



## STATE ETHICS COMMISSION

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### **FORMAL ADVISORY OPINION – EDITED FOR PUBLICATION**

October 29, 2007<sup>1</sup>

Re: Article 3 Gift Ban – Application of Gift Ban Exemption 138A-32(e)(1); Definition of “Public Event” – 138A-3(29); and Criteria for Determining an “Educational Meeting”  
G.S. 138A-32(e)(3)(i)  
AO-L-07-0001

Dear Requester:

You requested a formal advisory opinion on whether an association could sponsor (pay for) a legislative breakfast and provide food and beverages to the invited legislators under the new ethics and lobbying laws. The State Ethics Commission has authorized its staff to issue formal written advisory opinions (“formal advisory opinion”) pursuant to G.S. 120C-102 and G.S. 138A-13 upon the receipt of a proper request.

G.S. 120C-102 applies to written requests for formal advisory opinions from certain individuals, including lobbyists and lobbyist principals. G.S. 120C-102 requires the request for a formal advisory opinion be in writing and relate to real or reasonably anticipated fact settings and circumstances. All opinions are based on the particular facts presented. The Commission’s formal advisory opinions have prospective application only. G.S. 120C-102(a). Once issued these formal advisory opinions confer limited civil immunity upon the requester if the advice given is followed. Good faith reliance by the requester on the Commission’s issued formal advisory opinion grants civil immunity to the requester from (1) investigation by the Commission regarding the specific facts and circumstances addressed in the Commission’s formal advisory opinion and (2) any adverse action by a legislator, legislative employee, or public servant’s employing entity regarding the same. In addition, good faith reliance by the requester upon a formal advisory opinion issued by the Commission on or after August 9, 2007, also grants civil immunity to the requester from investigation by the Secretary of State’s Office.<sup>2</sup> Prior to August 9, 2007, the immunity granted by the Commission’s formal advisory

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<sup>1</sup> Note: This formal advisory opinion was initially issued on January 31, 2007; approved by the Commission on February 22, 2007, subject to modification as directed by the Commission; revised on October 29, 2007, to incorporate (1) a brief discussion of the Commission’s “educational meeting” criteria and (2) recent amendments to relevant parts of the Ethics Act and Lobbying Law; and approved as revised on November 9, 2007.

<sup>2</sup> House Bill 1111 (Session Law 2007-348) was signed into law on August 9, 2007. Section 10 of HB 1111 amended subsection (a) of G.S. 120C-102 and broadened the immunity granted to the requester by a formal advisory opinion issued by the Commission on or after August 9, 2007, to include

opinions did not include investigations or enforcement by the Secretary of State's Office. The Commission's formal advisory opinions do not confer immunity from any other investigative or enforcement agency; nor do they include immunity from criminal investigation or prosecution. Requests for advisory opinions, the opinions themselves and all materials related thereto are confidential and not a matter of public record, although the Commission is required to publish redacted copies of its formal advisory opinions annually. G.S. 120C-102(d).

In your request you asked, on behalf of an association, whether under the new ethics and lobbying laws, the association could provide food and beverages to legislators at a breakfast. You stated that a specific group of legislators would be invited and you expected 10 to 12 members of the association would be present along with the association's staff members, including registered lobbyists. You stated the purpose of the breakfast would be to provide an overview of issues of interest to the association, the role of the association with regard to the same, and to discuss related legislative issues in general and potential 2007 legislation in particular.

Based on your statement that staff, including registered lobbyists, would be present at this legislative breakfast, I assumed that the association you were asking on behalf of was a lobbyist principal.<sup>3</sup> The Secretary of State's records also listed the association as a lobbyist principal. Since the association was a lobbyist principal, this gift of food and beverages at this legislative reception was prohibited under G.S. 120C-303(a) and 138A-32(c), unless it met an exemption to the gift ban pursuant to G.S. 138A-32(e). In reviewing the 138A-32(e) gift ban exemptions, the association's legislative breakfast did not fit under one of the gift ban exemptions.

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investigations by the Secretary of State. Section 10 of HB 1111 also amended subsection (d) of G.S. 120C-102. Pursuant to the amended subsection (d), as of August 9, 2007, and forward, the Commission is *required* to provide the Secretary of State with an unedited copy of each written advisory opinion it issues pursuant to G.S. 120C-102(a) at the time such advisory opinion is issued to the requester. The staff of the Secretary of State is required to treat the information as confidential and it is not a public record. Subsection (d) was also amended to allow the Commission to share all information related to a request made for a formal written advisory opinion pursuant to G.S. 120C-102(a) with the staff of the Office of the Secretary of State. If the Commission shares such information with the staff of the Office of the Secretary of State, the staff is required to treat the information as confidential, and it is not a public record. Section 10 of HB 1111 went into effect on August 9, 2007.

<sup>3</sup> An association could be deemed a lobbyist principal by hiring a contract lobbyist or by having an internal employee whose duties include lobbying (both goodwill lobbying and direct lobbying), and who has spent at least 5% of their time in any rolling 30-day period engaging in direct lobbying. G.S. 120C-100(a)(10)d. Note that Section 8.(b) of HB 1111 amended G.S. 120C-100(a)(10)(d) to state that if an internal employee, whose duties include lobbying (both goodwill lobbying and direct lobbying), spends at least 5% of their time in any rolling 30-day period engaged in direct lobbying or spends at least 5% of their time in any rolling 30-day period engaged in goodwill lobbying, the employee is a lobbyist under G.S. 120C, which makes the employer a lobbyist principal under G.S. 120C. Section 8.(b) of HB 1111 went into effect on October 1, 2007.

G.S. 138A-32(e)(1) pertains to food and beverages for immediate consumption provided at a “public event.” In reviewing the subsections for this section that applied to legislators and applying the facts you provided, the exemption did not fit. Foremost, this legislative breakfast was not open to the general public, and all of the members of the North Carolina General Assembly (“GA”) were not invited. Therefore, this legislative breakfast did not meet the definition of public event under G.S. 138A-3(29)a.1. The group of legislators that were invited to this breakfast was not a recognized legislative caucus, delegation or standing committee; therefore, the association’s legislative reception did not meet the first requirement of public event in G.S. 138A-3(29)a.2. Accordingly, the association’s planned legislative breakfast did not meet either of the definitions of public event for legislators.<sup>4</sup>

Another possible gift ban exemption involves “educational meetings.” There is a gift ban exemption under G.S. 138A-32(e)(3)(i) for certain “reasonable actual expenditures,” including food and beverage expenditures, of a legislator incurred at an “educational” meeting if certain requirements are met. The statute does not define “educational”; however, the Commission has adopted some non-exclusive factors to be used as criteria in determining what is an “educational meeting” under G.S. 138A-32(e)(3)(i) (“Criteria”).<sup>5</sup>

Even with the Commission establishing these Criteria as the general guidelines for determining what is an educational meeting for the gift ban exemption of G.S. 138A-32(e)(3)(i), whether a particular meeting, conference, or event will be deemed to be an educational meeting under G.S. 138A-32(e)(3)(i) will depend on the specific facts. Your letter did not provide sufficient details about the legislative breakfast to enable me to address all the questions presented in the Criteria adopted by the Commission to determine if it would have qualified as an educational meeting under the 138A-32(e)(3)(i) gift ban exemption. For example, I would need to know the identity of the speaker(s) and the general nature of each speaker’s presentation, as well as the overall agenda for the entire legislative breakfast meeting. Also, I would need to know more about the association’s legislative agenda and any plans it had for the introduction or support of specific legislation.

However, if legislative issues, questions, and/or legislative agendas were going to be a significant part of the legislative breakfast, the breakfast meeting would probably not be considered an educational meeting under the new laws. You stated that both potential 2007 legislative issues and general legislative issues were going to be discussed at the legislative breakfast, but did not provide the

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<sup>4</sup> For future reference note that Section 24 of HB 1111 amended the definition of “public event” under G.S. 138A-3(29) and eliminated the two separate subsections, one for legislators and legislative employees, and another for public servants. Pursuant to Section 24 of HB 1111, there are now five definitions of “public event” under G.S. 138A-3(29), and if the sponsoring person and their/its event meet all of the requirements of any one of these five definitions, the event is a public event for legislators, legislative employees, and public servants. Section 24 of HB 1111 became effective on August 9, 2007. The lobbyist principal’s legislative reception here still would not qualify as a “public event” under any of the five definitions of “public event” created by Section 24 of HB 1111.

<sup>5</sup> Attached to this formal advisory opinion is a copy of these non-exclusive factors titled “Criteria for Determining an ‘Educational Meeting’ under G.S. 138A-32(e)(3)(i).” For your information and reference, the Commission has applied these Criteria in a formal advisory opinion issued in response to another requester. [See AO-L-07-0012.]

amount of time that was going to be spent on these legislative issues. This information would be an important factor along with the other factors addressed in the Criteria. Without such information, I could not make a determination as to whether the legislative breakfast met the educational meeting exemption under G.S. 138A-32(e)(3)(i).

Based on my above analysis, the association could not provide the select group of legislator's food and beverages at no charge. Note that if each legislator had paid fair market value for their food and beverages, it would not have been a gift and the select group of legislators could have eaten the meal. G.S 138A-3(15)a.

Hopefully this formal advisory opinion and the attached Criteria will give you some guidance regarding what information needs to be provided to the Commission's staff when requesting a formal advisory opinion as to whether a particular meeting or conference is an "educational meeting" under the G.S. 138A-32(e)(3)(i) gift ban exemption.

## Educational Meeting Exception

### **Criteria for Determining an “Educational Meeting” Under §138A-32(e)(3)(i)**

While there is an exception to the gifts ban for expenditures associated with “educational meetings,” the statute does not define that key term. So the Commission and its staff are left with the task of determining **what is “an educational meeting”?**

Without a statutory definition, and until the Commission attempts to define “educational meeting” through formal or informal rulemaking, our best option is to apply various non-exclusive factors or criteria to the specific situations with which we are presented. Determining what is or is not an “educational meeting” involves applying these non-exclusive factors or criteria on a fact-specific, case-by-case basis. To aid that fact-specific determination, the Commission has adopted the following criteria. Again, the list is non-exclusive, and the Commission may modify it as necessary in the future.

**Remember that an “educational meeting” must be for purposes primarily related to the public duties and responsibilities of the public servant, legislator, or legislative employee.**

In applying these factors, the focus of the Commission will be on the intent of the donor and the recipient’s knowledge of that intent. The determination as to whether a meeting is “educational” will vary according to the facts and circumstances of each meeting.

I. Is the educational content of the meeting related to a specific public duty or responsibility of the public servant, legislator, or legislative employee?

If so, what specific duty or responsibility?

- for legislators and legislative employees, this will be interpreted very broadly;
- for public servants, less so because of the scope of their public duties.

If the content of the meeting is not primarily related to a specific duty or responsibility of a public servant, legislator, or legislative employee, then it does not qualify as an education meeting under this section.

II. Is the primary purpose of the meeting educational?

A. If the meeting’s *primary* purpose is to *influence* a public servant, legislator, or legislative employee with respect to executive or legislative action (rather than educate them on a legitimate subject), the meeting is not “educational.” A meeting primarily intended to promote learning for self-improvement relative to the public duties of a person is “educational,” not a meeting intended to curry favor concretely.

Meetings intended to influence rather than educate may include meetings that are directly related to an upcoming official vote, recommendation, or other action that the public servant, legislator, or legislative employee may take, such as the discussion of a legislative or executive agenda or specific concerns with respect to a matter that would require legislative or executive action to remedy.

In determining the purpose of the meeting, the Commission will consider whether the entity holding the meeting:

- has legislation pending before the General Assembly or intends to request legislative action;
- is seeking, or seeding to impact, North Carolina legislative or executive action at the time of the meeting;
- can be impacted by the actions or decisions of the public servant, legislator, or legislative employee; or
- if the facts demonstrate that the entity’s purpose in holding the meeting is to advocate on behalf of legislative or executive action.

B. What is the nature of the entity holding the meeting?

- Is the entity a State agency or governmental entity?
- Is the entity an educational institution?
- Is the entity an organization that routinely sponsors meetings with educational content?
- Is the entity holding the meeting a Lobbyist Principal?

C. Is the Lobbyist Principal paying for the meeting also sponsoring the meeting?

- Is the source of the funding (gift) the same as the source of the education (as opposed to a Lobbyist Principal paying to send a public servant, legislator, or legislative employee to *another* entity's meeting)?

D. What is the complete agenda of the meeting?

- What proportion of the individual events scheduled at the meeting have a speaker, roundtable discussion, or other educational content that is directly related to the public duties of the public servant, legislator, or legislative employee?
- What proportion of those sessions is held in the absence of a meal or entertainment?
- What proportion of the meeting agenda includes meals or entertainment with formal educational content?
- Does the agenda cover a wide range of topics or have a very limited, industry-specific focus?
- Would the meeting take place regardless of whether the invited public servant, legislator, or legislative employee attends?
- Who are the speakers?
- Are they associated with the Lobbyist Principal or its Lobbyist?
- Are they outside experts in their field?

E. Is the location of the meeting directly related to the meeting's educational content?

- Is there a reason for holding the meeting in a location other than where the attendees live or work?
- Is it necessary to the meeting's educational purpose that an individual travel in connection with the meeting?
- Is the meeting sponsored by a state, national, or international organization for the benefit of its state, national, or international membership?
- Is the location of the meeting otherwise integral to the educational content of the meeting?
- Would an individual be capable of obtaining a comparable degree of educational information through other means that would not require travel?

F. Is the length of the educational meeting reasonably necessary to fulfilling the educational purpose of the trip?

G. What degree of personal benefit does the individual gain from attendance at the meeting?

- Does the personal benefit outweigh the public benefit gained by the educational value of the meeting?

H. Are there *other factors* that would support the conclusion that the meeting is educational?