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Special Edition -- *Gifts & "Freebies"*

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*"WHEREAS, THE PEOPLE OF NORTH CAROLINA ENTRUST PUBLIC POWER TO ELECTED AND APPOINTED OFFICIALS FOR THE PURPOSE OF FURTHERING THE PUBLIC, NOT PRIVATE OR PERSONAL, INTEREST..."*  
EXECUTIVE ORDER NO. ONE

## Letter from the Director

While questions to the Board of Ethics regarding the legality and appropriateness of the acceptance of gifts by covered Public Officials are more frequent during the traditional "gift-giving season," the answers apply year round. Accordingly, this *Special Edition* newsletter is dedicated entirely to the subject of gifts to Public Officials covered under Executive Order One. While we hope this will answer some of your basic gift questions, it is by no means intended to cover each and every situation.

Questions regarding gifts to public officials are some of the most common and most troubling in the ethics field. They are troubling not because of their factual or analytical complexity, but rather because they so often appear to require the seemingly harsh application of overprotective rules. At least that is the way answers to these questions are often perceived. It is often difficult to see the potential harm in a well-intentioned expression of genuine gratitude. Just as it is human nature to want to express such gratitude in a tangible way, however, it is also human nature to feel a return debt of gratitude and to question, at least for the non-recipient, the giver's motive and the recipient's response. And let's be honest: most gift & "freebie" questions involve someone (a contractor, a vendor, a bidder) trying to gain some sort of competitive advantage through the giving of a gift or favor. Advertising, even in the form of good will, works. (Why else would companies pay over a million dollars for less than a minute's worth of air time during the Super Bowl?) Public Officials must avoid both the perception and the reality that the performance of their public duty is somehow "for sale."

As each situation is different, I urge you to contact your Agency head, legal counsel, or the Board of Ethics with any specific questions you have concerning gifts. Together we can find the right answer.

Perry Y. Newson 

## Gifts, "Freebies," & Related Questions

Many people, both in and out of State government, are surprised to learn that there is no comprehensive statewide law or policy on gifts -- only a hit-or-miss collection of laws, rules, or policies applicable to specific situations or select agencies, departments, or boards. For example,

- It is unlawful for anyone to "corruptly give, offer, or promise anything of value" to any **Department of Transportation** employee or Board member with the intent to influence any official act, and it is unlawful for such employee or board member to solicit or accept the same (§136-13) ;
- The Secretary of the **Department of Administration**, any of the Secretary's "assistants," and **Advisory Budget Commission** members may not accept or receive gifts, money, or anything of value from any person, firm, or corporation to whom a contract may be awarded (§143-63);
- Members of the managing boards of **educational or penal institutions**, among others, cannot receive "any gift, emolument, reward or promise of reward" to influence the procurement of any goods or merchandise (§14-236);
- It is unlawful for any public utility to give **Utilities Commission** members or staff any gift of money, property, or anything of value, and it is unlawful for such Commissioners or staff to accept the same (§62-327);
- It is unlawful for "any person holding office under the laws of this State" to receive or consent to receive anything of value or personal advantage for performing or omitting to perform any official act within the scope of his or her official authority (§14-217); and
- Members of the **State Highway Patrol** generally may not solicit or accept any gift, favor, special accommodation, or donation if it may be reasonably inferred that the donor seeks to, among other things, influence official action (Policy Manual).

The closest we have to a general “gift” law in North Carolina is §133-32. This statute involves gifts and favors from public contractors to State officials and employees. It makes it unlawful for any contractor, subcontractor, or supplier who (1) has a contract with a governmental agency, (2) has performed under such a contract within the past year, or (3) anticipates bidding on such a contract in the future **to give gifts or favors to any government officer or employee** who is charged with the duty of (a) preparing plans, specifications, or estimates for public contracts, (b) awarding or administering public contracts, or (c) inspecting or supervising construction. It is also unlawful for any officer or government employee to **receive or accept any such gift or favor**. Violation of this provision is a criminal offense.

The general gift prohibition has several significant exceptions. It does not prohibit the giving or receiving of (1) **honorariums** for participating in meetings (but State employees must be careful to comply with the rules contained in the Budget Manual of the Office of State Budget and Management), (2) **advertising items or souvenirs of nominal value** (the statute does not set a dollar limit on what “nominal” is), or (3) **meals furnished at banquets**. One commentator has said that since the statute specifically exempts “meals furnished at banquets,” the suggestion is that other meals are covered by the prohibition. Nor is the statute intended to prevent public contractors from making donations to professional organizations to defray meeting expenses where government employees are members of such organizations, and government employees who are members of professional organizations may participate in all scheduled meeting functions which are available to all members of the professional organization attending the meeting.

Like its predecessor, Executive Order Number One does NOT speak directly to the propriety of the receipt of gifts. “Public Officials” must **disclose** certain gifts on their Statement of Economic Interest disclosure form. See §9 (c) (2) (m). Otherwise, gifts are dealt with in the context of conflict of interest and, more commonly, the **appearance of conflict** of interest.

Gifts to Public Officials can cause at least three problems. The first involves a direct conflict of interest. A Public Official shall not knowingly use his or her position in any manner which will result in financial benefit, direct or indirect, to the Official or an individual with whom or business with which the Official is associated. Executive Order Number One (“EO One” or “the Order”), §7 (a) (1). Nor shall a Public Official, directly or indirectly, accept, receive, or agree to receive anything of value for himself or herself or for another person in return for being influenced in the discharge of his or her official responsibilities. EO One, §7 (a) (2). Finally, a Public Official shall not receive personal financial gain, other than that received by the Official from the State for acting in his or her official capacity, for advice or assistance given in the course of carrying out the Public Official's duties. EO One, §7 (a) (3). These situations are extremely rare.

The second gift-related problem involves **appearances**. Public Officials must make every effort to avoid even the appearance of a conflict of interest. EO One, §7 (b) (1). An appearance of conflict may exist even in the absence of a true conflict of interest. The problem is usually not the bargaining away of the public trust for a meal or some token of appreciation, but rather the potential perception or appearance that the giver would be gaining or attempting to gain some unfair advantage or influence in the future.

The third problem is closely related to, and perhaps a subset of, the appearance issue. Because of conflict or appearance of conflict concerns, Public Officials or staff members who have accepted gifts from vendors or others seeking to influence their decisions might be prohibited from dealing with them in the future.

The following are some commonly-asked gift questions and general, non-fact-specific answers to the same.

## **TICKETS**

Should a Public Official accept free tickets from an agency vendor to a sporting event, play, or fundraising event?

Answer: Generally, no. It is generally not proper for Public Officials to accept gifts or services from someone whom the official regulates, contracts with, or otherwise does business with as part of his service as a Public Official. At a minimum, this can cause the appearance of a conflict of interest.

Does it make any difference if the tickets to a sporting event are season tickets or tickets the vendor received as part of its sponsorship of the event so that there was no purchase made specifically for the Public Official?

Answer: No. It does not matter how the vendor got the tickets.

Can a vendor take a Public Official to entertainment events when the Official has traveled to the vendor’s home city or when both vendor and Official are out of town (like at a non-vendor sponsored seminar)?

Answer: Not if it is otherwise prohibited. Ethics requirements do not end at the border.

## **GIFTS OF “NOMINAL VALUE”**

Should Officials accept small or token gifts from vendors (with or without the vendor’s logo on them)?

Answer: It depends. Normally, the giving and receiving of gifts of “nominal value” does not create a conflict of interest or the appearance of conflict of interest. This is consistent with §133-32. Typical items of nominal value include imprinted pencils or pens, matchbooks, coffee mugs, cups, etc. Regardless of value, a Public Official should not solicit items from clients or vendors.

Does it matter if the gift is to the whole staff, division, or agency rather than just an individual member?

Answer: Technically, no. The magnitude of the gift, together with what is done with it, is more important. Gifts such as food or fruit baskets are common, and if reasonable in scope and if they are made available to everyone, including the public at large, they generally do not create an impermissible conflict of interest.

## **MEALS & “FREE LUNCHES”**

Should Public Officials accept free meals from vendors, prospective bidders, or others either doing or seeking to do business with their branch or division of State government?

Answer: Generally, no. It is generally not proper for Public Officials to accept free meals (which is merely a form of “gift”) from someone whom the official regulates, contracts with, or otherwise does business with as part of his or her service as a public official. Even though it may arguably be of “nominal value,” it can cause the appearance of a conflict of interest. It may also violate §133-32.

During the bidding process for awarding a State contract, if an Official makes a site visit to a bidder, can the bidder furnish meals to the Official?

Answer: Not if it is otherwise prohibited. The location does not matter.

## **VENDOR-CATERED BANQUETS OR PARTIES**

Can a vendor cater an employee party?

Answer: Generally, no. This is merely a “free lunch” on a grand scale, and the same rules would apply.

Can a vendor or trade association cater or sponsor a hospitality room at an industry-wide meeting or conference?

Answer: It depends. If the proposed social event (be it a hospitality room, reception, or some other reasonable and customary meeting-related event) is open to **all members** of the host organization, it is probably in compliance with both §133-32 and also a reasonable interpretation of EO One, which is intended to protect the public interest, not prevent Public Officials from attending beneficial meetings clearly within the scope of their official duties and functions.

## **TRAVEL EXPENSES**

Can a vendor pay a Public Official’s travel expenses to attend a vendor-sponsored seminar?

Answer: Generally, no. The Board of Ethics has issued several advisory opinions in the past holding that allowing a private company interested in doing business with the State, and probably with the agency for which the employee works, to pay the employee’s travel expenses causes at a minimum the **appearance** of conflict of interest.

## HONORARIA

Should a Public Official accept a monetary “honorarium” from a vendor to speak at a meeting or seminar?

Answer: It depends, but probably not. Executive Order One does not deal with honoraria. Instead, this issue is generally covered by the rules and guidelines set out in the State Budget Manual, Office of State Budget and Management. Section 5 (E) (1) states, “A state employee shall not accept an honorarium for an activity conducted where state-reimbursed travel, work time or resources are used or where the activity can be construed as having a relationship to the employee’s state position....”

Obviously this is a very tough standard. The activity cannot have any relationship to the employee’s State duties. Such a relationship is deemed to exist if “but for” that employee’s State position, the employee would not participate in the activity in the same manner or capacity.

Can a vendor pay a Public Official to take part in a “discussion group” with their other clients outside of normal working hours?

Answer: Again, while this is no longer within the Board of Ethics’ jurisdiction, probably not under the rules and guidelines set out in the State Budget Manual, Office of State Budget and Management. That which we call an honorarium by any other name would smell as..... sweet?



**Did you forget to file your “new” Statement of Economic Interest by May 15<sup>th</sup>? If so, please return the appropriate form to the Board as soon as possible!**