

Dalberg, Heather L (DOA)

From: Ashley Reed <ashleyreed@gci.net>
Sent: Monday, October 08, 2018 1:21 AM
To: Hebdon, Heather R (DOA)
Cc: Dalberg, Heather L (DOA)
Subject: Formal Advisory Request

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The purpose of this emailed memorandum is to formally request advisory opinion(s) related to lobbyists and prohibitions related to forwarding fundraising invitations. Recognizing that the key agency people are out of the office this coming week and the statutory requirement that staff provide written guidance to the commission within seven (7) days of receiving a formal request for their review prior to adjudication, I wish to suspend the stipulated timeframe for action by staff.

With the election being only four (4) weeks away and with the now conflicting advice, I am suspending forwarding any invitations, to insure compliance, until the commission provides formal advice. Consequently, an immediate response is not necessary.

APOC staff, for years, has taken the position that lobbyists could forward fundraising invitations in an advisory role. Staff even provided written guidance accordingly. Now, I understand from a reporter, and a follow-up conversation with agency staff, that there may be a difference of opinion between the agency's lobbyist coordinator and the executive director. I seek guidance.

Specifically:

1. Is it permissible, as has been the guidance, for a lobbyist to forward a fundraising invitation as an advisory ?
2. Can a lobbyist advise, via a newsletter, about upcoming fundraising events?
3. Given the many court cases related to campaign finance laws, lobbyists and freedom of speech protections since the passage of Alaska's laws, I am formally requesting that APOC, with the advice and consultation of the Alaska Department of Law, review the applicability of existing laws and regulations (see notes below), given the more recent court decisions protecting citizen's constitutional rights and provide us additional guidance with these court decisions in mind where the higher courts have made definitive and clear decisions that seem contrary to our outdated statutes and supporting regulations.

It is widely accepted that the state may place broad restrictions on a lobbyist's ability to provide gifts to politicians. It is less clear that the state has broad authority to restrict the content of a lobbyist's speech. Indeed, the state can not enact laws, nor can an agency promulgate a regulation, that eliminate core constitutional protections. Alaska's laws must yield to fundamental protections set out in the Alaska and US Constitutions.

For this reason, any regulation or policy adopted by APOC must not violate fundamental rights that go to the heart of the constitution: every Alaskan's right to participate in the electoral process. As Justice Black wrote in *Mills v. State*: "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." Based on this well accepted axiom, federal courts have found that even registered lobbyists are protected by the First Amendment. *Liberty Lobby Inc. v. Pearson*, 390 F.2d 489, 491 (D.C. Cir. 1968); *Riley v. National Federation of the Blind of North Carolina*, 487 US 781, 801 (1988).

Similarly, laws regulating campaign activities must also comply with the Equal Protection provisions of the Alaska and US constitution. The government cannot arbitrarily treat similarly situated citizens differently and any law regulating a lobbyist's participation in an election must be narrowly tailored and designed to advance a compelling state interest. Cf. *Bullock v. Carter*, 405 US 134 (1972).

For these reasons, it is very difficult for a law or regulation that censors speech touching on elections to survive a legal challenge. See, e.g., *Citizens United v. FEC*; *Pickering v. Board of Education*, 391 US 563, 574 (1968) (holding unconstitutional a government's restriction on public employee speech on matters of public concern); *Autor v. Pritzker*, 740 F.3d 176 (D.C. Cir. 2014) (discussing first amendment and equal protection rights of lobbyists); see also Alaska AG Opinion, February 19, 2010 (applying *Citizens United* to Alaska's campaign laws and finding that several provisions likely violate the constitution) (available here: <http://www.law.state.ak.us/pdf/civil/021910-citizen.pdf>).

Given the recent developments in case law discussing the limits on the government's authority to restrict campaign speech, I would like APOC to formally review and examine whether the restrictions that it is imposing on lobbyists complies with the US or Alaska constitutions. I would hope and trust that APOC would consult with the Alaska Department of Law as part of their formal deliberative process.

As part of this review, I would also like APOC to analyze whether a lobbyist can be found to be in violation of Alaska law when that lobbyist has relied in good faith on the agency's longstanding and consistent interpretation of state law formal or otherwise. While an agency has broad authority to reverse a long standing interpretation of state law, it should not be allowed to sanction a lobbyist who relied on such an interpretation. Such a sanction would violate a lobbyist's due process rights. Moreover, it would seem that the agency should be estopped from imposing a sanction in such a situation.

Thank you for your time. I look forward to your review and guidance.

Sent from my iPhone

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