July xx, 2020

The Honorable Wayne Stenehjem

Attorney General

Office of the Attorney General

600 E. Boulevard Ave, Dept 125

Bismarck, ND 58505

RE: Request for Attorney General’s Opinion

Dear Attorney General Stenehjem:

The North Dakota Ethics Commission (Commission) is requesting an Attorney General’s Opinion to address its authority where there may be a conflict with a statute implemented by the Legislature.

In 2018 the voters approved Measure 1, establishing under Article XIV of the Constitution of North Dakota the North Dakota Ethics Commission. Article XIV is very specific as to areas where the Commission has authority, where the Legislature has authority, and where the authority is concurrent.

Article XIV, §1, mandates that “the legislative assembly shall implement and enforce this section by enacting, no more than three years after the effective date of this article, laws that require prompt, electronically accessible, plainly comprehensible, public disclosure of the ultimate and true source of funds spent in any medium, in an amount greater than two hundred dollars, adjusted for inflation, to influence any statewide election, election for the legislative assembly, statewide ballot-issue election, or to lobby or otherwise influence state government action.”

Article XIV, §2(1), deals with gifts between lobbyists and public offcials and authorizes the Commission to determine by rule what exceptions may be authorized that do not create ethical concerns. It then directs the Legislative Assembly to set “appropriate civil and criminal sanctions for violations of this subsection.” Article XIV, §2 (3) and §2(4) also provide the same directive to the legislative assembly. Article XIV, §2(5) directs concurrent jurisdiction by stating “The legislative assembly and the ethics commission shall enforce this provision by appropriate legislation and rules respectively.”

Article XIV, §3 creates the Commission and specifically authorizes the Commission to “adopt ethics rules related to transparency, corruption, elections, and lobbying to which any lobbyist, public official, or candidate for public office shall be subject, and may investigate alleged violations of such rules, this article, and related state laws.”

The 66th Legislative Assembly passed 2019 HB 1521, codified as N.D.C.C. ch. 54-66,

relating to reporting campaign contributions and expenditures, restrictions on public officials and lobbyists, investigations of ethics violations, and implementing requirements of Article XIV of the N.D. Constitution. The Legislature had many discussions about its authority vs. that of the Commission and generally concluded that the Commission would retain the ability to develop its own rules and processes even if it conflicted with the approved legislation.

***Representative Boschee:*** *Could you highlight the parts of Article XIV that gives the legislative assembly authority?*

***Claire Ness:*** *Under Section 1, subsection 2 the legislative assembly is given authority to implement and enforce that section regarding the disclosure of the ultimate and true source of funds for various purposes by enacting laws and by vesting one or more entities with the authority to implement, interpret and enforce those laws as well as that section of Article XIV. The legislative assembly also has authority to provide appropriate civil and criminal sanctions for violations of Section 2, subsections1, 2, 3, and 4. In subsection 5 of Section 2 the legislative assembly and the Ethics Commission share the authority to enforce the provision which deals with the appearance of bias. The legislative assembly is also required to provide adequate funds to the commission.*

 *HB 1521 legislative history January 30, 2020, page 6*

***Gregory Stites:*** *The senate bill does provide that structure. This bill goes way too far into the internal affairs that is left up to the Ethics Commission to make certain decisions of its own as opposed to having them done through the legislature.*

***Chairman Jim Kasper:*** *I have acknowledged the Ethics Commission will have the final say. I am just asking wouldn’t it benefit them to have something in place?*

***Gregory Stites:*** *When you say it will be up to the Ethics Commission to accept or not, I don’t believe that is in the bill. The bill makes it clear that they would be forced to follow this bill.*

***Chairman Jim Kasper:*** *I would disagree. We recognize as members of the legislature and the drafters of the bill that it is not right. Whatever we do statutorily cannot overrule what the Ethics Commission might do because they are constitutional. They have the supreme power to change whatever we do if they so choose. I believe that is in the measure. The commission could start over.*

*HB 1521 legislative history January 30, 2020, page 12*

*In (Section 2. Subsection 5. And Section 3. Subsection 1.) it also gives the Ethics Commission rulemaking authority. In my opinion the Ethics Commission has final say on the rules.*

 *Senator Rich Wardner, sponsor HB 1521, January 30, 2019*

*It is my strong feeling that whatever we do with these bills that we kick out of here concerning ethics; I believe in the end it will be how we think it should be because in the end it gives the Ethics Commission the rulemaking authority. In my opinion, we are telling the Ethics Commission, who has not been nominated yet, they will have the final say on some of these rules but at least we can give some guidance. I know you have a lot of work to do and there are people here that would like to comment as well, and so I will turn it over to you.*

 *Senator Rich Wardner, sponsor HB 1521, March 12, 2019*

***Vice Chair Unruh:*** *I have some clarification on my intent with allowing the commission to develop their own rules. In my opinion, we can put whatever we want in the Century Code, but Article XIV has a clause that says if there is any conflict, the article prevails and the article give the authority to the Ethics Commission to develop their own rules and processes. Even though I would like to change what we have in here, I think they would still have the authority to do whatever they wanted in the first place.*

***Chairman Hogue:*** *I concur with that.*

 *Senate Ethics Committee, HB 1521, April 11, 2019*

The Commission is greatly appreciative of the effort done by the legislative assembly to pass 2019 HB 1521. By laying out the framework for processes and procedures the legislature has greatly aided the Commission in its Constitutional mandate. There are, however, some areas in which the statute conflicts with the Commissions’ responsibilities and impairs its ability to effectively execute its mandate.

The Commission is currently establishing rules related to what gifts, if any, may be authorized that do not raise ethical concerns. N.D.C.C. §§ 54-66-01(7) and (8) define “lobbyist” and “lobby” using the existing definitions in N.D.C.C. ch. 54.05.1, entitled “Legislative Lobbying.” N.D.C.C. § 54-66-03 addresses the prohibition on lobbyist gifting. The Commission believes the statute is too narrow in defining “lobby” and “lobbyist” as it does not cover situations involving attempts to influence public officials other than the Governor and Legislators. The Commission has jurisdiction over “any elected or appointed office or official of the state’s executive or legislative branch, including members of the ethics commission, or members of the governor’s cabinet, or employees of the legislative branch.” The definition of “lobby” and “lobbyist” fails to cover actions by public officials other than legislature and Governor, thereby limiting the ability of the Commission to fulfill its constitutional mandate. The Commission believes that, for the sole purpose of defining acceptable or prohibited gifts under N.D.C.C. ch. 54-66, the Commission needs to be able to adopt an expanded definition of lobby to address attempts to otherwise influence public official action or decision.

The Commission does not challenge the authority of the legislature to define lobby and lobbyist under N.D.C.C. ch.54-05.1 or to establish criminal and civil penalties as directed by Article XIV. Looking at the intent and purpose of the citizens in adopting the amendment the petition title of Measure 1 provides clear guidance by stating “The commission, using funds provided by the legislature, would be responsible for adopting rules related to corruption, elections, and lobbying and for reporting and investigating alleged violations of those rules and related state laws.” The voters understood that the Commission had the specific responsibility in this area which is consistent with the full text of Article XIV.

It has been suggested that Section 1 and Section 3 are inconsistent in that it provides both the legislature and the Commission concurrent jurisdiction over lobbyists. Section 1 of Article XIV is very narrow and deals strictly with public disclosure of the ultimate and true source of funds over $200 to include while lobbying or attempting to influence state government action. Section 3 is much broader in identifying the authority of the Commission to “adopt ethics rules related to transparency, corruption, elections, and lobbying to which any lobbyist, public official, or candidate for public office shall be subject, and may investigate alleged violations of such rules, this article, and related state laws.”

The Oklahoma Supreme Court addressed the issue of the constitutional division of power between the Legislature and a constitutionally created Ethics Commission in Ethics Com’n of State of Okl. V Cullison, 850 P 2d 1069 (1993). The Court determined that the Oklahoma legislature had exceed its authority by bypassing the Commission’s rulemaking authority. It is also important to note that Article XIV, § 4(1) states that “Laws may be enacted to facilitate, safeguard, or expand, but not to hamper, restrict, or impair, this article.” Article XIV, § 4(3) states that “In any case of a conflict between any provision of this article and any other provision contained in this constitution, the provisions of this article shall control.”

The Commission is committed to working with the Legislature to fulfil its constitutional mandate “to strengthen the confidence of the people of North Dakota in their government, and to support open, ethical, and accountable government…”. In those rare instances where there is a conflict between enacted Legislation and our roles and responsibilities, or the Legislative enactments in the Ethics Commission’s opinion do not fully address the scope of Article XIV, we need clear guidance. More specifically, is the Ethics Commission’s authority to implement Article XIV in regard to defining “lobby” and “lobbyist” within the context of N.D.C.C. ch. 54-66 limited or subject to the Legislature’s laws enacted in the 2019 66th Legislative Session to implement the Legislature’s authority under Article XIV. Accordingly, we respectfully request an Attorney General’s Opinion. POC for this request is Executive Director Dave Thiele, who can be reached at (701) 328-5322 or dthiele@nd.gov.

Sincerely;

Ron Goodman

Chair, North Dakota Ethics Commission