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Via Electronic Transmission

Independent Ethics Commission
101 West Colfax Avenue, Suite 500
Denver, CO 80203

RE: Request for Advisory Opinion regarding whether it is permissible for a legislator to accept disbursements from a blind trust established for the purpose of collecting monetary donations made anonymously by individuals wishing to help defray the certain expenses incurred by the legislator's ill spouse

Dear Members of the Independent Ethics Commission:

This request is being submitted on behalf of a member of the Colorado General Assembly, who is not aware of this request, and for others who may be similarly situated in the future. Fellow legislators, staff, lobbyists, family, friends, and other interested and caring individuals wish to provide financial assistance to the legislator's family to help defray the mounting expenses occasioned by the ongoing medical crisis of the legislator's wife. The undersigned respectfully requests an advisory opinion pursuant to Article XXIX, section 5 (5) of the Colorado Constitution, section 24-18.5-101 (4) (b), Colorado Revised Statutes, and Rule 5 of the Rules of Procedure of the Independent Ethics Commission ("IEC") regarding whether it is permissible for the legislator to accept disbursements from a blind trust established for the purpose of collecting monetary donations made anonymously by these caring individuals. The following facts and IEC interpretations may be relevant to the issues raised by this request:

1. The legislator at issue is married and has children. The legislator's wife was diagnosed with an extremely rare form of cancer. Physicians in Colorado have treated her vigorously with every cancer treatment known and available to them. The cancer has metastasized.

2. While very few physicians have ever treated this rare form of cancer, one physician, located out of state, has experience treating it and is currently conducting clinical trials for which the legislator's wife has qualified. She has been transported out of state to undergo the experimental treatments in an effort to arrest the relentless progress of this life-threatening illness.

3. Over time, the legislator's family has incurred and continues to incur significant and burdensome medical expenses.

4. Furthermore, in order for the legislator's children to see their mother, they must travel out of state, which travel presents additional expenses for the family.

5. In addition to family members, friends, fellow members of the legislator's church, and neighbors, many other individuals associated with the legislative process have come to know and care about this legislator and his family.

6. Many of these concerned individuals wish to help the legislator's family by making monetary contributions to the family to address their mounting medical debt, transportation expenses, and other necessary family expenses.

7. However, the gift ban provisions of article XXIX, sections 1 and 3 of the state constitution might appear to pose a barrier to this act of benevolence. Those sections state:

Section 3. Gift ban. (1) No public officer, member of the general assembly, local government official, or government employee shall accept or receive any money, forbearance, or forgiveness of indebtedness from any person, without such person receiving lawful consideration of equal or greater value in return from the public officer, member of the general assembly, local government official, or government employee who accepted or received the money, forbearance or forgiveness of indebtedness.

(2) No public officer, member of the general assembly, local government official, or government employee, either directly or indirectly as the beneficiary of a gift or thing of value given to such person's spouse or dependent child, shall solicit, accept or receive any gift or other thing of value having either a fair market value or aggregate actual cost greater than fifty dollars (\$50) in any calendar year, including but not limited to, gifts, loans, rewards, promises or negotiations of future employment, favors or services, honoraria, travel, entertainment, or special discounts, from a person, without the person receiving lawful consideration of equal or greater value in return from the public officer, member of the general assembly, local government official, or government employee who solicited, accepted or received the gift or other thing of value.

8. Section 3 (3) (g) of article XXIX, however, states that the provisions of the gift bans do not apply if the gift or thing of value is given by an individual who is a relative or personal friend of the recipient on a special occasion.

9. The undersigned suggests that the individuals wishing to contribute financial assistance to the legislator's family would be doing so because they care about the legislator and the serious circumstances facing his family as a caring friend would, and that the circumstances of his wife's life-threatening illness is, in fact, a "special" occasion meeting the terms of the exception set out in subparagraph (g).

10. Furthermore, to protect the legislator against contributors' possible attempts to use donations to influence the legislator's official duties, the individuals who wish to help the legislator's family would ensure that all donations would be anonymous by establishing a blind trust. The sole purpose of the blind trust would be to defray the direct medical expenses incurred by the legislator's wife, travel expenses incurred by the family, and any additional support or maintenance the trustee believes necessary for her or the family. An independent trustee, who is neither a lobbyist nor a legislator, would oversee the trust, and the legislator would not have access to any information regarding amounts donated or the names of donors.

11. In its Position Statement 08-01, the IEC observed that "government officials and employees should not be prohibited from accepting offers and benefits given to the general public or a class of people under circumstances where others receive the same opportunity. It would be unfair to penalize people because they are in government, any more than they should not be rewarded for being in government."¹ In any other setting, friends, family members, neighbors, co-workers, and colleagues would be able to make monetary donations to assist a friend facing such a medical crisis. It seems unreasonable to disallow such caring generosity simply because the recipient of the generosity happens to be a member of the General Assembly.

12. In Position Statement 08-01, the IEC also addressed the topic of "special occasions" used in exception (3) (g), stating that "the term 'special occasion' should be broadly construed so as not to preclude public employees and officials from enjoying social situations available to other citizens. The term 'special occasion' should not be restricted to birthdays, anniversaries and

¹Position Statement 08-01, page 8. See also, Advisory Opinion 10-04, page 3.

holidays; nor should it necessarily mean events that are rare or unusual." While the IEC may not have anticipated the serious occasion triggering this request, it seems appropriate, based on the IEC's language, that a life-threatening medical illness could and should be construed as a "special occasion" under article XXIX, section 3 (3) (g).

13. For "special occasions", the IEC established the following two-prong test in Position Statement 08-01 that, if met, would indicate that gifts or other things of value given by relatives or personal friends are not a breach of the public trust and therefore permissible, if:

- i. It can be shown under all of the relevant circumstances that it is a family or personal relationship rather than the governmental position that is the controlling factor; and
- ii. The public official's or employee's receipt of the gift or other thing of value would not result in or create the appearance of:
 - a. Using his or her office for personal benefit;
 - b. Giving preferential treatment to any person or entity;
 - c. Losing independence or impartiality; or
 - d. Accepting gifts or favors for performing official duties.

Under the proposed blind trust, only those individuals who care personally about the legislator and his family would make donations, since there would be no motivation to donate anonymously other than to help someone in need. In addition, the legislator would not be using his office for personal benefit, giving preferential treatment to anyone, losing independence of judgment or impartiality, or accepting the donations for the performance of official duties because it would be impossible for the legislator to know who made the donations.

14. The purpose of article XXIX of the state constitution is to avoid conduct that is in violation of the public's trust or conduct that creates a justifiable impression among members of the public that such trust is being violated.² A blind trust provides an excellent vehicle by which to protect the public's trust and avoid corruption or even the appearance of corruption, consistent with what is presumed to be the goal of the IEC's "special occasion" two-prong test.

15. Furthermore, in Advisory Opinion 10-04, the Commissioners determined that it would not violate the constitutional gift ban for employees of state agencies to donate financial assistance to other state employees experiencing financial difficulties due to mandatory furloughs and budget

² See Article XXIX, section 1 (1) (c).

reductions if employees were not required to donate and if the donors remained anonymous. Although Advisory Opinion 10-04 relied on exception (3) (h) to approve the acceptance of donations, the situation that is the subject of this request is similar in that the proposed blind trust would preclude the opportunity for undue influence or the appearance of impropriety that article XXIX was designed to prevent. Individuals would donate voluntarily and anonymously through the independent trustee and there would be no solicitation for donations and no pressure placed on individuals to donate. The ultimate beneficiary of the anonymous donations would therefore never know who did or did not donate to the trust and therefore could not be influenced by such donations.

16. Finally, by accepting disbursements from the blind trust for the purpose of paying medical expenses incurred by his wife and travel expenses incurred by the family and other necessary family expenses, the legislator would not be breaching the public trust for his private gain or personal financial gain as contemplated in section 6 of article XXIX of the state constitution or as defined in section 24-18.5-101 (5), C.R.S., since the donations, being made voluntarily and anonymously through the blind trust, could not possibly influence any official act that the legislator might perform in the course of his public duties.³

³**24-18.5-101. Independent ethics commission - establishment - membership - subpoena power - definitions.** (5) (a) Subject to the provisions of paragraph (c) of this subsection (5), the commission shall dismiss as frivolous any complaint filed under article XXIX that fails to allege that a public officer, member of the general assembly, local government official, or government employee has accepted or received any gift or other thing of value for private gain or personal financial gain.

(b) For purposes of this subsection (5):

(I) "Official act" shall have the same meaning as set forth in section 24-18-102 (7).

(II) "Private gain" or "personal financial gain" means any money, forbearance, forgiveness of indebtedness, gift, or other thing of value given or offered by a person seeking to influence an official act that is performed in the course and scope of the public duties of a public officer, member of the general assembly, local government official, or government employee.

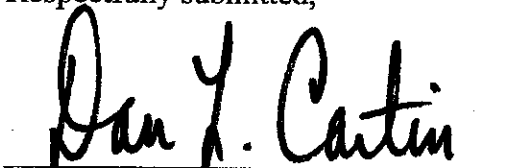
(c) This subsection (5) is repealed if the Colorado supreme court holds, in response to one or more written questions submitted by the general assembly pursuant to section 3 of article VI of the state constitution, that the standard of accepting or receiving "any gift or other thing of value for private gain or personal financial gain" specified in paragraph (a) of this subsection (5) is unconstitutional in applying section 3 (1) or (2) of article XXIX.

Questions Presented

1. May the legislator on whose behalf this request is submitted accept disbursements from a blind trust established to collect donations made voluntarily and anonymously by persons who care about the legislator and his family for the sole purpose of offsetting the direct medical expenses incurred for the treatment of his wife's cancer and for travel expenses incurred by the family and for any additional support or maintenance the trustee believes necessary for her or the family, without violating the provisions of article XXIX of the state constitution or any other provision of law or principle of ethics?

2. Notwithstanding the provisions of Article XXIX, section 3 (4), may a professional lobbyist make an anonymous donation to the blind trust that will ultimately benefit the legislator and his family, but which could not be used in a corrupt manner since the legislator would not know who may have donated to the trust?

Respectfully submitted,



Dan Cartin, Director

Office of Legislative Legal Services
Colorado General Assembly