OPINION
77-58

January 3, 1977 (OPINION)

Mr. Ben Meier

Secretary of State

State Capitol Building

Bismarck, ND 58505

Dear Mr. Meier:

This is in response to your letter requesting an opinion in regard to the North Dakota Lobbying Law as defined in section 54-05.1-02, N.D.C.C.

> The wording of this section provides that "the provisions of this chapter shall apply to any person except a legislator or a private citizen appearing on his own behalf and except employees of the state or its political subdivisions acting in their official capacity who, in any matter whatsoever, directly or indirectly, perform the following activities. . ."

Your letter requested first that this office outline guidelines regarding the applicability of these provisions if, for example, a school board member appears: 1) as an individual representing only himself, or 2) representing his local school board, or 3) representing the State Association of School Boards.

Second, you inquired how the status of school board members and other representatives of political subdivisions would differ under the Act from that of members of boards and groups representing more specialized interests.

Third, you inquired whether the registration and fee payment requirements apply to individuals and representatives of groups who limit their lobbying activities to testifying before legislative and interim committees. You further inquired whether there would be a meaningful distinction between such individuals and groups who appear before the committee to testify on their own initiative and those which are present at the request of the legislative committee.

In response to your first request, the statute would apply specifically to members of the school board as follows: 1) As to an individual, whether or not a member of the school board, representing only himself, the statute is clear. This individual would fit within the precise meaning of the phrase in N.D.C.C. 54-05.1-02: ". . . a private citizen appearing on his own behalf". This person is not in the category of persons meant to be regulated by this chapter of the code and therefore necessarily retains all of his rights to petition the government for a redress of grievances provided by the first amendment to the U. S. Constitution and Article I, Section 10 of the Constitution of North Dakota. This person acting in an individual capacity would therefore not need to register nor pay any fee.

2) The situation where a school board member is representing his local school board, presents a fairly clear cut issue also. Exempt from coverage under the Lobbying law are ". . . employees of the state or its political subdivisions acting in their official capacity . . .".

The school district is recognized in Sections 183 and 184 of the North Dakota State Constitution as a political subdivision of the state, created pursuant to law as part of the public school system. It has also been recognized as a political subdivision by the North Dakota Supreme Court in Baldwin v. Board of Education of Fargo, 33 N.W.2d. 473, 482 (N.D. 1948) and would therefore come within this "political subdivision" exception. A school board member acting in this capacity would also therefore be exempt from the registration and fee payment requirements of the Act.

It should be noted that this exception is stated in terms of "employees" of the state or its political subdivisions. However, this term is not defined in the context of the chapter nor is it clarified or even alluded to in the legislative history. (See, Hearings on Senate Bill 2368, Senate Committee on State and Federal Government, February 3 and 10, 1975; House Committee on State and Federal Government, March 4, 1975.) In the context of this legislation "employees" must be read to include elected officials of the state and its political subdivisions also or the results would be absurd. You might, for example, find that a teacher as an employee of the school district could testify but not an elected member of the school board who is more nearly a representative of the people within the district.

The school district, as a political subdivision, and its elected officials as agents and the only logical representatives of the district, had a right under the preexisting law to present testimony and provide information to the Legislative Assembly on legislation relevant to education. This was seen as a logical and necessary function under their legislative mandate to provide adequate educational facilities and opportunities for all school age children. In lending their expertise and experience in the field of education for the information of the legislators, they are fulfilling a crucial step toward providing adequate educational facilities and opportunities, and therefore are acting within their official capacity in this instance.

80 C.J.S. Statutes, Section 317 provides:

> "The government, federal or state, and its agencies are not ordinarily to be considered as within the purview of a statute, however general and comprehensive the language of the act may be, unless intent to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication.
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> This general doctrine applies with special force to statutes by which prerogative rights, titles, or interests of the government would be divested or diminished, or to statutes under which liabilities would be imposed on the government.

> Although the rule is less stringently applied where the law operates on the agents or servants of the government rather than the sovereign itself, it also applies where a reading which would include public officers would work obvious absurdity."

The North Dakota Supreme Court has recognized this general principle in Smith v. Anderson, 144 N.W.2d. 530, 535 (N.D. 1966) where it stated that: ". . . statutes which in general terms divest preexisting rights or privileges will not be applied to the sovereign without express words to that effect".

Also, in City of Grafton v. Ottertail Power Company, 86 N.W.2d. 197, 203 (N.D. 1957) the court quoted Sutherland, Statutory Construction, 3d. Edition, Section 6301 as stating ". . . general words or language of a statute that tend to injuriously encroach upon the affairs of the government receive a strict interpretation favorable to the public, and, in the absence of express provision or necessary implication the sovereign remains unaffected". Therefore, in his capacity as a representative of his local school board the school board member would also be exempt from registration under the Lobbying Act.

3) In the situation where an individual member of a school board is appearing as a representative, not of his local school district, but rather as a representative of the State Association of School Boards, the answer is not so straight forward but in this instance also, a school board member must be exempt from application of the Lobbying Act.

Services provided to and for the State Association of School Boards by members of local school boards must logically be considered within the official capacity of such board members.

North Dakota Century Code 15-29-08(19) provides:

> "The Legislative Assembly hereby recognizes the necessity for school boards to organize on the county and state levels, and the Legislative Assembly hereby authorizes school boards to pay membership dues to county and state associations and further authorizes county associations to pay membership dues to the state association." (Emphasis added)

In recognizing the necessity for an organization like the State Association of School Boards as a means to enable the local school board to more effectively use a statewide system for providing uniform public education, this statute implicitly invests the local school board members additional "official functions", i.e., participation and cooperation with such statewide organizations to effectively promote the goals for which it was established and to meet educational needs on a statewide level. Therefore, within the wording of the statute, a school board member although not mandated by the statute to do so, could also be acting in his official capacity when representing the statewide association and therefore would be exempt from registration under the Lobbying Act.

67 C.J.S. Officers, Section 110 provides:

> "The duties of a public officer are usually prescribed by statute, but it has been observed that such statute seldom, if ever, define with precise accuracy the full scope of such duties." (Board of Education of Boyd County et al v. Trustees, 76 S.W.2d. 267 (1934).)
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> "Generally the duties of a public officer include those lying fairly within its scope, those essential to the accomplishment of the main purpose for which the office was created, and those which, although incidental and collateral, serve to promote the accomplishment of the principle purpose.
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> . . . as a general rule the duties imposed by law on public officers are functions and attributes of the office and not of the officer . . . to be performed by the incumbent although they may have been left undone by the predecessor." (Emphasis added)

In addition Throop, Public Officials Section 542 provides:

> "The rule respecting (powers of officials) is that, in addition to the powers expressly given by statute to an officer or a board of officers, he or it has, by implication, such additional powers as are necessary for the due and efficient exercise of the power expressly granted, or as may be fairly implied from the statute granting the powers."

The above analysis provides as a means of fitting school board members within the "official capacity" language of N.D.C.C. 54-05.1-02 when they are acting as representatives of the State Association of School Boards. However, it should be noted that the district court of the District of Columbia has specifically found that public officers and employees engaging in lobbying through such an organization are in fact "acting in their official capacities". (See, Bradley v. Saxbe, 388 F. Supp. 53 (D.C.D.C. 1974).) The organizations involved in the Saxbe case were the National League of Cities, the National Association of Counties, and the U. S. Conference of Mayors, therefore, the Saxbe case is on point.

A constitutional imperative is added to this interpretation of the North Dakota Lobbying Act by the constitutional basis used by the Saxbe court in arriving at its decision that the above named organizations must be exempt from compliance with the Federal Regulation of Lobbying Act, Sections 302 et seq, 308, 308(a), 310(b), 2 U. S.C. Sections 261 et seq., 267, 267(a), 269(b). The Saxbe court was considering the Act's effect on the first amendment right of the people to petition the government for redress of grievances and therefore limited the operation of that Act by holding that it was not applicable to "organizations . . . (1) financed by public money, (2) concerned solely with lobbying in the public interest, (3) for officials who are themselves exempt, and (4) all of the lobbying work is for governmental purposes and is financed from public funds".

The court in Saxbe cited as having most significant bearing on its decision that the Act did not apply to this type of organization:

> ". . . the ground by which the constitutionality of the Act itself was sustained by a divided Court in U. S. v. Harriss, 347 U. S. 612 (1954).
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> A close reading of the Supreme Court decision (in Harriss) indicates that the Court sustained the Act by finding as a proper purpose underlying the statute the effort of Congress to force disclosure by private 'special interest groups seeking favored treatment while masquerading as proponents of the public weal'. Id, at 625. This narrow purpose, read into the statute, enabled the Court to overcome the first amendment challenge. This purpose would not be effected by registration in this particular instance. Here there can be no doubt that all officers and employees of the plaintiff organization are engaged in lobbying solely for what may properly be stated to be the 'public weal' as conceived by those in government they represent who are themselves officials responsible solely to the public and acting in their official capacities. The narrow interpretation of the Act should be maintained to assure its constitutionality. (Emphasis added.)

The constitutional considerations remain constant in dealing with the state regulation of Lobbying Law, and this case would appear directly applicable to the third situation outlined in the first paragraph of your request for opinion. Therefore it would appear that school board members need not register as lobbyists in any of the three situations outlined in your letter.

You will note, however, that in exempting "employees" of a political subdivision appearing on behalf of an organization such as the State Association of School Boards you are not exempting employees of the Association and are operating at the outer limits of the statute's express provisions, i.e., employees of a political subdivision of the state acting in their official capacity. The State Association is not thereby given the status of a political subdivision, but rather the result is mandated because all four of the criteria set out in the Saxbe case are present in this situation and because this particular organization's lobbying can be fitted into the political subdivision employee acting in his official capacity language of the statute. This would not necessarily be so for other groups who, although recognized in state legislation, are essentially proponents of special economic interests such as, for example, beef producers or potato growers, and only secondarily promote the interest of the general public via such things as a strong economy.

In the final paragraph of your request you inquire whether the registration and fee payment requirements apply to individuals and representatives of groups who limit their lobbying activities to testifying before a legislative and interim committees and whether there would be a meaningful distinction between such individuals and groups who appear before the committee to testify on their own initiative and those which are present at the request of the legislative committee.

It should be noted in this regard that Chapter 15-05.1 of the North Dakota Century Code nowhere distinguishes between merely testifying before a legislative committee and other less public forms of

lobbying. In fact, it expressly provides that "lobbying" equals actions which ". . . in any manner whatsoever, directly or indirectly . . ." are "1. Attempts to secure the passage, amendment or defeat of any legislation by the Legislative Assembly or the approval or veto of any legislation by the Governor of the state; or 2. Attempts to influence decisions made by the Legislative Council or by an interim committee of the Legislative Council. This language is certainly broad enough to encompass simply testifying before a committee.

Because there is a question as to the constitutionality of placing any kind of restriction on the right to testify before a legislative committee, several states, among them the state of Washington, have specifically exempted this activity from the definition of lobbying. (Section 16, R.C.W. 42.17.160) The North Dakota Legislative Assembly has not chosen to exempt this activity in its definition of lobbying. There is no clear law which would mandate this exemption and therefore unless the individual or group can fit within the specified narrow exceptions to the Act as set out in 54-05.1-02, registration and payment of the fee would be necessary under the statute by groups merely testifying if the testimony is at the initiative of the individual or group testifying.

However, the situation when the individual or group is requested by the committee to testify can be distinguished. In this type of situation the committee at all times has the power to subpoena witnesses should they refuse to appear voluntarily and therefore to require registration and the payment of the fee in this set of circumstances would put the individual in a difficult position. He or she would necessarily be forced to register and pay the fee or face two unattractive alternatives: 1) to refuse to appear and be cited for contempt or 2) to appear and face possible prosecution for violation of the Lobbying Act. At best, unconscionable action on the part of the government, at worst, unconstitutional. Therefore to avoid such an absurd result, those appearing at the request of a legislative committee simply to testify, should not be required to register under the Lobbying Act.

It is hoped that this analysis will provide adequate guidelines for application to future questions as they arise.

Sincerely,

ALLEN I. OLSON

Attorney General