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Advisory Opinion 18-02 (Travel Expenses Paid by Foreign Government)

Summary: It would not be a violation of Article XXIX for a member of the Colorado General Assembly to accept travel-related expenses from a foreign government to attend the 2018 Rising State Leaders Program.

I. Background

Requester is a member of the Colorado General Assembly in the House of Representatives. She has requested an advisory opinion regarding whether it is permissible to accept the costs associated with airfare, hotel accommodations, local ground transportation, meals, and other expenses from the Department of Foreign Affairs, Trade and Development (“DFATD”), a subdivision of the Government of Canada, in order to participate in the 2018 Rising State Leaders Program (“RSL Program” or “Program”).

The RSL Program is an educational working tour intended to foster mutual understanding between Americans and Canadians, strengthen ties between the United States and Canada, and assist in the development of friendly relations. Originally launched in 2006, the RSL Program provides state legislators from the United States an opportunity to visit Canadian provinces/territories and meet with provincial legislators and other government leaders. The Program underscores the importance and integrated nature of Canada-U.S. relations as related to trade, energy, environmental stewardship, border security, and economic development. In collaboration with provincial governments and legislatures, the Program also fosters relationships between state and provincial legislators. The Program builds strong personal ties with U.S. counterparts in Canada and participating legislators from other states. The Program is scheduled from June 24-30, 2018, and includes visits to Vancouver, British Columbia; Yellowknife, Northwest Territories; and Calgary, Alberta. The program will include meetings with provincial legislators and government officials, First Nations representatives, U.S. Consulate officials, U.S. border security officials, members of the private sector involved in Canada-U.S. trade, and nongovernment organizations that focus on environment, energy, health care, infrastructure, and First Nations issues.

Participants are selected by the Embassy of Canada in Washington, DC, and the Canadian Consulates in the United States. Some program invitees are chosen from the Council of State Government's Toll Fellowship Program which identifies promising state leaders. In this case, the

Requester was invited to participate in the RSL Program due to her “leadership role as Assistant Majority Caucus Chair; Agriculture, Livestock and Natural Resource Committee Chair; a Business and Labor Committee member; Vice Chair of Council of State Governments West Agriculture and Water Committee; and as a member of the [Council of State Governments] West Canada Relations Committee.”

Requester estimates the costs associated with this request as approximately \$600.00 for roundtrip airfare; \$250.00 nightly hotel accommodations totaling approximately \$1,500.00 for six nights; an amount not exceeding \$450.00 CAD (approximately \$350.00 USD) for meals, checked baggage, and ground transportation, upon presentation of original receipts. Total costs are therefore estimated as \$2,450.00 USD. In addition, some meals are included as part of the RSL Program.

II. Jurisdiction

Requester is a member of the Colorado General Assembly and is subject to the Commission’s jurisdiction under sections 3, 4, 5, and 6 of Colo. Const. Art. XXIX.

The Independent Ethics Commission has authority to issue advisory opinions on ethics issues arising under Article XXIX or any other standards of conduct or reporting requirements as provided by law. *See* Colo. Const. art. XXIX, § 5(5).

III. Applicable Law

Section 3(1) of Article XXIX of the Colorado Constitution provides:

No ... member of the general assembly ... shall accept or receive any money, forbearance, or forgiveness of indebtedness from any person, without such person receiving lawful consideration of equal or greater value in return from the ... member of the general assembly ... who accepted or received the money, forbearance or forgiveness of indebtedness.

Section 3(2) of Article XXIX of the Colorado Constitution provides:

No ... member of the general assembly ... 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) [now adjusted to \$59.00] 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 ... member of the general assembly ... who solicited, accepted or received the gift or other thing of value.

Section 3(3) of Article XXIX of the Colorado Constitution provides, in pertinent part:

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

* * *

(f) Reasonable expenses paid by a nonprofit organization or other state or local government for attendance at a convention, fact-finding mission or trip, or other meeting if the person is scheduled to deliver a speech, make a presentation, participate on a panel, or represent the state or local government, provided that the non-profit organization receives less than five percent (5%) of its funding from for-profit organizations or entities[.]

IV. Discussion

The purpose of Article XXIX of the Colorado Constitution is to restrict gifts to public employees and officials acting in their official capacities. Section 3(2) of Article XXIX (“the gift ban”) prohibits gifts to covered individuals. Reimbursement of travel expenses to covered individuals constitutes a prohibited gift unless such reimbursement either falls under a specifically enumerated constitutional exception or does not inure to the benefit of the covered individual, but rather to the State of Colorado.

The first consideration is whether any constitutional gift ban exceptions apply. Because the Requester was invited to participate in the RSL Program due, in large part, to her state legislative role, the Requester’s participation would be as a representative of state government. Article XXIX, section 3(3)(f) provides a gift ban exception for reasonable expenses paid by a nonprofit organization or state or local government if the recipient represents state government. However, section 3(3)(f) is inapplicable in this case because the exception does not contemplate expenses paid by a foreign government. *See* Advisory Opinion 10-11, at 4 (the Commission declined to include foreign governments in the section 3(3)(f) exception because resources from foreign governments and political subdivisions of foreign governments are not subject to the same degree of scrutiny and accountability as domestic state and local governments).

The second consideration is whether the reimbursement of travel expenses would constitute a gift to the covered individual or, instead, a gift to the State of Colorado. A gift to the state does not constitute a violation of section 3 of Article XXIX. In Position Statement 12-01, the Commission announced a five-factor test to determine whether a gift is to a covered individual or to the state. The Commission considers: (1) whether the offer is to a specific individual or to a designee of the state agency; (2) whether the offer of reimbursement is *ex officio*; (3) whether the event is related to the official duties of the covered individual; (4) whether there is an existing or potential conflict of interest or appearance of impropriety; and (5) whether the primary purpose of the travel is primarily educational or business-related. *See also* Advisory Opinion 14-02 (a covered individual may accept the payment of travel-related expenses from a foreign government where the payment was not a gift to covered individuals under Position Statement 12-01).

Under the first and second factors, the Commission finds that the offer was made specifically to the Requester individually, not to a designee of the state or a state agency. However, this factor, by itself, is not determinative. Advisory Opinion 14-02. The Commission finds that the offer of reimbursement was *ex officio*, or made by virtue of Requester’s specific position or area of

responsibility/expertise. Requester's multiple leadership roles in the Colorado General Assembly and in the Council of State Governments, together with the overlap of the specific RSL Program topics, was clearly the basis for the invitation.

Under the third factor, the Commission finds that the RSL Program is related to the official duties of Requester. The invitation to Requester described the RSL Program as focused on "trade, energy, environmental stewardship, border security, and economic development." Requester's roles as Chair of the Agriculture, Livestock and Natural Resource Committee; Chair of the Water Resources Review Committee;¹ and member of the Business and Labor Committee amply demonstrate the RSL Program's nexus to the official duties of the Requester.

Under the fourth factor, the Requester indicated that the General Assembly, when it was in session earlier this year, did not consider any legislation that would have affected Canada or Colorado's relationship with Canada. The Requester also stated that participation in the RSL Program is not to reward her for any action she has taken or will be taking in her official capacity as a state legislator, nor is it an attempt to curry favor with her. Although the Commission finds that, as such, there is no existing conflict of interest or appearance of impropriety, the Commission nevertheless cautions the Requester that the potential for a conflict does exist.

Specifically, the draft agenda for the 2018 RSL Program indicates that participants will be "Meeting with Microsoft (or other U.S. organization with sizable operations in BC)". The draft agenda also indicates "Energy sector meetings", "Agriculture sector meetings", and "Private sector meetings". The Commission cautions that the various meetings listed in the draft agenda have the potential for causing future conflicts, depending on the type of engagement between representatives of those private sectors and the Requester. These potential conflicts, by themselves, are not determinative; however, the Requester should take appropriate precautions to avoid the manifestation of an actual future conflict.

Lastly, under the fifth factor, the Commission finds that the purpose of the RSL Program is primarily educational in nature, rather than primarily networking or entertainment-related. In this case, nothing in the agenda is suggestive of an entertainment component. The networking component of the Program, when considered in the totality of the draft agenda, seems secondary in nature.

Consideration of all five factors weigh in favor of finding that the Canadian government's offer to pay Requester's travel and related expenses inures to the benefit of the State of Colorado and is not a gift to Requester under Article XXIX.

V. Conclusion

It would not be a violation of Article XXIX for the Canadian government to reimburse the Requester for travel-related expenses under the circumstances set forth in this request.

The Commission cautions that this opinion is based on the specific facts presented herein, and that different facts could produce a different result. The Commission therefore encourages

¹ Created in section 37-98-102, C.R.S.

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

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Dated: June 4, 2018