

Advisory Opinion 440
Withdrawn by Requester

State of Minnesota
Campaign Finance and Public Disclosure Board
Suite 190, Centennial Building. 658 Cedar Street. St. Paul, MN 55155-1603

THIS ADVISORY OPINION IS PUBLIC DATA
pursuant to a consent for release of information
provided by the requester

Issued to: Kevin Willis
Director/President
Minnesota Zoo
13000 Zoo Boulevard
Apple Valley, MN 55124

RE: Gift by state agency to public officials

ADVISORY OPINION 441

SUMMARY

The Minnesota Zoo is an agency of the State of Minnesota. A state agency is not a type of "association" under Minnesota Statutes Chapter 10A and, thus, is not included within the scope of entities that may be principals under the state's lobbying and gift prohibitions. Because the Zoo is not a principal, the gift prohibition of section 10A.071 is not applicable to the Zoo.

FACTS

As the Director and President of the Minnesota Zoological Garden (the Zoo), you request on the Zoo's behalf an advisory opinion from the Campaign Finance and Public Disclosure Board based on the following facts that were provided in the letter requesting the advisory opinion and in documentation provided with the request.

1. The Zoo is established in Minnesota Statutes Chapter 85A. The Zoo is a state agency operated by the Minnesota Zoological Board (the Zoo Board). The Zoo Board consists of up to 30 members, 15 appointed by the Governor and 15 appointed by the Zoo Board. The Zoo's board members are public officials. The Zoo Board appoints a director to oversee the Zoo's operations. The Zoo's director, officers, and employees are state employees.
2. All receipts from parking, admission, concessions, memberships, and donations to the Zoo are deposited into the state treasury and statutorily appropriated back to the Zoo Board for the Zoo's operations. Standard admission to the Zoo for one adult for the day is \$18.00. Parking is an additional \$7.00.
3. The Minnesota Zoo Foundation (the Foundation) is a Minnesota nonprofit corporation and a public charity under Section 501(c)(3) of the Internal Revenue Code. The purpose of the Foundation is to benefit, support, and carry out the purposes of the Zoo and, more specifically, to raise funds, and advocate on behalf of the Zoo.

4. The Foundation is governed by an independent board of trustees. The Zoo's director is *ex officio* the president of the Foundation and sits on the Foundation's board but does not have voting rights.
5. In consideration of fundraising and other services provided by the Foundation, the Zoo provides furnished office space and technical support to the Foundation. The Zoo and the Foundation also share a website at www.mnzoo.org.
6. The Foundation pays a lobbyist more than \$500 a year to represent the interests of the Zoo at the state legislature. The lobbyist works at the direction of the president of the Foundation, who is also the director of the Zoo, and in coordination with the Zoo's public affairs director, who is an employee of the Zoo. The Foundation does not direct the lobbyist's work. The lobbyist is registered with the Board and lists the Foundation as the organization represented on his registration form and lobbyist disbursement reports. These reports list the president of the Foundation (the director of the Zoo) as the contact for the principal.
7. For the past several years, the Zoo has held a Legislators' Day at the Zoo. The Zoo provides free admission to the Zoo, parking, lunch, and private tours by Zoo staff to legislators who attend this event. All legislators have been invited to the event in past years.
8. The Zoo would like to continue hosting a Legislators' Day at the Zoo and similar events for state legislators in the future.

ISSUE

Does the prohibition on gifts from lobbyists and principals to legislators in Minnesota Statutes section 10A.071 prohibit the Minnesota Zoological Garden from providing free admission, parking, food and beverages, and zoo tours to legislators as part of a Legislators' Day at the Zoo or similar events?

OPINION

Which entity is represented by the lobbyist who is paid by the Foundation?

The Board has previously examined situations where two related entities are involved in lobbying activities with one entity initially paying the lobbyist while the other entity directs the lobbyist's work and stands to benefit from the lobbyist's efforts. In the first such examination, the Board concluded that the entity that directed the lobbyist's work, and on whose behalf the lobbyist lobbied, was the association represented and that the lobbyist should register on behalf of that association. Advisory Opinion 292 (April 24, 1998).

More recently, the Board examined a situation in which a multi-faceted organization's public affairs department retained and directed the activities of lobbyists who lobbied on behalf of various operating units of the organization. The Board concluded that the lobbyist should register for the operating unit(s) whose interests were represented by the lobbyist. Advisory Opinion 413 (November 1, 2010).¹

The facts of the present situation are similar to those previously considered. Although the Zoo does not reimburse the Foundation for the lobbyist's salary, the Foundation exists solely

¹ In each of these cases, the entity whose interests were represented ultimately reimbursed the other entity for the services. However, for reasons described in this opinion, the Board does not find payment for a lobbyist's services to be controlling.

to further the goals of the Zoo. Under the facts of this opinion, the lobbyist's work is directed by the Zoo's director and its public affairs director, both of whom are employees of the Zoo. Additionally, the lobbyist advocates on behalf of the Zoo, not on behalf of the Foundation.²

The Board concludes that the approach it has previously applied to situations where a lobbyist represents the interests of one association while being paid, or even directed, by another is consistent with the plain language and intent of Chapter 10A. Thus, the Board concludes that the Zoo's lobbyist should be registered on behalf of the Zoo rather than the Foundation.

Direct payment by the Foundation for the lobbyist's services makes the Foundation an original source of funds under rule 4511.0100, subpart 5, which provides that:

"Original source of funds" means a source of funds, other than the entity for which a lobbyist is registered, paid to the lobbyist, the lobbyist's employer, the entity represented by the lobbyist, or the lobbyist's principal for lobbying purposes.

Once the lobbyist is properly registered based on the fact that he represents the Zoo's interests, it becomes clear that the Foundation is a source of funds paid to a lobbyist by an entity other than the entity for which the lobbyist is registered.

The lobbyist disbursement report should therefore show the Foundation as an original source of funds for lobbying. Although the Zoo has had a lobbyist representing its interests for several years, the Board applies this advisory opinion only prospectively and will not require amendments to lobbyist disbursements previously filed.

Is the Zoo a principal?

Minnesota Statutes section 10A.071, subdivision 2, provides as follows:

A lobbyist or principal may not give a gift or request another to give a gift to an official. An official may not accept a gift from a lobbyist or principal.

Legislators are officials covered by the gift ban. *Id.*, subd. 1 (c).

Under section 10A.071, a "principal" is "an individual or association". In order to conclude that the Zoo is a principal, the Board would first have to conclude that the Zoo is an "association".

An association is "a group of two or more persons, who are not members of an immediate family, acting in concert. Minn. Stat. § 10A.01, subd. 6. The Board has previously determined that political subdivisions and public higher education systems are not associations. Advisory Opinion 224 (January 26, 1996); Advisory Opinion 297 (July 24, 1998). Advisory opinion number 224 stated that the University of Minnesota, "as a constitutionally established institution which is recognized as a unique entity of state government", was "more than an association" as that term is defined in Chapter 10A.

The Board concludes that because the Zoo is a statutorily created state agency, which is recognized as a unique entity of state government, it is not included in the scope of entities defined as "associations" in Chapter 10A and, thus, cannot be a principal. A lobbyist that registers on behalf of a governmental entity that is not a principal is still covered by the

² In discussions with Zoo staff, it was made clear that the lobbyist does not lobby on charitable corporation issues or other issues that would be related to the Foundation and its operations. Rather, the lobbyist advocates on behalf of the Zoo and its operations.

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**THE FOLLOWING PUBLICATION DOES NOT IDENTIFY
THE REQUESTER OF THE ADVISORY OPINION, WHICH IS NON PUBLIC DATA
under Minn. Stat. § 10A.02, subd. 12(b)**

RE: Noncampaign Disbursement for Constituent Services

ADVISORY OPINION 442

SUMMARY

A candidate's campaign committee may, under certain circumstances, pay for use of office space as a constituent service. Payment to a corporation in an amount equal to the fair market value of the goods or services provided is required to avoid a prohibited contribution from the corporation.

FACTS

As a member of the Minnesota Legislature, you request an advisory opinion from the Campaign Finance and Public Disclosure Board based on the following facts that were provided in the letter requesting the advisory opinion and in discussions with Board staff.

1. You are the sole owner of a professional office that is registered in Minnesota as a limited liability company. You are the only professional practicing in that office.
2. You also own another business. Both the professional office and the other business are located in a leased two-room business office. The office space is rented from an unrelated third party.
3. You periodically meet with constituents in the business office. There is no specific meeting area within the business office for meeting with constituents. The same space and furniture used for meeting with business clients is also used for meeting with constituents.
4. You have not kept a log of your meetings or phone calls with constituents. You estimate that you meet with individuals in the business office on constituent issues between one and four times a week. Additionally, you take between one and ten phone calls a week while at your business office from constituents with issues that you may be able to address as a legislator. The number of meetings and phone calls at your business office is significantly less during legislative session when you spend the majority of your time in St. Paul.
5. Although infrequent, you occasionally receive a phone call or visit at the business office that is related to your campaign for reelection.

6. You are considering placing a sign on the outside of the business office that would serve two purposes. A portion of the sign would identify the office as a location to meet with you, or call you, in your role as a legislator. The other portion of the sign would identify the office as the location of your professional office.

INTRODUCTION

The use of a candidate's campaign committee funds is controlled by Minnesota Statutes section 211B.12. The limitations on corporate contributions to candidates are found in Minnesota Statutes section 211B.15. The Board was first given the authority to issue advisory opinions on these two provisions of chapter 211B in 2014, and this is the first advisory opinion issued under that authority.

Minnesota Statutes section 211B.12 limits use of campaign funds to activities intended to influence elections and to the noncampaign disbursements defined in Minnesota Statutes section 10A.01, subdivision 26. Section 211B.12 also provides an overall restriction on the use of campaign funds by providing in part, "Money collected for political purposes and assets of a political committee or political fund may not be converted to personal use."

Minnesota Statutes section 211B.15 limits the donation of corporate funds and resources to influence elections. Candidate committees are prohibited from accepting corporate donations, either cash or in-kind contributions.

The noncampaign disbursements currently established by the legislature in Minnesota Statutes section 10A.01, subdivision 26, identify permitted uses of campaign funds that are not directly related to influencing voters at an election. Noncampaign disbursements do not count against the spending limit applied to candidates who sign a public subsidy agreement.

Relevant and applicable to this opinion is the noncampaign disbursement identified in section 10A.01, subdivision 26(6), which in part provides:

...services for a constituent by a member of the legislature or a constitutional officer in the executive branch, including the costs of preparing and distributing a suggestion or idea solicitation to constituents,...

The term "services for a constituent" is defined in Minnesota Rules 4503.0100, subpart 6, as follows:

"Services for a constituent" or "constituent services" means services performed or provided by an incumbent legislator or constitutional officer for the benefit of one or more residents of the official's district, but does not include gifts, congratulatory advertisements, charitable contributions, or similar expenditures.

Whether a constituent service qualifies as a noncampaign disbursement depends on when the service is provided. A constituent service qualifies entirely as a noncampaign disbursement if the service occurs from the beginning of the term of office of the elected candidate to adjournment sine die of the legislature in the election year of the office held by the candidate. For the sixty days following adjournment sine die a constituent

service is classified as 50% noncampaign disbursement and 50% campaign expenditure. More than sixty days after adjournment sine die, the entire amount spent on a constituent service is a campaign expenditure.

To have constituents you must be an elected official, therefore, this noncampaign disbursement is available only to incumbents.

The Board has previously held that in order to qualify as a constituent service there must be an actual service provided. The Board has acknowledged the cost of printing and mailing an unsolicited informational mailing to constituents, the cost of providing a mailed response to a specific request from a constituent, and staff costs directly related to providing constituent services may be paid for with campaign committee funds and reported as noncampaign disbursements, (during the appropriate time frames).¹

Also relevant to this opinion are Minnesota Rules 4503.0100, subpart 3a, and 4503.0800, subpart 4, which, when read together, provide that shared office space and services must either be paid for at fair market value, or considered to be an in-kind contribution at fair market value. Fair market value is defined as the amount that an individual would pay for the same or similar service or item on the open market.

ISSUE ONE

May your campaign committee pay for some portion of the rent of your business office as a noncampaign disbursement for providing constituent services?

OPINION

The Board approaches this issue with three concerns: 1) what is the actual service provided to constituents; 2) could the use of the business office be a prohibited corporate contribution; and 3) is it possible that a payment with committee funds for use of the office could result in a conversion to personal use.

The service that is evaluated in this opinion is the use of the business office as a location for interacting with constituents. The Board has previously recognized in investigative findings that the cost of operating a constituent service office in the legislator's district may be paid for with committee funds and, depending on when the office was open, reported as either a campaign expenditure or a noncampaign disbursement.² The Board accepted that the office was a service to constituents because it provided a location within the district to meet with the legislator, leave phone messages, and in general provide easier access to the legislator.

The use of the business office in this opinion provides the same advantages, and is a service to constituents. Therefore, campaign committee funds may be used to pay for some portion of the business office operating costs.

¹ See Advisory Opinions 248, 275, 294, 307, 313, and 378. Opinions are available online at www.cfboard.state.mn.us/ao/index.html.

² See Findings regarding a complaint against Representative Greg Davids, October 15, 2004. The finding is available online at www.cfboard.state.mn.us/bdinfo/investigation/101504Davids.pdf

The constituent service office examined in the investigation referenced above was not shared with any other entity or business. This made it easy to determine the costs associated with operating the office and, by extension, the amount to be reported as a noncampaign disbursement. The single purpose use of the constituent office also meant there was no danger of a prohibited contribution from any other entity that shared the office.

In the facts of this opinion the business office space is not exclusively, or even primarily, used as a service to constituents. Further, as provided in the facts of this advisory opinion, there are no discrete additional costs associated with assisting constituents at the business office. The same office space and furniture used to run the businesses housed at the office are used when meeting with a constituent. Similarly, no additional staff or office equipment has been added to the business office to accommodate constituents who come to the office.

Payments from the campaign committee to the business must reflect actual use to avoid an inadvertent corporate contribution that might occur if the amount paid is not fair market value for the services received.

As stated in the facts the requester has not kept a log of constituent visits or phone calls, and acknowledges that the number of calls and visits can vary dramatically week to week. For a payment to be accurate it must be based on a record that can justify the payment. The payment cannot be based on an approximation of actual use. Therefore, a log of constituent meetings will need to be kept. A log of the number, dates, and duration of visits is also needed to meet the record keeping requirements of Minnesota Statutes section 10A.13, which requires the campaign committee treasurer to obtain a receipted bill, stating the particulars, for every committee expenditure in excess of \$100.

Finally, the Board is concerned that payments from the campaign committee for use of the business office could result in a conversion of committee funds to personal use. Because there are no additional identifiable costs to the business to support the constituent meetings, the payments received from the campaign committee will in effect partially pay the business operating costs, and therefore increase the profitability, of a business owned by the legislator. To avoid this, committee payment must again reflect the fair market value of the actual use of the office, not an approximation.

Paying the fair market value of an item like office space requires keeping an accurate log of the amount of time the office is used for constituent services, and then using that information to calculate what percentage of time the office is used for constituent services. The percentage of time the office is used for constituent services is used to determine the percentage of the lease costs that should be paid by the committee.

Any additional identifiable office costs, for example the use of a copier or a dedicated phone line, must be added to the fair market value of the space provided.

ISSUE TWO

During an election year may your campaign committee pay your business for some portion of the rent of the business office as a campaign expenditure?

OPINION

As noted in the introduction section of this opinion, the noncampaign disbursement for constituent services is available in full only during a certain time frame. In a year in which the legislator's office is on the ballot the adjournment of the legislature sine die starts a sixty-day period when the cost of the use of the business office is classified as 50% noncampaign disbursement, and 50% campaign expenditure. More than sixty days after adjournment sine die the entire amount spent on the use of the business office is a campaign expenditure.

Because all campaign expenditures count against the spending limit for a candidate that signed the public subsidy agreement, the campaign committee will need to monitor the payments to the business office carefully through the end of the election year.

To the extent that payments for constituent services as a noncampaign disbursement are approved in Issue One, payment for the campaign expenditure portion of those services is also approved.

ISSUE THREE

Should your campaign committee reimburse your business if you receive a call related to your election campaign at work?

OPINION

While this opinion is safe harbor only to the requester under the specific facts in the request, the Board believes that this question reflects a common quandary faced by both challengers and incumbent candidates. Namely, is a payment from the campaign committee to the candidate's employer or business required if the candidate takes any action related to the election while at work? While acknowledging that candidates should always be aware that corporate contributions to their campaigns are prohibited, the Board finds it unrealistic to expect that a candidate will never have a conversation or phone call related to the campaign during working hours. Such a standard would be both unreasonable and, as a practical matter, unenforceable.

Employers recognize that employees will need to make or receive the occasional personal phone call or visitor while at work. Allowing an employee to accept a personal phone call or visitor is a benefit given to the employee by the employer. If, as an example, the employee decides to use a personal phone call to order more lawn signs for the campaign, that phone call does not become a corporate contribution to the candidate's committee. Instead, the personal call made while at work is from the employee who made the call, not the employer that allows the call to occur.

