

EXECUTIVE BRANCH ETHICS COMMISSION
ADVISORY OPINION 93-79

December 16, 1993

RE: Questions generated from seminars of the Kentucky Society for Professional Engineers and the Consulting Engineers Council of Kentucky

This opinion is in response to your November 8, 1993, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the November 22 and December 16, 1993, meetings of the Commission, and the following opinion is issued.

In conducting seminars around the state, the Kentucky Society for Professional Engineers and the Consulting Engineers Council of Kentucky have received many questions concerning the new ethics laws pertaining to executive agency lobbying. You ask the Commission for clarification of these concerns.

1) Are procurement procedures for architectural and engineering services for the state, which are governed by KRS Chapter 45, exempt from the provisions of KRS Chapter 11A? If not, what parts of the procurement process are considered executive agency lobbying activities? Are all employees involved in a project proposal considered executive agency lobbyists (EAL) or just those who actually negotiate the contract? Will only negotiators who spend a substantial amount (20-30% or more) of their time attempting to influence state officials be considered EALs? What time percentage reasonably constitutes "substantial"?

KRS 11A.201(9)(a) defines:

"Executive agency lobbying activity" means contacts made to promote, oppose, or otherwise influence the outcome of an executive agency decision by direct communication with an elected executive official, the secretary of any cabinet listed in KRS 12.250, any executive agency official, or a member of the staff of any one of the officials listed in this paragraph.

The Commission believes procurement procedures detailed in KRS Chapter 45A do not exempt architects and engineers seeking state contracts from the provisions of KRS Chapter 11A. Executive agency lobbying activity includes all parts of the procurement process that include contacts with a state official or member of official's staff to influence the outcome of an executive agency decision. Those employees involved in a project proposal whose employment involves attempting to influence executive agency decisions as one of its main purposes are considered executive agency lobbyists.

KRS 11A.201(8)(a) defines:

"Executive agency lobbyist" means any person engaged to influence executive agency decisions or to conduct executive agency lobbying activity as one (1) of his main purposes on a regular and substantial basis.

The Commission, in Advisory Opinion 93-34, established a guideline that only those who lobby concerning executive agency decisions involving state expenditures of more than \$5,000 per decision are considered acting on a "regular and substantial" basis. The Commission also believes that on a "regular" basis involves two or more contacts by the lobbyist with state officials or their staff within a 12-month period..

2) *Are consultants who are engaged by small cities, which do not have engineering staff, exempt from the requirements of KRS Chapter 11A because they are working for or on behalf of a "political subdivision"?*

KRS 11A.201(8)(b) provides:

"Executive agency lobbyist" does not include an elected or appointed officer or employee of a federal or state agency, state college, state university, or political subdivision who attempts to influence or affect executive agency decisions in his fiduciary capacity as a representative of his agency, college, university, or political subdivision;

In Advisory Opinion 93-75 (a copy of which is enclosed), the Commission concluded those outside persons engaged to represent political subdivisions are not considered employees of the political subdivision, and thus, must register with the Commission if they are attempting to influence executive agency decisions. Consultants engaged by cities are not exempt from the requirements of KRS Chapter 11A.

3) *When representatives of professional engineering organizations meet with representatives of state universities and the Council on Higher Education for the purpose of enhancing engineering education, which concern \$500,000 for an Engineering Enhancement Fund or funding for a new mechanical engineering building, constitute executive agency lobbying activity? When these representatives are employed by engineering firms that provide consulting engineering services to the universities, does this constitute executive agency lobbying activity? If refreshments are provided by the professional engineering organization, are these reportable expenditures?*

Attempts made by representatives of professional engineering organizations to influence state universities, alone, are not governed by KRS Chapter 11A because state universities are not considered executive branch agencies. Attempts made by representatives of professional engineering organizations to influence the Council on Higher Education concerning

the expenditure of funds relative to the award of a state contract, grant or other financial arrangement are considered executive agency lobbying activity. Refreshments provided by the professional engineering organization should be reported as expenditures if the organization is registered as an executive agency lobbyist or employer.

4) *If a state agency considering an expansion of a building calls an architect who is considered an expert on the building and asks him questions about his opinion on the expansion, is it considered executive agency lobbying activity if the architect responds in such a manner that indicates he would like the opportunity to work on the job?*

The Commission believes an architect who is attempting to influence a state agency relative to the award of a contract is engaged in executive agency lobbying activity and should register with the Commission. However, if an architect contacted by a state agency is not involved in attempting to influence executive agency decisions as a main purpose of employment, then he is not considered an executive agency lobbyist and not required to register.

5) *Define "gift" as referred to in KRS 11A.201(2)(a)1. If a firm gives calendars to Transportation Cabinet officials and to private firms at Christmas, is this considered an "expenditure"?*

KRS 11A.201(2)(a) and (b) provide:

(a) "Expenditure" means any of the following that is made to, or for the benefit of an elected executive official, the secretary of a cabinet listed in KRS 12.250, an executive agency official, or a member of the staff of any of the officials listed in this paragraph:

1. A payment, distribution, loan, advance, deposit, reimbursement, or gift of money, real estate, or anything of value, including, but not limited to, food and beverages, entertainment, lodging, transportation, or honoraria;

2. A contract, promise, or agreement to make an expenditure; or

3. The purchase, sale, or gift of services or any other thing of value.

(b) "Expenditure" does not include a contribution, gift, or grant to a foundation or other charitable organization that is exempt from federal income taxation under Section 501(c)(3) of the Internal Revenue Code. "Expenditure" does not include the purchase, sale, or gift of services or any other thing of value that is available to the general public on the same terms as it is available to the persons listed in this subsection;

A gift referred to in the above provision means money, services, or any other

thing of value made to or on behalf of an executive agency official or a member of their staff. If the calendars given to Transportation Cabinet officials are available to the general public on the same terms as to the officials, then these gifts are not considered expenditures under the provision. However, if these calendars are available only to clients and not to the general public, then the firm must report the calendars as expenditures.

6) *Is an Area Development District a state agency for purposes of KRS 11A?*

The Area Development Districts are not part of the financial reporting entity of the state, and thus, are not executive branch agencies for purposes of KRS 11A.