



STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2020-03

June 5, 2020¹

QUESTIONS PRESENTED

1. Holtec International offers to provide flights, meals, refreshments, and lodging to New Mexico legislators as part of a two-day tour of Holtec's Callaway Nuclear Generating Station near Reform, Missouri. Does the Gift Act, NMSA 1978, §§ 10-16B-1 to -5, permit Holtec's donations?
2. Does the Campaign Reporting Act, NMSA 1978, §§ 1-19-25 to -36, require the legislators who attend Holtec's tour of the Callaway station to report the flights, meals, refreshments, and lodging accommodations as in-kind campaign contributions?

¹This is an official advisory opinion of the State Ethics Commission. Unless amended or revoked, this opinion is binding on the Commission and its hearing officers in any subsequent Commission proceedings concerning a person who acted in good faith and in reasonable reliance on the opinion. NMSA 1978, § 10-16G-8(C) (2019).

FACTS²

Holtec is an energy company that seeks to build an interim storage facility in southeastern New Mexico.³ To this end, Holtec seeks to conduct a series of two-day educational programs for members of the New Mexico Legislature at Holtec's Callaway Nuclear Generating Station near Reform, Missouri. Holtec offers to fly small groups of legislators from central gathering points in Santa Fe, Albuquerque, Farmington, and Las Cruces to Jefferson City, Missouri and, then, to shuttle the legislators to the Callaway site. There, Holtec proposes to inform legislators about Holtec's operations, structure, environmental protections, safety precautions, and general business practices. During the two-day program, Holtec offers to provide legislators with flights, meals, refreshments, and lodging, the total cost of which would exceed \$250 per legislator.

ANSWERS

1. Holtec's donation of reasonable expenses for flights, meals, refreshments, and lodging incidental to an educational tour for legislators is not subject to the Gift Act's limitations on gifts.
2. Because Holtec's donations are incidental to an educational purpose, and not a political purpose, the Campaign Reporting Act does not require legislators to report the flights, meals, refreshments, and lodging as in-kind contributions on filings with the Secretary of State.

²The State Ethics Commission Act requires a request for an advisory opinion to set forth a "specific set of circumstances involving an ethics issue." See NMSA 1978, § 10-16G-8(A)(2) (2019). "When the Commission issues an advisory opinion, the opinion is tailored to the 'specific set' of factual circumstances that the request identifies." State Ethics Comm'n, Advisory Op. No. 2020-01, at *1-2 (Feb. 7, 2020) (quoting § 10-16G-8(A)(2)). On April 7, 2020, the Commission received a request for an advisory opinion that detailed facts as presented herein.

³While the request does not specify details about Holtec's proposed interim storage facility, Holtec's website indicates that the proposed facility is intended to store "used nuclear fuel and high-level radioactive waste." *What is HI-STORE CISF?*, HOLTEC INTERNATIONAL, <https://holtecinternational.com/products-and-services/hi-store-cis/> (last accessed June 5, 2020).

ANALYSIS

1. Holtec may pay for the legislators' reasonable expenses related to the tour of the Callaway facility.

The Gift Act limits gifts from restricted donors to state officers and employees. The request stipulates that Holtec is a restricted donor. *See* § 10-16B-2(D).⁴ Legislators are state officers. *See* NMSA 1978 § 10-16B-2(E) (2007). Under the Gift Act, restricted donors may not give—and state officers, state employees, candidates for state office, and their family members, may not knowingly accept—a gift of a market value greater than \$250. *See* § 10-16B-3(A). Furthermore, lobbyists registered with the Secretary of State, lobbyist's employers, and government contractors cannot donate gifts of an aggregate value greater than \$1,000 in a calendar year to any one state officer, state employee, or candidate for state office. *See* § 10-16B-3(B).

The Gift Act excepts certain transfers from the Act's definition of a "gift." *See* § 10-16B-2(B)(1) to (10). Consequently, the \$250 single/\$1,000 aggregate

⁴The Gift Act defines a "restricted donor" to include any person who:

- (1) is or is seeking to be a party to any one or any combination of sales, purchases, leases or contracts to, from or with the agency in which the donee holds office or is employed;
- (2) 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 or on a substantial class of persons to which the person belongs as a member of a profession, occupation, industry or region;
- (3) is personally, or is the agent of a person who is, the subject of or party to a matter that is pending before a regulatory agency and over which the donee has discretionary authority as part of the donee's official duties or employment within the regulatory agency; or
- (4) is a lobbyist or a client of a lobbyist with respect to matters within the donee's jurisdiction.

§ 10-16B-2(D).

limitations do not apply to donations that satisfy an enumerated, statutory exception. *See id.* Under the “educational program” exception, for example, a donor can pay the “reasonable expenses for a bona fide educational program that is directly related to the state officer’s or employee’s official duties.” § 10-16B-2(B)(9).

No court has interpreted or applied the Gift Act’s “educational program” exception.⁵ But the statutory text is clear: a restricted donor may make payments in excess of the Gift Act’s \$250 single/\$1,000 aggregate limitations for (i) “reasonable expenses” for (ii) “a bona fide educational program” that (iii) is “directly related to official duties.” As described by the request, Holtec’s proposed donations satisfy these elements.

First, the costs associated with flights, meals, refreshments, and lodging are “reasonable expenses” incidental to the tour of the Callaway facility. § 10-16B-2(B)(9). To ascertain the meaning of a statutory phrase, it is common to look to other statutory provisions in *pari materia*. *See, e.g., Roth v. Thompson*, 1992-NMSC-011, ¶ 15, 113 N.M. 331, 334, 825 P.2d 1241, 1244. In a paragraph neighboring the “educational program” exception, the Gift Act excepts payments for “*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.” § 10-16B-2(B)(7) (emphasis added). Accordingly, the costs of flights, meals, refreshments and lodging are “reasonable

⁵The Office of the Attorney General, however, has issued two letter opinions addressing the exception. *See* Att’y Gen. Adv. Ltr. to Senators Leavell and Kernan, N.M. Senate, from Att’y Gen. Hector Balderas and Asst. Att’y Gen. Caroline Manierre (Aug. 10, 2015); Att’y Gen. Adv. Ltr. to Representatives Gray and Tyler, N.M. House of Representatives, from Att’y Gen. Gary King and Asst. Att’y Gen. Zachary Shandler (Jun. 5, 2007). The State Ethics Commission considers the Advisory Opinions and Advisory Letters issued by the New Mexico Attorney General as persuasive authority. The Attorney General’s opinions and letters, however, do not necessarily dictate the advisory opinions that the Commission may issue. *See* NMSA 1978, §§ 8-5-2(D) (requiring the Attorney General to issue opinions in writing upon questions of law submitted by state officials); 10-16G-8 (authorizing the Commission to issue advisory opinions on matters related to ethics upon request); *cf. also First Thrift & Loan Ass’n v. State ex rel. Robinson*, 1956-NMSC-099, ¶ 28, 62 N.M. 61, 70, 304 P.2d 582, 588 (“We are not bound by [opinions of the Attorney General’s office] in any event, giving them such weight only as we deem they merit and no more. If we think them right, we follow and approve, and if convinced they are wrong . . . we reject and decline to feel ourselves bound.”).

The Commission’s advisory opinion on this request accords with the Attorney General’s two letter opinions addressing the application of the “educational program” exception. § 10-16G-2(B)(9).

expenses” for the purposes of the “educational program” exception. § 10-16B-2(B)(9).⁶

Second, the tour of the Callaway site constitutes a “bona fide educational program.” § 10-16B-2(B)(9). Holtec proposes to inform legislators on its “operations, structure, environmental protections, safety precautions, and general business practices.” Request at 1. It is reasonable to expect that, through its two-day program, Holtec seeks to persuade legislators of the benefits of, and the safety precautions attending to, the nuclear waste storage facility that Holtec proposes to build in southeastern New Mexico. This reasonable expectation regarding Holtec’s motives, however, does not undermine the educational usefulness of the program. Nor do Holtec’s motives prevent legislators from treating the Callaway site visit as a bona fide opportunity to learn about the merits and risks of Holtec’s proposed storage site.

Third, the educational program is directly related to the legislators’ official duties. Legislators are required to attend legislative sessions and, prescinding from certain exceptions, to vote on every question and motion appearing before them. *See* House Rules 7-1, 7-5; Senate Rules 7-1, 7-5. A legislator’s power to vote is a public trust, and legislators must exercise their powers only to advance the public interest. *See* NMSA 1978, § 10-16-3 (2011); *see also Nev. Comm’n on Ethics v. Carrigan*, 564 U.S. 117, 126 (2010) (“The legislative power [to vote] thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it.”). To discern the public interest and to exercise their trust responsibility, legislators must inform themselves on the issues that affect their constituencies. This is no small feat, especially for New Mexico’s citizen legislators. Attending an educational program offered by a company that proposes to build a nuclear waste storage facility in New Mexico is one way that legislators can inform themselves on how the proposed storage facility would affect their constituents’ interests. The educational program that Holtec offers is directly related to legislators’ official duties.

⁶Under the Gift Act, Holtec’s donations of flights, meals, and lodging must be “reasonable.” § 10-16B-2(B)(9). In other words, the donations should not be so lavish that an observer might question the tour’s essentially educational purpose. Further, in this instance, the Lobbyist Regulation Act supports the Gift Act’s “reasonableness” requirement with required disclosure. Legislators should be aware that, under NMSA 1978, Section 2-11-6(A), Holtec must file an expenditure report corresponding to the tour of the Callaway site with the Secretary of State. *See infra*, § 3.

The “educational program” exception therefore applies. Holtec’s payments for the flights, meals, refreshments, and lodging incidental to the tour of Holtec’s Callaway facility are not “gifts,” as the Gift Act defines that term. Consequently, the Gift Act’s \$250 single/\$1,000 aggregate limitations do not apply to those donations.

2. The Campaign Reporting Act does not require the legislators who attend Holtec’s tour to report the costs of the trip as in-kind donations.

Under the Campaign Reporting Act, a “‘contribution’ means a gift, subscription, loan, advance or deposit of money or other thing of value, including the estimated value of an in-kind contribution, *that is made or received for a political purpose*, including payment of a debt incurred in an election campaign.” NMSA 1978, § 1-19-26(H)(1) (2019) (emphasis added). A “political purpose,” in turn, means “for the purpose of supporting or opposing a ballot question or the nomination or election of a candidate.” § 1-19-26(S); *but cf. N.M. Youth Organized v. Herrera*, 611 F.3d 669, 674 (10th Cir. 2010) (“[I]n order to be constitutional, the phrase ‘political purpose’ [in the Campaign Reporting Act] may be applied only to reach contributions or expenditures for communications that constitute express advocacy for the election or defeat of a clearly identified candidate, or its functional equivalent.”) (citations omitted).

The request indicates that Holtec’s payments of legislators’ tour-related expenses are “to inform legislators about Holtec’s operations, structure, environmental protections, safety precautions, and general business practices.” Request at 1. As described, the tour-related expenses are not made or received to advocate for the election or defeat of a candidate or ballot question. Accordingly, the flights, meals, refreshments, and lodging incidental to legislators’ tour of the Callaway station are not given for a “political purpose” and, hence, are not “contributions” under Section 1-19-26(H)(1). Section 1-19-27(A) does not require legislators to report the flights, meals, refreshments, and lodging incidental to the tour as contributions on their filings with the Secretary of State.⁷

⁷If Holtec otherwise makes a “contribution” authorized by the Campaign Reporting Act to a legislator, *see* § 1-19-26(H) (defining “contribution”), then the legislator must report that contribution on their filing with the Secretary of State. Contributions authorized by the Campaign Reporting Act are not “gifts” under the Gift Act and, therefore, are also excepted from the Gift Act’s \$250 single/\$1,000 aggregate limitations.

3. The Lobbyist Regulation Act would require Holtec to report Holtec's expenditures for the proposed educational tour to the Secretary of State.

Last, while New Mexico's campaign reporting statute does not require legislators to report Holtec's proposed donations as contributions, the Lobbyist Regulation Act, NMSA 1978, §§ 2-11-1 to -9 (2019), would require *Holtec* to report the same expenditures to the Secretary of State. *See* § 2-11-6(A); *see also* Att'y Gen. Adv. Ltr. to Representatives Gray and Tyler, N.M. House of Representatives, from Att'y Gen. Gary King and Asst. Att'y Gen. Zachary Shandler (Jun. 5, 2007), at 3 (noting § 2-11-6(A) in an advisory letter addressing a similar request). Under the Lobbyist Regulation Act,

Each . . . lobbyist's employer who makes or incurs expenditures . . . for the benefit of . . . a state legislator . . . who is involved in an official action affecting the lobbyist's employer or in support of or in opposition to . . . pending legislation or official action shall file an expenditure report with the secretary of state

§ 2-11-6(A).

The Lobbyist Regulation Act, therefore, requires more disclosure than the Campaign Reporting Act. In view of prevailing First Amendment jurisprudence, the difference is not accidental. The First Amendment limits state-mandated disclosure of payments made to influence *public opinion* to the disclosure of "contributions or expenditures for communications that constitute express advocacy for the election or defeat of a clearly identified candidate." *N.M. Youth Organized*, 611 F.3d at 674. By contrast, the First Amendment does not impose similar limitations on state-mandated disclosure of payments made to influence *legislators' opinions*. *See, e.g., United States v. Harriss*, 347 U.S. 612, 625 (1954) (rejecting a First Amendment challenge to disclosure requirements in the Federal Regulation of Lobbying Act and concluding "that Congress . . . is not constitutionally forbidden to require the disclosure of lobbying activities"); *see also Citizens United v. Fed. Elec. Comm'n*, 558 U.S. 310, 369 (2010) ("[T]he Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself.") (citing *Harriss*, 347 U.S. at 625). In other words, under the First Amendment, states may demand more disclosure of lobbying-related expenditures than of campaign-related expenditures. And, in the Lobbyist Regulation Act, the New Mexico Legislature required more disclosure. *See* § 2-11-6.

CONCLUSION

The Gift Act's limitations do not apply to reasonable expenses incurred for flights, meals, refreshments, and lodging incidental to an educational tour. Because these expenditures are for an educational purpose, and not a political purpose, legislators participating in the tour are not required to report the flights, meals, refreshments, and lodging as in-kind contributions.

SO ISSUED.

HON. WILLIAM F. LANG, Chair

JEFF BAKER, Commissioner

STUART M. BLUESTONE, Commissioner

HON. GARREY CARRUTHERS, Commissioner

RONALD SOLIMON, Commissioner

JUDY VILLANUEVA, Commissioner

FRANCES F. WILLIAMS, Commissioner