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September 28, 2012

ATTORNEY GENERAL OPINION NO. 2012- 22

The Honorable Scott Schwab
State Representative, 49th District
14953 W. 140th Terrace
Olathe, Kansas 66062

Re: Legislature—State Governmental Ethics—Registration of Lobbyists; Fees;
Constitutionality

State Departments; Public Officers and Employees—Secretary of State—
Information and Services Fees; Technology Communication Fee Fund;
Fees Remitted and Credited; Constitutionality

Constitution of the United States—Freedom of Religion, Speech and
Press; Rights and Immunities of Citizens—Freedom of Speech; Lobbying;
Fees; Constitutionality

Synopsis: Increases in the lobbyist registration fee, the information and services fee,
and the technology communication fee may be only in such amounts as
are necessary to defray the expense of regulating lobbyists or providing
certain services and materials. Failure to associate increases in such fees
with the costs of the activities could subject the increases to challenges
under the Freedom of Speech Clause of the First Amendment of the
United States Constitution. Cited herein: K.S.A. 25-4119e; K.S.A. 2011
Supp. 46-265; K.S.A. 75-435; K.S.A. 2011 Supp. 75-438; 75-444; K.A.R.
7-16-1; K.A.R. 7-16-2; L. 2003, ch. 143, § 1; L. 1982, ch. 363, §§ 1, 4;
U.S. Const., Amend. I.

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Dear Representative Schwab:

As State Representative for the 49th District, you request our opinion regarding whether increasing certain fees collected by the Secretary of State from persons who engage in lobbying is unconstitutional when the amounts of the increased fees would exceed the costs of performing the administrative functions required under the statutes. You ask specifically whether proposed increases in the lobbyist registration fee charged pursuant to K.S.A. 2011 Supp. 46-265, the information and services fee charged pursuant to K.S.A. 2011 Supp. 75-438, and the technology communication fee charged pursuant to K.S.A. 2011 Supp. 75-444 would violate the Freedom of Speech Clause of the First Amendment to the United States Constitution.

Every lobbyist is required under K.S.A. 2011 Supp. 46-265(a) to register with the Secretary of State by completing and signing a registration form and paying the statutorily required fee. The amount of the fee is based in part on anticipated spending of the lobbyist.¹ The collected fees are remitted by the Secretary of State to the State Treasurer who "deposit[s] the entire amount in the state treasury to the credit of the governmental ethics commission fee fund."² "All moneys credited to such fund shall be used for the operations of the commission in the performance of powers, duties and functions prescribed by law."³

Pursuant to K.S.A. 2011 Supp. 75-438 and 75-444, the Secretary of State is required to charge and collect an information and services fee and a technology communication fee, respectively, the amounts of which are fixed by rules and regulations of the Secretary of State.⁴ The fees are credited into segregated accounts⁵ and are intended to cover the costs of the services and materials for which the fees are imposed.⁶ The fees may be in addition to any other fees charged for such activities.⁷

The First Amendment of the United States Constitution states in part that "Congress shall make no law . . . abridging the freedom of speech. . . ." "A state may not impose a

¹ K.S.A. 2011 Supp. 46-265(b). If the lobbyist anticipates spending \$1,000 or less on behalf of an employer, a fee of \$35 must be paid. Exceeding the \$1,000 anticipated amount requires payment of an additional \$220 fee. If the lobbyist anticipates spending more than \$1,000 on behalf of an employer, the required fee is \$300. Any lobbyist who is an employee of a lobbying group of firm and not an owner or partner of such entity is required to pay an annual fee of \$360.

² K.S.A. 2011 Supp. 46-265(b).

³ K.S.A. 25-4119e.

⁴ See K.A.R. 7-16-1; 7-16-2. An information and services fee is assessed as follows: (a) \$12 for a lobbyist anticipating spending \$1,000 or less; (b) \$72 for a lobbyist anticipating spending more than \$1,000; and (c) \$87 for a lobbyist who is an employee of a lobbying group or firm. The technology communication fee is \$3. Ryan Kriegshauser, Correspondence, April 10, 2012.

⁵ K.S.A. 2011 Supp. 75-438(a) (information and services fee fund); K.S.A. 2011 Supp. 75-444(c) (technology communication fee fund).

⁶ See K.S.A. 75-435; K.S.A. 2011 Supp. 75-444(a); L. 1982, ch. 363, §§ 1, 4. The information and copy service fee established in L. 1982, ch. 363, § 4 was the precursor of the information and services fee. See L. 2003, ch. 143, § 1.

⁷ K.S.A. 2011 Supp. 75-438(a); 75-444(a).

charge for the enjoyment of a right guaranteed by the federal constitution."⁸ "[A] person cannot be compelled 'to purchase through a license fee or license tax, the privilege freely guaranteed by the constitution.'"⁹ A fee may be charged to defray the expense of administering legitimate regulation of First Amendment activity.¹⁰ "[L]egislative lobbying is an activity protected by the First Amendment"¹¹ and a state may only charge a fee as a precondition for lobbying where that fee is 'calculated to defray the expense' of lobbying regulation."¹²

The impetus for your request appears to be the introduction of 2011 Senate Bill No. 102.¹³ Under that bill, the registration fees charged to a lobbyist would have tripled. The bill also provided for increases in filing fees to be paid by candidates for state and local office and by political action committees. The bill did not propose increasing the information and services fee or the technology communication fee, leaving such authority with the Secretary of State. A fiscal note prepared by the Division of the Budget showed the proposed fees would have increased revenue to the Governmental Ethics Commission by \$259,690 in FY 2013.¹⁴ The fiscal note did not separate the amount that would be raised through the increased candidate filing fees from the amount resulting from increased lobbyist registration fees. No party has presented information regarding the actual costs associated with lobbyist regulation or providing the services and materials for which the information and services fee and the technology communication fee are collected.

We do not determine the factual question of whether the lobbyist registration fee, the information and services fee, and the technology communication fee exceed the costs of lobbyist regulation or providing the respective services and materials.¹⁵ However, any increases in those fees may be only in such amounts as are necessary to defray the expense of regulating lobbyists or providing the services and materials. Failure to associate increases in such fees with the costs of the activities could subject the

⁸ *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943).

⁹ *Id.* at 114, quoting *Blue Island v. Kozul*, 379 Ill. 511, 519 (1942).

¹⁰ *Id.* at 116-17. See *American Target Advertising, Inc. v. Giani*, 199 F.3d 1241, 1248-49 (10th Cir. 2000); *Jacobsen v. Lambers*, 888 F.Supp. 1088, 1094 (D. Kan. 1995).

¹¹ *Cammarano v. United States*, 358 U.S. 498, 513 (1959).

¹² *ACLU of Illinois v. White*, 692 F.Supp.2d 986, 992 (N.D. Ill. 2010) (internal citation omitted), quoting *Murdock*, 319 U.S. at 116.

¹³ The language in 2011 Senate Bill No. 102 was eventually removed; the bill became House Substitute for Senate Bill No. 102 that proposed new State Representative districts and State Board of Education member districts. We review the bill in its form as introduced.

¹⁴ Steven J. Anderson, Fiscal Note for SB 102 by Senate Committee on Ethics and Elections, February 10, 2011.

¹⁵ Attorney General's Statement of Policy Relating to the Furnishing of Written Legal Opinions, ¶ 8 (only questions of law will be answered).

Representative Scott Schwab
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increases to challenges under the Freedom of Speech Clause of the First Amendment of the United States Constitution.

Sincerely,

Derek Schmidt
Attorney General

Richard D. Smith
Assistant Attorney General

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