

**STATE OF MINNESOTA
CAMPAIGN FINANCE AND PUBLIC DISCLOSURE BOARD**

**Findings of Fact, Conclusions of Law, and Order
In the Matter of the Complaint of Common Cause Minnesota Regarding the
American Legislative Exchange Council**

I. The complaint

On May 15, 2012, the Campaign Finance and Public Disclosure Board received a complaint from Common Cause Minnesota (Complainant) alleging violations by the American Legislative Exchange Council (ALEC) and an individual named Amy Kjose of certain of Minnesota's statutes related to lobbying.

The complaint alleges that as the director of an ALEC task force in 2011, Ms. Kjose was required to register as a lobbyist in Minnesota, but failed to do so or to file the required reports. The complaint further alleges that in 2011 ALEC was a "principal" as defined in Minnesota Statutes section 10A.01, subdivision 33, either by virtue of employing Ms. Kjose as a lobbyist, or by virtue of spending more than \$50,000 in a year on activities to influence Minnesota legislative action. The complaint alleges that ALEC failed to provide the annual report of expenditures required of every principal.

The Board notes that the complaint includes a significant amount of legal citation and argument with regard to ALEC's nonprofit tax status and its lobbying reporting obligation under federal law. Additionally, although the complaint specifically notes certain issue alerts sent to Minnesota legislators and identifies expenses reported by three Minnesota legislators to attend ALEC events, most of the allegations of the complaint are of a more general nature applicable to ALEC's activities to influence legislation in the various 50 states rather than only to ALEC's Minnesota activities. Apparently the Minnesota complaint is a derivation of a complaint on the same subject that Common Cause filed with the Internal Revenue Service. The Board has not considered any of the federal questions raised by the complaint.

During the course of the investigation the Board obtained and considered ALEC documents beyond those submitted by Complainant. These documents include internal ALEC documents that were initially disclosed in connection with a news report in *The Guardian* newspaper as well as additional documents from ALEC's public website and documents from other sources that are deemed reliable.

II. The response

On May 22, 2012, Board staff notified ALEC of the complaint and offered ALEC an opportunity to provide a general response.

Because of other Board matters more closely related to the 2012 election, in which two constitutional amendment questions were on the ballot, the Board laid the matter over at its June and July meetings. At its August meeting the Board directed the Executive Director to use staff resources on matters related to the upcoming election and to defer further work on the ALEC matter until resources were available. ALEC was notified of this approach in a letter dated August 8, 2012, and expressed no objection.

On March 13, 2013, the Board notified ALEC by letter that staff resources were now available to undertake investigation of the Common Cause complaint. The letter asked ALEC to provide comprehensive information that would allow the Board to make a determination of the legal status of ALEC under Minnesota's lobbying statutes. On April 12, 2013, ALEC responded through its legal counsel, Mike Wittenwyler. Mr. Wittenwyler provided general information about ALEC and its structure and operations, but did not address the Board's specific requests for information.

Board staff compared the information provided in ALEC's April 12 letter to the Board's March 13 request and concluded that the letter was almost entirely nonresponsive. Staff sent this analysis to ALEC on July 11, 2013, and asked ALEC to respond to the Board's specific requests. In a letter dated July 26, 2013, Mr. Wittenwyler provided an additional response that consisted of an explanation of why ALEC was not required to respond to the Board's requests.

The matter was subsequently laid over at successive Board meetings as staff researched the issues raised by the complaint and ALEC's response and sought additional documentary evidence from the internet and other sources. At its November 2013 meeting the Board reviewed in detail the status of the investigation and the difficulties posed by the continued refusal of ALEC to provide anything but the most basic information about its operations. At that time, the Executive Director explained that staff planned to make a request for information from ALEC that would be more limited than previous requests and would not require ALEC to identify any of its members; an approach that would address one of ALEC's key objections.

On February 13, 2014, staff sent ALEC the narrower request for information. On March 10, 2014, ALEC responded and once again declined to provide any information beyond that which was included in its initial response.

In general, the substance of ALEC's response is that it is an educational organization that does not engage in lobbying as that term is defined by the Internal Revenue Code. ALEC also claims that it cannot be required to disclose either its members or its communications with its members under constitutional law principles.

ALEC also argues that it is not a principal under Minnesota law because it employs no lobbyists and because it has never spent more than \$50,000 in a year to influence Minnesota officials; which is the financial trigger that makes an association a principal even if it does not employ lobbyists.

III. Further background

At its meeting of April 1, 2014, the Board reviewed ALEC's reasons for declining to provide information and its contention that it did not fall under Minnesota's lobbying disclosure laws. The Board also reviewed the options available to compel ALEC to provide additional information. After discussion, the Board directed the Executive Director to develop a detailed legal and factual analysis that would allow the Board to evaluate whether the matter could be decided based on information provided by Complainant and assembled by staff from public sources.

The Board discussed staff's detailed analysis at its meeting of July 8, 2014. Mr. Wittenwyler also appeared at the meeting to urge the Board to dismiss the complaint. At its meeting of August 13, the Board further discussed the status of the matter, voted to set the scope of the investigation to include the years 2011 through 2014, and again laid the matter over.

At its meeting of September 2, 2014, the Board directed the Executive Director to continue the investigation by taking sworn testimony from individuals named as the public sector state co-chairs and the private sector state chair of ALEC. Sworn testimony was taken in November 2014 from Senator Mary Kiffmeyer and Representative Pat Garafalo, the ALEC public sector co-chairs, and from John Gibbs, the ALEC private sector state chair.

The Board discussed this matter at its November 2014 and January 2015 meetings. The Board considered draft findings, conclusions, and order at its February 2015 meeting.

IV. Analysis

ALEC argues that neither it nor its employees engage in lobbying under the Internal Revenue Code definition. That definition is, of course, not relevant in Minnesota. The Board's analysis considers whether Amy Kjose is a lobbyist under Minnesota Statutes section 10A.01, subdivision 21, and whether ALEC is a principal under section 10A.01, subdivision 33.

Is Amy Kjose a Minnesota lobbyist?

The complaint alleges that Amy Kjose is a lobbyist because she is paid by ALEC for activities that constitute lobbying. In Minnesota, a lobbyist is defined as follows:

[A]n individual engaged for pay or other consideration of more than \$3,000 from all sources in any year for the purpose of attempting to influence legislative or administrative action, or the official action of a metropolitan governmental unit, by communicating or urging others to communicate with public or local officials, or

who spends more than \$250, not including the individual's own traveling expenses and membership dues, in any year for the purpose of attempting to influence legislative or administrative action, or the official action of a metropolitan governmental unit, by communicating or urging others to communicate with public or local officials.

Minn. Stat. § 10A.01, subd. 21.

The complaint alleges, and ALEC does not dispute, that Ms. Kjose was the director of ALEC's Civil Justice Task Force during the time relevant to this matter. The complaint further alleges that Ms. Kjose's responsibilities require drafting and lobbying on model legislation and that Ms. Kjose has spent more than \$250 in a calendar year on lobbying. The complaint also alleges that the cost of the email system used to send issue alerts and the cost of ALEC conferences should be included when determining if Ms. Kjose spent more than \$250 on lobbying.

However, the Board interprets the \$250 spending trigger to apply only to individuals spending their own money, not to persons authorized by an association to spend the association's money.¹ The complaint does not allege that Ms. Kjose spent any of her own money to communicate with officials and the materials reviewed for this investigation do not suggest that she did so. Thus, Ms. Kjose is a lobbyist only if she was paid more than \$3,000 in a calendar year to communicate with Minnesota legislators or to urge others to do so.

¹ The position that the \$250 threshold applies to spending personal funds is of longstanding application. The interpretation is in part based on the statutory language in the same provision that excludes costs of the subject individual's own travel expenses. This principle was recently restated in the Matter of the Complaint Regarding the Coalition for Sensible Siting and others, where the Board said that "An individual who spends more than \$250 of **their personal funds** in a calendar year on lobbying" is required to register as a lobbyist. (Emphasis added.)

The Board notes that the complaint does not allege that Ms. Kjose communicated with others to urge them to communicate with Minnesota legislators to influence legislative action and the Board has found no evidence that she did so. Thus, if a determination is to be made that Ms. Kjose is a lobbyist, it must be based on actions taken by her that constitute communication with Minnesota legislators to influence legislative action.

The evidence submitted by the Complainant includes four issue alerts that Ms. Kjose sent to certain Minnesota legislators in 2011.² The complaint also alleges that as a task force director, Ms. Kjose drafted model legislation and lobbied to get it passed.

In its response to the complaint, ALEC indicates that the value of staff time to prepare and send each issue alert is approximately \$30. The issue alerts provided by Complainant and those provided by ALEC indicate that issue alerts were sent by various ALEC staff members. The response confirms that four of the alerts sent in 2011 were from Ms. Kjose. Even assuming that the full cost of staff time for drafting the alert is included in the compensation paid to the staff member, and assuming a reasonable amount of time to draft the alert and a reasonable salary for the staff member, Ms. Kjose would not become a lobbyist based on the drafting and sending of issue alerts alone.

In its purest sense, communicating with an official takes the form of a direct interaction. However, such direct communication is not required and actions beyond the actual exchange of words between the individual and the official are included in the communication. If a person is paid to write a letter to officials to influence official action, the time spent writing the letter is a part of the communication.³ Similarly, the Board has concluded that the creation of a website urging others to communicate with officials for the purpose of influencing a specific Minnesota administrative action is a communication that is included in the amount spent that can make an individual a lobbyist.⁴

Complainant is apparently arguing that all of the time Ms. Kjose spends drafting and editing model bills, researching and writing supporting papers and talking points, and preparing other materials⁵ that *might* be used later in support of a direct communication with a Minnesota legislator should be counted as time spent communicating with Minnesota officials. However, these activities, undertaken with no particular Minnesota purpose, are significantly broader in scope than the activities the Board has previously included when deciding if an individual is a lobbyist.

The problem with this approach is that although it can be assumed that all of the work of an ALEC task force director is undertaken in furtherance of ALEC's overall mission, ALEC's overall mission is not to influence legislative action in Minnesota. It is to influence public attitudes and legislative action in the nation as a whole. With the exception of the Minnesota issue alerts,

² ALEC's response also shows that Ms. Kjose sent one issue alert to Minnesota legislators in 2009 and no alerts in 2010. Although these years are outside the scope of the investigation, they demonstrate that Ms. Kjose's direct communication with Minnesota legislators over the years has been limited.

³ In the Matter of a Complaint Regarding the Minnesota Licensed Beverage Association and others. http://www.cfboard.state.mn.us/bdinfo/investigation/06_03_2014_Findings_Griffith_Ball_MLBA.pdf. Last visited January 27, 2015

⁴ In the Matter of the Complaint Regarding Coalition for Sensible Siting, and others. http://www.cfboard.state.mn.us/bdinfo/investigation/04_03_2012_CSS_GWT.pdf. Last visited January 27, 2015.

⁵ For the purpose of this analysis, the Board assumes that these activities actually took place. Because the Board concludes that they are not within the scope of activities that constitute communicating with a Minnesota official, it is not necessary to determine the exact scope of an ALEC task force director's duties.

virtually all of a task force director's work is done in the abstract, without any specific Minnesota connection.

While some part of a task force director's work may eventually support a communication with a Minnesota legislator (if a legislator happens to attend a task force meeting or otherwise interacts with the task force director), most of the work of a task force director will never be used to support any communication with a Minnesota legislator. The nexus between the task force director's work and some future hypothetical communication with a Minnesota legislator therefore is insufficient to justify its inclusion in the scope of activities that would make a task force director a lobbyist.⁶

For the reasons discussed above, the Board does not adopt such a broad scope of activities to be included when determining if an individual meets the threshold of compensation to become a lobbyist. As a result, the Board concludes that Amy Kjose does not meet the compensation threshold to be a lobbyist in Minnesota.⁷

The criteria for determining whether an association is a principal

An association that pays a lobbyist more than \$500 in a calendar year or that spends more than \$50,000 in a year on specified activities is a principal. Minn. Stat. § 10A.01, subd. 33. The Board concluded above that ALEC task force directors are not lobbyists. As a result, ALEC is a principal only if it spends more than \$50,000 in a year on the statutorily specified activities

The types of activities that are included to determine if the \$50,000 threshold is met are specified in Minnesota Statutes section 10A.04, subdivision 6, as follows:

all expenditures for advertising, mailing, research, analysis, compilation and dissemination of information, and public relations campaigns related to legislative action, administrative action, or the official action of metropolitan governmental units in this state

and

all salaries and administrative expenses attributable to activities of the principal relating to efforts to influence legislative action, administrative action, or the official action of metropolitan governmental units in this state.

In addition to listing the types of activities that can make an association a principal, the statute includes another important requirement. The activities must be "related to legislative action . . . in this state" or "to influence legislative action . . . in this state." *Ibid.*

To clarify the statute and to ensure that its application does not extend to communications in which the state may not have a substantially significant disclosure interest, the Board interprets the phrases "related to legislative action" and "to influence legislative action" to mean "for the purpose of influencing legislative action." This narrowing construction ensures that

⁶ Because the relationship between bill drafting or similar activities and communication with Minnesota legislators is so tentative in the immediate matter, the Board need not determine here exactly how close the nexus must be before an individual's actions are a part of the individual's communication with officials.

⁷ The Board recognizes that Complainant has provided evidence that three Minnesota legislators attended ALEC events in 2010 and that this investigation has disclosed other instances of Minnesota legislators attending ALEC events. However, neither the information provided by Complainant nor the evidence disclosed by this investigation suggests that any single task force director had sufficient contact with Minnesota legislators to support a conclusion that the task force director was paid more than \$3,000 in a calendar year for that Minnesota communication.

communication that is merely *about* legislation or legislative action, but does not try to influence official action will not make an association a principal.

Equally important is the limiting clause "in this state," which the Board interprets as modifying the legislative action under examination. In other words, the association's activities need not occur "in this state," but those activities must be for the purpose of influencing Minnesota legislative action.

Is ALEC a principal?

ALEC's mission is to work "to advance limited government, free markets, and federalism at the state level. . . ." In advancing that mission, ALEC task forces have "considered, written and approved hundreds of model bills on a wide range of issues;" bills that ALEC considers to be "model legislation that will frame the debate today and far into the future."⁸

Beyond drafting legislation, "ALEC staff provides research, policy analysis, scholarly articles, reference materials, and expert testimony on a wide spectrum of issues."⁹ ALEC's website and its publications make it clear that ALEC's mission is national rather than uniquely targeted to any particular state. As a result, ALEC bears many similarities to any number of associations operating as so-called "think tanks" whose overall mission is to change public opinion and to support those who want to advance the principles espoused by the association. Likewise, ALEC bears similarities to other associations that create and urge the adoption of model legislation.

If a distinction is to be made between ALEC and other national "think tanks" or model-law-writing organizations, that distinction must be based on the association's purpose with respect to influencing Minnesota legislative action, not on the question of *who* develops the policies advanced by the association.

Clearly, ALEC spends more than \$50,000 per calendar year to advance its mission. The types of activities that ALEC undertakes to advance this mission include the same activities that can make an association a principal. However, to decide that ALEC is a principal, it is also necessary to conclude that ALEC's activities are for the purpose of influencing legislative action *in this state*.

ALEC itself acknowledges that part of its goal is "to ensure that each of its legislative members is fully armed with the information, research, and ideas they need to be an ally of the free-market system."¹⁰ Ultimately, the only way for legislators to be such an ally is by passing legislation that advances ALEC's principles. In fact, ALEC's bylaws *require* it to work to influence legislative action. One of ALEC's stated purposes is "to disseminate model legislation and promote the introduction of companion bills in Congress and state legislatures."¹¹

Although the evidence supports a conclusion that ALEC's primary purpose is the passage of state legislation in the various states and that all of its wide-ranging activities are in support of this primary purpose, such a conclusion is not sufficient to further conclude that ALEC's activities are for the purpose of influencing legislative action *in this state* as the definition of principal requires.

⁸ The quotes in this paragraph are from the ALEC website at <http://www.alec.org/about-alec/history/> and <http://www.alec.org/about-alec/history/> last visited January 27, 2015.

⁹ ALEC Private Sector Membership brochure, Exhibit 2 to the complaint.

¹⁰ *ibid.*

¹¹ ALEC Bylaws, Exhibit 3 to the complaint.

The Board concludes that an activity directed at all 50 states in the abstract does not constitute an activity conducted for the purpose of influencing legislation *in this state* even though it may in some instances have that effect. Before an association's activity will be included in the activities that may make the association a principal, there must be some specific connection to Minnesota. With ALEC, that nexus is insufficient.

The Board reaches this conclusion based on its construction of Chapter 10A and the requirement that it give meaning to all of the words of each statute. In this case, the phrase "in this state" will be meaningless if all the activities of every national advocacy association are included when deciding if that association is a principal. Under such an approach, national associations whose activities never actually influence specific Minnesota legislative action might still be found to be principals in Minnesota.

The Board recognizes that over the years a small number of Minnesota legislators have attended ALEC conferences. As noted, it is possible that the communication by individual ALEC employees with Minnesota legislators at such conferences would be included when deciding if an ALEC employee is a lobbyist. However, the fact that ALEC offers conferences which Minnesota legislators may attend does not result in the cost of each conference being an expenditure "to influence legislation in this state."

Based on the same analysis, the Board concludes that the creation by an association of a public website and of content published on that website does not make the association a principal when the site has no specific Minnesota nexus. To conclude otherwise would result in principal status being determined based on who visits the site, rather than on a determination of whether the site and its content were produced for the purpose of influencing legislative action in Minnesota.

For these reasons, the Board concludes that ALEC has not reached the \$50,000 threshold necessary to be a principal in Minnesota.

Based on the investigation and the record in this matter, the Board makes the following:

Findings of Fact

1. ALEC is an association organized as a nonprofit corporation.
2. ALEC's primary purpose is to promote its "free market" principles throughout the United States. It does this in various ways, including by producing model state legislation that, if adopted, would incorporate its principles into state law.
3. ALEC's activities are conducted on a national platform. Although ALEC attempts to be active in every state, its programs and activities have no specific Minnesota connection.
4. Much of ALEC's efforts are directed toward advancing its principles through changing public perceptions and through advocacy of legislative action in the various states.
5. ALEC spends more than \$50,000 in each calendar year on communications in the form of publications, model legislation, conferences, and other activities to advance its principles.

6. ALEC's efforts have no particular nexus with Minnesota. Rather, they are directed at all of the states generally.
7. In at least some cases, Minnesota legislators have attended ALEC conferences and introduced legislation that is based on ALEC model legislation.
8. Amy Kjose had minimal communication with Minnesota legislators in 2009 and 2011 in the form of issue alerts she sent by email.
9. It is possible that Amy Kjose may have had additional minimal communications with Minnesota legislators at one or more ALEC events.
10. Amy Kjose did not spend any of her own money to influence Minnesota legislative action.
11. The total compensation paid to Amy Kjose in any calendar year for communications with Minnesota legislators did not exceed \$3,000.

Conclusions of Law

1. To become a lobbyist based on spending \$250 or more under Minnesota Statutes section 10A.01, subdivision 21(a)(2), only the spending of the individual's own money is considered.
2. Amy Kjose is not a lobbyist under section 10A.02, subdivision 21(a)(2) because she did not spend any of her own money for communications to influence legislative action in Minnesota.
3. Amy Kjose is not a lobbyist under section 10A.01, subdivision 21(a)(1) because she was not paid more than \$3,000 in a calendar year for communications to influence legislative action in Minnesota.
4. Because Amy Kjose is not a lobbyist, ALEC is not a principal based on spending more than \$500 in a calendar year to compensate a lobbyist.
5. Although ALEC spends more than \$50,000 per year to advance its principles through activities that include promotion of model legislation in the various states, ALEC does not specifically target Minnesota in such a way that its general spending constitutes spending for activities conducted for the purpose of influencing legislation in this state.
6. ALEC is not a principal based on its spending to advance its principles or to influence legislation in the fifty states generally.

Order

The investigation of this matter is concluded and the complaint is dismissed.

 /s/ George A. Beck
George A. Beck, Chair

 February 3, 2015
Date

Documents incorporated into these Findings by reference:

Complaint of Common Cause Minnesota Regarding the American Legislative Exchange

Council Exhibits to the complaint

May 22, 2012, letter advising ALEC of the complaint

March 13, 2013, letter requesting information from ALEC

Response from ALEC, April 12, 2013

July 11, 2013, letter requesting information from ALEC

Response from ALEC, July 26, 2013

Letter to ALEC February 13, 2014

Response from ALEC March 10, 2014

Referenced statutes

10A.01 Definitions

. . .

Subd. 21. **Lobbyist.** (a) "Lobbyist" means an individual:

(1) engaged for pay or other consideration of more than \$3,000 from all sources in any year for the purpose of attempting to influence legislative or administrative action, or the official action of a metropolitan governmental unit, by communicating or urging others to communicate with public or local officials;

. . .

Subd. 33. **Principal.** "Principal" means an individual or association that:

(1) spends more than \$500 in the aggregate in any calendar year to engage a lobbyist, compensate a lobbyist, or authorize the expenditure of money by a lobbyist; or

(2) is not included in clause (1) and spends a total of at least \$50,000 in any calendar year on efforts to influence legislative action, administrative action, or the official action of metropolitan governmental units, as described in section 10A.04, subdivision 6.

10A.04 Lobbyist reports.

Subd. 6. **Principal reports.** (a) A principal must report to the board as required in this subdivision by March 15 for the preceding calendar year.

(b) Except as provided in paragraph (d), the principal must report the total amount, rounded to the nearest \$20,000, spent by the principal during the preceding calendar year to influence legislative action, administrative action, and the official action of metropolitan governmental units.

(c) Except as provided in paragraph (d), the principal must report under this subdivision a total amount that includes:

(1) all direct payments by the principal to lobbyists in this state;

(2) all expenditures for advertising, mailing, research, analysis, compilation and dissemination of information, and public relations campaigns related to legislative action, administrative action, or the official action of metropolitan governmental units in this state; and

(3) all salaries and administrative expenses attributable to activities of the principal relating to efforts to influence legislative action, administrative action, or the official action of metropolitan governmental units in this state.

(d) A principal that must report spending to influence administrative action in cases of rate setting, power plant and powerline siting, and granting of certificates of need under section 216B.243 must report those amounts as provided in this subdivision, except that they must be reported separately and not included in the totals required under paragraphs (b) and (c).