



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

ATTORNEY GENERAL OPINION NO. 15-1

To: The Honorable Lawrence Denney
Idaho Secretary of State
Statehouse
VIA HAND DELIVERY

Per Request for Attorney General's Opinion

You asked this office for a clarification of the following question under the Sunshine Law:

QUESTION PRESENTED

Should a state employee lobbyist who proffers gifts and/or benefits to legislators and/or executive officials register and disclose his or her conduct as a lobbyist?

CONCLUSION

This answer is "yes" with limited exceptions explained below.

ANALYSIS

Regulation of lobbying in Idaho is statutory and is controlled by Idaho's Sunshine Law, Idaho Code §§ 67-6601 through 67-6630. "Lobby" and "lobbying" are defined in Idaho Code § 67-6602(j). This subsection is long and not explicitly broken into parts. It contains two independent definitions of lobbying (labeled as parts [I] and [II] below) and five "carve outs" from the definition of lobbying (labeled parts [III] through [VII] below).

In order to make this subsection more understandable, it is reformatted and broken up into two or three subparts for each of its seven parts. Those subparts are: (1) the kinds of contacts or communications covered by each part (labeled "[A]"); (2) the persons who are contacted (labeled "[B]"), and (3) the purposes of the contact (labeled "[C]"). Subsection (j) is set out in full below with an explicit structure imposed over the top of it:

[I] "Lobby" and "lobbying" each means:

- [A] attempting through contacts with, or causing others to make contact with
 - [B] members of the legislature or legislative committees or an executive official
 - [C] [i] 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; or
[ii] to develop or maintain relationships with, promote goodwill with, or entertain members of the legislature or executive officials
- [II] “Lobby” and “lobbying” shall also mean:
- [A] communicating
 - [B] with an executive official
 - [C] for the purpose of influencing
 - [i] the consideration, amendment, adoption or rejection of any rule or rulemaking as defined in section 67-5201, Idaho Code; or
 - [ii] any ratemaking decision, procurement, contract, bid or bid process, financial services agreement, or bond issue
- [III] Neither “lobby” nor “lobbying” includes:
- [A] an association’s or other organization’s act of communicating
 - [B] with the members of that association or organization; and
- [IV] provided that neither “lobby” nor “lobbying” includes:
- [A] communicating
 - [B] with an executive official
 - [C] for the purpose of carrying out ongoing negotiations following the award of a bid or a contract
- [V] [A] communications
- [B] conducted by and with attorneys for executive agencies
 - [C] involving ongoing legal work and negotiations
- [VI] [A] interactions
- [B] between parties in litigation or other contested matters; or
- [VII] [A] communications
- [B] [i] among and between members of the legislature and executive officials and their employees; or
[ii] by state employees
 - [C] while acting in their official capacity or within the course and scope of their employment.

Idaho Code § 67-6602(j) (bracketed subdivisions added; subsection reformatted).

Thus, a state executive officer or employee who contacts a legislator or who testifies before a legislative committee “to influence the approval, modification or rejection of any

legislation” would be within subdivision [I][C][i]’s definition of lobbying unless that activity is “carved out” later in subsection (j). The same would apply to a state employee who communicates with an executive officer to influence rulemaking, contracting, etc.; the employee would be lobbying within the meaning of subdivision [II][C][i] or [ii] unless there is a “carve out.”

However, subdivision [VII][C] is just such a carve out: State officers and employees may communicate with legislators or decision-making executive officers while acting in their official capacities or within the course and scope of their employment. This “carve out” for official capacity expression of the officer’s or agency’s position or views on legislation, rulemaking, procurement, etc. (these are activities otherwise covered by subdivisions [I][C][i] and [II][C][i] and [ii]) is not a “carve out” from all lobbying activities defined in subsection (j). In particular, there is no “carve out” from subdivision [I][C][ii]: contacts with legislative or executive officers “to develop or maintain relationships with, promote goodwill with, or entertain members of the legislature or executive officials.”

To take a first step toward answering your specific question on whether state employees who proffer gifts and/or benefits to legislators and/or executive officials must register and report as lobbyists, the preceding analysis shows that a state employee who proffers such gifts or benefits is lobbying under § 67-6602(j). That makes the employee a “lobbyist” within the meaning of § 67-6602(k) and the employee’s agency or constitutional office a “lobbyist’s employer” within the meaning of § 67-6602(l).

That leads to the next question: Are there any “carve outs” from the general rules for registering and reporting by lobbyists that would apply to a state employee “who proffers gifts and/or benefits to legislators and/or executive officials?” As explained below, there are some narrow “carve outs.”

Idaho Code § 67-6617 requires lobbyists to register with the Secretary of State. Idaho Code § 67-6618 provides a number of exemptions from registration and reporting, two of which may be applicable to state officers or employees “who proffer gifts and/or benefits to legislators and/or executive officers.” The applicable part of § 67-6618 provides:

67-6618. Exemption from registration. — The following persons and activities shall be exempt from registration and reporting under sections 67-6617 and 67-6619, Idaho Code:

...

(c) Persons who do not receive any compensation for lobbying and persons whose compensation for lobbying does not exceed two hundred fifty dollars (\$250) in the aggregate during any calendar quarter, including persons who lobby on behalf of their employer or employers, and the lobbying activity represents less than the equivalent of two hundred fifty dollars (\$250) of the employee’s time per calendar year quarter, based on an hourly proration of said employee’s compensation.

(d) Elected state officers and state executive officers appointed by the governor subject to confirmation by the senate; elected officials of political subdivisions of the state of Idaho, acting in their official capacity.

...

Subsection (c)'s exception is highly dependent upon the hourly rate of the employee involved. For example, a lower-paid staffer who is tasked with providing coffee and doughnuts to a legislative delegation visiting an agency might well be acting on behalf of the agency "to develop or maintain relationships with, promote goodwill with, or entertain members of the legislature or executive officials," but there is an exemption from registering and reporting as a lobbyist under subsection (c) so long as the staffer was not paid more than \$250 while performing those duties. On the other hand, a highly-paid employee who took a legislator to a tailgate party, a football game, and out for dinner afterward could easily exceed the \$250 limit in an afternoon and evening. Subsection (c)'s exception is strictly dependent upon the hourly compensation of the employee.

Subsection (d)'s exception is narrow: Among state officers and employees it applies only to elected officers and executive officers appointed by the governor and confirmed by the senate. Thus, to take an example, a department director appointed by the governor and confirmed by the senate as provided in Idaho Code § 67-2404 would be exempt from registering and reporting as a lobbyist for gifts "to develop or maintain relationships with, promote goodwill with, or entertain members of the legislature or executive officials," but a deputy director appointed by the director pursuant to § 67-2403 would not.

Idaho Code § 67-6619 also contains an implicit exception from reporting of lobbying activities. It is set out below:

67-6619. Reporting by lobbyists. — . . .

(2) Each annual, semiannual and monthly periodic report shall contain:

(a) The total of all expenditures made or incurred on behalf of such lobbyist by the lobbyist's employer or employers, not including payments made directly to the lobbyist, during the period covered by the report. . . .

(b) The name of any legislator or executive official to whom or for whose benefit on any one (1) occasion, an expenditure . . . in excess of one hundred dollars (\$100) per person on and after January 1, 2011, for the purpose of lobbying, is made or incurred and the date, name of payee, purpose and amount of such expenditure. Expenditures for the benefit of the members of the household of a legislator or executive official shall also be itemized if such expenditure exceeds the amount listed in this subsection.

...

(e) The itemization threshold in subsection (2)(b) of this section shall be

adjusted biennially by directive of the secretary of state, using consumer price index data compiled by the United States department of labor.¹

...

Thus, under subsections (2)(b) and (e), state officers or employees who are not otherwise exempt from registering and reporting as lobbyists and who “proffer gifts and/or benefits to legislators and/or executive officials” (or members of their households) but who do not spend more than \$105 per legislator or executive officer (together with members of their households) in doing so must report their aggregate expenditures under subsection (2)(a), but need not break down their expenditures by the individual person lobbied.

In summary, with the exception of elected state officials and state officers appointed by the governor and approved by the senate, a state officer or employee who “proffers gifts and/or benefits to legislators and/or executive officials” is generally required to register and report as a lobbyist. There are two exceptions: for employees whose compensation for time spent lobbying does not exceed \$250 (who need not register or report) and for lobbying expenditures that do not exceed \$105 per person (who need not report upon whose behalf the expenditures were made).

Dated this 16th day of March, 2015.



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Analysis by:

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¹The current lobbying reporting forms on the Secretary of State’s website show that the \$100 figure found in subsection (2)(b) has been increased to \$105 pursuant to subsection (2)(e) to take into account changes in the Consumer Price Index.