

Memo

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From: Tad Heuer
Kathleen M. Brill
Andrew M. London

Regarding: City of Boston Lobbying Ordinance and Potential Amendments

OVERVIEW

This memorandum provides an overview and analysis of the City of Boston's new ordinance governing registration and reporting for lobbyists.¹ This memorandum also analyzes the most unduly burdensome requirements within the Ordinance and identifies targeted potential amendments to address these concerns.

The Ordinance, as adopted, is significantly broader than either the federal or the Massachusetts state equivalent. Most notably, the Ordinance captures a far greater number of interactions than do the federal and state statutes, and does not include the exceptions in the federal and state laws that relieve many individuals who are not professional lobbyists from extensive registration and reporting requirements.

Because of this over-breadth, the Ordinance in its current form will create an unnecessary and unintended burden on both private parties and on the city officials tasked with implementation.

I. BACKGROUND

In October 2018, Mayor Walsh signed the Lobbyist Registration and Regulation Ordinance for the City of Boston. The Ordinance, which is modeled after the Massachusetts State Lobbying Law (M.G.L. c. 3, §§39-50), was enacted to promote transparency in government by requiring registration and disclosure of lobbying activities. The Ordinance went into effect and online registration opened on April 16, 2019.

¹ An Ordinance Amending Chapter 2 of the City of Boston Code, Ordinances Regarding Lobbyist Registration and Regulation, Ordinances of 2018 – Chapter 9, *available at* <https://www.boston.gov/sites/default/files/lobbying-ordinance-2019.pdf> (“the Ordinance”).

The Ordinance requires all lobbyists, lobbying entities, and clients to register with the City and file a registration fee on an annual basis or within 10 days of qualifying under the requirements.²

Lobbyists, lobbying entities, and clients are also required to make quarterly disclosures with the City Clerk's Office. In these disclosures, lobbyists are required to report (1) all campaign contributions to state and municipal candidates, (2) the client(s) for whom the lobbyist provided lobbying services, (3) the matter(s) on which they lobbied, (4) their position on those matters, and (5) the client(s) on whose behalf the lobbyist was acting with respect to those matters.³ Lobbying entities and clients are required to report (1) all campaign contributions, (2) whether they are receiving compensation for lobbying, and (3) expenditures incurred or paid in connection with each matter on which they lobbied.

Under the Ordinance, a "lobbyist" includes any person "retained, employed, or designated" by any client or lobbying entity "with or without compensation." A lobbying entity is an organization, including not-for-profits, engaging in lobbying activities "consisting of at least one lobbyist."

Unlike the federal and state laws, the Ordinance contains no *de minimis* threshold or exception for incidental lobbying activity. As a result, an individual is required to register as a lobbyist if they engage in only a single covered communication, and an organization is required to register as a lobbying entity if only a single employee must register as a lobbyist.

The scope of lobbying activities that trigger the registration requirements is equally expansive. The Ordinance defines "lobbying" and "lobbying activities" to include any attempt to influence:

- a. Any legislative action made by the City Council or any member thereof with respect to the introduction, passage, defeat, or substance of any local legislation or resolution;
- b. Any administrative action made by the Mayor to support, oppose, approve, or disapprove any local legislation or resolution, whether or not such legislation or resolution has been introduced in the City Council;
- c. Any decision or administrative action made by an employee of the city with respect to the procurement of goods, services, or construction, including the preparation of contract specifications, or the solicitation, award or administration of a contract, or with respect to the solicitation, award or administration of a

² The City Clerk "may, in its discretion and upon written request, waive the filing fees for a not-for-profit client, a lobbying entity which registers to exclusively represent not-for-profit clients, a client that employs fewer than 10 persons and has been in business for fewer than 5 years, or a lobbyist that registers to exclusively represent such client." §2-15.3.

³ State law limits the amount of campaign contributions by individuals registered state lobbyists. G.L. c. 55, §7A(b). The Ordinance does not similarly limit campaign contributions for individuals who are only registered as lobbyists with the city.

grant, loan, or agreement involving the disbursement of public monies;

- d. Any decision by the Mayor, the City Council, or city employee with respect to the approval, denial, or postponement of a decision concerning the development of real property or zoning, including zoning approval;
- e. Any legislative or administrative action concerning the adoption, defeat or postponement of a standard, rate, rule, or regulation promulgated pursuant to any local or special law; the adoption or rejection of a policy position.

While the Ordinance does include exceptions that provide some limits to this definition, the Ordinance nonetheless captures numerous routine interactions with city officials, including line-level city employees who have minimal influence on policy.

II. AREAS OF CONCERN

A. *Lack of a De Minimis Threshold*

Analogous federal, state, and municipal lobbying registration statutes are written to acknowledge that certain technical experts, employees of not-for-profit entities, and others who only participate in a limited number of lobbying activities need not register as lobbyists. The federal and state laws do so by creating “de minimis” thresholds, and only requiring an individual to register as a lobbyist if their lobbying activity exceeds an incidental amount of lobbying. Under the state law, an individual is required to register if they engage in lobbying activity for more than 25 hours during any reporting period or if they receive more than \$2,500 during any reporting period for lobbying.⁴ Federal law requires an individual to register as a lobbyist if they have engaged in more than one lobbying contact and if their lobbying activities constitute more than 20 percent of the total time spent by that individual on behalf of the client over a 3-month period (i.e., an individual who works for a client for 100 hours in a reporting period, and expends 21 of those hours on lobbying activities, is required to register).⁵

As mentioned above, the Ordinance does not include any *de minimis* exception or incidental-lobbying threshold to its reporting requirements. Without such an exception, many individuals participating in a single meeting or phone call would be required to register as a lobbyist, submit disclosure reports, and pay a registration fee. The Ordinance will require the registration of a large number of individuals that are not professional lobbyists.

Below are three examples of the unintended impact of failing to include a *de minimis* exception (in the absence of any other applicable exception):

- A physician employed at a non-profit community health center attends a single meeting with employees of the Boston Public Health Commission to discuss the

⁴ G.L. c. 3, § 39

⁵ 2 U.S.C. § 1602(10)

administration of a grant to the center. The physician is required to register as a lobbyist, and the community health center is required to register as a client.

- An architecture firm is engaged by a developer to design an upcoming development. An architect joins a meeting with the planning staff of the Boston Planning and Development Authority to explain the benefits of certain technical elements of the potential development to the planning official tasked with permitting a portion of the project. The architect must register as a lobbyist. The architecture firm must register as a lobbying entity.
- A member of the clergy (non-volunteer) meets with her City Councilor regarding a proposed marijuana dispensary adjacent to church property, where the church hosts a pre-school and after-school care program. The clergy member is required to register as a lobbyist. The church is required to register as a client.

This cannot be what the City Council intended in passing the Ordinance. The proposed Amendment 1 in Section III addresses this issue.

B. Applies Regardless of Compensation

Under both the federal and state laws, an individual must receive compensation before he or she is required to register as a lobbyist. In sharp contrast, the registration requirements in the Ordinance apply *regardless* of whether the individual receives compensation.

While there is an exception in the Ordinance for an uncompensated individual engaged in lobbying on behalf of a not-for-profit entity, it is narrow. Uncompensated individuals lobbying on behalf of unincorporated entities like neighborhood associations — or even merely as the chosen representative of an informal group of neighbors — would be required to register, as would unpaid individuals conducting lobbying activities on behalf of for-profit entities. Indeed, the Ordinance as drafted appears to require registration and reporting by civic and community leaders talking to city officials on behalf of residents and small businesses in their neighborhoods.

The proposed Amendment 1 in Section III addresses this issue as well.

C. Applies to Communications with All City Employees

The Ordinance requires an individual to register as a lobbyist if they engage in any attempt to influence a nearly exhaustive list of actions, decisions, and policy positions by the Mayor, the City Council, or city employees. Any communication to influence these decisions is lobbying, irrespective of the city official to whom the communication is made. This includes communications with line-level city employees, many of whom lack executive decision-making authority or the authority to influence policy.

In comparison, the state law intentionally excludes routine meetings with line-level civil servants from the definition of lobbying, by limiting the definition in most executive branch contexts to communications directly with an enumerated list of “covered executive

officials.”⁶ Covered executive officials include constitutional officers, department heads, and any person who holds “a major policy making position.”⁷

The intent and effect of this limitation is to prevent meetings with line-level state employees from triggering the registration and reporting burdens of the lobbying statute. Adding a similar provision to the Ordinance would reduce the administrative burden of its requirements by limiting the number of registrants, while maintaining the Ordinance’s goals of providing transparency for meetings with city officials who hold executive authority or who otherwise have the ability to influence city decision-making.

The proposed Amendments 2 and 3 in Section III address this issue.

D. Applies to Individuals Represented by Not-for-Profit Entities

Not-for-profit entities frequently represent low-income individuals (and unincorporated groups comprised of low-income individuals) in proceedings, meetings, and other interactions with city officials, and often do so *pro bono* or on a highly subsidized basis. While the Ordinance makes an exception for lobbying activities on behalf of an individual with regard to that individual’s benefits, a not-for-profit entity’s representation of an individual will not always be covered by this exception.

For example, an employee of a legal services organization might meet with city officials regarding a client’s landlord-tenant dispute. The employee would be required to register as a lobbyist, the legal services organization would be required to register as a lobbying entity, and the individual client would be required to register as a client. Moreover, the individual client would be required to comply with the Ordinance’s reporting requirements. The registration and reporting requirements will create a significant

⁶ G.L. 3, §39 (defining “executive lobbying” in part as “any act to communicate directly with a covered executive official to influence a decision concerning policy or procurement”).

⁷ “Covered Executive Official” is defined in the state statute as “the governor, lieutenant governor, state secretary, attorney general, state treasurer, state auditor, any person who holds a major policy making position, as defined in section one of chapter two hundred and sixty-eight B, and as designated by the governor, lieutenant governor, state secretary, attorney general, state treasurer or state auditor in accordance with the provisions of said chapter two hundred and sixty-eight B, the secretary or deputy or assistant secretary of any executive office, or the executive or administrative head or deputy or assistant head of any authority, any department, board, commission, or division of the state government or subdivision of any of the foregoing, but not including the legislative and judicial departments.” G.L. c. 3, §39.

A “major policymaking position” is defined as “the executive or administrative head of a governmental body, all members of the judiciary, any person whose salary equals or exceeds that of a state employee classified in step 1 of job group XXV of the general salary schedule contained in section 46 of chapter 30 and who reports directly to said executive or administrative head, the head of each division, bureau or other major administrative unit within such governmental body and persons exercising similar authority.” G.L. c. 268B, §1.

administrative barrier that may discourage some individuals, including undocumented immigrants, from seeking assistance from a not-for-profit entity.

Further, individual clients will be required to pay the \$150 registration fee. While the Ordinance grants the City Clerk authority to waive the registration fee for “not-for-profit clients” and “a client that employs fewer than 10 persons and has been in business for fewer than 5 years,” the City Clerk is not authorized to waive the registration fee for clients who are individuals. The registration fee will be cost-prohibitive for many low-income individuals, and will impose an unfair financial barrier upon individuals seeking to exercise their rights to interact with the Mayor, the City Council, and other city officials.

The proposed Amendment 4 in Section III addresses this issue.

E. Applies to Technical Experts

The Ordinance will require many scientists, engineers, architects, and other technical experts to register as lobbyists for participating in meetings in which their role is to provide factual information and technical analysis to city officials.

In contrast, New York City has sought to limit the applicability of its own municipal lobbying ordinance to technical experts by exempting persons providing “technical services” from the definition of lobbying under certain circumstances. New York City defines “technical services” as “advice and analysis directly applying any engineering, scientific, or other technical discipline.”⁸ Absent such an exception, the Ordinance will discourage technical experts from participating in meetings on important public policy issues, and city officials will lose the benefits of this technical expertise in their decision-making.

Below are three examples of technical experts who would be required to register under the Ordinance (in the absence of any other applicable exception):

- A local academic medical center has a meeting with the Mayor, seeking financial support from the City for a drug treatment and needle exchange program on its campus. While the academic medical center employs a government affairs professional to advocate for funding, a faculty member who is an expert in public health and drug abuse prevention attends to answer questions on the medical benefits and risks of needle exchange. The faculty member is required to register as a lobbyist.
- A small business owner is meeting with the Boston Environment Department regarding an approval the small business requires to modify the waterfront property it occupies. The small business owner has hired a real estate attorney to advocate for the needed approval, but a climate scientist also joins the meeting to explain and answer technical questions on the potential impact of rising sea levels on the project. To the

⁸ N.Y.C. Admin. Code §3-211.

extent any of these permits were deemed discretionary, the climate scientist is required to register as a lobbyist.

- A developer of a proposed project that requires discretionary approvals seeks to minimize project traffic impacts, and as part of her permit application proposes designing, funding, and constructing improvements to nearby public ways. In the course of designing these improvements, the developer's architects, engineers, and transportation consultants participate in technical review meetings with members of the Public Improvement Commission, Police Department, Water & Sewer Commission, Inspectional Services Department, Public Works Department, and Transportation Department. To the extent any of these permits were deemed discretionary, these technical consultants would be required to register as lobbyists, and the firms employing these consultants are required to register as lobbying entities.

The proposed Amendment 5 in Section III addresses this issue.

F. Lack of a Definition of "Non-Discretionary"

The Ordinance includes an exception to the definition of "lobbying activities" for "any act done in furtherance of a non-discretionary city approval such as applying for a permit or license." However, the Ordinance does not provide any definition or guidance as to what constitutes a "non-discretionary" approval, and in many instances, it may be unclear in practice whether or not a given act or permit is "discretionary."

For example, building permits and entertainment licenses are within the category of "a permit or license", and are well established as being exemplars of non-discretionary permits. There remains a concern, however, that because the issuance of ministerial permits or licenses routinely requires applying a standard contained in an ordinance or regulation, a strict reading of the Ordinance would render even such ministerial permits "discretionary". Defining as "non-discretionary" any permit or approval other than one issued by the Mayor, City Council, or multi-member deliberative body would not only align with common practice, but would provide significant clarity to the general public.

The proposed Amendment 6 in Section III addresses this issue.

G. Quarterly Reporting Requirements

The Ordinance requires lobbyists, lobbying entities, and clients to make quarterly disclosures to the City Clerk's office. Quarterly reporting presents a significant administrative burden to both registered parties and the City. The City's transparency goals could be equally achieved with a semi-annual reporting requirement, consistent with what is required by the state.

The proposed Amendment 7 in Section III addresses this issue.

H. Ambiguous Provisions

Several provisions of the Ordinance are ambiguous and require additional clarification. Without further clarification, these provisions will result in inconsistent application of the Ordinance in practice. Of equal concern, a more expansive interpretation of these provisions by the City Clerk could dramatically increase the scope of the Ordinance beyond even what the City Council intended.

- Indirect Communications. The Ordinance applies to “any attempt to influence” a comprehensive list of decisions made by city officials. On its face, the Ordinance appears to apply not only to direct communications to influence city decisions, but indirect communications as well. Both the federal and state statutes address this issue by requiring that there be a personal “lobbying contact” with a covered official (in addition to the individual being compensated and having more than *de minimis* lobbying activity) before an individual is required to register as a lobbyist.

The Ordinance contains no such threshold requirement for there to be a “lobbying contact,” and is thus silent on issue of what the boundaries of “any attempt to influence” may be. However, an expansive interpretation of an indirect communication would significantly increase its scope and burden. For example:

- A trade union hires an advertising agency to create and lease a billboard advocating for particular piece of legislation before the City Council. The advertising agency would be required to register as a lobbying entity and individual employees at the advertising agency could be required to register as lobbyists. The union must register as a client.
 - A non-profit organization employs a digital communications/social media coordinator. This employee sends an email to individuals involved with the non-profit and posts a message on the non-profit’s Facebook page informing the community that the City Council is considering a measure that could reduce the non-profit’s public funding. The message encourages people to reach out to their City Councilors in opposition. Although the individual volunteers are exempt from the registration requirements, the digital communications/social media coordinator must register as a lobbyist and the non-profit must register as a client.
- Newspapers and Other Periodicals. The Ordinance includes an exception for “newspapers and other periodicals and radio stations and television stations, and owners and employees thereof.” It is unclear if this exception is limited to the owners and employees of these media outlets, or if it would cover (for instance) individuals who write letters to the editor, or opinion columns published in a newspaper or periodical. Because the term “other periodicals” is undefined, it is also not clear whether internet-only news sources, blogs, or social media posts constitute non-exempted (and thus registrable) “attempts to influence.”
 - Owner Occupied Homes. The Ordinance excludes from the definition of lobbying activities “expressing an opinion, filing a complaint or tip, seeking information or advice, or requesting constituent services” for a matter involving possible benefits to

an owner-occupied home. It is unclear how this exception applies to multi-family homes in which the owner occupies a single unit. It is also unclear whether this would apply to an individual expressing an opinion where the possible benefits may extend not only to that individual's owner-occupied home, but also to other properties owned or managed by the same individual.

III. POTENTIAL AMENDMENTS

We recommend a small number of targeted amendments to the Ordinance to ameliorate its most unduly burdensome requirements, while still maintaining the Ordinance's intent and purpose. Specifically, we recommend amending Section 2-15.2 as follows (proposed additions in underlined italics; proposed deletions in ~~strike through~~):

- 1) Establish a *de minimis* exemption consistent with approach of the federal lobbying law, and clarify that one threshold for registration is that the individual is being compensated (consistent with both federal and state law):

Lobbyist shall mean every person retained, employed or designated by any client or lobbying entity, with ~~or without~~ compensation to engage in lobbying or lobbying activities, other than an individual whose lobbying activities constitute less than 20 percent of the time engaged in the services provided by such person to that client over a 3-month period. The term "lobbyist" shall not include any officer or employee of the City of Boston, the Commonwealth of Massachusetts, any political subdivision of the State, or any legislatively-created corporation, authority, agency, or commission, or the United States when discharging his or her official duties. ~~The term "lobbyist" shall not include any uncompensated volunteer for a not for profit entity who seeks to influence legislative or administrative action solely on behalf of that entity.~~

- 2) Clarify that registrable lobbying requires direct communications with specific City employees who have executive, legislative, or policy-making authority:

Lobby or Lobbying Activities shall mean any direct communications with the Mayor, the City Council, or Policy Making City Employee that attempt to influence:

- 3) Consistent with the above recommendation, define Policy Making City Employee in a manner consistent with the state lobbying law definition for "covered executive official":

Policy Making City Employee shall mean a person holding elected office, employees of the Mayor, employees of the Boston City Council, the executive or administrative head of a governmental body, the head of each division, bureau or other major administrative unit within such governmental body and persons exercising similar authority. Every City Employee shall, upon request,

state whether he or she has been designated as a Policy Making City Employee for purposes of this definition.

- 4) Exempt not-for-profit entities in their representation of individual clients from the lobbying registration and reporting requirements:

Lobbying or lobbying activities shall not include the following:

....

(q) a not-for-profit entity, or a person working on behalf of a not-for-profit entity, in its representation of any person;

- 5) Exempt persons providing technical services from the lobbyist registration and reporting requirements, defining technical services in a manner consistent with the New York City lobbying ordinance:

Lobbying or lobbying activities shall not include the following:

....

(r) persons who provide technical services in connection with lobbying activities. Technical services shall mean advice and analysis directly applying any engineering, scientific, or similar technical discipline.

- 6) Establish a definition of what constitutes a “non-discretionary” approval, permit, or license:

Lobbying or lobbying activities shall not include the following:

....

(i) any act done in furtherance of obtaining a non-discretionary City approval, such as applying for a permit or license. For the purposes of this Ordinance, every City permit, license, or approval of any type shall be presumed to be non-discretionary unless said permit, license, or approval must be issued by the Mayor, the City Council, or by vote of a multi-member appointed or elected governmental body of the City.

- 7) Amending Section 2-15.3 to establish semi-annual reporting periods, consistent with state law, by amending the first sentences of the fourth and fifth paragraphs, respectively:

No later than January 20th, ~~April 20th,~~ and July 20th ~~and October 20th~~ of each year, every lobbyist shall provide to the City Clerk a statement, under oath, listing:

....

No later than January 20th, ~~April 20th,~~ and July 20th ~~and October 20th~~ of each year, every lobbying entity and client shall provide to the City Clerk a statement, under oath, listing:

* * *