

**STATE OF MINNESOTA
CAMPAIGN FINANCE AND PUBLIC DISCLOSURE BOARD**

.....
**February 7, 2024
Blazing Star Room
Centennial Office Building**
.....

MINUTES

The meeting was called to order by Chair Asp.

Members present: Asp, Flynn, Rashid, Soule, Swanson

Members absent: Leppik

Others present: Sigurdson, Engelhardt, Johnson, Olson, staff; Hartshorn, counsel (left following discussion regarding request for Advisory Opinion 459)

The meeting did not strictly follow the order of business set forth in the agenda with respect to the request for Advisory Opinion 459.

MINUTES (January 3, 2024)

The following motion was made:

Member Swanson's motion: To approve the January 3, 2024, minutes as drafted.

Vote on motion: Unanimously approved.

CHAIR'S REPORT

2024 meeting schedule

The next Board meeting was scheduled for 9:30 a.m. on Wednesday, March 6, 2024.

ADVISORY OPINIONS

B. Consideration of Request for Advisory Opinion 459

Mr. Hartshorn presented members with a memorandum regarding this matter that is attached to and made a part of these minutes in redacted form. Mr. Hartshorn addressed four specific questions posed by the Board. Due to the requestor's anonymity, certain portions of the memorandum from Mr. Hartshorn have been redacted, and the request itself is not being made available to the public.

Mr. Hartshorn provided his input on whether all four questions needed to be addressed or if the matter should be postponed until March. Member Swanson expressed concern with the request itself, stating that the requestor needs to improve the wording of their questions, as they are not applicable or based on real hypotheticals or facts. Therefore, the Board cannot provide a satisfactory response. Member Flynn stated that if the Board does not respond now, similar questions may be asked again. Member Soule had concerns about the memorandum being labeled as client-attorney privileged and being made public. Mr. Hartshorn explained that Board staff decided to make most of the memorandum public despite being labeled as attorney-client privileged, and that he had no objections to that decision.

Vice Chair Rashid suggested that the Board address this advisory opinion cautiously, as it is a newer statute. Chair Asp asked if the Board had previously issued an advisory opinion like this. Mr. Sigurdson stated he did not recall a similar instance. Mr. Sigurdson then suggested asking the requester to refine their questions and address the issues of concern to the Board. Chair Asp responded that it would be strange to deny a request for an advisory opinion and then be faced with the question of whether or not the Board can turn down a requester.

Member Swanson stated that having an informal discussion with the requestor would not be productive or appropriate in this case. This is because the requestor wants the Board to make decisions regarding future litigation, which, according to member Swanson, is not acceptable. Member Swanson stated that the requestor took phrases from prior ads and that we do not have the authority to respond to an advisory opinion such as this because we cannot imply or add facts stated in the request.

Member Soule wanted clarification on what the Board should prepare in terms of a draft. Member Swanson suggested the Board take the 5 questions asked and indicate that the limited facts the requestor gave are not sufficient to respond.

The following motion was made:

Chair Asp's motion: To lay over the request for an advisory opinion.

Vote on motion: Unanimously passed.

EXECUTIVE DIRECTOR'S REPORT

Mr. Sigurdson presented members with a memorandum regarding this matter that is attached to and made a part of these minutes. Mr. Sigurdson provided an overview of the Board's operations, focusing on the filing of 2023 year-end campaign finance reports, lobbyist reports covering the second half of 2023, and annual statements of economic interest. He informed the Board that there were only two outstanding lobbyist reports and that 94% of lobbyist disbursement reports were filed electronically. Mr. Sigurdson mentioned that the Board is currently missing approximately 150 economic interest statements. He clarified that there is a grace period for submitting late economic interest statements,

and late fees will not be imposed until February 13th. After that date, the late fees will accumulate at a rate of \$5 per day, with a maximum of \$100.

Mr. Sigurdson explained that the Campaign Finance Program is facing resource problems. Specifically, he pointed out that the new online filing system was overwhelmed near the report deadline, resulting in a delay in some reports being filed. He also mentioned that Board staff is planning to develop a list of truly active candidate committees. If a committee is found to be inactive, the Board can forcibly terminate it under certain circumstances.

Chair Asp asked Mr. Sigurdson to provide more details about the resource problems that the Board is facing. Mr. Sigurdson explained that Board staff is struggling with the increasing number of online filings and software updates, and therefore requires additional hardware and IT staff. Mr. Sigurdson stated that the Board is planning to switch from a local server to a cloud-based server, which will be more cost-effective. When asked about the availability of funds to hire more staff, Mr. Sigurdson confirmed that the legislature has approved the Board to hire more staff, and there are sufficient funds available.

ENFORCEMENT REPORT

A. Consent Items

1. Lobbyist registration termination of Eric Hyland (#2986)

Eric Hyland, who was a registered lobbyist for seven principals, passed away on August 6, 2023. As of that date, the Board staff provisionally terminated his lobbyist registrations. Mr. Hyland was the designated lobbyist for two principals, one of whom has already assigned a new designated lobbyist. Staff is currently waiting to hear from the other principal regarding the registration of a new designated lobbyist. Staff asked for authorization to terminate the registrations for Mr. Hyland.

B. Discussion Items

1. Administrative termination of lobbyists Justin Lewandowski (#4720) and Lee Blons (#5020)

Beacon Interfaith Housing Collaborative (#4750) requested that the lobbyist registration of lobbyists Lewandowski and Blons be terminated. Lewandowski left Beacon on June 7, 2023, and Blons left Beacon on August 31, 2023. The principal attempted to contact the lobbyists via phone and e-mail asking them to file termination agreements, without any success. Both of their disbursements have been reported and they are no longer active.

2. Balance adjustment request—Hausman (Alice) Volunteer Committee (#12313)

The Hausman committee would like to terminate; however, in preparing the termination report for 2023, the committee's treasurer discovered a cash balance discrepancy. The current treasurer stepped in on

an ad-hoc basis to assist the Hausman committee as the previous treasurer had a family emergency. The bank balance at the end of 2022 was \$899.43 higher than the 2022 ending cash balance from the 2022 year-end report. The current treasurer has attempted to find the error but only has access to records from 2021 to 2023. The cash balance issue existed prior to 2021. The bank account was closed in September 2023 with a \$0 balance. The 2023 year-end report was filed with a negative \$899.43 balance. The Hausman committee requested an upward balance adjustment from negative \$899.43 to \$0 in order to terminate the committee.

3. Balance adjustment request—Friends of MN School Bus Operators Assn (#30639)

The Friends of MN School Bus Operators Assn requested a balance adjustment. Their 2023 ending cash balance was \$11,068.54; however, the 12/31/2023 bank statement shows a balance of \$10,864.04. The treasurer worked with Board staff to find the discrepancy but was unable to find it. The Friends of MN School Bus Operators Assn requested a downward balance adjustment of \$204.50 for the ending cash balance of 2023.

The following motion was made:

Vice Chair Rashid’s motion: To approve the consent and discussion items.

Vote on motion: Unanimously approved.

C. Waiver Requests

#	Committee/ Entity	Late Fee/ Civil Penalty	Report Due	Factors	Prior Waivers	Recommended Action
1	Debra White (Cook County Commissioner)	\$100 LFF \$1,000 CP	Original EIS	Report due 1/30/23 and filed on 10/11/23. Ms. White reported that her email account had been hacked, and she had changed her phone number from the one she initially provided to CFB. Due to the unstable internet connection in her area, email correspondence from CFB was intermittent. Although CFB sent reminders to her home address, she did not receive them because the postal service only delivers to PO Boxes in her locality. Ms. White explained that she is a caregiver to her husband, which made it difficult for her to adjust to her new position.	No.	Waive.

The following motion was made:

Vice Chair Rashid's motion: To approve the waiver request.

Vote on motion: Unanimously approved.

ADVISORY OPINIONS

A. Advisory Opinion 461

Mr. Sigurdson presented members with a memorandum regarding this matter that is attached to and made a part of these minutes. Mr. Sigurdson gave an overview of the request for this advisory opinion. It was received from Education Minnesota, the Minnesota State Building and Construction Trades Council, and Teamsters Joint Council 32 on December 21, 2023. Representatives for Education Minnesota, the Minnesota State Building and Construction Trades Council, and Teamsters Joint Council 32 signed a release making the request and the resulting opinion public data. The request provides that unions with public sector members negotiate collective bargaining agreements with political subdivisions. The request states that a collective bargaining agreement provides the terms and conditions under which public employees provide services to the political subdivision. The request points out that Minnesota Statutes section 10A.01, subd. 21 (b)(6), provides that selling goods or services that are to be paid for with public funds is not lobbying. Based on these facts, the request asks if negotiating a collective bargaining agreement can be viewed as selling a service to a political subdivision, and therefore not lobbying of the political subdivision. For reasons explained in the opinion, the draft opinion provides that the exception to the definition of "lobbyist" for selling goods and services to a political subdivision cannot be applied to negotiating a collective bargaining agreement. The request also asks if work by an agent of the public sector union to enforce provisions of the collective bargaining agreement, or representing a union employee before the human resources staff of a political subdivision, is lobbying. As drafted the opinion provides that neither action requires an official action of a political subdivision, and therefore is not lobbying.

After discussion amongst the Board clarifying the contents of the opinion, Vice Chair Rashid inquired if the members of a school board, for example, could participate in negotiating labor agreements and also participate in a final vote of approval. Mr. Sigurdson responded that the advisory opinion request states that elected school board members do participate in the negotiations of labor agreements in some districts, and that attempting to influence the actions of elected local officials, including school board members, is lobbying.

The following motion was made:

Member Soule's motion: To approve the advisory opinion as drafted.

Vote on motion: Unanimously passed.

RULEMAKING UPDATE

Mr. Olson presented members with a memorandum regarding this matter that is attached to and made a part of these minutes. Mr. Olson informed the Board that the first meeting of the Rulemaking Committee was held on January 29, 2024. Four organizations submitted written comments addressing draft rule language concerning lobbying. Two individuals testified before the committee regarding the draft rule language concerning lobbying. No written comments were received, or testimony made, regarding the draft rule language concerning campaign finance or audits and investigations. Several people attended the meeting in person and several more attended remotely via Webex. Committee members suggested several changes to the draft rule language, which will be incorporated by staff for further discussion at the next meeting of the Rulemaking Committee, on Friday, February 9, 2024, at 9:30 a.m. Member Asp asked Mr. Olson when they would get the proposed language, and Mr. Olson responded sometime tomorrow.

LEGAL REPORT

Mr. Hartshorn prepared a legal report that is attached to and made a part of these minutes. Mr. Sigurdson stated that there is a path forward in the Mariani matter and the required reports should be completed soon.

EXECUTIVE SESSION

Chair Asp recessed the regular session of the meeting and called to order the executive session. Upon recess of the executive session, the chair had nothing to report into regular session.

There being no other business, the meeting was adjourned by the chair.

Respectfully submitted,



Jeff Sigurdson
Executive Director

Attachments:

Executive director's report
Memo on Advisory Opinion 461
Request for Advisory Opinion 461
Draft of Advisory Opinion 461
Memo from Mr. Olson on Advisory Opinion 459
Redacted memo from Mr. Hartshorn on Advisory Opinion 459
Rulemaking update memo
Legal report



MINNESOTA CAMPAIGN FINANCE BOARD

Date: January 31, 2024

To: Board Members

From: Jeff Sigurdson, Executive Director

Telephone: 651-539-1189

Re: Executive Director's Report – Board Operations

Year-end Reports

All three major program areas; campaign finance, lobbying, and economic interest statements had year-end filing requirements in January. A brief update for each program follows:

Lobbying Program. The lobbyist disbursement report covering the period of June 1 through December 31, 2023, was due on January 16, 2024. Of the 2,547 reports due, 2,507 (98.5%) were filed by the deadline. As of the date of this memo, five reports are still outstanding. The use of the online reporting system remains high with 94% of lobbyist disbursement reports filed electronically.

Campaign Finance Program. The year-end report of receipts and expenditures for 2023 is due on January 31, 2024. Reports are expected from 1,299 candidate committees, political party units, and political committees and funds. This is the first reporting period where Campaign Finance Reporter Online (CFRO) is being used to file reports. The process of migrating committee data from the PC-based reporting software provided by the Board to CFRO has been arduous. Staff has put a lot of effort into producing online videos that explain the migration process, and how to use CFRO. Staff has also spent a lot of time working with individual treasurers who were having a problem with the migration. At the Board meeting, I will have an update on the number of reports filed, and the number still outstanding.

Economic Interest Statement. The annual certification by public officials for 2023 was due on January 29, 2024. Of the 2,609 public officials required to file, 2,432 (93%) were filed by the deadline. There is a grace period for the late filing of an economic interest statement, late fees will not begin until February 13th, and will accumulate at a rate of \$5 a day to a \$100 maximum. A \$1,000 civil penalty may also be imposed after a certified letter is sent.

Training

Staff has offered WebEx-based training sessions on using CFRO to report receipts and expenditures, compliance training for treasurers of political party units and political committees, and compliance training for candidate committees. Training is scheduled on February 8th to review the new compliance and reporting requirements for lobbyists. Remote training is usually well attended. For example, 119 treasurers attended the CFRO training. In addition, the training sessions are recorded and placed on the Board's website for individuals who could not attend the session, or who want to review some portion of the training.



MINNESOTA CAMPAIGN FINANCE BOARD

Date: January 31, 2024

To: Board Members

From: Jeff Sigurdson, Executive Director

Telephone: 651-539-1189

Re: Advisory Opinion 461 – An official action of a political subdivision occurs when elected local officials vote to approve a collective bargaining agreement for a public employee union. Attempting to influence the vote of the elected official is lobbying. Administration of the agreement, including advocating for public employees by agents of the union, is not an official action of a political subdivision, and is therefore not lobbying.

The request for this advisory opinion was received from Education Minnesota, the Minnesota State Building and Construction Trades Council, and Teamsters Joint Council 32 on December 21, 2023. The request was received too late for staff to draft an opinion for the January meeting, and the request was laid over. Representatives for Education Minnesota, the Minnesota State Building and Construction Trades Council, and Teamsters Joint Council 32 signed a release making the request and the resulting opinion public data.

The request provides that unions with public sector members negotiate collective bargaining agreements with political subdivisions. The request states that a collective bargaining agreement provides the terms and conditions under which public employees provide services to the political subdivision. The request points out that Minnesota Statutes section 10A.01, subd. 21 (b)(6), provides that selling goods or services that are to be paid for with public funds is not lobbying.

Based on these facts, the request asks if negotiating a collective bargaining agreement can be viewed as selling a service to a political subdivision, and therefore not lobbying of the political subdivision. For reasons explained in the opinion, the opinion provides that the exception to the definition of “lobbyist” for selling goods and services to a political subdivision cannot be applied to negotiating a collective bargaining agreement.

The request also asks if work by an agent of the public sector union to enforce provisions of the collective bargaining agreement, or representing a union employee before the human resources staff of a political subdivision, is lobbying. As drafted the opinion provides that neither action requires an official action of a political subdivision, and therefore is not lobbying.

Attachments

Advisory Opinion Request
Draft Advisory Opinion 461

December 20, 2023

Mr. Jeff Sigurdson
Executive Director
Minnesota Campaign Finance and Public Disclosure Board
190 Centennial Office Building
485 Cedar Street
St. Paul, MN 55155

Re: New Lobbyist Requirements

Dear Mr. Sigurdson:

We are writing on behalf of a number of unions with public sector members, including Education Minnesota, the Teamsters Joint Council 32 and the Minnesota State Building and Construction Trades Council to request an advisory opinion regarding the application of the new statutory provisions for lobbyists. In particular, we request guidance on the extent to which the definition of “lobbying” extends to negotiations over the value of employee services. We believe that these negotiations may be subject to the reporting exception that pertains to individuals selling goods and services to a unit of government. This question has taken on new importance with the expansion of lobbyist reporting requirements to many additional local units of government, including school districts and municipalities.

We represent several unions whose members work in the public sector. The local unions have been elected to serve as the exclusive representative in negotiations regarding compensation and fringe benefits. Minn. Stat. § 179A.03, subd. 8. Some exclusive representatives employ individuals who work as representatives for the local in its contractual relationship with a public employer. Some local unions receive the assistance of an affiliated labor organization that provides this support, in which case an agent works with the public employer on behalf of the local.

It is often the case that union agents meet with elected officials for a local unit of government. In the case of school districts, the agent’s contact will sometimes be with school board members or with the superintendent. In the case of cities and townships, the agent’s contact may be with members of a city council or town board or supervisors. In some larger school districts and municipalities, an agent’s contact may primarily be with staff in a human resources department.

In representing employees of a local union, an individual may be engaged for compensation exceeding \$3,000 for the purpose of assisting a local union with negotiating and enforcing the provisions of an agreement with a public employer that captures the compensation and working conditions of employees in a particular bargaining unit. Minnesota Statute Section 179A.06, subd. 5 describes the bargaining relationship in this way:

Mr. Jeff Sigurdson

December 20, 2023

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Public employees, through their certified exclusive representative, have the right and obligation to meet and negotiate in good faith with their employer regarding grievance procedures and the terms and conditions of employment, but this obligation does not compel the exclusive representative to agree to a proposal or require the making of a concession.

“Terms and conditions of employment” includes “the hours of employment, the compensation therefor including fringe benefits except retirement contributions or benefits other than employer payment of, or contributions to, premiums for group insurance coverage of retired employees or severance pay, staffing ratios, and the employer's personnel policies affecting the working conditions of the employees.” Minn. Stat. § 179A.03, subd. 19. In other words, these are the circumstances under which an employee will provide service to a public employer.

Minnesota Statutes Section 10A.01, subd. 21 (b) (6) excludes from the definition of lobbyist an individual “engaged in selling goods or services to be paid for by public funds.” Additionally, The Campaign Finance Board has previously stated that “the exception applies to individuals selling goods and services on their own behalf as well as to employees or independent contractors, such as attorneys, acting on behalf of sellers.” Op. Campaign Fin. & Pub. Disclosure Bd. 304 (October 30, 1998) (Advisory Opinion 304). In that opinion, an attorney served as an agent for clients selling their services, including financial, educational, and consulting, to a public entity.

The unions we represent request responses to the following questions:

1. Does working as an agent helping employees to collectively bargain the compensation for their services fall under the lobbying exception set forth in Minnesota Statutes Section 10A.01, subd. 21?
2. Does working as an agent helping employees to enforce the provisions of a collective bargaining agreement setting forth their compensation for services to a public entity fall under the lobbying exception set forth in Minnesota Statutes Section 10A.01, subd. 21?
3. If the answers to Questions 1 or 2 are no, does advocacy on behalf of public employees to human resources staff for a public entity qualify as attempting to influence official action?

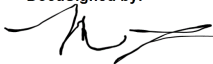
We appreciate your consideration of these questions. If you require additional information in order to better understand our inquiry, please do not hesitate to contact us.

Sincerely,

DocuSigned by:

13FEC2917E9A423...

Tom Dicklich
Minnesota State Building and
Construction Trades Council

DocuSigned by:

894BA2D48C804F5...

Meg Luger-Nikolai
Education Minnesota

DocuSigned by:

8A279A157634436...

Kyle Makarios
Teamsters Join Council 32

State of Minnesota
Campaign Finance and Public Disclosure Board
Suite 190, Centennial Building. 658 Cedar Street. St. Paul, MN 55155-1603

THIS ADVISORY OPINION IS PUBLIC DATA
pursuant to a consent for release of information provided by the requester

Issued to: Meg Luger-Nikolai
Education Minnesota
41 Sherburne Avenue
St. Paul, MN 55103

Tom Dicklich
MN State Building & Construction Trades Council
353 W 7th Street
Suite 105
St Paul, MN 55102

Kyle Makarios
Teamsters Joint Council 32
3001 University Ave SE
Suite 510
Minneapolis, MN 55414

RE: Lobbyist Registration and Reporting

ADVISORY OPINION 461

SUMMARY

The vote of an elected local official to adopt a collective bargaining agreement for union employees of a political subdivision is an official action of a political subdivision. Attempting to influence the vote of an elected official on a collective bargaining agreement is lobbying. Actions by union representatives to enforce the provisions of a collective bargaining agreement after it has been adopted, or to represent union employees in discussions with human resource staff, is not lobbying.

FACTS

On behalf of Education Minnesota, the Minnesota State Building and Construction Trades Council, and Teamsters Joint Council 32 you request an advisory opinion from the Campaign Finance and Public Disclosure Board based on the following facts which were provided to the Board in a written request.

1. Education Minnesota, the Minnesota State Building and Construction Trades Council, and Teamsters Joint Council 32 represent several unions whose members work in the public sector. The local unions have been elected to serve as the exclusive representative in negotiations regarding compensation and fringe benefits.

2. Some local unions employ individuals who work as representatives for the union in contractual relationships with a public employer. Some local unions receive the assistance of an affiliated labor organization, in which case an agent works with the public employer on behalf of the local union.
3. Union representatives and agents often meet with elected officials for a political subdivision. In the case of school districts, the representatives and agents may contact school board members or the superintendent. In the case of cities and townships, the representatives and agents contact city council members or town board supervisors. In larger school districts and cities, the contact may be primarily with staff in a human resources department.
4. In representing employees of the local union, the representatives and agents may be compensated more than \$3,000 for assisting with negotiating and enforcing the provisions of an agreement on compensation and working conditions with a public employer.
5. You state that Minnesota Statutes section 179A.06 provides the right for public employees to negotiate through their union representative terms and conditions of employment and grievance procedures. You describe the terms of and conditions of employment as the circumstances under which an employee will provide service to a public employer.
6. You note that Minnesota Statutes section 10A.01, subdivision 21 (b) (6) excludes from the definition of lobbyist individuals “engaged in selling goods or services to be paid for by public funds.” You further note that in Advisory Opinion 304¹ the Board provides that “...the exception applies to individuals selling goods and services on their own behalf as well as to employees or independent contractors, such as attorneys, acting on behalf of sellers.”

Issue One

Does working as an agent helping employees to collectively bargain the compensation for their services fall under the lobbying exception for individuals selling goods and services that will be paid for with public funds?

Opinion One

No. The Board understands the negotiation of a labor contract to be a complex process that involves many factors and issues. In the Board’s view a union contract is not the type of transaction that may be reasonably seen as the selling of goods or services to a political subdivision.

¹ [Advisory Opinion 304](#), issued October 30, 1998.

Issue Two

Does working as an agent helping employees to enforce the provisions of a collective bargaining agreement setting forth employees' compensation for services to a political subdivision constitute lobbying?

Opinion Two

No. Lobbying of a political subdivision occurs when an individual attempts to influence an official action of the political subdivision. The definition of "official action of a political subdivision" is provided in Minnesota Statutes section 10A.01, subdivision 26b:

"Official action of a political subdivision" means any action that requires a vote or approval by one or more elected local officials while acting in their official capacity; or an action by an appointed or employed local official to make, to recommend, or to vote on as a member of the governing body, major decisions regarding the expenditure or investment of public money.

The vote of elected local officials to accept the collective bargaining agreement is an official action of a political subdivision, and attempting to influence the vote of the elected official, including negotiating with the elected official on the content of the collective bargaining agreement, is lobbying.

However, in this question, the vote to accept the collective bargaining agreement has already occurred, and the issue is the application of some provision of that agreement. The administration of the collective bargaining agreement, including discussions to ensure that the terms of the contract are followed, do not require local officials to make an "official action of a political subdivision". Therefore, working with local officials to enforce the provisions of the collective bargaining agreement is not lobbying of the political subdivision.

Issue Three

Does advocacy on behalf of public employees to human resources staff for a public entity qualify as attempting to influence official action of a local official?

Opinion Three

No. Similar to the answer provided for issue two, union representation advocating on behalf of a public employee with human resources staff is not an attempt to influence the official action of a political subdivision, and therefore is not lobbying.

Board Note

If the Board intends to apply principles of law or policy announced in an advisory opinion more broadly than to the individual or association that requested the opinion, then the Board must adopt the principal or policy in an administrative rule.² The Board notes that it is in the process of adopting and modifying administrative rules regarding lobbying, and that the issue of negotiating a collective bargaining agreement with political subdivisions may be addressed in the forthcoming administrative rules.

Issued: February 7, 2024

David Asp, Chair
Campaign Finance and Public Disclosure Board

² Minn. Stat. § 10A.02, subd. 12a.



MINNESOTA CAMPAIGN FINANCE BOARD

Date: January 31, 2024

To: Board members
Nathan Hartshorn, counsel

From: Andrew Olson, Legal/Management Analyst

Telephone: 651-539-1190

Re: Request for advisory opinion 459

In late November the Board received an advisory opinion request regarding the recently amended definition of the term “expressly advocating,” which impacts the scope of which communications are independent expenditures. The Board laid over the request at the December and January Board meetings. During the January Board meeting, there was a discussion about whether the request is valid and whether the Board is required to issue an advisory opinion in response.

Attached is a memorandum from Board counsel, Nathan Hartshorn, addressing four specific questions posed during the discussion during the January Board meeting. Because the requestor has not consented to its identity being revealed, portions of the memorandum from the Board’s legal counsel have been redacted, and the request itself is not being made available to the public. During the Board’s discussion, it is important to not reveal details about the requestor that would allow it to be identified.

Board staff has not yet prepared a draft advisory opinion. If the Board wishes to issue an advisory opinion in response, Board staff asks that the matter be laid over again so that Board staff may prepare a draft advisory opinion in advance of the March Board meeting.

Attachments:

Request for advisory opinion 459

Memorandum from Board counsel, Nathan Hartshorn

Governing Law

Under Minnesota law, the Board “may issue and publish advisory opinions on the requirements of [chapter 10A] . . . based upon real or hypothetical situations.” Minn. Stat. § 10A.02, subd. 12(a) (2022). The Board “must issue written opinions on all such questions submitted to it within 30 days after receipt of written application,” though the Board can, by majority vote, extend this time limit. *Id.*¹

An advisory opinion is generally binding on the Board in a subsequent administrative proceeding involving the requester and can generally be used as a defense in a judicial proceeding involving the subject matter of the opinion. *Id.*, subd. 12(b). These general rules, however, are subject to specific exceptions: most notably, an opinion does not bind the Board if the opinion request “omitted or misstated material facts” or if the person making the request or alleging that they are covered by it has not acted in good faith. *Id.*, subd. 12(b)(2)-(3).

You ask four questions prompted by the advisory opinion request. I will take each one in turn.

1. The Board has discretionary authority to issue advisory opinions.

Your first question is whether the Board is required by law to issue advisory opinions in response to all requests that satisfy the conditions in its statute.

As noted above, the Board’s statute provides that the Board “may issue and publish advisory opinions.” Minn. Stat. § 10A.02, subd. 12(a). In Minnesota statutes, “may” is permissive, while “must” is mandatory. *Id.* § 645.44, subs. 15-15a. As a result, the Board’s authority to issue advisory opinions is discretionary.

A requester could conceivably argue that third sentence of Minn. Stat. § 10A.02, subd. 12(a), which states that the Board “must issue written opinions on all such questions submitted to it within 30 days after receipt of written application,” creates a mandatory duty to issue advisory opinions when they are requested. Minnesota courts, however, read and construe each statute as a whole and interpret each provision within it in light of the surrounding ones to avoid conflicting interpretations. *Pooley v. Pooley*, 979 N.W.2d 867, 877 (Minn. 2022). Moreover, the canons of statutory construction require Minnesota courts to give meaning to every word and phrase in a statute. *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999). Under those standards, a court would likely hold that, in light of the use of “may” in the first sentence of subdivision 12(a), the mandatory nature of the “must” in the third sentence applies to the 30-day time limit if the Board chooses to issue an opinion and not to the Board’s general authority to provide advisory opinions upon request. The statute’s use of “such” in the third sentence (“The board must issue written opinions on all *such* questions....”) also supports the inference

¹ The Board voted unanimously to lay the advisory opinion request over, thus extending the 30-day statutory time limit, at both the December and January monthly meetings.

that that sentence is subject to the first sentence of subdivision 12(a) and its use of “may.”²

The Board should be aware that, even if section 10A.02 gives the Board legal authority to decline to issue an advisory opinion, doing so in this or any similar situation involves some level of litigation risk. First, if the Board does not provide a reasonable basis for declining to issue an opinion, a court could conclude that that decision was arbitrary and capricious and therefore unlawful. *See In re Max Schwartzman & Sons*, 670 N.W.2d 746, 752 (Minn. Ct. App. 2003) (holding that decision of administrative agency can be overturned on appeal if it is arbitrary and capricious). More specifically, in the Board’s context, the requester could respond to a Board decision not to issue an advisory opinion by filing a declaratory judgment action in state or federal court, arguing that the ambiguity left by the amended Minn. Stat. § 10A.01, subd. 16a, chills the requester’s First Amendment activity. *Cf., e.g., ACLU v. The Fla. Bar*, 999 F.2d 1486, 1490 (11th Cir. 1993) (holding that judicial candidate’s speech had been chilled after state judicial qualifications commission refused to issue advisory opinion on First Amendment issue), *McCutcheon v. FEC*, 496 F. Supp. 3d 318, 330 (D. D.C. 2020) (adjudicating plaintiffs’ claim that Federal Election Commission’s failure to issue advisory opinion chilled their First Amendment rights).

2. The requester likely satisfies the conditions stated in the advisory opinion statute.

Next, you ask whether the requester in this matter meets the conditions stated in the statute—that is, whether the requester is “a person who is subject to this chapter and who wishes to use the opinion to guide the person’s own conduct.” *See* Minn. Stat. § 10A.02, subd. 12(a); *see also id.* § 10A.01, subd. 26a (defining “person” to include individuals and associations). The requester in this matter fits that definition. You state that the entity that made the request is [REDACTED] and is closely affiliated with [REDACTED].

Under these facts, I believe it is likely that a court would hold that the requester met the requirement that it is subject to chapter 10A and intends to use the opinion to guide its own conduct. The Board should not refuse to provide an advisory opinion on this basis.

² A search into the legislative history of subdivision 12(a) provided no clarification of the legislature’s intent for the purposes of interpreting the “may” in the first sentence and the “must” in the third.

3. Concerns about misstatements of fact or bad faith do not affect the Board's authority to issue an advisory opinion.

You ask whether an omission or misstatement of material facts within the request or the submission of the request in bad faith alter the Board's obligation, if any, to issue an advisory opinion.

As noted above, an entity regulated by the Board may not be allowed to use an advisory opinion to defend itself if the request for that opinion (a) "omitted or misstated material facts" or (b) was not made in good faith. *Id.*, subd. 12(b)(2)-(3). Nothing in the statute, however, suggests that these conditions would alter the Board's authority to issue an advisory opinion.

In light of the fact that, as explained above, the Board's advisory-opinion power is discretionary, it could conceivably cite either (a) omissions or misstatements of fact or (b) bad faith as grounds for refusing to issue an advisory opinion in response to a request. In the current case, however, I am not aware of any basis for the Board to conclude that the request has either of these problems. Indeed, in light of the fact that the current request pertains to hypothetical fact patterns, it is difficult to understand what it would mean for the request to "omit[] or misstate[] material facts."

4. The Board has legal authority to issue an advisory opinion in response to the request.

Finally, you note that the Board "has no authority to issue general advisory opinions to guide the public, and specific advisory opinions must be based upon specific articulated material facts and cannot be applied beyond the requester unless adopted by rule." You ask whether this provides grounds for the Board to refuse to issue an advisory opinion in this matter.

I answer this question in the negative. You are correct that (1) the Board does not have general, open-ended authority to issue advisory opinions and (2) an advisory opinion does not bind the Board in a case that does not involve the requester or does not involve the specific facts identified in the request. Nonetheless, the Board's statute explicitly authorizes the Board to issue advisory opinions "based upon real or hypothetical situations." *Id.*, subd. 12(a). If, in the future, the requester at issue here or another entity attempts to take shelter under the Board's advisory opinion, any differences between the facts of that future case and the hypothetical fact patterns contained in the current request may render the advisory opinion inapplicable to the future case. At present, however, there does not appear to be any problem with the advisory opinion request that would bring it outside of the discretionary authority provided to the Board by subdivision 12(a).



MINNESOTA CAMPAIGN FINANCE BOARD

Date: January 31, 2024

To: Board members
Nathan Hartshorn, counsel

From: Andrew Olson, Legal/Management Analyst **Telephone:** 651-539-1190

Subject: Rulemaking update

The first meeting of the Rulemaking Committee was held on January 29, 2024. Four organizations submitted written comments addressing draft rule language concerning lobbying. Two individuals testified before the committee regarding the draft rule language concerning lobbying. No written comments were received, or testimony made, regarding the draft rule language concerning campaign finance or audits and investigations. Several people attended the meeting in person and several more attended remotely via Webex. Committee members suggested several changes to the draft rule language, which will be incorporated by staff for further discussion at the next meeting of the Rulemaking Committee. The draft rule language considered by the committee, written comments, and video of the committee meeting, are available at cfb.mn.gov/citizen-resources/the-board/statutes-and-rules/rulemaking-docket/committee-meeting-materials/.

The Rulemaking Committee will meet again on Friday, February 9, 2024, at 9:30 a.m. The meeting will be held in the Lady Slipper Room on the ground floor of the Centennial Office Building. The meeting will be open to the public and interested individuals may attend the meeting remotely by Webex. There will be an opportunity for public comment regarding the draft rule language being considered by the committee.

The Board does not need to take any action at this time regarding administrative rulemaking.

**CAMPAIGN FINANCE AND PUBLIC DISCLOSURE BOARD
 FEBUARY 2024
ACTIVE FILES**

Candidate/Treasurer/ Lobbyist	Committee/Agency	Report Missing/ Violation	Late Fee/ Civil Penalty	Referred to AGO	Date S&C Personally Served	Default Hearing Date	Date Judgment Entered	Case Status
Mariani, Carlos	Neighbors for Mariani	2022 year-end report	\$1,000 LFF \$1,000 CP	11/22/23				
		Late filing of 2018 year-end report	\$525 LFF					
		Late filing of 2020 pre-primary report	\$1,000 LFF \$1,000 CP					
		Late filing of 2018 pre-primary report	\$1,000 LFF \$100 CP					
		2018 pre-general report	\$1,000 LFF \$1,000 CP					
		2020 pre-general 24- hour large contribution notice	\$1,000 LFF					
		2022 annual statement of economic interest	\$1,000 LFF \$100 CP					
		Late filing of 2018 annual statement of economic interest	\$1,000 LFF \$100 CP					
		Late filing of 2018 candidate statement of economic interest	\$95 LFF					