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Annual Gifts & "Freebies" Edition

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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

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## Letter from the Director

Board staff receives many questions regarding the legality and appropriateness of the acceptance of gifts by covered Public Officials. While these questions are common throughout the year, they are more frequent during the traditional "gift-giving season." We have addressed this subject before, but it bears reexamination on an annual basis, not only because of its timely nature but also because of the large number of new Public Officials joining the ranks of those covered by Executive Order Number One each year. For those loyal readers of this newsletter who recognize pretty much the same material as last year, bear with us and keep in mind that "repetition is the foundation of learning."

Accordingly, we once again devote this entire newsletter 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. 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*

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"Always do the right thing. It will gratify some and astonish the rest."

*Mark Twain*

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## Gifts, "Freebies," & Related Questions

Many people, both in and out of State government, are surprised to learn that there is no comprehensive statewide law 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);
- No public officer or employee may solicit or receive any gift, reward, or promise of reward in exchange for recommending, influencing, or attempting to influence the award of a contract by the public agency he or she serves (§14-234);
- 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). (Continued on next page.)

## Gifts, “Freebies,” & Related Questions (continued from previous page)

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.

In the same spirit as §133-32, the General Assembly amended §14-234 in late 2001 to include a gifts provision: “No public officer or employee may solicit or receive any gift, reward, or promise of reward *in exchange for* recommending, influencing, or attempting to influence the award of a contract by the public agency he or she serves.” N.C.G.S. §14-234 (a) (3) (emphasis added). Note the “in exchange for” requirement. This gifts provision is much more akin to the bribery statute (§14-217) and is not a true regulation of the giving and receipt of gifts *per se*.

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.

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 quite frankly, 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 millions of 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.”

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); *see also* §14-234 (a) (3). 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, concert, 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"**

May Public 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 LUNCHESES"**

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 or §14-234.

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?

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“Whenever you are to do a thing, though it can never be known but to yourself, ask yourself how you would act were all the world looking at you and act accordingly.”

*Thomas Jefferson*

## **GIFTS: TWO PERSPECTIVES\***

### **NO GIFTS: A CASE FOR ZERO GIFT POLICIES**

Public administrators must respond to the loss of public confidence in government. In order to regain trust, the current standards must be raised. One such standard concerns the gift policy for administrators. Zero gift policies, like the one recently implemented by the city of Houston, Texas, seek to set the clear standard that officials should not receive goods or services for doing their job. With the implementation of a zero gift policy, citizens have evidence that administrators cannot be influenced in the course of their work.

The giving and receiving of gifts is standard practice in business worldwide and even an expected occurrence in some cultures. However, the loss in public confidence in government demands a code of ethics higher than popular culture. Good publicity alone will not change public perception. Higher standards will. A zero gifts policy will “astonish the public” by setting a higher standard and thereby helping improve citizens’ views and restore confidence.

Gifts can be presented in a variety of ways. For example, a tangible gift of monetary value, such as a bottle of wine or a new watch, may be given directly to the administrator. Other gifts include buying lunch, offering tickets to a ballgame, or providing an honorarium for a speaking engagement. These may be presented innocently, or they can be given to influence a public servant’s decision, as in sending an expensive item just before a decision is to be finalized to determine who will be awarded a government contract. When the public learns that a gift has been given, it perceives the situation as a bureaucrat who is “for sale” to the highest bidder. This can only serve to diminish confidence in government.

A zero gift policy may seem severe to administrators and employees who do not see gift giving as a problem or do not believe that confidence in government is at an all-time low, but Houston has not suffered any further embarrassment due to questionable acceptance of gifts since the new policy was put into effect. The policy is easy to understand and it is consistent. All employees know that under no circumstances are gifts to be accepted. Conversely, the policy is easy to enforce because all employees know that if anyone accepts a gift, no matter what the size or cost, the policy has been violated.

Public administrators need clear guidelines to follow in implementing an effective and trusted administration. Without clear boundaries, drawn to define the parameters where legal conduct ends and illegal conduct begins, there remains room for confusion. When conduct falls into this gray area, the public may perceive the conduct as illegal simply because it is not legal. Even if the conduct is actually legal, if the public perceives it to be illegal, then confidence in the governing administration is further eroded.

Guidelines for acceptable behavior, a workable framework, and appropriate disciplinary measures show employees what is expected of them and what they can expect from others. The most positive aspect of implementing a clear no gift policy is that the public no longer sees the government or its agents as being “for sale.” Implementing a zero gift policy may sound extreme, but it creates a clear standard that is easy to follow. It rules out confusion as to what is and is not acceptable. The final result is that the government is viewed as more ethical and trustworthy because the people know that their leaders are influenced only by what is in the public interest and not personal gain. Setting high ethical standards increases confidence, which in turn provides the government with more support to better the public.

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\* Taken from the Point-Counterpoint commentaries in the Winter 2002 edition of *Public Integrity*, Vol. IV, No. I, pages 61-80: “The Case for a Zero Gift Policy” by Herbert Fain; and “Extremism in the Search for Virtue: Why Zero Gift Policies Spawn Unintended Consequences,” by Kathryn G. Denhardt and Stuart C. Gilman.

## A “BRIGHT LINE” *DE MINIMUS* POLICY IS BETTER

Gift policies are an essential element of ethics regulations in government because they address very real concerns about private gain from public office. But experience has shown that zero gift policies – according to which a public official may receive absolutely nothing of value from vendors, clients, or the general public – can create problems by defining common social practices as ethics violations. A *de minimus* policy is preferable because such a policy allows for token gifts that are a common part of social relations.

Public trust in government depends on a robust perception that government employees are acting in the public interest. However, trust also depends on a perception that government employees are able to make good judgments based on standards of reasonableness. Although a zero gift policy leaves no room for doubt about expectations, it also leaves no room for participating in basic social graces.

An unintended consequence of an absolutist approach is the creation of unnecessarily awkward situations. Should employees interact with citizens with enough detachment to ensure that no expression of appreciation is ever offered? Surely this would feed the stereotype of the rigid, uncaring bureaucrat, when we know that such “uncaring” behavior is one cause of the deteriorating trust in government. By modifying the gift policy to permit gifts of minimal (*de minimus*) value, such unintended quandaries can be avoided.

Obviously, it is important to prevent the appearance (and reality) of impropriety surrounding gifts from those who do business with government. Confidence in government is eroded when there is any appearance that a public servant’s actions are influenced by a gift of any sort. Without a doubt, distrust is fed by revelations that personal gain may have influenced an official’s actions. A gift policy is essential, and as important for elected officials as for civil servants.

Prohibitionist policies are well intentioned and grounded in important values, but the enforcement too often results in situations that defy commonsense standards of reasonableness and propriety. In one case, a major [federal] procurement process had to be voided after a losing bidder reported that an official had accepted a Big Mac and fries at a local McDonald’s. This cost taxpayers hundreds of thousands of dollars and the procurement officer’s job, even though there was general agreement that the lunch did not influence the official’s decision.

It is important to note that *de minimus* gift restrictions should specify (1) a maximum value for any single gift, (2) a maximum aggregate value for all gifts from a single source in a given time period, and (3) provisions that allow for personal gifts from family members. If a provision for a maximum aggregate value for all gifts is missing, for example, the spirit of the law may be circumvented by someone giving an official a set of golf clubs – one at a time – as has occurred.

Another strategy for avoiding rigidity while promoting confidence in government is to utilize the mechanisms of disclosure and/or approval by an independent third party. On some occasions employees are offered something of value that would be of significant benefit to the government while not posing a conflict of interest. An alternative to a strictly enforced zero gift policy is to have a policy requiring the *approval* of an independent third party.

Another option is to require *disclosure* of all gifts as a way of detecting and dealing with any potential conflicts of interest that could erode trust. Such a provision puts the emphasis on transparency rather than rigid rules and allows for public dialogue about what constitutes a reasonable situation. Requiring the employee to publicly disclose the gift through financial disclosure forms maximizes transparency. By having in place a mechanism for disclosure, the reasonableness of the gift can be assessed not only by the individual and the government but by the public as well.

## ANNOUNCEMENTS & GENERAL INFORMATION

### "Statement of Economic Interest" Due-Dates

All **new** employees or appointees who are covered by Executive Order Number One must file their Statement as soon as reasonably possible, the intent being to have a conflict evaluation prior to or contemporaneous with the commencement of public service where feasible.

All **currently serving** Public Officials who submitted a Statement under former Executive Order 127 should have submitted a **new Statement** in 2001. See section 9 (e) of Executive Order Number One.

Thereafter, all covered Officials must file an **updated Statement** by May 15 *each year*. See section 9 (b). Be looking for next year's Statements in January.

If you have any questions relating to the Statement, please call the Board's offices at 733-2780.

### ETHICS EDUCATION

For the first time in two years, Board staff is able to travel outside of the Raleigh area to make basic ethics education and awareness presentations.

If your board or agency would like such a presentation, please call the Board's offices to make the necessary arrangements.

In the meantime, Board staff is always available for telephone consultations regarding relevant conflict of interest questions.