

June 5, 2007 Gift Act to allow for travel to LES Overseas Location

Honorable William Gray
Honorable Shirley Tyler
New Mexico House of Representatives
State Capitol Building, Room 411
Santa Fe, NM 87501

Re: Request for Opinion – Gift Act and Travel to LES Overseas Location

Dear Representatives Gray and Tyler:

You have requested our advice regarding the application of the 2007 Gift Act (“Gift Act”) to an out-of-state educational site visit that will be made between June 12 to June 17, 2007. See 2007 N.M. Laws, Ch. 226. According to your request: “We plan on traveling to the Netherlands ... to tour a uranium enrichment plant that is identical to the plant currently being constructed in southeastern New Mexico... Specifically, the purpose of the trip is to provide local officials with an overview of the plant, talk to residents about living near a uranium enrichment plant and learn about safety aspects and the uranium enrichment process.” It is our understanding that LES, a registered lobbyist, is providing a gift to you by paying for your travel, food and lodging. 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 is applicable and permits LES to pay for your trip as long as the payment constitutes reasonable expenses paid for a bona fide educational program that is directly related to your official duties as a legislator.

The Gift Act, in pertinent part, reads: “A state officer ... shall not knowingly accept from a restricted donor ... and a restricted donor shall not knowingly donate to a state officer or employee ... a gift of a market value greater than two hundred fifty dollars (\$250).” 2007 N.M. Laws, Ch. 226, §3(A) (emphasis added). The definition for “restricted donor” is a multi-pronged. It includes a person who “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...” or “a lobbyist ... with respect to matters within the donee’s jurisdiction.” Id. at §2(D). In addition, a lobbyist, a lobbyist’s employer and a government contractor have an annual requirement and “shall not donate gifts of an aggregate market value greater than one thousand dollars (\$1,000) in a calendar year to any one state officer...” Id. at § 3(B). A gift is defined as a “transfer ... of any other thing of value, including food, lodging, transportation....” Id. at § 2(B). However, a gift is not the “reasonable expenses for a bona fide education program that is directly related to the state officer’s or employee’s official duties.” Id. at § 2(B)(9).

The provisions of the Gift Act did not include a specific effective date. Thus, pursuant to constitutional mandate, New Mexico Constitution Article IV, Section 23, the Act will become effective ninety days after adjournment of the session, which is June 15, 2007.

Your letter asks whether the Gift Act will apply to LES's gift to you "even though the assumed gift was accepted and the trip commenced before the law's effective date." A canon of statutory construction is that "New Mexico law presumes that statutes and rules apply prospectively absent a clear intention to the contrary." Howell v. Heim, 118 N.M. 500, 506, 882 P.2d 541 (1994). The Gift Act does not have any retroactive language. Another canon of statutory construction is that statutes "must be interpreted to accord with common sense and reason." Sandoval v. Rodriguez, 77 N.M. 160, 163, 420 P.2d 308 (1966). A common sense reading of the law supports application of the Gift Act to your trip because portions of the trip will occur on or after June 15, 2007 and discourages an attempt to parse the portions of the trip or to argue that the value of the gift was given in advance in order to avoid the application of the Act. Accordingly, we presume, for purposes of this letter, that the Gift Act applies under the circumstances you describe.

Your letter also asks whether there is an applicable exception to this matter. Another canon of statutory construction is "that the legislature intended that statutes enacted would be effective and productive of the most good." State v. Martin, 90 N.M. 524, 527, 565 P.2d. 1041 (Ct. App. 1977), overruled on other grounds by State v. Wilson, 116 N.M. 793, 867 P.2d 1175 (1994). Consistent with that precept, the Gift Act should be interpreted to balance the importance of placing restrictions on inappropriate gifts against the importance of a legislature knowledgeable about issues they may act upon or that may directly affect their constituencies. New Mexico, like many states, has a part-time citizen legislature. "For the most part the lawmakers have real lives as farmers, teachers, bankers, business owners and lawyers ... The fact that lawmakers have real lives as citizens in their communities is a tremendous asset to the legislative process." N.M. Att'y Gen. Op. 03-01 (2003) (quoting Michael Mello, The Unfinished Battle for Same-Sex Marriage in Vermont, 25 Vermont Law Rev. 149, 160 (2000)). National Conference on State Legislatures training sessions, conferences on state public policy issues, and educational site visits affecting legislators and their constituents all provide helpful training and information for part-time legislators. Therefore, a common sense reading of subsection 2(B)(9) of the Act is that state officers, including legislators, and employees can accept a gift covering "reasonable expenses" to attend an educational program or site visit.¹ This exception permits LES to pay for your trip because it is not considered a "gift", so long as the payment constitutes reasonable expenses paid for a bona fide educational program that is directly related to your official duties as a legislator.

The statutory exception should not be read to give carte blanche to all expenses and for all trips that have only an incidental educational component to them. The Act includes several phrases, such as "reasonable expenses", "bona fide", "directly related" and "official duties" that provide for common sense limitations. We believe that in the context of your request, these limitations should be interpreted to permit: (a) coach class travel; (b) reasonably priced hotel expenses; (c) reasonably priced meals; (d) attendance at a bona fide educational visit or program; (e) a site or program that is directly related to the officer or employee's official duties; (g) meetings for a limited number of days directly related to the educational purposes of the trip; and (h) a return to New Mexico.²

How these general parameters are applied to your specific trip will be in the first instance for you to determine using your own good judgment. We certainly appreciate you contacting us in advance to raise this matter. We also generally note that registered lobbyists may have to publicly report all expenses paid for these types of trips in accordance with the Lobbyist Regulation Act. See NMSA 1978, § 2-11-6 (2005). The law states: “Each lobbyist or lobbyist’s employer who makes or incurs expenditures ... for the benefit ... to a state legislator ... a state public officer ... who is involved in an official action affecting the lobbyist’s employer ... shall file an expenditure report with the secretary of state....” Id.

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,

GARY K. KING
Attorney General

ZACHARY A. SHANDLER
Assistant Attorney General

Cc: Stuart Bluestone, Chief Deputy Attorney General
Liz Holmes, Legislative Council Service (by letter and facsimile 986-4680)
Frank Weissbarth, CYFD General Counsel
Gary Kilpatric, LES lobbyist (by letter and facsimile 982-4289)

[1] The Gift Act states that a gift does not include: “any gift accepted on behalf of and to be used by the state ... including travel, subsistence and related expenses accepted by a state agency in connection with a state officer’s or employee’s official duties that take place away from the state official’s or employee’s station of duty.” 2007 N.M. Session Law, Ch. 226, § 2(B)(7) (emphasis added). While this exception does refer to travel expenses for official duties, it does not appear to apply here because LES’s gift is not being made to the state legislature as a state agency, but to individual members of that body.

[2] Please note, for example, that if a restricted donor offers a ticket to a football game, a concert or golf green fees for the night of or the day after a conference or program, this activity is not reasonably considered part of a “bona fide” educational program that is “directly related” to one’s “official duties,” and thus any such extra expense is a gift. If the state officer or employee reasonably knows that the offeror is a restricted donor and reasonably knows that the gift is valued at approximately two-hundred fifty dollars or

more, then the state officer or employee should not accept the gift and should pay for the event from his or her own funds.