

August 7, 1998

No. 8259

This opinion is issued in response to questions from Chris Dearth, Legislative Director, Office of the Governor, concerning application of the state lobbying regulations, ORS 171.725 to 171.785, to certain activities by state employees.

FIRST QUESTION PRESENTED

Are any of the following activities by a state employee "lobbying" for purposes of ORS 171.725 to 171.785?

- a. Creating and preparing testimony to be presented at a legislative hearing that takes a position on a legislative measure?⁽¹⁾
- b. Waiting to testify at a legislative hearing in support of or opposition to a legislative measure?
- c. Testifying at a legislative hearing in support of or opposition to a legislative measure?
- d. Discussing a legislative measure with a legislator in the legislator's office, when the discussion includes not only information, but reasons why the agency employee, representing the position of the Governor, thinks it is a good or bad idea?
- e. Developing legislative measures, including holding or attending stakeholder meetings for approval or compromise during the interim, which may or may not result in pre-session or session filing of a legislative measure?
- f. Pre-session work on agency budgets to be presented to the legislature as appropriation bills?
- g. Pre-session meetings with stakeholders discussing the proposed agency budget?
- h. Session testimony stating support of the agency budget?

ANSWER GIVEN

- a. Creating and preparing testimony that takes a position on a legislative measure is not "lobbying."
- b. Waiting to testify at a legislative hearing in support of or opposition to a legislative measure is not "lobbying" so long as the state employee does not engage in any activities that would be "lobbying" during the waiting period.
- c. Testifying at a legislative hearing in support of or opposition to a legislative measure is "lobbying."
- d. Discussing a legislative measure with a legislator in the legislator's office, when the discussion includes not only information, but reasons why the agency employee, representing the position of the Governor, thinks it is a good or bad idea is "lobbying."
- e. The activities of state employees in developing legislative measures are not "lobbying" if those activities are internal to

the agency and do not involve communications with others, except for obtaining input to the agency. If agency employees hold or attend stakeholder meetings for approval or compromise during the interim, the employees are "lobbying" to the extent that during such meetings they communicate with legislative officials to attempt to influence sponsorship, voting or other legislative action on the measure, or solicit the stakeholders to do so.

f. Pre-session work on agency budgets to be presented to the legislature as appropriation bills is not "lobbying" so long as there is no communication with legislative officials to influence or attempt to influence legislative action on the budget or solicitation of others to attempt to influence legislative action on the budget.

g. State employees' pre-session meetings with stakeholders discussing the proposed agency budget are "lobbying" if the employees solicit the stakeholders to attempt to influence legislative action on the budget, whether or not any of the stakeholders so solicited carried through with any attempt to influence legislative action.

h. Presentation of the budget to the legislature and testimony in support of that budget by state employees is "lobbying."

SECOND QUESTION PRESENTED

For purposes of the answers to the first question, would it make a difference if:

- a. The individual is registered as a lobbyist?
- b. The activity is performed by agency support staff at the request of the agency's registered lobbyist?
- c. The testimony or activity is invited or requested by a legislator or the legislator's aide?
- d. The testimony or activity is neither in support of or opposition to a legislative measure, but merely provides information?

ANSWER GIVEN

Our answers to the first question would not change merely because the individual is registered as a lobbyist, the activity is performed by agency support staff at the request of the agency's registered lobbyist, or the testimony or activity is invited or requested by a legislator or the legislator's aide. If the testimony or activity described in the first question is neither in support of or opposition to a legislative measure, but merely provides information, the testimony or activity would not be "lobbying."

THIRD QUESTION PRESENTED

If any of the activities identified in the first question are "lobbying," must they be reported? If so, by whom -- the agency staff person performing the activity, the agency's registered lobbyist, the employer?

ANSWER GIVEN

Unless exempt under ORS 171.735 from the reporting requirements, ORS 171.745 requires any state employee who

engages in any lobbying activities to report, at regular intervals, all moneys expended by that employee "for the purpose of lobbying." If a state agency employs a lobbyist who was registered or required to register with the Government Standards and Practices Commission (GSPC), ORS 171.750 requires the agency to report annually all moneys expended "for lobbying activities" in behalf of the state agency. See the discussion below for an explanation of how these requirements apply in the situations identified in the first question.

DISCUSSION

I. Lobbying

In 1973, the Oregon Legislative Assembly enacted ORS 171.725 to 171.785, finding that to preserve and maintain the integrity of the legislative process, it is necessary that the identity, expenditures and activities of certain persons *who engage in efforts to persuade members of the Legislative Assembly* or the executive branch to take specific actions, either by direct communication to such officials or by solicitation of others to engage in such efforts, be publicly and regularly disclosed.

ORS 171.730 (emphasis added). To accomplish this purpose, ORS 171.725 to 171.785 require "lobbyists" to register with the Oregon Government Standards and Practices Commission (GSPC), ORS 171.740, and to file periodic reports detailing their lobbying expenditures, ORS 171.745.

For purposes of these statutes, a "lobbyist" is:

- (a) Any individual who agrees to provide personal services for money or any other consideration for the purpose of lobbying.
- (b) Any person not otherwise subject to paragraph (a) of this subsection who provides personal services as a representative of a corporation, association, organization or other group, for the purpose of lobbying.
- (c) *Any public official who lobbies.*

ORS 171.725(8) (emphasis added). Public officials were expressly added to the definition of "lobbyist" in 1975. Or Laws 1975, ch 747. A "public official" is defined as "any member or member-elect of any public agency and any member of the staff or an employee thereof." ORS 171.725(10). A public agency is "a commission, board, agency or other governmental body." ORS 171.725(9).

"Lobbying" is defined as:

influencing, or attempting to influence, legislative action through oral or written communication with legislative officials, solicitation of others to influence or attempt to influence legislative action or attempting to obtain the good will of legislative officials.

ORS 171.725(7). "Legislative action" includes the introducing of, or testifying, voting or any other official action on any measure or other matter that may be the subject of action by either house of the Legislative Assembly, or any legislative committee. ORS 171.725(4).⁽²⁾

We are asked whether different types of activities by a state employee would be "lobbying" under the above statutes. To answer these questions, we must interpret the statutory definition of "lobbying."

In interpreting a statute, our goal is to discern the intent of the legislature. ORS 174.020; *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993). We first look at the text and context of the statute, which includes other provisions of the same statute and related statutes. In so doing, we consider statutory and judicially developed rules of construction that bear directly on how to read the text, such as "words of common usage typically should be given their plain, natural, and ordinary meaning." *Id.* at 611. If the legislative intent is clear from the text and context, the search ends

there. Only if the legislative intent is not clear from the text and context of the statute will we look to the legislative history to attempt to discern that intent. *Id.* at 611-612. If, after considering text, context and legislative history, the intent of the legislature remains unclear, we may resort to general maxims of statutory construction to resolve any remaining uncertainty as to the meaning of the statute. *Id.* at 612.

The primary element of "lobbying" is "influencing, or attempting to influence, legislative action." ORS 171.725(7). The terms "influencing" or "attempting to influence" are not defined in the lobbying statutes. Webster's Third New International Dictionary (unabridged 1993) (*hereinafter* Webster's) defines the verb "influence" as:

1 : to affect or alter the conduct, thought or character of by indirect or intangible means * * * **2** : to have an effect on the condition or development of : determine partially * * * .

Id. at 1160. None of the dictionary definitions of the term "influence" in either its verb or noun sense includes any element that the conduct of influence be limited to advocacy or efforts to persuade. Arguably, providing "neutral" information to legislative officials could be "lobbying" if it influences legislative action, even if the person providing the information takes no position on a particular legislative action. Further insight into whether the legislature intended this very broad interpretation of the term "influence" may be found in the remainder of the statutory definition of "lobbying."

"Lobbying" includes not only "influencing" but also "attempting to influence" legislative action. The term "attempt" means "to make an effort to do, accomplish, solve, or effect." Webster's, *supra*, at 140. "Attempting to influence legislative action" inherently requires some intent to accomplish or effect a certain result, which strongly suggests that advocating a particular position must be an element not only of the attempt, but also of "influencing." Thus, the legislature may not have intended to include in "lobbying" merely providing neutral information to legislators when the person making that communication takes no position on the legislative action.

At the first level of statutory interpretation, we consider not only the text of the statute, but also its context. ORS 171.730 expresses the legislative purpose for the lobbying statutes, i.e., to regulate "certain persons who engage in efforts to persuade members of the Legislative Assembly * * * to take specific actions." Relying on this purpose statement, this office previously concluded that the Oregon Council on Crime and Delinquency did not engage in "lobbying" by publishing "information bulletins" on juvenile justice issues because those bulletins did not advocate "either the passage or defeat of any particular bill." Letter of Advice dated April 10, 1979, to Keith A. Stubblefield, Administrator, Law Enforcement Council of Oregon, (OP 4617), at 3.

In light of the purpose statement in ORS 171.730, we believe that it is reasonable to conclude that "lobbying" does not include merely providing information to legislators without taking a position either in support of or opposition to specific legislative action. Because we cannot say that this is the only plausible interpretation of the statute, however, we turn to legislative history. *See State v. Allison*, 143 Or App 241, 251, 923 P2d 1224 (1996),

Before 1973, the Oregon statutes provided minimal regulation of persons who engaged in "lobbying," which was defined as "influencing, or attempting to influence, the passage or defeat of a measure by the Legislative Assembly or the approval or veto thereof by the Governor or attempting to influence other executive branch action, or inaction, regarding passage, defeat or veto of legislation." ORS 171.755(1) (1971). When ORS 171.725 to 171.825 were enacted in 1973, David B. Frohmayer testified on behalf of Common Cause, at whose request the legislation was introduced, about "deficiencies" in Oregon's existing lobbying law. One of those deficiencies was that "the existing law could exempt informational lobbying which, of course, is one of the major loopholes in the federal lobbying Act." Joint Special Committee on Professional Responsibility (HB 2530), May 7, 1973, tape 7, side 1 at 380. This statement corresponded to item nine in the Statement of Common Cause Oregon Policy Advisory Committee, which further described that "loophole" as follows:

[E]xpenditures and efforts made in attempts to 'inform' as opposed to 'influence' need not be reported. The Oregon law defines lobbying in such a way that it appears to refer exclusively to influence or advocacy situations.

Thus, the proponents of the legislation apparently understood the then-existing definition of "lobbying" in ORS 171.755(1) (1971) (i.e., "influencing, or attempting to influence") to exclude providing neutral information to legislators. Mr. Frohmayer was asked by the committee co-chairs to provide a definition of "lobbying," as the proposed legislation did not contain one.

On May 14, 1973, Dick Allen, representing the Capitol Club, testified about the lack of a definition of "lobbying" in the bill. Mr. Allen stated that there was an existing definition of "lobbying" in ORS 171.755 (1971), which we think is pretty

good. It seems to take care of the usual and the usually thought of definition and we think it is concise enough to take in most of what most of us think of as lobbying.

Testimony of Dick Allen, Joint Special Committee on Professional Responsibility, House Members (HB 2530), May 14, 1973, tape 9, side 1 at 224. Mr. Frohnmayer then noted that he felt a separate definition of "lobbying" was unnecessary, but that he had prepared a memorandum for the committee with various definitions of lobbying from other states. In this memorandum, Mr. Frohnmayer recommended that the legislation define lobbying as "influence directed at public decision makers," giving as an example those statutes that include virtually any *influence* situation in which legislators and other parties are involved. The Wisconsin Act, specific in most respects, typically declares that lobbying is

". . . the practice of *promoting or opposing* the introduction or enactment of legislation before the legislature, or the legislative committees, or the members thereof."

While other statutes in this group do not always define "lobbying" or "lobbyists" in quite these terms, their applicability is essentially the same. Thus Virginia does not define lobbying, but it defines "legislative counsel and agent" as

". . . any person employed *to promote or oppose* in any manner the passage by the General Assembly of any legislation."

Memorandum from David B. Frohnmayer to Senator Jack D. Ripper and Representative Robert C. Ingalls, Joint Special Committee on Professional Responsibility, May 14, 1973, at p. 3 (emphasis added). Mr. Frohnmayer then stated that although he had some technical adjustments to suggest, the definition of lobbying provided by Dick Allen, which he described as "the intent to influence the passage or defeat of a measure," was a good starting point. Testimony of David B. Frohnmayer, Joint Special Committee on Professional Responsibility, House Members (HB 2530), May 14, 1973, tape 9, side 1 at 235.

Ultimately, the definition of "lobbying" in the 1973 legislation, codified as ORS 171.725(4), differed from the previous definition in ORS 171.755(1) only by the addition of the language shown below as bold and the deletion of the language in brackets.

"Lobbying" means influencing, or attempting to influence, **by direct communication**, the passage or defeat of [*a measure by the Legislative Assembly*] **legislative action** or the approval or veto thereof by the Governor or attempting to influence other executive branch action, or inaction regarding passage, defeat or veto of legislative action.

Or Laws 1973, ch 802, § 3(4). In effect, the "loophole" identified by Common Cause in the pre-1973 definition of "lobbying" -- that it did not cover efforts to "inform" -- was not fixed by the 1973 legislation. Based on the above history, we believe that, when enacted in 1973, that definition was not intended to include neutral information provided to legislators, but only communications that take a position on the passage or defeat of legislative action.

In 1975, "public officials" were expressly added to the definition of lobbyists. Or Laws 1975, ch 747, § 1. During the debate over whether public officials should be included, the issue of what was considered "lobbying" again came up. John Richardson, Assistant to the Chancellor of Higher Education, suggested that if public officials were included, and the Department of Agriculture then asked an Oregon State University (OSU) professor for assistance in preparing legislation, the OSU professor "would have to register." Testimony of John Richardson, House Elections Committee (HB 2757), April 15, 1975, tape 15, side 1 at 222. Representative Earl Blumenauer responded:

I would differ with you on your interpretation * * * . He may have been contacted because of his expertise to draft legislation, but he's not really up here selling it unless he's really coming up here and testifying and trying to push a particular idea through the legislature. I would think that he still remains an employee of the institution and not really a lobbyist. But when, I think, people from some of these institutions come and they say, "we've got a point of view and we would want to tell you about it -- that affects our budget," I think that's very much the same as any other interest group that's telling their story.

Testimony of Rep. Blumenauer, *id.*, at 224. No one controverted this point of view.

The resulting legislation significantly simplified the definition of "lobbying" to provide merely: "Lobbying' means influencing, or attempting to influence, legislative action." Or Laws 1975, ch 747, § 1(6). The former references to "direct communication" and to the "passage or defeat" of legislative action were deleted.

That definition remained in the statute until 1987 when a bill was introduced at the request of the Government Ethics Commission to clarify the meaning of the phrase "attempting to influence legislative action," which the Commission felt was ambiguous after the phrase "by direct communication" was deleted from the definition of "lobbying" in 1975. *See* Minutes, Senate Judiciary Committee (HB 2171-A), May 26, 1987, Exhibit A.⁽³⁾ There was no discussion of whether or not "influencing" or "attempting to influence" would include providing only neutral information to a legislator. Ultimately, the words shown in bold below were added to the end of the definition:

"Lobbying" means influencing, or attempting to influence, legislative action **through oral or written communication with legislative officials, solicitation of others to influence or attempt to influence legislative action or attempting to obtain the good will of legislative officials.**

Or Laws 1987, ch 566, § 1.

Based on the text, context and legislative history of the definition of "lobbying" in ORS 171.725, we conclude that for purposes of ORS 171.725 to 171.785, "lobbying" does not include merely providing information to legislators without taking a position either in support of or opposition to specific legislative action. Taking a position in support of or opposition to specific legislative action includes not only seeking a legislator's vote on the merits of a legislative measure, but also suggesting or seeking sponsorship, testimony, debate or any other official action on the measure or on any amendment (whether "technical" or otherwise) to the measure, or an appointment, report, or any other matter that may be the subject of action by the legislature or a legislative committee. *See* ORS 171.725(5).

With this interpretation of "lobbying" in mind, we turn to the specific activities by state employees identified in the first question.

A. Creating and Preparing Testimony for Legislative Hearing

We are first asked whether creating and preparing testimony to be presented at a legislative hearing is "lobbying" if the testimony takes a position on a legislative measure. The relevant portion of the definition of "lobbying" is "influencing, or attempting to influence, legislative action through oral or written communication with legislative officials." ORS 171.725(7).

Creating and preparing the testimony is not by itself a communication "with" a legislative official. Unless the testimony being prepared is actually presented to a legislative official, merely creating and preparing testimony cannot be "lobbying." When such testimony is presented, however, the question becomes whether the acts of creating and preparing the testimony are integral to the testimony and therefore an inseparable part of the "communication" with legislative officials.

The term "communication" can mean either "the act or action of imparting or transmitting" or the "information communicated." Webster's, *supra*, at 460. We believe that the legislature intended "lobbying" to include only the acts of imparting or transmitting the testimony to legislative officials and not to encompass the acts of creating and preparing the testimony.

"Lobbying" is accomplished through communication "with" legislative officials. Because the acts of creating and preparing testimony often are done by someone other than the person presenting the testimony, those acts are clearly separable from any contact "with" legislative officials. Moreover, the legislative purpose expressed in ORS 171.730 is to regulate the activities of "certain persons who engage in efforts to persuade members of the Legislative Assembly * * * either by **direct communication** to such officials or by solicitation of others to engage in such efforts." (Emphasis added.) Thus, based on its text and context, the definition of "lobbying" appears to be limited to acts of directly communicating with someone, not the acts of preparing the communication.

Because we cannot say that this is the only plausible interpretation, however, we also consider legislative history. One of the bills introduced by the Oregon Government Ethics Commission during the 1987 legislative session would have added "research and preparation of testimony or other materials related to legislative action" to the definition of "lobbying." HB 2169 (1987). This language raised concerns that it would include many people in a law firm or lobbyist's office "who have never met a legislator * * * [but] have been preparing testimony, doing research and putting other materials related to legislative action together * * * much of * * * which will get tossed out, maybe the whole thing will." Testimony of Roger Martin, Capitol Club Ethics Committee, House Committee on State and Federal Affairs (HB 2169), April 6, 1987, tape 70, side A at 180-200. *See also* Testimony of Representative Ron Cease, *id.* at 232 ("[I]n response to what Roger has said, if

you had three or four staff people in your office that were involved in preparing testimony, this presumably would cover those people, and I don't know why that makes any sense at all."). The Ethics Commission already had proposed an amendment to delete that provision regarding research and preparation of testimony, which Betty Reynolds, Executive Director of the Ethics Commission, described as "overly broad." Testimony of Betty Reynolds, *id.* at tape 71, side A at 140, 307. The amendment was passed unanimously (one member excused). Minutes, House Committee on State and Federal Affairs (HB 2169), April 6, 1987, at 7.

We recognize that the legislature's failure to include "research and preparation of testimony" in the definition of "lobbying" is of dubious value in interpreting legislative intent. See *Kola Tepee, Inc. v. Marion County*, 99 Or App 481, 484, 782 P2d 955 (1989), *rev den* 309 Or 441, 789 P2d 5 (1990) ("The defeat of an amendment to existing law, even if it directly concerns a substantive aspect of a law, is of dubious value, if any at all, in determining legislative intent."); see also *Oregon State Emp. Assn. v. Workers' Compensation Dept.*, 51 Or App 55, 624 P2d 1078, *rev den OSEA v. Workers' Compensation Dept.*, 291 Or 9, 631 P2d 340 (1981). But the legislature not only rejected the proposal to include the preparation of testimony in the definition of "lobbying," the legislature instead added language clarifying that "influencing or attempting to influence legislative action" was only "lobbying" when it was done "through oral or written communication with legislative officials." This new language addressed the ambiguity created in 1975 when the phrase "by direct communication" was deleted from the definition of "lobbying," which is what the Ethics Commission sought to accomplish. See Minutes, House Committee on State and Federal Affairs (HB 2169), April 6, 1987, Exhibit A at 1. The legislature resolved the ambiguity as to whether research and preparation of testimony was "lobbying" not only by refusing to add those acts to the definition, but also by limiting the influence aspect of "lobbying" to communication "with" legislative officials.

Accordingly, based on text, context and legislative history, we conclude that the legislature intended to exclude from "lobbying" the acts of creating and preparing testimony, whether or not that testimony is actually presented to a legislative committee in support of or opposition to a particular legislative measure.

B. Waiting to Testify at a Public Hearing

We are next asked whether waiting to testify at a legislative hearing in support of or opposition to a legislative measure is "lobbying." Although waiting is often a necessary aspect of communicating with legislative officials, it is not an oral or written communication; nor does it express any position or attempt to affect any particular legislative action. Thus, time spent waiting to testify is not "lobbying," regardless of whether the testimony to be presented is "lobbying," so long as the employee does not engage in any activities that would be considered "lobbying" during the waiting period.

This conclusion is supported by legislative history. In one of the hearings on House Bill 2171 (1987), Senator William Frye, Chairman of the Senate Judiciary Committee, suggested that a lobbyist might sit in the audience of one of the committee meetings for about three days waiting to testify, to which Senator Jan Wyers responded: "That's not lobbying, Mr. Chairman. * * * [i]t's when you're trying to influence legislative action. It's when you're actually talking with somebody trying to -- ." This statement was supported by Betty Reynolds, Executive Director of the Ethics Commission, at whose request the legislation was introduced. Testimony, Senate Judiciary Committee (HB 2171), May 26, 1987, tape 158, side A at 145, 160.

During the time spent waiting to testify before a legislative committee, an individual may do more than just wait. Thus, if a state employee, while waiting to testify, communicates with a legislative official in a manner that influences or attempts to influence any legislative action, that would be "lobbying." "Lobbying" includes not only communication with legislative officials in support of or opposition to legislative action, but also "solicitation of others to influence or attempt to influence legislative action or attempting to obtain the good will of legislative officials." ORS 171.725(7). If the employee engages in any of these activities while waiting to testify, that also would be "lobbying."

C. Testimony at a Legislative Hearing

We are also asked whether testifying at a legislative hearing in support of or opposition to a legislative measure is "lobbying." Again, the relevant portion of the definition of "lobbying" is "influencing, or attempting to influence, legislative action through oral or written communication with legislative officials." ORS 171.725(7).

Whether presented orally or in writing, testimony at a legislative hearing is a "communication with legislative officials."

Because the testimony in the question posed takes a position in support of or opposition to a legislative measure, it is "lobbying." This would include testimony that proposes, supports or opposes amendments to a bill, no matter how minor or technical, as well as testimony that states support for or opposition to the bill in its entirety.

D. Private Discussions with Individual Legislators

We are next asked about a discussion with a legislator in the legislator's office, when the discussion includes the reasons why the state employee, representing the position of the Governor, thinks that a particular legislative measure is a good or bad idea. The definition of "lobbying" includes any attempt to influence legislative action through oral or written communication with "legislative officials." ORS 171.725(7). Although the term "legislative officials" is in the plural, we do not believe that the legislature intended to exclude from the definition of "lobbying," communications with individual legislators. *See* ORS 174.110(1) (as used in Oregon statutes, the singular may include the plural and the plural, the singular). Thus, we conclude that any attempt to influence legislative action through oral or written communication with one or more legislators is "lobbying."

Legislative officials include not only legislators, but also "any staff person, assistant or employee." ORS 171.725(6).⁽⁴⁾ A private meeting with a legislator or staff person to express the position of the Governor on a particular legislative measure falls squarely within the definition of "lobbying." The statute draws no distinction based on the location where the communication with legislative officials takes place. If the meeting includes any communication in support of or opposition to the merits of the measure or suggests sponsorship, testimony, debate or any other official action on the measure or on any amendment (whether "technical" or otherwise) to the measure, then the state employee is "lobbying."

E. Developing Legislative Measures

We are asked about activities to develop legislative measures, including holding or attending stakeholder meetings for approval or compromise during the interim, that may or may not result in legislative bills. "Lobbying" includes three distinct acts: (1) "influencing, or attempting to influence, legislative action through oral or written communication with legislative officials," (2) "solicitation of others to influence or attempt to influence legislative action," and (3) "attempting to obtain the good will of legislative officials." ORS 171.725(7).

We first consider activities by state employees to develop legislative measures that are internal to the agency and do not involve stakeholder meetings or other contacts with persons outside of the agency. An example might be when agency employees prepare a "legislative concept." Because these activities do not involve contact with persons outside of the agency, such activities are not communications "with" legislative officials, nor "solicitation of others," nor attempts to obtain the "good will" of legislative officials. Therefore, activities to develop legislative measures that are internal to the agency are not "lobbying." Even if other persons were to meet with agency employees to provide information or suggestions *to* the agency, those activities would not be "lobbying" so long as the agency employees are not soliciting others to influence or attempt to influence legislative action.

We next consider the participation of state employees in stakeholder meetings held for purposes of obtaining approval or compromise on proposals for legislative measures. If any legislative officials are present during such a meeting, state employees who participate in the meetings would likely be "lobbying." This would be the case if the employees make any oral statements or hand out written materials that encourage the sponsorship or passage of the proposed measure. Even if legislative officials are not present during the stakeholder meeting, "lobbying" may occur if, for instance, the employees request or urge members of the stakeholder group to communicate with legislative staff or interim committees about the group's work for the purpose of having the proposed measure sponsored, supported or passed (or contrary legislation defeated). Such actions by the state employees would be "solicitation of others to influence or attempt to influence legislative action" even if none of the stakeholders so solicited carried through with any attempt to influence legislative action.

In sum, whether or not a legislative measure is actually introduced during the session, the activities of state employees in developing a legislative measure is "lobbying" if the employees communicate with legislative officials to attempt to influence the sponsorship, voting or other legislative action on the measure, or solicit others to do so.

F. Pre-session Work on Agency Budgets

The next three activities about which we are asked involve the preparation of agency budgets and their presentation to the legislature as appropriations bills. The budget process involves the efforts of many persons in state agencies, coordinating with the Department of Administrative Services and ultimately the Governor to present a state budget to the Legislative Assembly. ORS 291.200 to 291.224. The first step in this process is for the agency to assess the cost of its programs to determine what size of a budget the agency needs to implement and administer those programs.

When state employees prepare the agency budget or assist in the preparation of the budget, they are not "lobbying." "Lobbying" does not occur when there is neither oral or written communication "with" legislative officials nor solicitation of others to communicate with legislative officials in support of the agency budget.

G. Pre-session Discussions with Stakeholders on Proposed Agency Budget

State employees who participate in stakeholder meetings to discuss the agency's proposed budget would likely be "lobbying" if the purpose of the meetings is to engender support for the agency budget and to have that support conveyed to legislative officials or to others who might themselves make a request to legislative officials to support the agency budget. It would be "lobbying" for agency employees, by word or manner, to solicit the stakeholders to attempt to influence legislative action, i.e., approval of the agency budget even if none of the stakeholders so solicited carried through with any attempt to influence legislative action. In contrast, if the purpose of the meeting is to obtain input from stakeholders about what should be included in the agency budget, or to explain what the agency has put in its budget, agency employees who participate in the meeting would not be "lobbying" so long as there was no solicitation of the stakeholders to influence or attempt to influence legislative action. Caution is appropriate, however, because the agency budget ultimately is legislation and the line between providing information about that budget and soliciting others to support that budget may be difficult to ascertain.

H. Session Testimony in Support of Agency Budget

The presentation of the budget to the legislature and testimony in support of that budget by state employees is "lobbying." The presentation is a communication with legislative officials, the sole purpose of which is to influence legislative action, i.e., the adoption of the agency's budget. ORS 171.725(5), (7).

II. Factors Affecting Whether an Activity Is "Lobbying"

The second question asks whether our answers to the first question would be affected by any of several factors. Specifically, we are asked whether it would make any difference to our answers if the individual performing the activity is a registered lobbyist. It would not. An activity is "lobbying" if it comes within the definition of that term. ORS 171.725(7). Whether or not the individual is a registered lobbyist may affect the duty to report, but it does not alter whether the activity itself is "lobbying."

We are asked whether our answers would differ if the activity is performed by agency support staff at the request of the agency's registered lobbyist. Again, that fact would not be determinative of whether the activity is "lobbying."

We are also asked whether the fact that the testimony or activity is invited or requested by a legislator or legislative aide would affect our answers. It would not. The definition of "lobbying" makes no distinction between meetings or activities initiated by the legislative official or the state employee. If the activity meets the definition of "lobbying," then the state employee is lobbying.

Finally, we are asked whether our answers would differ if the testimony or activity is neither in support of nor opposition to a legislative measure, but merely provided information. As discussed above, at pages 5 to 8, we do not believe that "lobbying" includes merely providing neutral information to legislative officials without taking a position either in support of or opposition to specific legislative action. Therefore, if the employee merely provides information to legislative officials, either in testimony at a legislative hearing or in private discussions, without taking a position in support of or in opposition to a particular legislative measure (or amendments thereto) or other legislative action, the employee would not be "lobbying." Likewise, employee meetings with stakeholders would not be "solicitation of others to influence or attempt to influence legislative action" if the employee did not request the stakeholders to take a position in support of or in

opposition to a legislative measure or the proposed agency budget.

III. Reporting Requirements

The next question relates to the reporting requirements. Two different statutes require the filing of reports with the GSPC. ORS 171.745 requires lobbyists to report expenditures by the lobbyist. ORS 171.750 requires employers of lobbyists to file a report of moneys expended for lobbying activities in the employer's behalf. We discuss each of these requirements below.

A. Lobbyist Reporting Requirements

ORS 171.745(1) requires "[a]ny lobbyist who engages in any lobbying activities" to file reports at regular intervals with the GSPC, showing the total amount of "all moneys expended by the lobbyist for the purpose of lobbying." Provided they are not already registered with the GSPC, the following persons are exempt from the lobbyist reporting requirements of ORS 171.745:⁽⁵⁾

- (1) News media or their employees or agents * * * .
- (2) Any legislative official acting in an official capacity.
- (3) Any individual who receives no additional compensation for lobbying and who limits lobbying activities solely to formal appearances to give testimony before public sessions of committees of the Legislative Assembly, or public hearings of state agencies, and who, if the individual testifies, registers an appearance in the records of such committees or agencies.
- (4) A person who spends not more than 24 hours during any calendar quarter lobbying, excluding travel time, and who does not spend an amount in excess of \$100 lobbying during any calendar quarter excluding the cost of personal travel, meals and lodging. * * *
- (5) The Governor, Executive Assistant to the Governor, Legal Counsel to the Governor, Secretary of State, Deputy Secretary of State appointed pursuant to ORS 177.040, State Treasurer, Chief Deputy State Treasurer appointed pursuant to ORS 178.060, Attorney General, Deputy Attorney General appointed pursuant to ORS 180.130, Superintendent of Public Instruction, Commissioner of the Bureau of Labor and Industries and any judge.

ORS 171.735. Thus, any public official who "lobbies" and who is not exempt under ORS 171.735 is subject to the lobbyist reporting requirements of ORS 171.745.

Two of the above exemptions are most relevant to the questions we have been asked. ORS 171.735(3) exempts any individual: (1) who receives no additional compensation for lobbying, (2) whose lobbying activities are limited *solely* to formal appearances to give testimony before public sessions of committees of the Legislative Assembly or public hearings of state agencies, and (3) who registers an appearance in the records of such committees or agencies before which he or she testifies. State employees do not receive additional compensation for their lobbying activities above their regular state salary and, thus, would meet that element. However, the exemption applies only if both of its other elements are also met. Thus, if a state employee speaks privately with a legislator on a single occasion to express reasons why a particular bill is a good or bad idea, asks other persons to support or oppose a legislative measure, or engages in any other lobbying activity than formal, registered appearances at public sessions of legislative committees, the employee would not come within this exemption. In that case, *all* moneys expended by the employee "for the purpose of lobbying" would need to be reported, even those expenditures for prior formal appearances that the employee registered in committee or agency records, unless he or she comes within one of the other exemptions.⁽⁶⁾

ORS 171.735(4) exempts any individual who, during any calendar quarter, does not spend more than 24 hours or more than \$100 lobbying, excluding travel, meals and lodging. All of the activities that we identify in response to the first question as "lobbying" would be counted toward this 24-hour or \$100 threshold. Once either the 24-hour or \$100 threshold is exceeded by an employee, the employee must comply with the lobbyist reporting requirements of ORS 171.745. If a state employee meets the exemption in ORS 171.735(3) because he or she only makes formal, registered appearances before legislative committees, however, the employee would be exempt from the lobbyist reporting requirement even if

those appearances totaled more than 24 hours or \$100 in expenditures. If the employee does not meet the exemption in ORS 171.735(3) because the employee does not limit his or her lobbying activities to formal, registered appearances before legislative committees, any such appearances would count toward the 24-hour threshold.⁽⁷⁾

If a state employee is not exempt from the lobbyist reporting requirements, the lobbyist's report must show the total amount of all moneys "expended by" that individual "for the purpose of lobbying" in the preceding reporting period.⁽⁸⁾ ORS 171.745(1)(a). We believe that ORS 171.745 requires the employee to report only those amounts actually paid out by the lobbyist personally. The term "expend" means "to pay out or distribute : spend." Webster's, *supra*, at 799. Under this definition, a state employee expends only those moneys that he or she pays out; the employee does not "expend" funds when he or she arranges the purchase of goods or services that are billed to the state agency.⁽⁹⁾ In other words, we believe that the employee must include in the lobbyist's report only his or her out-of-pocket expenses.

These amounts must be reported by general category, including but not limited to (A) food, refreshments and entertainment; (B) printing, postage and telephone; (C) advertising and public relations, education and research;⁽¹⁰⁾ and (D) miscellaneous. *Id.* The expenditures required to be reported do not include "amounts expended by the lobbyist for personal living and travel expenses and office overhead, including salaries and wages paid for staff and secretarial assistance, and maintenance expenses."⁽¹¹⁾ ORS 171.745(3).

The lobbyist's report must also show the name of any legislative official to whom or for whose benefit an expenditure of more than \$60 is made on any one occasion "for the purposes of lobbying." ORS 171.745(1)(b).⁽¹²⁾ The date, name of payee, purpose and amount of that expenditure must also be shown. *Id.*

Further explanation of the lobbyist reporting requirements may be found in the GSPC rules, OAR 199-010-0060 to 199-010-0081.⁽¹³⁾

B. Employer Reporting Requirements

ORS 171.750 contains a separate reporting requirement for the employers of lobbyists who were registered or required to register with the GSPC at any time during the preceding calendar year.⁽¹⁴⁾ This employer reporting requirement expressly applies to public agencies. The exemptions in ORS 171.735 do not directly apply to the employer reporting requirements. Thus, if an employer has at least one employee who was registered or required to register with the GSPC because he or she did not come within any of the exemptions in ORS 171.735, the employer must file the employer report showing expenditures for all lobbying activities for the preceding calendar year, including those of any exempt lobbyists.

The employer's report must show the "total amount of all moneys expended for lobbying activities in the employer's behalf, excluding living and travel expenses incurred during a session of the Legislative Assembly." ORS 171.750(1)(a). Unlike ORS 171.745(1)(a), which requires a lobbyist to report moneys expended "for the purpose of lobbying," ORS 171.750(1)(a) requires the employer to report moneys expended "for lobbying activities." Thus, the employer's report needs to include only expenditures for those activities that are "lobbying." ORS 171.750 does not, however, exclude the office overhead directly related to those activities. Thus, the employer's report must include that portion of the salary, benefits and directly related overhead of any employees who engage in "lobbying," but not the salaries, benefits or overhead for support personnel or other persons who may assist the lobbyist but do not themselves engage in any "lobbying" activities.⁽¹⁵⁾ Unlike the lobbyist's expenditure report, the employer's report need not list expenditures by category.

The employer's report must also show the name of any legislative official to whom or for whose benefit an expenditure of more than \$60 is made on any one occasion by the employer for "the purpose of lobbying," but not including information previously reported in a lobbyist's report filed in compliance with ORS 171.745. ORS 171.750(1)(b).⁽¹⁶⁾ The date, name of payee, purpose and amount of that expenditure must also be shown. *Id.*

C. Examples

To more clearly explain how the principles discussed above would apply to state agency employees in the situations identified in the first question, we discuss several examples below.

Example #1: Employee A presents testimony in support of a legislative measure at a public session of a legislative committee and has registered that appearance in the records of the committee.

Assuming that Employee A does not engage in any other lobbying activities, Employee A would be exempt under ORS 171.735(3) from the lobbyist reporting requirement. If Employee A engages in lobbying activities other than registered, formal testimony, Employee A would need to file the lobbyist's expenditure reports if the total of his or her lobbying activities, including formal committee appearances, exceeds either the 24-hour or the \$100 threshold.

If Employee A is not exempt under ORS 171.735(3) or (4) from the lobbyist reporting requirement, then he or she is also required to register with the GSPC. In that case, the agency that employs this individual must file an employer expenditure report showing the portion of this employee's salary, benefits and overhead attributable to this employee's lobbying activities, as well as all other moneys expended "for lobbying activities" in the agency's behalf. Even if Employee A is exempt from the lobbyist reporting (and registration) requirement, the agency must report expenditures for Employee A's lobbying activities if any other persons employed by the agency were registered or required to register with the GSPC.

Example #2: Employee B creates and prepares the formal testimony presented by Employee A in the above example.

Creating and preparing testimony in support of a legislative measure is not "lobbying," whether or not done at the direction of the lobbyist who presents the testimony. Assuming that Employee B does not engage in any other activities that would be "lobbying," Employee B does not need to file a lobbyist's expenditure report.

The agency that employs Employee B does not need to report the salary or other expenses attributable to Employee B's creation and preparation of testimony because those expenditures are not "for lobbying activities."

Even if Employee A is required to file a lobbyist's expenditure report, he or she would not need to include in that report the portion of Employee B's salary attributable to Employee B's creation and preparation of the testimony. Although Employee B's activities were "for the purpose of lobbying" by Employee A, the lobbyist's report need not include office overhead or staff salaries.

If Employee B does engage in activities that are "lobbying," he or she would need to file the lobbyist's expenditure reports unless he or she is otherwise exempt under ORS 171.735. If Employee B, or any other person employed by the agency as a lobbyist, is required to register and to file a lobbyist's expenditure report, the agency employer would need to file an employer expenditure report that shows the total amount of all moneys expended "for lobbying activities" in the agency's behalf. This would include the portion of Employee B's salary, benefits and overhead attributable to Employee B's lobbying activities, but not Employee B's creation and preparation of testimony because that is not a "lobbying" activity.

Example #3: Employee C and Employee D each spend approximately 25 hours working together to develop a legislative concept and approximately 10 hours at stakeholder meetings at which they encourage the stakeholders to contact their representatives to support the proposed legislation. In addition, Employee D authorizes an expenditure of \$150 for printing and advertising for the meetings, which will be paid by the agency employer. These are the only activities engaged in by Employees C and D that could be considered "lobbying."

Assuming that Employee C does not engage in other "lobbying" activities, Employee C does not need to file a lobbyist's expenditure report. Because 25 hours of Employee C's activities were internal to the agency and did not entail communicating with legislative officials or stakeholders, they are not "lobbying." The 10 hours that Employee C spent at the stakeholder meetings does not exceed the 24-hour threshold.

Assuming that Employee D does not engage in other "lobbying" activities, Employee D does not need to file a lobbyist's expenditure report. The 10 hours that Employee D spent "lobbying" at stakeholder meetings does not exceed the 24-hour threshold. Although the expenditure of \$150 that Employee D authorized for printing and advertising for the stakeholder meetings exceeds the \$100 expenditure threshold, Employee D did not personally expend or pay out those moneys.

Because neither Employee C nor Employee D is required to register or to file a lobbyist's expenditure report, the agency employer is not required to file an employer expenditure report unless other agency employees are registered or required to register with the GSPC. If any agency employee is registered or required to register with the GSPC during the calendar year, then the agency employer must file an employer expenditure report that includes the portion of both Employee C's and Employee D's salary, benefits and overhead directly related to the 10 hours that they spent at the stakeholder meetings, as well as the \$150 expenditure authorized by Employee D and all other moneys expended for "lobbying activities" in the

agency's behalf. Because the 25 hours that Employee C and Employee D spent in developing the legislative concept is not "lobbying," the agency's expenditures for those activities does not need to be included in the agency's report.

IV. Caveat

This opinion construes statutory provisions that have not been interpreted by the courts or by the GSPC in advisory opinions issued pursuant to ORS 171.776. We recognize that our answers to several of the questions differ from that of the GSPC in its informal advice to lobbyists and in the GSPC rules.

The GSPC has authority to issue and publish opinions on the requirements of ORS 171.725 to 171.785 based on actual or hypothetical circumstances. ORS 171.776(2). Any lobbyist or lobbyist employer may request in writing a determination from the GSPC whether a proposed transaction or action constitutes a violation of ORS 171.725 to 171.785. An advisory opinion issued by the GSPC in response to such a request is considered a formal opinion having precedential effect. ORS 171.776(4). A lobbyist or lobbyist employer who relies on such a formal opinion shall not be liable for violation of the lobbying statutes for any action or transaction carried out in accordance with the GSPC opinion. *Id.* Although we believe that our interpretation of the reporting requirements is correct and would be shared by the GSPC if it were asked to address those questions, an opinion from this office does not guarantee the same protection from liability.

HARDY MYERS

Attorney General

HM:AV:naa/JGG11E72

1. By "creating and preparing" testimony, we understand you to be describing the creative acts of devising the content of the testimony, not the manual acts of typing and formatting a written document.

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2. ORS 171.725(5) provides in its entirety:

"Legislative action" means introduction, sponsorship, testimony, debate, voting or any other official action on any measure, resolution, amendment, nomination, appointment, or report, or any matter which may be the subject of action by either house of the Legislative Assembly, or any committee thereof or the approval or veto thereof by the Governor.

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3. Two bills introduced at the request of the Oregon Government Ethics Commission, HB 2169 and 2171, would have amended the lobbying statutes. HB 2169, which contained the original "clarifying" language to the definition of "lobbying," was consolidated into HB 2171.

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4. "Legislative official" is defined as:

any member or member-elect of the Legislative Assembly, any member of an agency, board or committee that is part of the legislative branch, and any staff person, assistant or employee thereof.

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5. These same persons are exempt from the registration requirements in ORS 171.740. ORS 171.735.

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6. The employee would also no longer be exempt from the registration requirement in ORS 171.740 unless he or she came within another exemption.

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7. It is conceivable, though perhaps unlikely, that a state employee might spend more than 24 hours in formal, registered appearances before legislative committees during a calendar quarter. If such an individual were then to engage in some other lobbying activity (e.g., a 5-minute conversation with a legislator outside the committee room urging the legislator to support an amendment to a bill), the employee would no longer be exempt under ORS 171.735(3) from the reporting requirements. Because this employee had already exceeded the 24-hour limit for exemption under ORS 171.735(4) at the time he or she became no longer exempt under ORS 171.735(3), he or she would now be required to comply with the registration requirements of ORS 171.740 and the lobbyist reporting requirements of ORS 171.745. The employee would need to register with the GSPC within three working days after losing the exemption under ORS 171.735(3). The employee would have to file a report with the GSPC on the next reporting date, showing the total amount of all moneys expended by the employee for the purpose of lobbying "in the preceding reporting period." ORS 171.745(1)(a). The employee must also include in this report any expenditures made to, or for the benefit of, a legislative or executive official. ORS 171.745(1)(b). Although the statute does not specify, we believe that such reportable expenditures are also limited to those in the preceding reporting period.

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8. These reports must be filed on January 31 and July 31 of each even-numbered year and on January 31, April 30 and July 31 of each odd-numbered year. ORS 171.745(1).

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9. The GSPC rules provide that all expenditures "incurred by a lobbyist or at the lobbyist's direction or instigation for the purpose of lobbying" must be reported, even though the employer pays the bills. OAR 199-010-0075(1). We believe this rule is overly broad in that it requires reporting by the lobbyist of amounts that are not actually "expended by the lobbyist." *See* ORS 171.745(1)(a).

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10. ORS 171.745(1)(a)(C) requires a lobbyist who engages in any lobbying activities to file a statement showing the "total amount of all moneys expended by the lobbyist for the purpose of lobbying," expressly including "research." This provision requires expenditure reporting of research only when it is done "for purposes of lobbying," not research prepared initially for other purposes. To the extent testimony at a legislative hearing incorporates information or research from a report or other document prepared initially for other purposes, the work of researching and preparing the earlier report or document would not be "lobbying" because it was not done for the purpose of influencing legislative action. In the 1973 hearing on House Bill 2530, one of the senators asked whether lobbying included all research done on the subject of the law merely because it becomes available to a legislator or whether the research had to be done specifically in order to influence legislation. David B. Frohnmayer responded:

I would say the latter conclusion and I would point to the language [of the bill] which says "all amounts received or expended directly or indirectly for lobbying activities." And while something clearly could do double duty, it seems to me that the purpose of that expenditure would not initially have been for the purpose of influencing a given legislator and therefore that would not be reported.

What we're getting at is obviously is the informational literature which is generated for the specific purpose of influencing legislative * * * action. While that's a fine line, I think it's not an impossible one to draw.

Testimony, David B. Frohnmayer, Joint Special Committee on Professional Responsibility (HB 2530), May 7, 1973, tape 7, side 1 at 497.

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11. The employee's own salary need not be included in the lobbyist's report because it is not an amount expended by the employee or at his or her direction for the purpose of lobbying. *See* OAR 199-010-0075(4).

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12. ORS 171.745(1)(b) references an expenditure amount of \$25. Beginning July 1, 1979, that dollar amount has been adjusted annually by the GSPC based on the change in the Portland Consumer Price Index for All Urban Consumers for All Items as prepared by the Bureau of Labor Statistics during the preceding 12-month period. *See* ORS 171.745(2). The current amount of \$60 was effective January 1, 1998.

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13. The GSPC rules provide that when a lobbyist is employed by a public agency, the agency must file the lobbyist report rather than the individual who lobbies. OAR 199-010-0050. We find no support in the statutes for this requirement which was deleted from ORS 171.745 in 1987. *See* Or Laws, 1987, ch 566, § 4.

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14. The employer expenditure report must be filed by January 31st of each year. ORS 171.750(1).

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15. The GSPC rules require the employer report to include all payments for "overhead, support personnel, and other personal expenses, such as for travel, if they in any way *relate to* lobbying activities," OAR 199-010-0095(1), as well as all expenditures reported in the lobbyist's expenditure reports. OAR 199-010-0095(2) (emphasis added). We believe that these rules are overly broad in that they require reporting of expenditures that are not "for lobbying activities."

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16. ORS 171.750(1)(b) references an expenditure amount of \$25. Beginning July 1, 1979, that dollar amount has been adjusted annually by the GSPC based on the change in the Portland Consumer Price Index for All Urban Consumers for All Items as prepared by the Bureau of Labor Statistics during the preceding 12-month period. *See* ORS 171.750(2). The current amount of \$60 was effective January 1, 1998.

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