



STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
LAWRENCE G. WASDEN

June 7, 2007

VIA E-MAIL

Timothy A. Hurst  
Chief Deputy Secretary of State  
thurst@sos.idaho.gov

Re: Our File No. 2007STA033 – Sunshine Laws / Charity Golf Tournament

Dear Mr. Hurst:

This letter responds to questions from your office regarding Idaho's Sunshine Laws. Specifically, you have asked the following in the context of a lobbyist who pays for a legislator to play in a charity golf tournament.

Question 1. Are activities undertaken by lobbyists for the purpose of developing and maintaining relationships with governmental officials "lobbying"?

Response to Question 1. Yes. Developing and maintaining relationships are an intrinsic aspect of lobbying. Therefore, activities that cultivate and nurture the relationship between lobbyists and governmental officials constitute lobbying.

Question 2. Are lobbyist expenditures made for the purpose of developing and maintaining relationships with governmental officials reportable?

Response to Question 2. Yes. However, since criminal penalties may be sought for reporting violations, if prosecuted, a defendant lobbyist *may* prevail using the doctrine of lenity as a defense by arguing that a strict reading of the term "lobbying" does not include activities intended solely to obtain the good will of government officials.

Question 3. Are public servants who are not legislators allowed to accept gifts from lobbyists made for the purpose of developing and maintaining relationships between lobbyists and servants?

Response to Question 3. Gifts to public servants valued at more than \$50 and given in return for official action are not permitted. Gifts to public servants that are not in return for official action may or may not be allowable, depending upon the type of public servant and the gift-giver's interests. Enclosed is a copy of a 1990 Attorney General Guideline that concludes that highway district commissioners may be criminally prosecuted for accepting a free golf weekend from a construction firm that does business with the district.

### **Discussion of Question 1 – Lobbying.**

Idaho's Sunshine Laws define "lobbying".

"Lobby" and "lobbying" each means attempting through contacts with, or causing others to make contact with, members of the legislature or legislative committees or an executive official, to influence the approval, modification or rejection of any legislation by the legislature of the state of Idaho or any committee thereof or by the governor, and shall also mean communicating with an executive official for the purpose of influencing the consideration, amendment, adoption or rejection of any rule or rulemaking as defined in section 67-5201, Idaho Code, or any ratemaking decision, procurement, contract, bid or bid process, financial services agreement, or bond issue . . . .

Idaho Code § 67-6602. The Sunshine Laws also describe what is *not* lobbying.

Neither "lobby" nor lobbying" includes an association's or other organization's act of communicating with the members of that association or organization; and provided that neither "lobby" nor "lobbying" includes communicating with an executive official for the purpose of carrying out ongoing negotiations following the award of a bid or a contract, communications involving ongoing legal work and negotiations conducted by and with attorneys for executive agencies, interactions between parties in litigation or other contested matters, or communications among and between members of the legislature and executive officials and their employees, or by state employees while acting in their official capacity or within the course and scope of their employment.

Idaho Code § 67-6602(j).

Sponsoring a legislator to play in a charity golf tournament will cause the lobbyist or others to make contact with the legislator to extend the invitation and explain the terms of participation (e.g., time and place of the event and who will bear the costs). Payment of the legislator's tournament fee may also qualify as a contact. An important question

is whether the purpose of this contact is to influence the approval, modification, or rejection of any legislation.

A lobbyist is "any person who lobbies". Idaho Code § 67-6602(k). Before lobbying, a person must file as a lobbyist with the Secretary of State and pay a registration fee. Idaho Code § 67-6617. By registering, the lobbyist has declared his intent to influence or attempt to influence governmental action. There are many ways in which a lobbyist may do this: He may communicate with the official orally or in writing, solicit others to influence the official, or attempt to cultivate the good will of the official by providing items or services of value. A lobbyist's professional purpose is to influence administrative or legislative action. When a lobbyist confers something of value upon a government official, it is reasonable to presume that act is in furtherance of this purpose and is, therefore, "lobbying".

The definition of lobbying does not state that a lobbyist's attempt to influence must be tied to particular legislation, nor does it specify that the legislation of interest must be before, or likely to be before, the legislature or a committee. Moreover, efforts to develop and maintain relationships are not included in the list of activities that do *not* constitute lobbying. It may be deduced that the bestowing of items or services of value upon government officials is the type of activity that the Sunshine Laws require a lobbyist to disclose to avoid secrecy and to promote the public's confidence in their government. Idaho Code § 67-6601 declares that:

The purpose of this act is:

- (a) To promote public confidence in government; and
- (b) To promote openness in government and avoiding secrecy by those giving financial support to state election campaigns and those promoting or opposing legislation or attempting to influence executive or administrative actions for compensation at the state level.

Furthermore, the act requires that its provisions "be liberally construed to effectuate the policies and purposes of this act, and any other act, the provisions of this act shall govern." Idaho Code § 67-6628.

A court, liberally construing the Sunshine Laws to effectuate its policies and purposes as it is required to do, would likely rule that lobbyist efforts to develop and maintain relationships with governmental officials are lobbying pursuant to the Idaho Sunshine Laws.

### **Discussion of Question 2 – Reporting.**

Idaho Code § 67-6619 requires that:

Any lobbyist registered under section 67-6617, Idaho Code, shall file with the secretary of state and annual report of his *activities* signed by both the lobbyist and the lobbyist's employers. The reports shall be made in the form and manner prescribed by the secretary of state and shall be filed on January 31. In addition to the annual report, while the legislature is in session, every registered lobbyist shall file interim monthly periodic reports for each month or portion thereof that the legislature is in session, which reports need be signed only by the lobbyist and which shall be filed within ten (10) days of the first day of the month for the activities of the month just past, provided, however, that any lobbyist covered under this chapter whose *lobbying activities* are confined only to executive officials shall be required to file interim periodic reports semiannually, which reports need be signed only by the lobbyist . . . .

While this section requires lobbyists to report their *activities*, it provides an exception for lobbyists whose *lobbying activities* are confined to executive officials. It also exempts from reporting reimbursed personal living and travel expenses incurred by the lobbyist "for any *lobbying purpose*". The logical conclusion therefore, is that not all expenditures need be reported, just lobbying expenditures. This requires that a distinction be made between lobbying and non-lobbying activities. Because provisions of this act are to be liberally construed, a broad reading of the term "lobbying" would normally be appropriate. This would be the case in determining if a civil penalty applies for a violation of the reporting requirement as provided for in Idaho Code § 67-6625(a). However, persons who knowingly and willfully violate the reporting requirement may be subject to criminal penalties. Idaho Code § 67-6625(b). Despite the command to construe language liberally, if a court were to decide that it was ambiguous whether expenditures made for the purpose of developing and maintaining relationships were included in the definition of lobbying, the doctrine of lenity would apply, and the statute would be construed in favor of the accused (i.e., excluding expenditures for developing and maintaining relationships from the definition of lobbying). See Brown v. State, 137 Idaho 529, 50 P.3d 1024 (2002). See also State v. Beard, 135 Idaho 641, 22 P.3d 116 (2001). The Doctrine of Lenity holds that if a statute's meaning is so unclear that it is uncertain that, by law, whether the defendant's conduct constituted a criminal violation, the defendant is to be given the benefit of the doubt and found not guilty. In baseball vernacular, tie goes to the defendant. This, of course, applies only if the statute is ambiguous, that is, capable of more than one reasonable interpretation. It would be ill-advised for any lobbyist to rely on this defense.

### **Discussion of Question 3 – Executive and Judicial Branch Officials.**

Generally, it is a misdemeanor crime for regulatory and law enforcement officials to accept pecuniary benefits from persons subject to their department or agency's regulation, inspection, investigation, and custody or with whom litigation is pending or likely. Idaho Code § 18-1356(1). Public servants having discretion over contracts


purchases, payments, claims, or other governmental pecuniary transactions may not accept any pecuniary benefit from persons interested or likely to become interested in such transactions. Idaho Code § 18-1356(2). Judicial officers, administrative tribunal officials, and their employees and agents may not accept any pecuniary benefit from persons known or likely to be interested in the outcome of any matter before the court or tribunal. Idaho Code § 18-1356(3). An examination of the permissibility of gift-giving to public servants who are not legislators requires classifying the type of public servant and identifying the interests of the gift-giver and any exceptions that might apply. Such an analysis must be accomplished on a case-by-case basis. As in the criminal prosecution of reporting violations discussed above, if there is ambiguity as to whether a public servant is the type prohibited from receiving gifts, the statute will be strictly construed in favor of the defendant. The enclosed 1990 Attorney General Legal Guideline concludes that highway district commissioners who accept a free golf weekend at Sun Valley from a construction firm doing considerable business with the district can be punished through criminal prosecution pursuant to Idaho Code § 18-1351 *et seq.* This is an example of prohibited conduct under Idaho Code § 18-1356(2).

**Conclusion.**

In summary, activities undertaken by lobbyists for the purpose of developing and maintaining relationships with governmental officials are "lobbying", and lobbyists must report associated expenditures to the Secretary of State. If lobbyists are criminally prosecuted for failure to report these expenditures, a possible defense is that the statute is ambiguous and should not be enforced. The ultimate success of this defense is doubtful. While accepting gifts over \$50 in value in exchange for official action is a crime for government officials of any branch, certain executive and judicial branch officials may not accept any pecuniary benefits from persons under their control or purview, even if the accepted benefit was not *quid pro quo* for official action.

I hope that these observations have been responsive to your questions. Please contact me if you would like to discuss this matter further.

Kind regards,

  
MITCHELL E. TORYANSKI  
Deputy Attorney General

MET/mdw

Enclosure

1990 Attorney General Legal Guideline

August 21, 1990

Mr. Fritz A. Wonderlich  
City Attorney, Twin Falls  
c/o BENOIT, ALEXANDER, et al.  
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Twin Falls, ID 83303-0366

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE  
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Dear Mr. Wonderlich:

This letter is in response to your telephone inquiry regarding the recently amended statutes comprising chapter 13A, title 18, Idaho Code. You expressed concern as to what conduct was prohibited due to the statutory definition of "pecuniary benefit" in Idaho Code § 18-1351(7) and its relationship to Idaho Code § 18-1356(2).

To illustrate the problem, a hypothetical situation would be a highway district's board of commissioners being provided a weekend of golf and accommodations at Sun Valley by a large construction firm which does considerable business with the district. This is the precise type of activity forbidden under Idaho Code § 18-1356(2), which governs "gifts to public servants by persons subject to their jurisdiction":

(2) Officials concerned with government contracts and pecuniary transactions. No public servant having any discretionary function to perform in connection with contracts, purchases, payments, claims or other pecuniary transactions of the government shall solicit, accept or agree to accept any pecuniary benefit from any person known to be interested in or likely to become interested in any such contract, purchase, payment, claim or transaction.

(Emphasis added.) Undoubtedly, the private party providing the golf holiday is an interested party within the scope of this section. Similarly, the highway district commissioners' control and discretion over the enforcement of highway district contracts bring them within the scope of this section.

The question then focuses on whether the type of benefit being bestowed upon the district commissioners is "pecuniary" in nature and within the scope of Idaho Code § 18-1356(2). "Pecuniary benefit" is defined as follows by Idaho Code § 18-1351(7), as amended:

(7) "Pecuniary benefit" is any benefit to a public official or member of his household in the form of money, property or commercial interests, the primary significance of which is economic gain.

(Emphasis added.) It is the opinion of this office that the legislature's definition of "pecuniary benefit" was intended to prohibit gifts of any sort that provide economic gain, regardless of the form such gifts might take. Thus, under the hypothetical example, the commissioners would clearly be receiving a "pecuniary benefit" from the interested contractor.

This analysis is bolstered by the language in which the statute provides for exceptions. Specifically, Idaho Code § 18-1356(5)(c) states:

(5) Exceptions. This section shall not apply to:

.....

(c) trivial benefits not to exceed a value of fifty dollars (\$50.00) incidental to personal, professional or business contacts and involving no substantial risk of undermining official impartiality.

The legislature set the \$50 limitation upon "trivial benefits" in order to close an obvious loophole which could be abused by a subjective construction of the term "trivial." 1990 Idaho Sess. Laws, ch. 328 at 903. The fact that trivial benefits not exceeding \$50 in value are permitted supports the conclusion that benefits which have a much larger cash-equivalent value, such as a golf weekend in Sun Valley, are improper. The legislature recognized the function of private interest groups in government and the need to occasionally conduct business in social settings. The "working lunch" has been retained in the ethics legislation. However, the "trivial benefits" language of Idaho Code § 18-1356(5)(c) would be pointless if the activities discussed above were permitted under a cramped reading of "pecuniary benefits" under § 18-1356(2).

Fritz Wonderlich  
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In conclusion, a "pecuniary benefit" may include goods or services purchased by a private party on behalf of a public employee. The legislature has established an exception for "trivial benefits" received. The \$50 value limitation should be strictly followed. The hypothetical example of a weekend in Sun Valley golfing and being entertained by a private interest group is absolutely contrary to the provisions of Idaho Code § 18-1351 *et seq.*, and punishable through criminal prosecution. Idaho Code § 18-1360.

If I can be of further assistance in this matter, please do not hesitate to contact me.

Very truly yours,

FRANCIS P. WALKER  
Deputy Attorney General