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Dino Ioannides, *Executive Director*

Letter Ruling 19-01 (Acceptance of Pro Bono Lobbyist Services)

Summary: It would not be a violation of Article XXIX for the Office of Public Guardianship to solicit and obtain pro bono professional lobbyist services under the facts and circumstances of this request.

I. Background

The Office of Public Guardianship (“OPG”) seeks an advisory opinion from the Independent Ethics Commission (“IEC”) about whether the OPG may engage a professional lobbyist on a pro bono basis. The professional lobbyist would be hired to assist with legislative and budgetary efforts on a pro bono basis because the OPG does not have adequate budgetary resources to pay a professional lobbyist.

Colorado House Bill 17-1087 (the “Act”) established a pilot program under the OPG intended to provide public guardians for certain qualified indigent and incapacitated adults and to gather data on the feasibility of establishing a statewide office of public guardianship. The pilot program is intended to be evaluated and either continued, discontinued, or expanded at the discretion of the General Assembly in 2021. The Act is codified in Article 94 of Title 13, C.R.S.

The OPG is established in the Judicial Department. It includes the five-member Public Guardianship Commission (“PGC”) and a director appointed by the PGC. The PGC’s members are appointed by the Colorado Supreme Court and the Governor. The Act does not authorize, and the PGC members do not receive, any compensation. No later than one month after \$1.7 million is raised from gifts, grants, or donations, the PGC is required to appoint a director. The pilot program is currently intended to be funded solely through gifts, grants, and donations raised by the PGC or, after appointment, the OPG director.

All member positions in the PGC have been appointed. However, the PGC’s activities since appointment have not yielded the necessary donations to appoint a director. As such, the PGC is seeking both budgetary and legislative changes that would fund the OPG and allow the PGC to hire a director without first raising \$1.7 million from gifts, grants, or donations. *See, e.g.,* HB 19-1045.

The PGC members lack the legislative expertise necessary to conduct lobbying efforts. The OPG has no staff able to pursue legislative or budgetary changes. The OPG reports that, given the paucity of gifts, grants, and donations, the ability to hire a professional lobbyist at market rates is impossible.

As such, the OPG asks for guidance on two questions: (1) do the provisions of Colo. Const., Art. XXIX, § 3 apply to the PGC members; and (2) if the IEC has jurisdiction over the PGC members, can the PGC use the services of a lobbyist on a pro bono basis for the 2019 session of the General Assembly?

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 consider a letter ruling request submitted by the OPG.

Article XXIX gives the IEC jurisdiction over public officers, members of the general assembly, local government officials, government employees, professional lobbyists, and statewide elected officeholders. *See generally* Colo. Const. Art. XXIX §§ 3, 4, and 6.

With limited exceptions that are inapplicable to this inquiry, Article XXIX establishes an absolute ban on professional lobbyists providing gifts or anything of value to a covered individual. Colo. Const. Art. XXIX, § 3(4). *See* Advisory Opinion 10-14, at 6 – 7. The ban on gifts from lobbyists, however, is inapplicable under the facts of this case because no covered individual subject to the provisions of Article XXIX is at issue in this letter ruling request.

The OPG is an office established in the Judicial Department. § 13-94-104, C.R.S. The office includes a five-member commission, the PGC. Article XXIX defines "public officer" to include elected and appointed members of state boards and commissions. However, Article XXIX specifically excludes from the definition of public officer any member of a board, commission, council or committee who receives no compensation other than a per diem allowance or necessary and reasonable expenses. Colo. Const. Art. XXIX § 2(6). Because the PGC members receive no compensation, they are not public officers within the meaning of Article XXIX. Nor do PGC members meet the criteria of any other individuals covered by Article XXIX. Article XXIX does not apply to, and the IEC has no jurisdiction over, the members of the PGC.

Article XXIX defines "government employee" to mean any employee, including independent contractors, of the state executive branch, the state legislative branch, a state agency, a public institution of higher education, or any local government, except a member of the general assembly or a public officer. Colo. Const. Art. XXIX § 2(1). The OPG does not yet have any employees. The OPG director has not been hired and, under current law, cannot be hired until the PGC raises \$1.7 million. Therefore, the IEC does not need to reach the question of whether the OPG director would be a covered individual over whom the Commission has jurisdiction.

The OPG is an office in the judicial department; it is not a covered individual under Article XXIX. Because the OPG is not a covered individual, the IEC has no jurisdiction over the OPG.

III. Conclusion

The IEC has no jurisdiction to regulate the provision of pro bono lobbyist services to the OPG or the members of the PGC. The question about whether pro bono lobbyist services can be provided to the OPG director is not before the IEC because no covered individual currently occupies that position.

Because Article XXIX confers no jurisdiction over the OPG or the members of the PGC, it would not be a violation of Article XXIX for the OPG to solicit and obtain pro bono professional lobbyist services under the facts and circumstances of this request. The gift ban applicable to gifts from lobbyists does not apply when the provision of pro bono professional lobbyist services would be given exclusively to an office and commission whose commissioners are not covered individuals and whose director has yet to be appointed.

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

April Jones, *Chair* (not participating)
Jo Ann Sorensen, *Vice-Chair*
William J. Leone, *Commissioner*
Elizabeth Espinosa Krupa, *Commissioner*
Matt Smith, *Commissioner* (dissenting)

Dated: February 11, 2019

Commissioner Smith dissents from the Advisory Opinion

My most earnest desire is that this dissent makes its way to the Colorado General Assembly during the 2019 Legislative Session. The Legislature deserves to know what is going on across the street in front of the Colorado Independent Ethics Commission (“IEC”). The bulk of the issues presented by the request should more properly be directed to the Legislature. My hope is that the Legislature will also address the ethical concerns which are being raised by a funding “shift” in the underlying program.

HB 17-1087 passed on 6/5/2017 to create a pilot program in the Second, Seventh and Sixteenth Judicial Districts. Volunteer Commissioners have been appointed. According to the legislation,

the program was to be funded by “Gifts, Grants and Donations” in the amount of \$1.7 million dollars. A Director is to be appointed only after this amount is raised. The problem is that the program after almost two years of operation has raised only \$1,877. It appears from the request that a Supplemental Appropriation has already been made for General Funds. It is unknown who prepared the request or whether a lobbyist was involved.

So how does the Office of Public Guardianship (“OPG”) (without a Director) plan to solve this funding shortfall? It offers to bring in a lobbyist. Not just any lobbyist, a “pro bono” lobbyist, at least until additional funding is secured to pay for the lobbyist, according to the Requestor’s presentation. Voters in Colorado sent a clear message with the passage of Article XXIX that they wanted to “distance” lobbyists from public officials. It seems ethically incongruous that a fledgling state agency would turn over its financial and statutory future to a single “pro bono” lobbyist. On its face, the request sounds more like it is time to “tear down the glass and allow the lobby back into the legislative chambers” rather than advancing ethical principles.

I am disappointed that the majority of the IEC Commissioners has chosen to narrowly limit their ethical inquiry to the request of the volunteer OPG Commission as filed. Such a limited inquiry does nothing to put up “side boards” on how a “pro bono lobbyist” must follow ethical requirements, or worse sends a signal that “lobbyists” are free to create “positions/funding” that may owe future allegiance to the unsupervised activities of a lobbyist who could be the architect of who knows what legislation or program.

Article XXIX, Section 3(4), intentionally restricts the “gift giving” from lobbyist to public officials and their immediate families. Both House and Senate rules restrict requests for funding from lobbyists during the legislative session. See, AO 10-07, p. 4. Article XXIX, Section 3(5), imposes a duty upon the General Assembly and the IEC regarding reporting requirements, including lobbyists. CRS 24-6-308 includes a list of prohibited practices by any person engaged in lobbying. At a minimum, all lobbyists should be forewarned to avoid these prohibited practices.

The present request sheds little light on who the volunteer lobbyist will be or what real purpose is intended. The Legislature may soon find out. The IEC can take some solace in that today’s opinion is limited to the meager facts that have been presented here.

The case does resemble two prior Opinions issued by the IEC where limited questions, when probed further, revealed more elaborate funding schemes to skirt Article XXIX. In AO 10-17, the Colorado Legislative Women’s Caucus asked whether they could form a nonprofit or partner with a nonprofit to solicit and accept private donations. The Commission responded that there was no ethical violation in setting up a nonprofit or partnering with a nonprofit, but reminded the covered individuals that there were restrictions on how funds could be solicited. AO10-07, p. 5. In AO 10-14, the Colorado Channel Authority sought authorization for members of the General Assembly to receive free admission to a luncheon as a fund-raising effort, tickets costing \$100 to the paying members of the public. AO 10-14, p. 4. The IEC allowed speaking members of the program to accept luncheon tickets under Article XXIX, Section 3(3)(e). AO 10-14, p. 4. However, the IEC expressed concern that a luncheon held two days after the General Election (and within days before bill submittals) used legislators as a draw for lobbyist attendance eager

to gain access to members of the General Assembly. AO 10-14, pp. 5-8.

The ultimate question before the IEC today is whether the OPG can accept the services of a pro bono lobbyist? This is truly a question best answered by the Legislature. There is nothing in HB 17-1087 which addresses this subject. The original legislation was limited to funding from Grants, Gifts and Donations. Now that OPG appears headed for requesting General Funds, the Legislature may choose to revisit the question. Other questions may include, whether this is really a request for a “volunteer lobbyist” under CRS 24-6-301(7)? The term “pro bono” lobbyist appears undefined by statute. The Requestor suggests that the pro bono lobbyist’s role is akin to that of a legislative liaison. If this is the case, is the OPG a “principal department of state government” as outlined in CRS 24-6-303.5(1) and will these requirements be appropriately followed? Lastly, the Legislature might choose to revisit the prohibitions on lobbyists contained in CRS 24-6-308 to make certain that the potential mischief of a “pro bono” lobbyist is adequately curtailed. Again, these are all questions far better answered by the Legislature.

Dated: February 11, 2019