



LAO/09-3

The Commonwealth of Massachusetts
William Francis Galvin, Secretary of the Commonwealth
Public Records Division - Lobbyist Section

Alan N. Coe
Director

December 29, 2009

Marie D. Marra
Supervisor, Lobbyist Section

Mr. Douglas H. Wilkins, Esq.
Anderson & Kreiger, LLP
One Canal Park, Suite 200
Cambridge, MA 02141

Dear Attorney Wilkins:

I have received your December 1, 2009 correspondence requesting a lobbying advisory opinion. Specifically, you requested guidance on the following issues:

1. Does providing information to a regulatory agency as required by statute, regulation, or approved plan fall within the written request and response exception to the definition of "executive lobbying" in G.L. c. 3, § 39 as amended?
2. To what extent, if at all, does the current definition of "lobbying" include testimony by fact and expert witnesses under oath during an administrative ratemaking hearing conducted pursuant to the trial-like rules in 211 C.M.R. 110.04?

Chapter 28 of the Acts of 2009 revises the definition of executive lobbying and sets forth the following:

... "executive lobbying" shall not include providing information in writing in response to a written request from an officer or employee of the executive branch or an authority for technical advice or factual information regarding a standard, rate, rule or regulation, policy or procurement...

2009 Mass. Acts 28, Section 2.

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An issue presented in your request is whether a statute, regulation, or approved plan that requires submission of information or technical advice constitutes a "written request." Whether the above-referenced items constitutes a "written request" need not be addressed, as a portion of the lobbying statute, which is unchanged by Chapter 28 of the Acts of 2009, provides for exceptions to what is defined as an "act to communicate directly with a covered executive official to influence a decision concerning policy or procurement." Specifically, the statute provides that an "act to communicate" shall not include the following:

an act required by subpoena, civil investigative demand, or otherwise compelled by statute, regulation or other action of the executive branch or an authority, including, but not limited to, statewide constitutional offices...

G.L. c. 3, § 39 (2008 ed.).

Thus, an act compelled by statute or regulation does not constitute an act to communicate directly with a covered official. Therefore, in an instance where a person provides data to a regulatory agency as required by statute, regulation or approved plan, this office finds that such acts are exempted from the definition of an "act to communicate directly with a covered executive official to influence a decision concerning policy or procurement," and would not constitute acts of lobbying. See G.L. c. 3, § 39 (2008 ed.).

The statute additionally provides the following exemption from an "act to communicate" with a covered executive official:

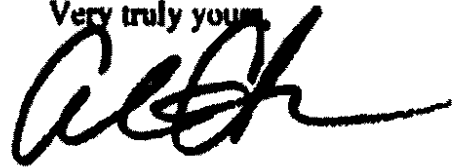
an act made in compliance with written agency procedures regarding an adjudicatory proceeding, as defined in section one of chapter thirty A, conducted by the agency, or similar adjudicatory or evidentiary proceedings conducted by any department, board, commission or official not governed by chapter thirty A...

G.L. c. 3, § 39 (2008 ed.).

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An act made in compliance with an adjudicatory proceeding conducted by any commission not governed by chapter thirty A also falls within the exception to an "act to communicate directly with a covered executive official to influence a decision concerning policy or procurement." Thus, to the extent that a person engages in evidentiary proceedings, such activities do not fall within the statutory definition of lobbying, both currently and as amended.

Very truly yours,

A handwritten signature in black ink, appearing to read "Alan N. Cote", with a long horizontal flourish extending to the right.

Alan N. Cote
Director