



COMMONWEALTH OF KENTUCKY

EXECUTIVE BRANCH ETHICS COMMISSION

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Executive Branch Ethics Commission
ADVISORY OPINION 18-01
January 16, 2018

RE:

1. Do publications of the Institute for Justice fall within the statutory definition of gift in KRS 11A.010(5)?
2. Does the cost of staff time spent preparing these publications count towards their value as gifts for purposes of applying KRS 11A.045(1)?
3. Do these gifts fit within any of the exemptions to the definition of a gift in KRS 11A.010(5)?
4. If the publications are considered gifts, do these publications have a value of less than \$25?

DECISION:

1. Yes.
2. No, so long as the cost of staff time is already included in the market price.
3. No, based on the scenario provided.
4. Yes, at present market value.

This opinion is issued in response to your December 5, 2017 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission") on behalf of Institute for Justice (IJ). This matter was reviewed at the January 16, 2018 meeting of the Commission and the following opinion is issued.

You state the relevant facts as follows: The IJ is a Section 501(c)(3) nonprofit public-interest law firm that promotes economic liberty, freedom of speech, educational choice, and property rights. IJ engages in lobbying activities, pursuant to KRS 11A.201, et. seq., and has an Executive Agency Lobbyist registered with the Commission to lobby executive branch agencies on its behalf. As part of IJ's mission, IJ has published several books and reports. You specifically refer to two publications that you wish to have disseminated to executive branch agency officials. The first work is entitled *Bottleneckers: Gaming the Government for Power and Private Profit* ("Bottleneckers") by William Mellor and Dick M. Carpenter II, which is currently available for purchase online for \$17 to \$19. The second publication is a 224-page report entitled *License to Work 2*, which is available for free download from IJ's website.

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You ask whether your representatives may provide these publications to executive branch officials without violating the gifts rule in the Executive Branch Code of Ethics (Ethics Code). You specifically ask question, which we have parsed as follows:

1. Do publications of the Institute for Justice fall within the statutory definition of gift in KRS 11A.010(5)?
2. Does the cost of staff time spent preparing these publications count towards their value as gifts for purposes of applying KRS 11A.045(1)?
3. Do these gifts fit within any of the exemptions to the definition of a gift in KRS 11A.010(5)?
4. If the publications are considered gifts, do these publications have a value of less than \$25?

KRS 11A.045(1) provides:

- (1) No public servant, his spouse, or dependent child knowingly shall accept any gifts or gratuities, including travel expenses, meals, alcoholic beverages, and honoraria, totaling a value greater than twenty-five dollars (\$25) in a single calendar year from any person or business that does business with, is regulated by, is seeking grants from, is involved in litigation against, or is lobbying or attempting to influence the actions of the agency in which the public servant is employed or which he supervises, or from any group or association which has as its primary purpose the representation of those persons or businesses. Nothing contained in this subsection shall prohibit the commission from authorizing exceptions to this subsection where such exemption would not create an appearance of impropriety.

KRS 11A.010 defines "gift" as follows:

- (5) "Gift" means a payment, loan, subscription, advance, deposit of money, services, or anything of value, unless consideration of equal or greater value is received; "gift" does not include gifts from family members, campaign contributions, the waiver of a registration fee for a presenter at a conference or training described in KRS 45A.097(5), or door prizes available to the public;

The term "value" is not specifically defined by the Ethics Code; however, the Commission has historically determined "value" to mean the price of a particular item on the open market, such as the cost or expense of the item if a member of the general public desired to purchase the item.

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Generally speaking, a public servant may not accept within one calendar year gifts totaling in value of more than \$25 from a single source if that source is a person or business engaging in conduct listed in KRS 11A.045(1). As you have described your scenario, IJ has a registered lobbyist that will be lobbying executive branch officials. Therefore, IJ is or will be engaging in conduct listed in KRS 11A.045(1). Therefore, the public servants being lobbied may not accept anything of value totaling more than \$25 from representatives for IJ. In other words, the public servants may accept items of value from IJ representatives until the items of value reach the maximum threshold in value of \$25 for the calendar year.

As for the two publications mentioned in your request, they do fall within the statutory definition of gift in KRS 11A.010(5) because they have a value. *License to Work 2* is currently free to the general public for download, therefore its present value is \$0. Yet, if the IJ were to print the report and provide it to the public officials, there would be a cost for printing the 224 page report. If IJ were to provide the report electronically, then the value would be much reduced. If have indicated in your request that if IJ were to sell the License to Work 2 Report, it would do so at an online price of \$2 per report. *Bottleneckers'* present value is \$17 to \$19 because that item may be purchased by the general public for that amount online. KRS 11A.010(5) does not separately define a gift by the cost of staff time spent preparing the item of value. The assumption is that the cost of staff creating an item of value is already included in the market price of the item. If an item is offered to the general public for free, then the staff time creating that item is not factored into its value. Therefore, staff time in preparing an item is not calculated separately from the market value of a gift for purposes of applying KRS 11A.045(1).

The IJ publications do not fit within any of the exemptions to the definition of a gift in KRS 11A.010(5). The exemptions from the definition of the term gift include gifts from family members, campaign contributions, the waiver of a registration fee for a presenter at a conference or training described in KRS 45A.097(5), and door prizes available to the public. Based upon your scenario, these publications do not fit within these exemptions as described in your request. However, any of these exemptions could apply based on an individual scenario. It will be up to the individual public servants to monitor whether the gift prohibition applies to them in a particular factual situation. For instance, if IJ provides these publications to an elected official as a campaign contribution, then the publications would not be considered a prohibited gift.

Finally, the publications present total online market value is at most \$21 [\$19 plus \$2]; therefore, these publications have a present value of less than \$25. If the value of these items were to increase beyond the \$25 threshold, then the public servant receiving those items will need to ensure that the gifts he or she receives from the IJ do not exceed a combined total value of more than \$25 in a calendar year. Nevertheless, the responsibility is on the public servant to ensure that he or she is only accepting gifts within the dictates and requirements of the Ethics Code.

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Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

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By Chair: William G. Francis