July 23, 2009 Gift Act and Campaign Reporting Act

Paula Tackett, Director
Legislative Council Service
411 State Capitol Building
Santa Fe, NM 87501

Re: Opinion Request - Gift Act and Campaign Reporting Act

Dear Ms. Tackett:

You have requested our advice regarding the application of the Gift Act, NMSA 1978, Sections 10-16B-1 to -4 and Campaign Reporting Act, NMSA 1978, Sections 1-19-25 to –37. Specifically, your letter asks how the Gift Act would apply to a legislator accepting: (a) a ticket that is labeled "admission for two" but costs more than $250; (b) a ticket that costs more than $250 when the legislator is a guest of honor, and; (c) medicine that costs more than $250. Your letter asks how the Campaign Reporting Act would apply to a legislator using his campaign account: (a) to make a contribution to a candidate for federal office; (b) to pay for a specific student's scholarship to a state university, and; (c) for any purpose after the legislator has failed to win re-election.

Based on our examination of the relevant New Mexico constitutional, statutory and case law authorities, and on the information available to us at this time, we conclude that the Gift Act prohibits a state legislator from accepting a gift, as defined in the Act, regardless of how it is labeled, with a market value greater than two hundred and fifty dollars ($250) from a restricted donor unless receipt of the donation or transfer is excluded from coverage under the Gift Act's provisions at NMSA 1978, Section 10-16B-2(B)(1)-(10). We also conclude that the Campaign Reporting Act permits a contribution to a candidate for federal office under NMSA 1978, Section 1-19-29.1(A)(6) and a donation to a tax exempt organization "to which a federal income tax deduction would be permitted" under NMSA 1978, Section 1-19-29.1(A)(4). The Campaign Reporting Act's provisions governing the use of campaign funds apply regardless of whether a candidate wins or loses an election.

There are three rules of statutory construction that apply to this matter. First, a statute should be read according to its plain, written meaning. See Wilson v Denver, 125 N.M. 308, 314, 961 P.2d 153 (1998). Second, a statute should be read in a common sense manner. See State v. Portillo, 110 N.M. 135, 137, 793 P.2d 265 (1990). Third, a statute should be read together with other statutes relating to the same subject matter to ascertain the legislative intent. Roth v. Thompson, 113 N.M. 331, 334, 825 P.2d 1241 (1992).

Gift Act

The Gift Act prohibits a state officer, such as a state legislator, from accepting a gift with a market value greater than two hundred and fifty dollars ($250) from a restricted donor.

See NMSA 1978, § 10-16B-3 (2007). A restricted donor includes, in relevant part, a person who "is a lobbyist" or "will personally be, or is the agent of a person who will be, directly and substantially affected financially by the performance or nonperformance of the donee's official duty in a way that is greater than the effect on the public generally…." Id. § 10-16B-2(D). "Market value" is "the retail cost a person would incur to purchase a gift." Id. § 10-16B-2(C) (emphasis added). A "gift" is defined as a "transfer without commensurate consideration…." Id. § 10-16B-2(B). A transfer is not considered a gift if a legislator pays for or reimburses the lobbyist for the fair market value of the item. See id. § 10-16B-2(B)(8).

According to the Gift Act's plain, written meaning, a "transfer" from a restricted donor[1] will constitute a gift subject to the Gift Act's restrictions. The market value of the "transfer" is whatever the legislator would have otherwise paid to *purchase* the item if he had not received the gift from a restricted donor. So, if a ticket's or medicine's purchase price is greater than $250, the value of the gift under the Gift Act is greater than $250. Therefore, a legislator cannot accept from a restricted donor: (a) a ticket labeled "admission for two" but costs more than $250; (b) a ticket that costs more than $250 when the legislator is a guest of honor, or; (c) medicine that costs more than $250 unless there is an exchange of consideration or the transfer falls under an applicable exception.[2]

Campaign Reporting Act

The Campaign Reporting Act provides seven permitted uses of campaign account monies. One permitted use is to make "donations to … another candidate seeking election to public office…." NMSA 1978, § 1-19-29.1(A)(6) (1995). The Act does not make a distinction between a federal, state or local candidate and a common sense reading of the law is that a donation to a candidate for any public office—federal, state or local is permissible.[3]

Your letter asks whether campaign funds may be used to make an expenditure to a state university on behalf of a specific student for a scholarship. This action, on its face, is not one of the seven permitted uses. The Act, however, does permit a legislator to make "donations to an organization to which a federal income tax deduction would be permitted under Subparagraph (A) of Paragraph (1) of Subsection (b) of Section 170 of the Internal Revenue Code of 1986…." Id. § 1-19-29.1(A)(4)(1995). Therefore, if the expenditure were to be structured in a manner pursuant to Subsection (A)(4), then it could be considered permissible under the law.

The Campaign Reporting Act provides that "[a]ny candidate who loses an election" is still subject to the penalties of the Act "until the candidate satisfies all reporting requirements…." NMSA 1978, § 1-19-35(F) (1997). The reporting requirements provide that a candidate must file a campaign report under NMSA 1978, Section 1-19-29(F) until: "(2) all money has been expended in accordance with the provisions of Section 1–19-29.1 NMSA 1978; [or] (3) the bank account has been closed." Therefore, reading

these statutes together, the account may be used as specified in NMSA 1978, Section 1-19-29.1(A) until it has been officially closed.

You have requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Although we are providing you with our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Sincerely,

ZACHARY A. SHANDLER
Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General
Alex Romero, Albuquerque Hispano Chamber of Commerce

[1] The Gift Act does not cover a gift from a person who is not a restricted donor.

[2] It is unclear from the facts presented whether or not one of the exceptions applies to these matters if the legislator is designated a guest of honor at an event. For example, if the event is a retirement dinner for that legislator, then the “retirement gift” exception under NMSA 1978, Section 10-16B-2(B)(10) would likely apply. Similarly, if the legislator renders services as part of the legislator’s attendance at an event, as a guest of honor, the legislator may be compensated for those services in a normal and reasonable amount, commensurate with the value of the services rendered and in no way increased or enhanced by reason of the recipients position as a legislator. See NMSA 1978, Section 10-16B-2(B)(3). If otherwise allowed by law, this compensation would not be subject to the limitations of the Gift Act.

[3] The 10th Circuit has struck down a previous attempt to make a distinction in this section regarding federal and state campaigns. See New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495 (10th Cir. 1995) (Court invalidates Section 1-19-29.1(C) regarding a ban on using federal funds for state campaigns).