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Opinion No. 05-073

Disclosing Contracts for Out-of-State Consulting Services

QUESTIONS

1. Does the Joint Conference Committee Report on House Bill 0001/Senate Bill 1841, which has been passed by both Houses of the General Assembly and transmitted to the Governor for his signature (the "Ethics Act"), require the members, members-elect, and/or employees of the Tennessee General Assembly to disclose the terms of consulting contracts for services rendered outside the State of Tennessee?

2. May the Tennessee General Assembly require, by rule or by statute, the members, members-elect, and/or employees of the Tennessee General Assembly to disclose consulting contracts for services rendered outside the State of Tennessee with individuals, parties, or entities that conduct business with the State of Tennessee?

3. May the Tennessee General Assembly require the members, members-elect, and/or employees of the Tennessee General Assembly to disclose the terms of such consulting contracts?

OPINIONS

1. The Ethics Act bans a legislator from accepting a fee or compensation for attempting to influence legislative or administrative action by the Tennessee state government. The prohibition applies regardless of where these services are rendered. No disclosure requirements would apply to these agreements because the Ethics Act prohibits them entirely.

The Ethics Act does not prohibit a legislator from accepting a fee or compensation for attempting to influence legislative or administrative action by a state government other than that of Tennessee. The Ethics Act requires legislators annually to disclose the name and address of an entity that provides more than two hundred dollars income to the legislator or a spouse with whom the legislator resides. Presumably this would include the name and address of an entity for which the legislator or his or her spouse provides services to influence legislative or administrative action outside this State, except that the legislator need not disclose a client or customer list. The Ethics Act requires no further disclosure about such an agreement.

The Ethics Act, as applied to state officials and employees, covers contracts for services to influence legislative or administrative action within the Tennessee state government. These services

may be rendered inside or outside Tennessee. With regard to contracts for services to influence legislative or administrative action by the Tennessee state government, General Assembly staff and employees must disclose the person from whom the fee was received, the amount of the fee, the date the services were rendered, and a general description of the services rendered. But these disclosure requirements do not apply to contracts for services to influence legislative or administrative action by a state government other than that of Tennessee. The Ethics Act imposes no disclosure requirements on legislative staff and employees with regard to these contracts.

2. A definitive answer to this question would depend on the terms of the particular requirement. But we think requiring members of the General Assembly and members-elect to disclose information regarding contracts with entities that do business with the State of Tennessee to lobby other state governments would be defensible. This requirement would further the important state interest in avoiding corruption and the appearance of corruption. Similarly, requiring employees of the General Assembly to disclose this information would generally be defensible. To the extent that it would apply to staff employees with no authority to make policy, it could be subject to challenge on the grounds that it does not promote a substantial state interest.

3. Again, a definitive answer to this question would depend on the terms of the particular requirement. But such a requirement would be defensible if it furthers the important state interest in avoiding corruption and the appearance of corruption.

ANALYSIS

1. Disclosure Requirements under House Bill 0001/Senate Bill 1841, as Enacted

The first question is whether the Joint Conference Committee Report on House Bill 0001/Senate Bill 1841, which has been passed by both Houses of the General Assembly and transmitted to the Governor for his signature (the "Ethics Act"), requires the members, members-elect, and/or employees of the Tennessee General Assembly to disclose the terms of consulting contracts for services rendered outside the State of Tennessee.

A. Members and Members-Elect of the General Assembly

By its terms, the Ethics Act prohibits a member of the General Assembly or a member-elect from receiving compensation for consulting services from any entity other than compensation paid by the State, a county, or a municipality. Proposed Tenn. Code Ann. § 2-10-123. As discussed below, the Ethics Act bans a legislator from accepting a fee or compensation[1] for attempting to influence legislative or administrative action by the Tennessee state government. Some or all of these services — such as preparing written material or contacting government officials by phone —

[1] The terms "fee, commission, or any other form of compensation" do not include anything of value which may be accepted under Tenn. Code Ann. § 2-10-116 or which is identified in § 3-6-114(b) or (c). Proposed § 2-10-122(5).

may be rendered outside the State of Tennessee. The statute defines "consulting services" as follows:

> The term "consulting services" with respect to an official in the legislative branch or an official in the executive branch means services to advise or assist a person or entity in influencing *state legislative or administrative action as such term is defined in § 3-6-102(11)*, including, but not limited to, services to advise or assist a person or entity in maintaining, applying for, soliciting or entering into a contract with the state. The term "consulting services" does not mean the practice or business of law in connection with representation of clients by a licensed attorney in a contested case action, administrative proceeding or rule making procedure.

Proposed § 2-10-122(1) (emphasis added). Tenn. Code Ann. § 3-6-102(11) provides:

> "Influencing legislative or administrative action" means promoting, supporting, influencing, modifying, opposing or delaying any legislative or administrative action by any means, including, but not limited to, the provision or use of information, statistics, studies, or analyses, but not including the furnishing of information, statistics, studies, or analyses requested by an official of the legislative or executive branch to such official or the giving of testimony by an individual testifying at an official hearing conducted by officials of the legislative or executive branch.

We assume the bill, by incorporating this definition, also incorporates the definition of the other terms within this provision that appear in Tenn. Code Ann. § 3-6-102. The term "legislative action:"

> means introduction, sponsorship, debate, voting or any other nonministerial official action or nonaction on any bill, resolution, amendment, nomination, appointment, report or any other matter pending or proposed *in a legislative committee or in either house of the general assembly*.

Tenn. Code Ann. § 3-6-102(12) (emphasis added). The term "administrative action:"

> means the taking of any recommendation, report or nonministerial action, the making of any decision or taking any action to postpone any action or decision, action of the governor in approving or vetoing any bill or resolution, the promulgation of a rule and regulation, or any action of a quasi-legislative nature, by an official in the executive branch.

Tenn. Code Ann. § 3-6-102(1). The term "official in the executive branch" is not defined for purposes of this bill by Tenn. Code Ann. § 3-6-102 but, instead, is found in proposed section 2-10-122(3):

> *The term "official in the executive branch" means the governor, any member of the governor's staff or any person in the executive service as such term is defined in § 8-30-208(b);* provided however, that such term shall not include members of boards and commissions who receive only expenses or a nominal per diem not to exceed six hundred dollars ($600.00) per month, unless they provide consulting services for compensation with respect to the activities of the board or commission of which they are a member.

(Emphasis added). Proposed section 2-10-122(4) provides that the term "official in the legislative branch" has the same meaning as the term has in Tenn. Code Ann. § 3-6-102(17). That definition provides:

> "Official in the legislative branch" means *any member, member-elect, any staff person or employee of the general assembly or any member of a commission established by and responsible to the general assembly or either house thereof who takes legislative action.* "Official in the legislative branch" also includes *the secretary of state, treasurer, and comptroller of the treasury and any employee of such offices.*

(Emphasis added). By its terms, therefore, the bill bans a legislator from accepting a fee or compensation for attempting to influence legislative or administrative action by the Tennessee state government. The prohibition applies regardless of where these services are rendered. No disclosure requirements would apply to these agreements because the Ethics Act prohibits them entirely.

Based on the opinion request, however, we assume your question refers to contracts for services to influence legislative or administrative action by some state government other than that of Tennessee. The ban in proposed section 2-10-123(a) does not extend to these services. The question then becomes the extent to which a legislator or a legislator-elect must disclose the terms of any such consulting services contract. Under proposed section 2-10-128(a) of the Ethics Act, members of the General Assembly must report the following annually in writing to the Registry of Election Finance prior to February 1:

> (1) The major source or sources of private income of more than two hundred dollars ($200), including, but not limited to, offices, directorships, and salaried employments of the person making disclosure, or a spouse residing with such person, but no dollar amounts need be stated. The disclosure shall state the name and address of any entity which provides a source of private income of

> more than two hundred dollars ($200). This subdivision (1) shall not be construed to require the disclosure of any client list or customer list, nor the address or any investment property;
>
> (2) Any positions held during the applicable reporting period, including, but not limited to, those of an officer, director, trustee, general partner, proprietor, or representative of any corporation, firm, partnership, or other business enterprise, or any non-profit organization or educational institution. Both the year and month must be reported for the period of time the position was held. Positions with the federal government, religious, social, fraternal, or political entities, and those solely of an honorary nature do not require disclosure.

Under this provision, legislators are required to disclose the name and address of any entity that provides a source of private income of more than two hundred dollars, but this requirement does not require disclosing a client list or a customer list. The Ethics Act, therefore, would require legislators to disclose the name and address of an entity that provides more than two hundred dollars income to the legislator or a spouse with whom the legislator resides. Presumably this would include the name and address of an entity for which the legislator or his or her spouse provides services to influence legislative or administrative action outside this State, except that the legislator need not disclose a client or customer list. The Ethics Act requires no further disclosure about such an agreement.

B. Disclosure by Employees of the General Assembly

Under the Ethics Act, a staff person or employee of the General Assembly who contracts to receive a fee for consulting services from a person or entity other than the State, a county, or municipality must disclose the information required under proposed section 2-10-125. Proposed § 2-10-126(a). That provision requires a staff person or employee of the General Assembly to disclose the following to the Registry of Election Finance:

> (1) The person to whom the fee was paid;
> (2) The position of the person to whom the fee was paid;
> (3) The amount of the fee;
> (4) The date the services were rendered; and
> (5) A general description of the services rendered.

Proposed § 2-10-125(a)(4). The statute directly applies to any person or other entity, other than the State, a county, or municipality, that contracts to pay a fee for consulting services to certain listed officials and employees, including General Assembly staff and employees. Presumably, as applied to the recipient of the fee, that person must disclose the person from whom the fee was received. As discussed above, however, the Ethics Act, as applied to state officials and employees, covers contracts for services to influence legislative or administrative action within the Tennessee state

government. These services may be rendered inside or outside of Tennessee. With regard to these contracts, therefore, General Assembly staff and employees must disclose the person from whom the fee was received, the amount of the fee, the date the services were rendered, and a general description of the services rendered. But these requirements do not apply to contracts for services to influence legislative or administrative action by state governments other than that of Tennessee. The Ethics Act imposes no disclosure requirements on legislative staff and employees with regard to these contracts.

2. Disclosing Contracts for Lobbying States Outside of Tennessee

The second question is whether the Tennessee General Assembly may require, by rule or by statute, the members, members-elect, and/or employees of the Tennessee General Assembly to disclose consulting contracts for services rendered outside the State of Tennessee with individuals, parties, or entities that conduct business with the State of Tennessee. A definitive response to this question, of course, would require a review of the actual rule or statute. We assume your question refers to disclosing contracts under which an individual is paid to lobby state governments outside of Tennessee. Any definitive answer on this issue would require a review of a proposed rule or statute. As a general matter, each House of the General Assembly may determine the rules of its proceedings. Tenn. Const. Art. II, § 12. Once assembled, however, each House of the General Assembly is the sole judge of the qualifications and election of its members. Tenn. Const. Art. II, § 11; *Comer v. Ashe,* 514 S.W.2d 730 (Tenn. 1974) (the Senate is the sole and exclusive judge of the qualifications and election of its members after that particular Senate is constituted as of the day of the November general election). Each House, therefore, is authorized to adopt rules requiring disclosure of out-of-state lobbying contracts in which a member is compensated by an entity that does business with the State of Tennessee to lobby a state government outside of Tennessee.

As a general matter, courts will not review the internal proceedings of a House of the General Assembly. *See, e.g., Mayhew v. Wilder,* 46 S.W.3d 760 (Tenn. Ct. App. 2001). At the same time, however, non-legislators who implement a legislative policy may be subject to a lawsuit challenging the substantive constitutionality of the action. *Powell v. McCormack,* 395 U.S. 486, 89 S.Ct. 1944 (1966). Further, if the General Assembly wishes to impose criminal sanctions, it should enact a statute requiring disclosure. Any regulation of lobbying activities will be subject to a high standard of review. This Office recently noted that the right to engage in lobbying — including paid lobbying — is guaranteed by the First Amendment. Op. Tenn. Att'y Gen. 05-054 (April 20, 2005). Courts have upheld laws regulating and monitoring the activities of lobbyists. The United States Supreme Court has recognized that "statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick v. Oklahoma,* 413 U.S. 601, 611-612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) (citations omitted); *see also, Bemis Pentecostal Church v. State,* 731 S.W.2d 897, 903 (Tenn. 1987), *appeal dismissed,* 485 U.S. 930, 108 S.Ct. 1102, 99 L.Ed.2d 264 (1988), *rehearing denied,* 485 U.S. 1029, 108 S.Ct. 1587, 99 L.Ed. 2d 902 (1988).

Similarly, it appears that each House could probably adopt rules requiring disclosure by legislative employees. Under Tenn. Code Ann. § 3-13-101, the Office of Legislative Administration is authorized to "[m]aintain such personnel records as may be necessary or advisable in accordance with accepted personnel practices." Again, however, rules requiring disclosure by governmental employees are subject to judicial review. Governments may limit the political activities of government employees to ensure impartial execution of the laws and maintain public confidence in governmental fairness. *United States Civil Service Commission v. National Association of Letter Carriers AFL-CIO*, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973). But, in determining the validity of a restraint on job-related speech of public employees, a court must arrive at a balance between the interests of the employee as a citizen in commenting upon matters of public concern and the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees. *United States v. National Treasury Employees Union*, 513 U.S. 454, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995), *citing Pickering v. Board of Education of Township High School District 205, Will County*, 391 US. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). Again, any provision imposing criminal sanctions must be passed as a statute.

The United States Supreme Court has upheld extensive disclosure requirements for lobbyists. *United States v. Harriss*, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 (1954). In that case, the Court found that the disclosure requirements enabled members of Congress to evaluate the different sources of lobbying pressure and to maintain the integrity of a basic governmental process. 74 S.Ct. *at* 816. Other courts have upheld lobbyist disclosure requirements on similar grounds. *See, e.g., Minnesota State Ethical Practices Board v. National Rifle Association*, 761 F.2d 509, 512 (8th Cir. 1985), *cert. denied*, 474 U.S. 1082, 106 S.Ct. 853, 88 L.Ed.2d 893 (1986).

The proposed disclosure requirements pertain to lobbying activity outside of the State. Disclosure of paid lobbying of state governments outside Tennessee is not as closely related to furthering these purposes as disclosure of lobbying directly focused on state government. The request, however, concerns disclosure of paid lobbying that members of the General Assembly or legislative employees undertake for entities that do business with state government. We think disclosure of this information could generally be upheld as a valid disclosure requirement imposed on state legislators and employees of the General Assembly. Courts have rejected claims that financial disclosure requirements for state officials violate their constitutional right to privacy. *Plante v. Gonzalez*, 575 F.2d 1119 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129, 99 S.Ct. 1043, 59 L.Ed.2d 90 (1979). The Court also found that public disclosure of the information was constitutional so long as it significantly advanced important state concerns. The Court found that public disclosure of state officials' financial information met this test.

Similarly, the United States Court of Appeals for the Second Circuit upheld a city law requiring financial disclosure by most elected and appointed officials, city candidates, and civil service employees with an annual salary equal to or greater than $30,000. *Barry v. City of New York*, 712 F.2d 1554 (2d Cir. 1983), *cert. denied*, 464 U.S. 1017, 104 S.Ct. 548, 78 L.Ed.2d (1983). The disclosure reports were available for public inspection. The Court employed a balancing test and found that the requirements furthered a substantial interest in deterring corruption and conflicts of interest among city officers and employees, and in enhancing public confidence in the integrity

of its government. 712 F.2d at 1560. The Court found that the right to privacy did not protect public employees from the release of financial information related to their employment or indicative of a possible conflict of interest. *Id. at* 1562. The Court also noted that the statute allowed an employee to make a claim of privacy with respect to any item of information by explaining in writing the reasons for the request. The Court found this process gave the employees adequate opportunity to contest the disclosure of information whose release might violate their right to privacy.

We think requiring members of the General Assembly and members-elect to disclose information regarding contracts with entities that do business with the State of Tennessee to lobby other state governments would be defensible. This requirement would further the important state interest in avoiding corruption and the appearance of corruption. Similarly, requiring employees of the General Assembly to disclose this information would generally be defensible. To the extent that it would apply to staff employees with no authority to make policy, it could be subject to challenge on the grounds that it does not promote a substantial state interest.

3. Disclosing the Terms of Contracts for Lobbying States Outside of Tennessee

The last question is whether the General Assembly may require legislators and employees of the General Assembly to disclose the terms of contracts for lobbying state governments outside of Tennessee. Again, a definitive answer to this question would depend on the terms of the particular requirement. But such a requirement would be defensible if it furthers the state interest in avoiding corruption and the appearance of corruption.

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