office in a political subdivision or who is appointed to or employed in a public position in 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. Minn. Stat. § 10A.01, subd. 25 (1990).

A city with a population of over 50,000 located in Dakota County, one of the seven counties in the metropolitan area as defined in Minn. Stat. § 473.121, subd. 2, is deemed to be a "metropolitan governmental unit".

Minn. Stat. § 10A.01, subd. 26 (1990).

"Political subdivision" includes a municipality as defined in section 471.345, subd. 1. Minn. Stat. § 10A.27 (1990). Section 471.345, subd. 1, states that the term municipality includes a city.

A local official elected to or appointed by a metropolitan governmental unit who in the discharge of official duties would be required to take an action or make a decision that would substantially affect the official's financial interests or those of an associated business may be required to take certain actions as provided in Minn. Stat. § 10A.07 CONFLICTS OF INTEREST (1990).

An individual must file a statement of economic interest within 60 days of accepting employment as a local official in a metropolitan governmental unit or within 14 days after filing an affidavit of candidacy or petition to appear on the ballot for an elective local office in a metropolitan governmental unit. A local official required to file a statement of economic interest shall file the statement with the governing body of the official's political subdivision. The governing body shall maintain the statements that are filed under the provisions of Minn. Stat. § 10A.09 as public data. Minn. Stat. § 10A.09 (1990).

OPINION

Minn. Stat. Ch. 10A, as amended in 1990, requires certain disclosure by candidates for and holders of local elective office and local officials employed in metropolitan governmental units. The provisions of Minn. Stat. Ch. 10A governing this disclosure became effective January 1, 1991.

The Board prescribed forms for statements and reports required to be filed by individuals and local officials as required by Minn. Stat. § 10A.02, subd. 8 (b). The Board provides herewith a set of the prescribed forms and a **Local Officials Handbook** to assist Burnsville in compliance with the new law. Burnsville may duplicate the forms and handbook for distribution to individuals required to comply with the local officials' disclosure provisions of Ch. 10A.

In regard to procedures for distributing and receiving the statements required, the Board suggests that the Burnsville city council direct the city clerk to perform the functions for local officials similar to the functions that the Board performs for "public officials" under Minn. Stat. §§ 10A.02, subd. 8; 10A.07; and 10A.09. The Board suggests that the city clerk adapt for use with Burnsville's local officials certain procedures outlined in the Board's administrative rules governing public officials' economic interest disclosure and conflicts of interest, Minn. Rules Chs. 4505 and 4515, respectively.

Because the Board is directed to secure local officials' compliance with the disclosure provisions of Minn. Stat. § 10A.09, the Board requests that the city clerk of Burnsville notify the Board of the name, address, and office held (or sought, in the case of a candidate for local elective office) of any individual required to file a statement of economic interest under Minn. Stat. § 10A.09. The Board further requests that the city clerk notify the Board about any individual who fails within the prescribed time to file a statement of economic interest required by Minn. Stat. § 10A.09. Upon receipt of the latter notice, the Board will proceed with official notifications as prescribed by Minn. Stat. § 10A.09, subd. 7, to secure the required filing.

In regard to compliance by city staff, the Board notes that the statute defines "local official" as a person who holds elective office in a political subdivision or a person who is appointed or employed in a public position in a political subdivision in which the individual "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." Minn. Stat. § 10A.01, subd. 25 (1990). In the opinion of the Board, a level of authority to make or to recommend major decisions regarding

the expenditure or investment of public money probably resides in department heads or deputy department heads. However, the city council must examine the organizational structure of decision making assigned to city employees when determining which employees meet the definition of "local official" for purposes of the application of economic interest and potential conflicts of interest disclosure under Minn. Stat. Ch. 10A.

Issued to:

Timothy P. Flaherty, Esq.
Briggs and Morgan Law Offices
2200 First National Bank Building
St. Paul, MN 55101

Approved:

May 10, 1991

RE: Lobbyist Disclosure

ADVISORY OPINION #109

SUMMARY

109. Lobbyist registration and reporting laws as amended in 1990 and effective January 1, 1991, require the attribution and disclosure of certain costs of research related to attempts to influence legislative, administrative, and metropolitan governmental unit action.

FACTS

You state that as a result of the changes made in the 1990 legislature to Minn. Stat. Ch. 10A and with the withdrawal of the Board's proposed rules, you request an advisory opinion of the Board with regard to five questions. You state that the Board's advisory opinions will assist you in preparation of your Ethical Practices filings and fulfillment of your requirements under Minnesota Statutes.

You ask the Board the following questions:

QUESTION ONE

If an individual is retained by an organization to merely prepare research materials and reports that may or may not be used to influence legislative, administrative, or metropolitan government action, does this individual fall under the definition of "lobbyist" under Minn. Stat. § 10A.01, subd. 11 (a)? (assuming that individual meets the other criterion under the definition).

OPINION

An individual who is retained by an association to prepare research materials and reports is not required to register as a lobbyist under Minn. Stat. §§ 10A.01, subd. 11, and 10A.03. The mere preparation of research materials does not require registration as a "lobbyist".

However, if the association uses the aforementioned research or reports to influence legislative action, administrative action, or the official action of a metropolitan governmental unit, the association is required to include the costs of the research and reports in periodic reports required by a lobbyist employed by the association and in the annual report of the association as a "principal" under Minn. Stat. §§ 10A.01, subd. 28, and 10A.04, subs. 3, 4, and 6.

QUESTION TWO

If the answer to Question 1 is yes; would that individual (registered lobbyist) be required to report the cost of the preparation of the research report, or does the language contained in Minn. Rules pt. 4510.0500, subp. 3. A. .."the cost of researching and writing reports from which data is used in preparing lobbying

materials is not reportable as a lobbyist disbursement even if the individual preparing the research materials is a registered lobbyist", still reflect the position of the Ethical Practices Board with respect to the reporting of these posts?

OPINION

To the extent that Minn. Rules pt. 4510.0500, subp. 3. A. conflicts with the Minn. Stat. §§ 10A.01, subd. 11, and 10A.04 as amended in 1990, the statutes supersede the rule. A lobbyist must report the cost of researching and writing reports from which data is used in preparing lobbying materials.

QUESTION THREE

Is it the interpretation of the Board that if a political subdivision makes monetary contributions to an association that retains a lobbyist to influence legislative, administrative, or metropolitan government action that this political subdivision falls under the definition of "principal" under Minn. Stat. § 10A.01, subd. 28, and is therefore required to submit lobbyist reports under Minn. Stat. § 10A.04, subd. 6? Does the Board have any direction on how an individual member of an association will determine which portion of the member's association dues is attributable for lobbying purposes?

OPINION

It is the Board's opinion that contributing to an association that retains a lobbyist does not make the original contributor a lobbyist by virtue of the monetary contributions.

QUESTION FOUR

Where an employee of an association, political subdivision, or public higher education system is required to register as a lobbyist, and also retains a contract lobbyist, we would ask that the Board provide guidance to us in reporting the total disbursements for that principal. It would appear that both the contract lobbyist and the employee lobbyist will be required to report the total disbursements on behalf of the principal. This could lead to a duplication of disbursements reporting. We would appreciate any guidance that you are able to provide with respect to this matter.

OPINION

In the context of this question the words "principal" and "employer" are synonymous. Each employer about whose activities a lobbyist is required to report must provide the information required by Minn. Stat. §§ 10A.03 to 10A.05 to the lobbyist no later than five days before the filing date for each lobbyist report in accordance with Minn. Stat. § 10A.04, subd. 3.

An employer which employs more than one registered lobbyist must convey this information to one of the lobbyists.

The designated lobbyist will include the employer's information in the designated lobbyist's report along with disbursements by the designated lobbyist and by any employee of the designated lobbyist.

The designated lobbyist and the other lobbyists representing the same employer may use the option provided in Minn. Rules pt. 4510.0900 EMPLOYERS WHICH EMPLOY MORE THAN ONE LOBBYIST. This rule states that each lobbyist must register separately and provides that one lobbyist may report all disbursements for lobbying purposes made by all lobbyists representing a common employer, person, or association. A lobbyist, so represented, must file lobbyist disbursement reports specifying the name of the lobbyist who will report total disbursements on behalf of the joint employer.

QUESTION FIVE

Under Minn. Stat. § 10A.04, subd. 6 (d) (3), "all salaries and administrative expenses attributable to activities of the principal relating to efforts to influence legislative action, administrative action, or the official action of metropolitan governmental units in Minnesota" is it the interpretation of the Board that the principal should only report that pro-rata portion of an employee salary attributable to the activity of influencing legislative action, administrative action, or the official action of a metropolitan governmental unit? If not, please advise us on the Board's interpretation of this language and any direction you believe would be useful.

OPINION

In the context of this question the words "principal" and "employer" are synonymous. A principal should include in the principal's annual report only that pro-rata portion of an employee's salary attributable to the activity of influencing legislative action, administrative action, or the official action of metropolitan governmental units in Minnesota. Minn. Stat. § 10A.04, subd. 7, authorizes the Board to randomly audit the financial records of lobbyists and principals who are required to report under Minn. Stat. § 10A.04. Since the statute does not specify what record keeping is necessary, the Board suggests that a principal should follow its internal accounting procedures to support its annual reports with monthly time allocations by percentage of total hours worked.

Issued to:

Bert J. McKasy, Commissioner
Department of Commerce
133 East 7th Street
St. Paul, MN 55101

Approved:

May 16, 1991

RE: Potential Conflict of Interest

ADVISORY OPINION #110

SUMMARY

110. The options regarding disclosure of a public official's potential conflict of interest are prescribed by Minn. Stat. § 10A.07. Where the potential conflict of interest is too speculative and remote, there is no conflict of interest. The decision regarding the determination of or disclosure of a potential conflict of interest resides with the public official.

FACTS

You are the owner of an annuity issued by Executive Life Insurance Company ("Executive Life") which has recently been placed in conservatorship by the California Commissioner of Insurance. You purchased the annuity in 1985. Under the terms of the annuity, you will begin to receive monthly annuity payments in calendar year 1996. You have no opportunity under your policy to elect to receive payments prior to that time.

As the Commissioner of the Department of Commerce since January, 1991, you supervise the Minnesota Life and Health Insurance Guaranty Association ("Guaranty Association") pursuant to the Minnesota Life and Health Insurance Guaranty Association Act ("Guaranty Act"); see Minn. Stat. ch. 61B (1990). The Guaranty Act provides a form of protection to Minnesota policyholders in regard to financially troubled insurance companies. The Guaranty Association is composed of all insurers who sell life, health or annuity insurance in the State of Minnesota; see Minn. Stat. §§ 61B.03, subd. 10 and 60B.04 (1990). The obligations of the Guarantee Association are funded by assessments imposed against all of its member insurers, subject to certain annual limitations; see Minn. Stat. § 61B.07 (1990).

Under the Guaranty Act you are accorded the authority to effectively decide whether the Guaranty Association should be required to pay claims that are or become due and owing to Minnesota residents during the pendency of a rehabilitation, liquidation, or conservation proceeding. You have the authority to decide whether the Guaranty Association should be required to commence payment of claims during the rehabilitation, liquidation, or conservation proceeding or whether the proceeding should be completed before the Guaranty Association is required to pay; see, e.g., Minn. Stat. §§ 61B.03, subd. 9 and 61B.06, subds. 3 and 9 (1990). If action by the Guaranty Association were "triggered," the Association would only be required to pay the contractual obligations of the impaired insurer that were or became due and owing.

You could in the relatively near future be faced with the decision of whether to "trigger" action by the Guarantee Association in regard to Executive Life and possibly a different insurer that has also recently been placed in conservation. Due to the fact that the Guaranty Association could only be assessed a limited amount per calendar year, if the Association were triggered as to both companies it would

appear necessary to allocate Association payments between policyholders of the two companies.

Accordingly you state that Guaranty Association public policy related to the one insurer seems inextricably intertwined with policy issues pertaining to Executive Life. If other insurers subsequently become impaired, it would become all the more necessary to coordinate Association policy with respect to policyholders of any other previously impaired companies.

You state that in your view the decision whether to trigger the Guaranty Association during the pendency of Executive Life's conservation proceeding would not seem to affect your financial interest at all, let alone, in any substantial manner. You further state that if you proceeded to make the decision regarding the triggering of the Guaranty Association and if based on future developments in the Executive Life matter a potential conflict were to materialize you would at that time take appropriate action consistent with Minn. Stat. § 10A.07.

You state that although it seems to you that Minn. Stat. § 10A.07 is at least at this time inapplicable, you have nonetheless considered not making the decision to avoid even an appearance of personal financial interest. You further state that if you were to recuse yourself in the Executive Life matter you believe you would also have to disqualify yourself in regard to a different insurer that has also recently been placed in conservation as discussed previously.

You state that you believe that the consequence of disqualifying yourself at this time from discharging your Guaranty Association responsibilities in regard to Executive Life would be to seriously undermine your ability to participate in any substantial Guaranty Association policy decision that may occur during your tenure as Commissioner of the Department of Commerce.

You ask the Board to issue an opinion whether the situation discussed herein constitutes a conflict of interest under Minn. Stat. § 10A.07, subd. 1.

OPINION

The term "public official" includes the Commissioner of the Department of Commerce. Minn. Stat. § 10A.01, subd. 18 (d) (1990).

A public official who in the discharge of official duties would be required to take an action or make a decision that would substantially affect the official's financial interests or those of an associated business, unless the effect on the official is no greater than on other members of the official's business Advisory Opinion #110 classification, profession, or occupation, must inform the official's immediate superior of the potential conflict. Minn. Stat. § 10A.07, subd. 1 (1990).

The immediate superior of an appointed public official for purposes of notification of a potential conflict of interest is the appointing authority for that office. Minn. Rules pt. 4515.0100, subp. 7. B. Accordingly the Governor is the immediate superior of the Commissioner of the Department of Commerce for purposes of notification of a potential conflict of interest.

Upon receipt of the official's notice of potential conflict of interest, the official's immediate superior must assign the matter, if possible, to another employee who does not have a potential conflict of interest. Minn. Stat. § 10A.07, subd. 2 (1990); Minn. Rules pt. 4515.0500, subp. 1.

If the official is not permitted or is otherwise unable to abstain from the action, then the statute as amended in 1990 provides that the public official must file a statement with the Ethical Practices Board describing the potential conflict and the action taken. The public official must file this statement with the Board within a week of the action taken. Minn. Stat. § 10A.07, subd. 2 (1990).

It is the Board's view that a number of factors must be considered in determining the point at which there is a potential conflict of interest requiring disclosure. The factors include whether the financial interest is recent or predates the appointment of the individual to a public office as a "public official"; and whether the impact of the public official's action upon the official's personal financial interests is marginal or significant.

As the facts indicate, the Commissioner is to make his decision at the present time. How the Commissioner's decision will affect his future personal financial interests is speculative. Based on the facts presented and the applicable statutes, it is the opinion of the Board that the Commissioner's decisions at this date regarding financially troubled insurance companies do not appear to constitute a potential conflict of interest at the present time within the meaning of Minn. Stat. § 10A.07, subd. 1 (1990).

The Board considers the imminence of possible future conflict to be speculative because the Commissioner will not receive annuity payments from Executive Life until 1996, five years in the future; the likelihood of the impact on the Commissioner's financial interest, while unknown, appears to be remote; and the likelihood of additional insurance companies' conservatorships requiring similar action is unknown. The Board urges the Commissioner to monitor these matters closely and to take immediate action as prescribed in Minn. Stat. § 10A.07 should future developments cause a potential conflict of interest.

Issued to:

Approved:

Jane A. McPeak, City Attorney
City of St. Paul
647 City Hall
St. Paul, MN 55102

June 6, 1991

RE: Lobbyist Disclosure

ADVISORY OPINION #111

SUMMARY

111. The governing body of a metropolitan governmental unit may determine what constitute "major decisions" for purposes of the economic interest disclosure and the lobbyist disclosure provisions of Minn. Stat. ch. 10A. The governing body should maintain for public inspection a list of the nonelected officials and employees whom it has designated as "local officials" under Minn. Stat. § 10A.01, subs. 25 and 26 (1990).

FACTS

You are the city attorney of the City of St. Paul which has concerns caused by the changes in Minn. Stat. ch. 10A enacted by the Legislature in 1990. The City of St. Paul is concerned about two areas. The first concern is about the application of the statute to the City of St. Paul and its employees and the possible need for registration and reporting of activity that appears to fall within the purview of the statute as lobbying activity. The second concern is the apparent burden the statute creates on those members of the public who deal with the City of St. Paul on a daily basis and the burden created for the City in tracking the registration of these persons.

You state that the concerns are rooted in the seemingly overbroad definition of lobbying and local government official contained in the statute. The plain language of the statute could mean that dozens of City employees could be "lobbyists" if they interact with other units of government in the routine course of their duties of providing service to the City's taxpayers. An example would be City Public Works Department officials who meet with representatives of the Metropolitan Waste Control Commission to discuss various aspects of the City's sewer separation project. If the statute is strictly construed and enforced these employees face the risk of prosecution if they fail to register as a lobbyist, and the City faces a problem if it fails to adequately report the expenses incurred in their effort.

You further state that the definition of "local government official" also appears overly broad and raises questions about how the "lobbyist" is to know when he or she is in contact with a "local government official." The definition does not limit the application to elected officials. You add that again a strict application of the statute would require that anyone who contacts a municipal employee would first have to question that employee on their position in the chain of authority to determine if the course of action on the specific subject employee is in a position to recommend a involved. Then questions would have to be asked on how important the matter is since there must be a decision on whether the matter is a "major decision."

While Advisory Opinion No. 108 as published allows the municipality to define who is a "local official", in your opinion, that still does not solve the problems you have

noted. Without making inquiry a person who is talking to a public employee does not know if that person is a designated "local official" and therefore does not know if the expenses incurred as part of that contact need to be tracked and reported. You state that the Board's opinion may allow the City of St. Paul to shorten the list of "local officials", but, in your view, that does little to solve the major problems this legislation has created.

Finally, in your view, there exists the possibility that a very large number of persons who come in contact with the City will fall within the purview of the definition of "lobbyist" and face the necessity of registration and reporting expenses. In your view, virtually everyone who appears before the City Council falls within the definition from homeowners appealing an assessment or their lawyer representatives to persons seeking a rezoning or involved in a development project. Literally dozens of people a week exercise their right to seek redress from the government. Each person feels that his or her matter involves a "major decision." Each person could easily run afoul of the statute.

You state that it would appear that the depth to which this statute could apply to City government was not considered when the current language was drafted. You add that the expense to the City of trying to identify affected employees, track, and report their activities would be immense. The expense of compliance by persons who interact with the City would also be considerable. Finally, you state that in your opinion the burden imposed on the City to somehow take the information supplied by these individuals and put it to some meaningful use, or make it available, is very significant and must be taken into account.

You state that the fact that the Board and its staff have attempted to clarify the statute is appreciated. You further state that in your opinion the Board has been asked to perform an impossible task and that enforcement of this statute for complete compliance will require a Herculean effort.

You ask the Board the following questions:

QUESTION ONE

What enforcement does the Board intend to take with respect to the portions of the statute that create a duty by government employees who do not function as lobbyists in the more traditional sense?

OPINION

A nonelected official or employee of a political subdivision may meet the definition of "lobbyist" under certain conditions. The definition of a lobbyist set forth in Minn. Stat. § 10A.01, subd. 11 (b) (4) includes a nonelected official or employee of a political subdivision who spends more than 50 hours in any month attempting to influence legislative or administrative action or the official action of a metropolitan governmental unit other than the political subdivision employing the official or employee. The following are to be included when calculating the time factor that may require registration as a lobbyist under Minn. Stat. §§ 10A.01, subd. 11 (b) (4) and 10A.03: time spent monitoring legislative, administrative, or metropolitan governmental unit action and related research, analysis, and compilation and dissemination of information relating to legislative or administrative policy in this state or to the policies of metropolitan governmental units.

A nonelected official or employee of a political subdivision must file a registration form with the Board within five days after becoming a lobbyist as defined above. The Board prescribes and furnishes lobbyist registration forms under Minn. Stat. §§ 10A.02, subd. 8 (b) and 10A.03.

Each registered lobbyist must file with the Board a report on the lobbyist's activities as long as the lobbyist continues to lobby. A lobbyist may file a termination statement at any time after ceasing to lobby. Minn. Stat. § 10A.04. About three weeks before each periodic reporting date, the Board sends to each registered lobbyist the necessary report forms and instructions in accordance with Minn. Stat. §§ 10A.02, subd. 8 (b) and 10A.04.

Should a registered lobbyist fail to file a required report, the Board proceeds to secure the report by sending notices to the lobbyist as required by Minn. Stat. § 10A.04, subd. 5., and by legal action under Minn. Stat. § 10A.34. The Board has experienced a voluntary compliance level of approximately 99% in administering the lobbyist disclosure provisions of Minn. Stat. ch. 10A since enactment in 1974.

The Board conducts an active program of information about the lobbyist registration and reporting requirements of Minn. Stat. ch. 10A. Board staff members respond to oral and written requests for information, conduct public information meetings, and upon request present information to meetings of associations and organizations whose activities may require registration of a lobbyist.

It is the intent of the Board to continue in its information dissemination and enforcement activities to ensure required disclosure in compliance with the lobbyist registration and reporting provisions of Minn. Stat. ch. 10A. The means whereby a political subdivision describes or assigns duties to its nonelected officials or employees is not within the jurisdiction of the Board. Should the assigned duties meet the definition of "lobbyist," the Board is prepared to offer assistance to the political subdivision, the nonelected official, or the employee to effect compliance with the registration and reporting requirements of Minn. Stat. ch. 10A.

QUESTION TWO

What enforcement does the Board intend to take with respect to persons who have contact with local government officials, or what enforcement efforts or assistance do you expect from the local units of government?

OPINION

From time to time Board staff receives from a variety of sources inquiries about the activities of associations or individuals that may require lobbyist registration and reporting. In response to the inquiries, staff members provide information orally and in writing about the lobbyist disclosure laws.

The Board's active program of information about the lobbyist registration and reporting requirements of Minn. Stat. ch. 10A includes maintaining lists of registered lobbyists, the names of the associations or individuals they represent, the subjects on which they intend to lobby, and the kinds of lobbying they seek to influence: legislative, administrative, or metropolitan governmental unit action. This list is updated regularly and is available for inspection in the Board office.

Thirty days after each lobbyist reporting date the Board compiles the foregoing information in the Lobbyist Report required by Minn. Stat. § 10A.05. Under this statute the Board distributes to the governing body of each metropolitan

governmental unit the Lobbyist Report pertaining to lobbyists who seek to influence metropolitan governmental units. This requirement was enacted in 1990 and became effective for metropolitan governmental units with the Lobbyist Report issued May 15, 1991.

Should the governing body of a metropolitan governmental unit fail to find information on the Lobbyist Report about an individual or association attempting to influence the unit's official actions, the Board invites the governing body to call or write the Board about the matter. In the Board's opinion this kind of exchange of information regarding legislative and administrative action has contributed to voluntary compliance with the lobbyist disclosure laws.

The Board's information program also includes maintaining lists of individuals who are "public officials" as defined in Minn. Stat. § 10A.01, subd. 18. The lists include the official's name, the state agency in which the official serves, and the term for which the official was elected or appointed. Individuals, including registered lobbyists, who seek to influence legislative or administrative action may consult this list when determining the application of the lobbyist disclosure laws to their lobbying activities.

In response to concerns expressed in this advisory opinion request, the Board suggests that the governing body of a metropolitan governmental unit should maintain for public inspection a list of those individuals who are determined to be "local officials" within the meaning of Minn. Stat. § 10A.01, subd. 25. The list should include the local official's name and the department or division in which the official serves. Individuals, including registered lobbyists, who seek to influence the official action of that metropolitan governmental unit could consult this list when determining the application of the lobbyist disclosure laws to their lobbying activities.

QUESTION THREE

What steps are going to be taken to clarify the statute, hopefully to limit the application of it with respect to the problems noted above?

OPINION

The Board is required to report at the close of each fiscal year to the legislature, the governor, and the public about its activities and may indicate apparent abuses and offer legislative recommendations. Minn. Stat. § 10A.02, subd. 8 (a).

In a supplement to its Annual Report for Fiscal Year 1990, the Board forwarded to the legislature, the governor, and the public certain recommendations designed to help the Board fully implement Minn. Stat. ch. 10A including amendments to the economic interest and lobbyist disclosure provisions enacted in 1990 that became effective January 1, 1991.

Among the recommendations about economic interest disclosure, the Board asked the legislature to clarify filing requirements of a "local official" and to define "major decisions" as the term is used in the definition of local official at Minn. Stat. § 10A.01, subd. 25.

Among the recommendations about lobbyist disclosure, the Board asked the legislature to define "lobbying", to provide for a records retention requirement for lobbyists and principals, and to require a lobbyist to include on the lobbyist registration form the kind of lobbying the lobbyist seeks to influence for each of the subjects the lobbyist seeks to lobby.

Although some of the Board's recommendations for the 1991 legislative session were introduced in proposed legislation, the recommendations cited above were not enacted in the legislative session that ended May 20, 1991. The Board plans to include in its Annual Report for Fiscal Year 1991 recommendations to the 1992 Legislative Session. The Board will consider issues raised in this advisory opinion request when preparing its recommendations and invites additional suggestions from individuals, associations, and political subdivisions whose activities may require disclosure under Minn. Stat. ch. 10A.

The Board reaffirms its opinion that a city council in a metropolitan governmental unit must examine the organizational structure of decision making assigned to its nonelected officials and employees when determining which officials or employees meet the definition of "local official" for purposes of the application of economic interest and potential conflicts of interest disclosure. In the opinion of the Board the city council's determination of what constitute "major decisions" for purposes of both economic interest disclosure and lobbyist disclosure is valid until such time as the Legislature may clarify the applicable provisions of Minn. Stat. ch. 10A.