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Letter Ruling 19-02

(Information Provided to Members of the General Assembly)

Summary: It would not be a violation of Article XXIX to provide informational material to members of the general assembly for use in the legislative process, either directly or through a registered professional lobbyist.

I. Background

The Requester is a “social welfare” 501(c)(4) nonprofit animal advocacy organization. Requester conducts legislative advocacy by informing its supporters about legislative activity, asking that supporters contact elected officials about pending legislation, and testifying at legislative hearings. Requester is not a lobbying firm, but currently uses the services of a registered professional lobbyist under a part-time contractual agreement.

Requester occasionally receives requests from lawmakers for reports, studies, and/or other materials relevant to the legislative process, including information that would support the introduction of bills in the general assembly. To gather the material for lawmakers, Requester will pull informational material, such as journal or news articles, from its existing archives. It may also conduct additional research as needed.

Requester asks whether providing such informational materials to lawmakers, pursuant to lawmakers’ requests, is a violation of Colo. Const. Art. XXIX.

II. Jurisdiction

Any person who is not a public officer, member of the general assembly, local government official, or government employee may submit a request to the IEC for a letter ruling concerning whether potential conduct of the person making the request satisfies the requirements of article XXIX. § 24-18-101(4)(b)(III), C.R.S. The IEC has jurisdiction to issue a letter ruling in response to the request. *Id.*

Colo. Const. Art. XXIX gives the IEC jurisdiction over members of the general assembly. *See generally* Colo. Const. art. XXIX, §§ 3, 4, and 6.

III. Applicable Law

Article XXIX, §§ 3(2), (3), and (4) state, in pertinent part:

(2) No public officer, member of the general assembly, local government official, or government employee, either directly or indirectly as the beneficiary of a gift or thing of value given to such person's spouse or dependent child, shall solicit, accept or receive any gift or other thing of value having either a fair market value or aggregate actual cost greater than fifty dollars (\$50) in any calendar year, including but not limited to, gifts, loans, rewards, promises or negotiations of future employment, favors or services, honoraria, travel, entertainment, or special discounts, from a person, without the person receiving lawful consideration of equal or greater value in return from the public officer, member of the general assembly, local government official, or government employee who solicited, accepted or received the gift or other thing of value.

(3) The prohibitions in subsections (1) and (2) of this section do not apply if the gift or thing of value is:

* * *

(d) Unsolicited informational material, publications, or subscriptions related to the recipient's performance of official duties[.]

(4) Notwithstanding any provisions of this section to the contrary, and excepting campaign contributions as defined by law, no professional lobbyist, personally or on behalf of any other person or entity, shall knowingly offer, give, or arrange to give, to any public officer, member of the general assembly, local government official, or government employee, or to a member of such person's immediate family, any gift or thing of value, of any kind or nature, nor knowingly pay for any meal, beverage, or other item to be consumed by such public officer, member of the general assembly, local government official or government employee, whether or not such gift or meal, beverage or other item to be consumed is offered, given or paid for in the course of such lobbyist's business or in connection with a personal or social event; provided, however, that a professional lobbyist shall not be prohibited from offering or giving to a public officer, member of the general assembly, local government official or government employee who is a member of his or her immediate family any such gift, thing of value, meal, beverage or other item.

IV. Discussion

Starting with the plain language of the gift ban in Article XXIX, § 3, a member of the general assembly may not solicit, accept, or receive any gift or other thing of value having either a fair market value or aggregate actual cost greater than \$50 (currently adjusted to \$65) in any calendar year, including but not limited to, gifts, loans, rewards, promises or negotiations of future employment, favors or services, honoraria, travel, entertainment, or special discounts. The first question, then, is whether the provision of information to lawmakers constitutes “a gift or other thing of value” proscribed by Article XXIX.

Whether informational material is a “thing of value”, as that phrase is used in Article XXIX, is

likely subjective—perhaps too subjective to measure—and depends on the type of information, who is receiving the information, and what value the recipient ascribes to it. Certain types of information, if they have a market value at all, may have a higher market value than others. At the same time, information valued highly by one individual in one context may be virtually worthless in another context to another individual. Attempting to place a value on the informational material that is the subject of this specific request is neither necessary nor desirable. Rather, other factors obviate the need to do so.

Unsolicited information provided by the Requester to lawmakers, in the course of lawmakers' official duties in the legislative process, is specifically excepted from the gift ban. Colo. Const. art. XXIX, sec. 3(3). Therefore, to the extent unsolicited information is being provided to lawmakers in the course of their official duties, there is no violation of the gift ban. But the request in this case also concerns information solicited of the Requester by lawmakers. There is no specific exception in Article XXIX pertaining to solicited information, but that is not the end of the inquiry.

The definition of “speech” protected by the First Amendment is broad, and the Colorado Constitution provides broader protection to First Amendment rights than even the U.S. Constitution. *Bock v. Westminster Mall Co.*, 810 P.2d 55, 59 (Colo. 1991). The provision of information is undoubtedly “speech” under the First Amendment. *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1054 (Colo. 2002) (“[T]he First Amendment protects one’s right to receive and distribute information and ideas...”); *Houston v. Manerbino*, 521 P.2d 166, 168 (Colo. 1974) (“[T]he First Amendment and Article II, Section 10 of the Colorado Constitution afford protection to all forms of communications ... which attempt to convey a thought or message to another person.”).

The First Amendment also protects “the right to receive information and ideas”. *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972); *Martin v. City of Struthers, Ohio*, 319 U.S. 862, 863 (1943). The type of information disseminated or received is irrelevant. *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757-78 (1976). In this case, legislators’ receipt of informational material is undoubtedly “information and ideas”. Therefore, although Article XXIX does not contain a specific exception for solicited informational material, the Commission finds that such an exception is not necessary in this case. Inasmuch as informational material is solicited by lawmakers as part of their official duties in the legislative context, the exchange of such material is protected by the free speech provisions of the Colorado and U.S. Constitutions. "Because we must presume that Colorado voters did not intend to adopt an amendment that would have raised serious doubts as to its constitutionality, we reject such a construction." *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 275 P.3d 674, 683 (Colo. App. 2010), *aff'd*, 269 P.3d 1248 (Colo. 2012).

Even if free speech protections were not applicable in this case, the exchange of solicited informational material would still not be a prohibited gift in this case. The Commission has repeatedly stated that gifts or other things of value that inure to the benefit of the state or local government are not the type of gifts sought to be prohibited by Article XXIX. *See* Position Statement 12-01, and Advisory Opinions 10-02, 10-11, 11-09, 16-01, 16-02, 16-03, 16-04, and 16-07. Usually, these types of gifts or other things of value are gifts of travel. The Commission

has extended this analysis to other types of gifts or things of value, such as event registration costs. *See* Letter Ruling 16-02; *see also In re the Matter of Ransom*, at 8-9.

A five-part test is used to determine whether a gift is being given to a covered individual such as a member of the general assembly or, rather, is being given to the state or local government, as follows:

- 1) Is the gift to a specific individual or to the designee of an agency?
- 2) Is the offer made *ex officio*?
- 3) Is the travel [or, in this case, informational material] related to the public duties of the traveler [or, in this case, member of the general assembly]?
- 4) Is there a potential conflict of interest or appearance of impropriety in acceptance of the gift?
- 5) Is the purpose of the trip [or, in this case, receipt of information] primarily educational?

Using the five-part analysis in this case, the Commission finds that the provision of information as part of the legislative process is a gift to the state, not to a specific member of the general assembly.

In the typical case of providing informational material to members of the general assembly, the information is frequently provided to groups of individuals, such as a legislative committee. Bill assignments are to committees, not to individual members of the general assembly. So too, therefore, informational material related to bills is provided to the designated committee rather than to a specific individual. On the other hand, it is possible that informational material would be provided to an individual, such as the prime bill sponsor, without such information being provided to other members of the general assembly. Even when this is the case, however, the other factors of the five-part test weigh in favor of finding that the information is a gift to the state.

The offer of information in a case such as this is necessarily being made in the legislators' *ex officio* capacity. The information is being provided precisely so that the legislators may use the information, in their official capacity, to debate matters of public policy within the legislative setting. Legislators' use of such information in their legislative capacity, regardless of its source, is critical to the evaluation of important policy questions in Colorado. The more information the general assembly has when making policy decisions, the more the state benefits. In the same vein, the informational material is closely related to the public duties of members of the general assembly.

There is little, if any, opportunity for the provision of information to represent a potential conflict of interest or an appearance of impropriety, even in those circumstances where Requester provides that information through its lobbyist. First, receipt of that information through lobbyists is indistinguishable from receipt of that information from members of the public. Second, when information is used to inform public policy decisions in the legislative context, that process happens on the record in a transparent public setting. The provision of information to legislators working in the legislative context is not, in and of itself, prone to creating a conflict

of interest or appearance of impropriety.

Lastly, the purpose of providing information to members of the general assembly will almost always be educational in nature. While various interest groups clearly represent specific issues and agendas, there would be little point, if any, in providing information in the legislative context that does not inform a policy discussion.

For all these reasons, and absent any information that would be contrary to the analysis above, the provision of information to members of the general assembly is a gift to the state and not a gift to a particular member of the general assembly.

V. Conclusion

Under the facts and circumstances of this request, it would not be a violation of Article XXIX for the Requester to provide informational material to members of the general assembly for use in the legislative process. Providing such information, whether directly or through a registered professional lobbyist, is protected free speech and/or a gift to the state. The IEC recognizes the importance of the flow of information to legislative committees and to the general assembly, and finds that provision of such information by interested parties does not violate the gift ban of Article XXIX.

The IEC cautions that this opinion is based on the specific facts presented herein, and that different facts could produce a different result. The IEC therefore encourages individuals with particular questions to request more fact-specific advice through requests for advisory opinions and letter rulings related to their individual circumstances.

The Independent Ethics Commission

Elizabeth Espinosa Krupa, *Chair*
April Jones, *Commissioner*
Jo Ann Sorensen, *Commissioner*
Matt Smith, *Commissioner* (dissenting)

Dated: June 24, 2019

Commissioner Smith dissents from the Advisory Opinion

“Unsolicited informational material, publications, or subscriptions related to the recipient’s performance of official duties” are specifically exempted under Article XXIX, section 3(3)(d). Solicited informational material is not.

Does this mean that a legislator cannot solicit a request for information? No, it means the request is limited to the “gift ban” currently set at \$65 per year. Under the facts presented,

Requester needs to be aware that while its contract lobbyist cannot provide this information to a legislator under the gift ban in Article XXIX, section 3, the organization may do so under Position Statement 9-01. *See* Position Statement 9-01, pp. 5-6.

While the majority postulates that the information may be too subjective to measure in value, the Requestor explained in its presentation to the Commission that it would use a more “objective” standard such as the time that an intern spent on a request multiplied by their hourly rate to determine such value. The majority concludes that such objectivity is neither “necessary nor desirable”. I conclude that it is both necessary and beneficial to the Requester, the public as a whole and the Commission to utilize the objective standard suggested by the Requester.

There is no doubt that there is an unfettered, unrestrained right for the public to exercise their First Amendment right to communicate with their elected representatives. Hence, the express exemption provided in Article XXIX, section 3(3)(d). However, to suggest that the First Amendment is a two-way street allowing elected representatives the same right “to solicit” specific information from the public is neither supported by the First Amendment nor the Article XXIX gift ban.

First, individual legislators serve as trustees for their constituents and their votes are not a prerogative of personal power. *Nevada Commission on Ethics v. Carrigan*, 546 U.S. 117 (2011)(slip op. at 8)(citing *Raines v. Byrd*, 521 U.S. 811, 821 (1997)). While *Carrigan* expressly addresses long standing recusal rules, the Court . . . “rejected the notion that the First Amendment confers a right to use governmental mechanics to convey a message. *Carrigan* (slip op. at 9). A legislator’s vote is not a core legislative function protected by the First Amendment. *Carrigan* (slip op. at 3).

Secondly, legislators have paid staff, Legislative Legal Services and Legislative Council to turn to for specific information, as well as general staff to provide guidance on fiscal and financial impacts. Colorado pays dues to Government Exchange Organizations so that Colorado Legislators have access to the Council of State Governments and the National Conference of State Legislatures to draw from the legislative resources of all 50 states. Article XXIX, section 1(2) finds and declares that certain costs associated with holding public office . . . should be born(e) [sic] by the state or local government.

The gift ban contained in Article XXIX applies equally to all Colorado legislators, regardless of party affiliation. It is content neutral.

If a majority of the Commission intends to presume that the First Amendment overrides the plain language of the Article XXIX gift ban, then the Commission needs to address related First Amendment questions. May a legislator solicit assistance in setting up and administering surveys and polls on legislative matters? May a legislator request that an outside organization other than paid staff establish and maintain a blog? Can an entity organize and pay for a legislator’s meeting, effectively overriding the Commission’s recent ruling in *Marble*, Case 17-18?

Lastly, I served on the Commission during the adoption of Position Statement 8-02, its retraction and the issuance of Position Statement 12-01. Nowhere in either Position Statement did the Commission contemplate that a gift to the State could or would be initiated by a covered individual rather than an outside entity attempting to benefit the State. Position Statement 12-01 specifically addresses travel. Subsequent opinions address attendance at conferences often connected to travel to attend such conferences.

The majority cites a prior Commission case suggesting that payment for attendance at a conference (where travel was perhaps relevant but not paid for by an outside party) to propose a significant departure in the application of Position Statement 12-01. *See In the Matter of Ransom Complaint* 16-20. The reference to *Ransom* fails to reveal her reliance on a previous Advisory Opinion 11-07, issued by the Commission under prior Position Statement 8-02, regarding her representation of State government. The *Ransom* “State” analysis of Position 12-01 was in addition to an analysis under Article XXIX, section (3)(3)(f) and Advisory Opinion 11-07 was subsequently labeled as akin to an “unpublished opinion”. *Ransom* pp. 7-9, specifically finding #58.

In Colorado, there are 65 elected House members and 35 elected Senators. Together they comprise the Legislature. Individually they are law makers. They may be designated by their respective bodies to act on behalf of the State. But a sole legislator soliciting information from the public is just that, a sole legislator. No amount of torture can “shoe horn” a solicitation by a single legislator into a benefit for the State.

In issuing Position Statement 12-01, the Commission determined that the prior Position Statement 8-02 was an overly broad exception to the gift ban not firmly rooted in the Constitution. *See* Position Statement 12-01, p.2. Both Position Statements are creations of the Commission. If the Commission desires to undertake a significant departure from Position Statement 12-01, I would recommend taking the matter up as a new position statement.