ALAN WILSON
ATTORNEY GENERAL

December 11, 2015

The Honorable David Pascoe
Solicitor, First Judicial District
Post Office Box 1525
Orangeburg, SC 29116

Dear Solicitor Pascoe:

You have asked for our opinion regarding interpretation of the State Ethics Act. Specifically, your questions are as follows:

1. Whether it is a violation of South Carolina law for a Member of the General Assembly to pay for campaign services performed by a business in which the Member or a member of the Member's family has an economic interest, and

2. Whether it is a violation for a South Carolina House Majority Leader to cause or influence the House Legislative Caucus to hire and pay a business in which the Majority Leader has an economic interest.

You have included two memos which you have prepared on the issues. In these, you argue that the answer to both of the foregoing questions is "yes." Also included by you are other materials which comment on these questions, including a recent opinion of the House Ethics Committee, which addressed your second question, and concluded that the answer to it is "no." Finally, you have submitted the informal thoughts of the Executive Director of the State Ethics Commission who appears to disagree with the Opinion of the House Ethics Committee. From what we can tell, the Executive Director argues that, because a person must be a legislator to be part of the Caucus and to be Majority Leader, any award by the Caucus to the Majority Leader of a contract for business is the use of his official office for his economic benefit. Based upon extensive analysis, set forth below, it is our opinion that a court would likely conclude that the answer to your questions is "no."

Introduction

At the outset, it is important to reiterate what we have said before regarding the Solicitor's broad authority to make the ultimate decision to prosecute or not prosecute a particular case. As we observed in Op. S.C. Att'y Gen., Op. No. 89-70 (July 11, 1989),

> . . . [t]his Office can only set forth the general law . . . in the abstract. As with any prosecutorial decision made by the Circuit Solicitor, the judgment call as to whether to prosecute a particular individual or whether a specific prosecution is warranted, or is on sound legal ground in an individual case, remains a matter within [the Solicitor's] exclusive discretion and jurisdiction.

And, as our Supreme Court recently observed in this same regard:

> [a] prosecutor exercises considerable discretion in matters such as the determination of which persons should be targets of investigation, what methods of investigation should be used, what information will be sought as evidence, which persons should be charged with what offenses, which persons should be utilized as witnesses, whether to enter into plea bargains and the terms on which they will be established, and whether any individuals should be granted immunity. These decisions, critical to the conduct of a prosecution, are all made outside the supervision of the court.

Order in Hammond v. S.C. Attorney General Alan Wilson, et al., No. 2015-001842 (October 12, 2015), quoting Young v. U.S. ex rel. Vuitton et Fils S.A., 481 U.S. 787 (1987). Accordingly, as you are aware, while we may comment in an advisory opinion upon issues of "general law . . . in the abstract," the issue of whether or not to proceed in a specific case rests with the Solicitor alone.

Ethics Act, Generally

Your questions posed involve interpretation of the Ethics, Accountability and Campaign Reform Act of 1991. See S.C. Ann. Section 8-13-100 et seq. As we recognized previously in Op. S.C. Att'y Gen., 2006 WL 2593082 (August 24, 2006),

> [w]ith respect to interpretation of the Ethics Act, several principles of statutory construction are pertinent to your inquiry. First and foremost, is the cardinal rule of statutory interpretation, which is to ascertain and effectuate the legislative intent, whenever possible. State v. Morgan, 352 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002), citing State v. Baucom, 340 S.C. 339, 531 S.E.2d 922 (2000). All rules of statutory interpretation are subservient to the one that legislative intent must prevail if it can be reasonably be discovered in the language used, and such language must be construed in light of the statute's intended purpose. State v. Hudson, 336 S.C. 237, 519 S.E.2d 577 (Ct. App.

> 1999). Moreover, a statutory provision should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute. Hay v. S.C. Tax Comm., 273 S.C. 269, 255 S.E.2d 837 (1979). In construing statutes, the words must be given their plain and ordinary meaning without resort to a subtle or forced construction for the purpose of limiting or expanding their operation. Walton v. Walton, 282 S.C. 165, 318 S.E.2d 14 (1984).

In State v. Thrift, 312 S.C. 282, 306, 440 S.E.2d 341, 354 (1994), our Supreme Court recognized that the overarching purpose of the Ethics Act of 1991 is best expressed in the Act's preamble. The Act came about in response to the "Lost Trust" scandal. Thus, the Supreme Court noted:

> [t]he preamble provides that the purposes of the Act include the fostering of public trust and confidence in government, and the promotion of the integrity of government through openness. Given the overall climate . . . in which the legislation was enacted and the more stringent guidelines set forth in the new Act, it is apparent that the legislature did not intend to permit someone to escape prosecution for acts of bribery or similar activity committed prior to the amendment of the legislation.

On the other hand, as we advised in the 2006 opinion, referenced above, criminal prosecution for violation of the Ethics Act carries with it a heavy burden on the part of the State. In this regard, we stated:

> [t]he State Ethics Act is a penal statute, attaching criminal penalties to any violation thereof. See, § 8-13-1520. Penal statutes are generally strictly construed against the State and in favor of the defendant. State v. Hill, 361 S.C. 297, 305, 604 S.E.2d 696, 700 (2004).

We should also observe that this Office has, in any interpretation of the Ethics Act, consistently deferred to the construction rendered by the agency assigned by law to interpret the Act – whether that agency be the State Ethics Commission or, in the case of a legislator, the House or Senate Ethics Committee. See Op. S.C. Att'y Gen., 2013 WL 6924890 (Dec. 23, 2013) (and opinions cited therein); Op. S.C. Att'y Gen., 1989 WL 508504 (Feb. 16, 1989) (up to House Ethics Committee to advise member of General Assembly re Ethics Act). This is especially true in the latter instance, because of constitutional implications. Only recently, in Rainey v. Haley, 404 S.C. 320, 326, 745 S.E.2d 81, 84 (2013), the South Carolina Supreme Court stated that "the South Carolina Constitution and this Court have expressly recognized and respected the Legislature's authority over the conduct of its own members." Thus, "ethics investigations concerning members and staff of the Legislature are intended to be solely within the Legislature's purview. . . ." 404 S.C. at 327, 745 S.E.2d at 84-85. Pursuant to the South Carolina Constitution, and our

longstanding practice, we must, therefore, defer to the interpretation of the House Ethics Committee unless we believe that interpretation to be plainly wrong.

Our Supreme Court has also emphasized the exclusivity of the Senate Ethics Committee with respect to an Ethics Act complaint against a Senator. The Ethics Commission has, under our law and Constitution, no authority over members of the General Assembly. In Ford v. State Ethics Commission, 344 S.C. 642, 545 S.E.2d 821 (2001), the Court addressed the question whether the State Ethics Commission possessed jurisdiction under the Ethics Act over the conduct of "a sitting member of the South Carolina Senate, [who] . . . was a member of the Senate in 1998 when the alleged improper conduct occurred." 344 S.C. at 643, 545 S.E.2d at 821-822. The Supreme Court concluded that ". . . the Ethics Commission clearly has no jurisdiction over Senator Ford. . . ." 545 S.E.2d at 823. Again, the Court emphasized in Ford that the Ethics Commission has, under current law, no power to apply the Ethics Act to a member of the General Assembly. Likewise, this Office must defer to an interpretation of the Ethics Act by the body assigned by law to render such interpretations in the context of a House Member.

With these rules of construction in mind, we turn now to the specific provisions of the Ethics Act which are the subject of your inquiry. We will first address your second question regarding the House Majority Leader. We assume from your questions that the Majority Leader's "business," as specified in Question 2, is to provide "campaign services" rather than to perform any official act as part of his legislative duties. This assumption is, of course, consistent with a candidate's use of campaign funds to pay for campaign services.

Background of Section 8-13-700 of the Ethics Act

Section 8-13-700, which changed former § 8-13-410,[1] provides in pertinent part as follows:

> (A) No public official, public member, or public employee may knowingly use his official office, membership, or employment to obtain an economic interest for himself, a family member, an individual with whom he is associated or a business with which he is associated. This prohibition does not extend to the incidental use of public materials, personnel, or equipment, subject to or available for a public official's, public member's, or public employee's use that does not result in additional public expense.
>
> (B) No public official, public member, or public employee may make, participate in making, or in any way attempt to use his office, membership, or employment to influence a governmental decision in which he, a family member, an individual with whom he is associated, or a business with which he is associated has an economic interest. A public official, public

[1] Former Section 8-13-410 provided in part that a public official must avoid using his official position to obtain financial gain for himself. See Op. S.C. Att'y Gen., 1985 WL 259111 (January 15, 1985).

> member, or public employee who, in the discharge of his official responsibilities, is required to take an action or make a decision which affects an economic interest of himself, a family member, an individual with whom he is associated, or business with which he is associated shall
>
> . . . .

Subsections (B)(1) and (5) then proceed to "establish the procedure by which a public [official] or member must recuse himself from any official action on matters potentially affecting his economic interest." Op. S.C. Att'y Gen., 2004 WL 1297822 (June 7, 2004). The threshold requirement of both § 8-13-700(A) and (B) is that a "public official, public member or public employee" must "knowingly use his public office" or "make, participate in making, or in any way attempt to use his office" for his economic benefit. In short, as the case law discussed below demonstrates, if there is no "use" of one's office, membership or employment, § 8-13-700 is not violated.

By way of background, long ago, our Supreme Court, in O'Shields v. Caldwell, 207 S.C. 194, 216, 35 S.E.2d 184, 193 (1945), stated as follows:

> "The obligations of public officers as trustees for the public are established as part of the common law, fixed by the habits and customs of the people. Among their obligations as recipients of the public trust are to perform the duties of their office honestly, faithfully and to the best of the ability . . . (and) to use reasonable skill and diligence . . . Every public officer is bound to perform the duties of his office honestly, faithfully, and to the best of his ability, in such manner as to be above suspicion of irregularities, and to act primarily for the benefit of the public." 43 Am. Jur. 77, 78 [emphasis added]. The fact that the treasurer in this case was vitally, personally interested in the payment to himself put upon him, in the sight of the law, the strict necessity of being a model 'Caesar's wife.' 43 Am. Jur. 81. These are not mere platitudes, but important principles, necessary to be observed and enforced, particularly in a democracy.

(emphasis added).

This analysis by the Court in O'Shields is consistent with the common law rule that "'public officials should not have a personal interest in the business transactions in which they are engaged for government, nor should they exploit their influence or acquaintances with persons who conduct transactions so that businesses in which they have a personal interest are profited. '" Marsh v. Town of Hanover, 313 A.2d 411, 415 (N.H. 1973), quoting Eisenberg, "Conflicts of Interest Situations and Remedies," 13 Rutgers L. Rev. 666, 686 (1959).

Statutory provisions, many carrying criminal penalties, have codified these common law requirements placed upon public officers and employees.[2] As one court has noted, the objective of such statutory provisions is "'to remove or limit the possibility of any personal influence, either directly or indirectly which might bear on an official's decision. . . .'" Stigall v. City of Taft, 375 P.2d 289, 291 (Cal. 1962) (en banc). (emphasis added).

Moreover, courts have also explained that there are certain "noninterests . . ., interests that, while technically within the scope of the financial interests . . . as a practical matter do not raise the sorts of conflict of interest problems with which [the statute] is concerned and thus are statutorily excluded from its purview." Lexin v. Superior Court, 222 P.3d 214, 229 (Cal. 2010). Such 'noninterests" are generally "no bar at all to participation in the making of a contract. . . ." Id. Thus, for example, where "the County suffered no adverse economic consequences and thus, any economic impact is clearly de minimis," the statute in question was deemed not violated. Kraines v. Pa. Ethics Comm., 805 A.2d 677, 682 (Pa. 2002). Both of these limitations – that the official must have been exercising the duties of office to obtain the economic benefit and that there must have been more than a de minimis expense to the public – are designed to avoid the absurdity that every contract by a public official, no matter how little the government is impacted, or whether the contract is made in the official's individual capacity, is made a criminal offense. As will be discussed below, Section 8-13-700 contains both of these important limitations.

Interpretation of Section 8-13-700 of the Ethics Act

Our opinions have addressed and summarized § 8-13-700 on several occasions. We have noted that this provision prohibits "a public official from using his office for financial gain and [requires] a public official in certain instances to disclose any conflicts of interest that may arise." Op. S.C. Att'y Gen., 2007 WL 1302778 (April 5, 2007). We have also recognized that "Section 8-13-700 forbids any public member from using his office to obtain an economic interest." Op. S.C. Att'y Gen., 1996 WL 679453 (October 10, 1996). Further, in Op. S.C. Att'y Gen., 2005 WL 1609288 (June 27, 2005), we stated:

> [o]f course, Section 8-13-700 does not prevent a public official from voting generally, but only requires his or her non-participation where an economic interest of the official or his immediate family would be affected by the official's action. Of course, such a recusal decision must be made on a case-by-case basis, depending upon the particular facts and is thus beyond the scope of an opinion of this Office. (emphasis added).

Moreover, in Op. S.C. Att'y Gen., 2011 WL 1444717 (March 31, 2011), we concluded:

> . . . it does not appear in this instance that one serving as County Voter Registration/Elections Director is in a position to use his office to influence a

[2] We have concluded, however, that the common law conflict of interest prohibitions have "survived the adoption of the Ethics Act." Op. S.C. Att'y Gen, 2011 WL 4592368 (September 12, 2011).

> governmental decision in which he or a business with which he is associated, such as the GSP Airport, has an economic interest. Therefore, no conflict of interest would exist. (emphasis added).

In addition, with regard to § 8-13-700, we have stated that "the State representative must avoid the use of his official position or office to obtain financial gain for himself." Op. S.C. Att'y Gen., 2007 WL 1031451 (March 28, 2007). These opinions emphasize that a threshold requirement for violation of § 8-13-700 is that a public official must "use" his or her "office, membership or employment" to obtain an economic interest in order for the statute to be violated.

We have also stressed the importance of the last sentence of § 8-13-700(A), which provides: "[t]his prohibition does not extend to the incidental use of public materials, personnel, or equipment, subject to or available for a public official's, public member's or public employee's use that does not result in additional public expense." In Op. S.C. Att'y Gen., 1994 WL 738179 (December 7, 1994), we referenced an opinion of the State Ethics Commission which had relied upon this last sentence in concluding that off-duty law enforcement officers may wear their uniforms, carry their weapons, etc. while working as private security guards. We explained as follows:

> [i]n addition, the State Ethics Commission advised in their Opinion AO 92-154 (May 27, 1992) that police officers may utilize uniforms, weapons and like equipment during off-duty security work under § 23-24-10 when approved by their law enforcement agency and governing body, when no additional public expense would be involved.

(emphasis added).

Thus, reading the text of § 8-13-700(A) as a whole, and in common sense fashion, with every word being given meaning, it is clear that the General Assembly has instructed that the phrase "use his official office membership, or employment to obtain an economic interest" is closely intertwined with whether or not there is the "incidental" use of public resources which do not "result in additional public expense." In other words, if there is, only "incidental" use of public resources, resulting in little or no additional public expense, the public official is deemed by law not to have "used" the office for his or her economic benefit. It is well established in South Carolina and elsewhere that public funds may not be used for a private purpose. See Op. S.C. Att'y Gen., 2005 WL 469070 (February 3, 2005) ["This office has repeatedly recognized that public funds must be used for public and not private purposes."]. Such a prohibition is thus codified in § 8-13-700 and other ethics laws around the country. As one court has recognized:

> [t]he concept of public trust extends to all matters within the duties of the public office. The broad policy of the ethics laws is to ensure that government employees do not gain personal financial advantage through their access to the assets and other advantages of government.

Davidson v. Oregon Govt. Ethics Commission, 712 P.2d 87, 92 (Ore. 1985) (emphasis added). Accordingly, the "use" of one's office to obtain an economic benefit, as well as the requirement that there be more than the incidental use of public resources which results in expenditure of additional public funds, is absolutely crucial in order for there to be a violation of § 8-13-700.

Recent House Ethics Opinion

The recent Opinion of the House Ethics Committee, submitted by you to us, is highly instructive with regard to your second question and relies upon both of the limitations ("use" of office and no additional public expense). The issue presented was whether there is "a violation of S.C. Code Ann. § 8-13-700 when an officer or member of a House Legislative Caucus refers Caucus business to himself or to a business with which he is associated and from which he makes a profit." The House Ethics Committee concluded that there was no violation in such circumstances. As will be shown below, we believe the House Opinion provides excellent analysis as to any interpretation of § 8-13-700, and is supported by case law in other jurisdictions.

The analysis provided in this House Ethics Committee Opinion is extensive, and we believe correct. The Ethics Committee first reviewed the relevant statutory definitions of key terms contained in § 8-13-700. Of course, as the Committee stated, a member of the General Assembly is a "public official" pursuant to § 8-13-100(26) because he is a "State elected official." The Opinion also concluded that the phrase "official office, membership or employment," as used in § 8-13-700, and as it concerns a member of the Caucus, must only relate to "official office," and thus necessarily "refers to the Caucus member's status as a 'public official.'" With respect to the term "official office," the Committee noted that such term is not defined, but the term "official capacity," pursuant to § 8-13-100(30), means activities which

> "'a) arise because of the position held by the public official . . .;
>
> b) involve matters which fall within the official responsibility of the . . . public official . . . and
>
> c) are services the agency would normally provide and for which the public official . . . would be subject to expense reimbursement by the agency with which the public official . . . is associated.'"

(emphasis in original).

Importantly, the House Ethics Committee's Opinion thus found:

> [t]o meet the definition of "official office" the activity or use must be related to the Caucus member's official capacity, not something that is collateral to those activities. Being in a House Legislative Caucus does not meet this requirement.

3. The use of the official office must be to obtain an economic interest for the public official, a family member, an associated individual, or an associated business. Again, because the Caucus does not meet the definition of "official office," this section would not apply to a use of membership in the Caucus to do anything, including providing services from which a Caucus member's personal business earns income.

4. The Act defines an "**economic interest**" as an interest **distinct from that of the general public** in a purchase, sale, lease, **contract**, option, or other transaction or arrangement involving property or services in which a public official, public member, or public employee may gain an economic benefit of fifty dollars or more." S.C. Code Ann. § 8-13-100(11)(a) (2011) (emphasis added). Under the question presented the interest here would be one "distinct from that of the general public" only insofar as someone in the general public would not have membership in the Caucus.

5. Even if the previous portions of Section 8-13-700(A) were met, any such use of the official office to obtain an economic interest for the Caucus member, a family member, an associated individual, or an associated business must be "**knowingly.**" That term is not defined in the Act. The general definition of the term "knowingly" means: (A) to act intentionally, State v. Green, 397 S.C. 268, 724 S.E.2d 624 (2012), (B) to act with actual knowledge, State v. Thompkins, 263 S.C. 472, 211 S.E.2d 549 (1975), or (C) to act with deliberate blindness to obvious facts. State v. Thompkins. Thus, the statute is not a strict liability statute, but must involve a deliberate intent to use the "official office" for gain, or use the "official office" despite obvious fact that such activity would improperly benefit the official, his family, his associates, or his business. Again, this is a scienter requirement that precludes strict liability under this statute.

6. To be prohibited, the use of the official office must also **not be "incidental"** with regard to public materials, personnel, or equipment. "Incidental" is not defined in the Act. The term "incidental" generally means "depending upon or appertaining to something else as primary or depending upon another which is termed the principal; something incidental to the main purpose." Archambault v. Sprouse, 218 S.C. 500, 63 S.E.2d 459 (1951) (citing Black's Law Dictionary); Charleston County Aviation Authority v. Wasson, 277 S.C. 480, 289 S.E.2d 416 (1982) (citing Archambault); Gurley v. USAA, 279 S.C. 449, 309 S.E.2d 11 (Ct. App. 1983) (same). See also Re Hon. Jimmy C. Bales, Op. S.C.A.G. (11/7/07) (2007 WL 4284622) (discussing definition of "incidental" in context of licensing vehicle for roadway use). Of course, the primary use of the "official office" is to carry out the business of the State through official legislative activities – things like proposing

> legislation, conducting legislative hearings, participating in votes on various legislative matters. Activities associated with a House Legislative Caucus do not meet that test.
>
> 7. The use of the official office, even if "incidental," must not result in **additional public expense**. There are no facts set forth in the query or of which the Committee is otherwise aware that the incidental use by a House Legislative Caucus of any State resources resulted in additional public expense.

These various conclusions of the House Ethics Committee are vitally important in the analysis of your questions and will be discussed extensively below.

The House Ethics Committee Opinion then proceeds to discuss the procedure set forth in § 8-13-700 that the "public official must follow to recuse himself or herself from a vote on any issue that would benefit these groups." In addition, the Opinion references other provisions of the Ethics Act which may be applicable, including § 8-13-775, prohibiting a public official from having an economic interest in a contract in which the official performs official functions relating thereto. However, the House Opinion concludes this provision is inapplicable because "[t]he Caucus member's official function as a legislator does not contain any authorization related to the agreement with the Caucus." Also deemed inapplicable by the Committee is § 8-13-1120. According to the Committee, "[a] House Legislative Caucus would not fall within the definition of 'governmental entity' such that Section 8-13-1120 requires a public official to disclose payments received from the Caucus on the statement of economic interest, therefore the Act does not mandate disclosure."

The Committee's Opinion further notes that article 7 of the Ethics Act does not define the term "caucus." However, § 8-13-1300(21) does define "legislative caucus Committee" for purpose of "Campaign Practices" to include "(a) a committee of either house of the General Assembly controlled by the caucus of a political party or a caucus based upon racial or ethnic affinity, or gender. . . ." In the Committee's view, the definition "provides no guidance into how a 'caucus' may be organized, what authority (if any) a 'caucus' may have, and what duties (if any) a 'caucus' may owe."

The House Ethics Opinion also references House Rule 3.13. The Committee noted that the Rule:

> . . . provides that legislative caucuses who use space in the Blatt Building or who use State-owned office or equipment (including internet and telephone service) may make payment as determined by the House Clerk. Legislative Caucuses are also not subject to FOIA pursuant to House Rule 4.5. Note further that members of legislative caucus committees as defined by Section 8-13-1300(21) are eligible for state health and dental insurance plans – however,

> there are 29 other non-legislative entitles listed in the statute, none of which would fall within the "official office" of the House of Representatives. S.C. Code Ann. § 1-11-720 (2011).

Thus, based upon this extensive analysis of the Ethics Act provisions, the House Ethics Committee concluded:

> Section 8-13-700(A) would not apply to the activity of a member of the House who is also a member of a legislative caucus and who earns income from doing business with that caucus. A House Legislative Caucus does not constitute an "official office" for purpose of the Act. Furthermore, a Caucus Member would not be using his or her official office (i.e. as a member of the S.C. House of Representatives) to gain an economic benefit from a contract with the State or its subdivisions. Also, the Caucus does not qualify as a "governmental entity" for purposes of the Act's disclosure requirements. Therefore, a Caucus member would not violate Section 8-13-700(A) (or any other portion of the Act) by engaging in a transaction with the Caucus.

(emphasis added).

In its analysis, the Ethics Committee Opinion emphasized that there must be both the "use" of one's office to obtain an economic benefit, and that any such use must not be merely "incidental" and that additional public funds must have been expended. In the Committee's view, § 8-13-700 simply does not apply to Caucus activities, including providing services to the Caucus, and, therefore, no "use" of one's official office is involved. Moreover, the Committee found Caucus activities to be "incidental" and not resulting in additional public expense.

As explained earlier, we are required to defer to the House Ethics Committee's interpretation with respect to a member of the General Assembly. Moreover, our Supreme Court recently concluded in Rainey v. Haley, supra that the constitutional principle of separation of powers mandates that the Ethics Committee possesses exclusive jurisdiction to interpret the Ethics Act with respect to any civil violations thereof by a House Member. That being said, we also agree with the Committee's conclusion that a "House Legislative Caucus does not constitute an 'official office' for purpose of the Act" and that "a Caucus member would not violate Section 8-13-700(A) (or any other portion of the Act) by engaging in a transaction with the Caucus." The House Ethics Committee thoroughly analyzes § 8-13-700. While we agree with that Opinion, independent of it, a wealth of authorities support the Committee's conclusion and these will be discussed, in turn, below.

Our Analysis of § 8-13-700

First of all, we note that no South Carolina decisions construe § 8-13-700(A)'s provision concerning the phrase requiring a public official to "knowingly use his official office, membership

or employment to obtain an economic interest for himself, a family member, an individual with which he is associated, or a business with which he is associated." However, as already discussed, our prior opinions uniformly conclude that the public official must not "us[e] his or her position for financial gain." Op. S.C. Att'y Gen., 2006 WL 3522437 (November 8, 2006). Importantly, we advised in Op. S.C. Att'y Gen., 2001 WL 957757 (July 19, 2001):

> [i]n particular, the State representative must avoid the use of his official position or office to obtain financial gain for himself. See S.C. Code Ann. § 8-13-700. Furthermore, the representative should not solicit or receive any money in addition to that received by him in his official capacity for advice or assistance which would be included in the normal course of the representative's public duties. See S.C. Code Ann. § 8-13-705. This means that any action taken by the representative must be unrelated to the activities performed by the representative in his official capacity as a State representative. Furthermore, pursuant to provisions of Section 8-13-735, the representative cannot use of disclose any confidential information gained by him in the course of his official activities in a way that would result in financial gain for himself or to his consulting firm.
>
> If the representative is faced with a situation, in the discharge of his official duties, which would require him to take action or make a decision which would substantially affect his personal financial interest or those of his consulting firm, the representative must comply with the provisions of Section 8-13-700. In sum, these provisions require the preparation of a written statement describing the matter requiring action, and the nature of the particular conflict of interest with respect to that action. The statement is to be delivered to the presiding officer of the House, and he shall be excused from votes, deliberations, and other actions on the matter on which a potential conflict of interest exists.

(emphasis added). Just as the House Ethics Committee concluded in its recent Opinion that §8-13-700 requires that "the activity or use must be related to the Caucus member's official activity, not something that is collateral those activities," our July 19, 2001 Opinion found that any action taken by a representative which is "unrelated to the activities performed by the representative in his official capacity as State representative" does not contravene § 8-13-700.

Likewise, in an earlier opinion of the House Ethics Committee, HEC OP. No. 93-27 (1993), the Committee reviewed the requirements of § 8-13-700(A) and (B) and advised:

> [t]hese sections would prohibit a member from voting or working on an issue or matter which would affect him economically. If the member is in a position in which he is called upon to make a decision, then he must abstain from voting on the matter pursuant to Section 8-13-700(B).

Further, in Op. S.C. Att'y Gen., 2013 WL 3133640 (June 7, 2013), we concluded that "the law is not violated where a public official abstains from voting, or a particular matter in which he has a potential conflict of interest and otherwise complies with the requirements of § 8-13-700(B). Thus, the thrust of § 8-13-700, as demonstrated by § 8-13-700(B), is casting a vote. While by no means exclusive, this would be the main prohibition (voting where there is a conflict of interest) when applied to a legislator. Similarly, in HEC 2015-1 (2015), the House Ethics Committee stated:

> [r]esearch revealed there is not much decisional authority regarding Section 8-13-700(A). In SEC Adv. Op. No. 93-063, a DHEC Board member entered into a contract for the provision of medical services with a local clinic only after the clinic could not find any other physicians to perform these services. The State Ethics Commission noted that the member did not knowingly use his official office to obtain an economic interest in violation of Section 8-13-700(A) and must comply with the requirements of Section 8-13-700(B). In the instant situation, it does not appear that the member is knowingly using his official position to obtain an economic interest for himself with the business with which he is associated.

Decisions In Other Jurisdictions Which Are Instructive in Interpreting § 8-13-700

Decisions in other jurisdictions are instructive as to how our courts would interpret § 8-13-700 in this regard. Such decisions emphasize not only that the public official must "use" his office for his economic benefit, but that such conduct must be part of the officer's official duties. For example, in Doe and Doe v. May, 2004 WL 1459402 (Tenn. 2004), the Tennessee Court of Appeals, in an unpublished decision, addressed a statute which imposed liability upon the county for harm caused by a deputy sheriff acting by virtue of or under color of office. The case involved a situation in which a deputy had sexual intercourse with a teenager when she was 14 and 15 years old. The Court concluded that it was insufficient that the deputy was a public officer for the statute to be applicable. In this situation, the Court held that the deputy had not acted by virtue of or under color of office, stating as follows:

> Deputy May . . . was not on duty and did not, so far as it is alleged, use his official status to put himself in the position to commit the crimes he is accused of. He was a friend of the victim's mother, and that is how he came into contact with the daughter. Although the victim may have been attracted to May's uniform and other symbols of power, the Doe allegations do not describe the mis-use of official power to facilitate a wrong.

(emphasis added). Importantly, the ruling thus distinguishes between "holding" office and "using" the office.

Collier v. State, 55 Ala. 125 (1876), involving an extortion statute, is also helpful to this analysis. There, a local prosecutor provided legal advice to a criminal suspect for a fee. The Alabama Supreme Court concluded, however, that acceptance of the fee did not constitute "extortion" because such fee was not accepted "under color of office." According to the Court, "[t]he offense cannot be committed unless there is a right to demand a fee of the person paying it, or unless official service has been rendered for such person, for which a fee cannot be demanded. The object of the statute is the punishment of the abuse of official power – not the obtaining money by mere interpretation of conduct, or by fraud by persons filling official position." Id. at 127. (emphasis added). The Court went on to say that "[i]n this case, the money obtained from Reynolds was not for any official service rendered to him, nor was he under any obligation to pay for any service to any other person. It was not extorted by color of office; and, however great may be the moral impropriety of taking the money under the circumstances, it is not a criminal offense." Id. at 128 (emphasis added). The criminal charge was thus unwarranted because "[t]here was evidence, uncontradicted, that the money paid the defendant was not for official services, but for advice as an attorney, in a matter on which he was under no duty to advise as an officer, and that he disclaimed acting as such in giving the advice, and therefore demanded for it compensation as an attorney." Id. (emphasis added).

Particularly instructive is the decision of the Wisconsin Supreme Court in State v. Bennett, 252 N.W. 298 (1934). There, the defendant, a city planning engineer, was also a member of an "unofficial committee, appointed without statutory provision therefore by the superintendent of schools of the city, to make surveys of future school areas, and recommend plans for school development and the location and procurement of school sites. . . ." Defendant was a stockholder in the Triangle Company, which sold certain property to the city upon recommendation by the Committee, as well as owning one-third interest in the commission paid to the real estate broker for such transaction. Thus, according to the Court, "Bennett had a pecuniary interest at least indirectly in that sale of property to the city" and thus fell within the language of the statute at issue, having "any pecuniary interest, directly or indirectly . . . in any purchase or sale."

However, defendant contended he was not guilty of violating the statute in question because the language in the statute mandated that such contract be "made by, to or with him in his official capacity or employment, or in any public or official service. . . ." 252 N.W. at 300. According to the defendant, he was not acting in his official capacity in this instance.

The Court concluded that "[d]efendant's contentions in those respects are sound." Id. at 301. There, the Court explained:

> [i]t certainly was not intended by that statute that any officer, agent, or clerk of the state or governmental unit "who shall have . . . any . . . interest shall be punished." That manifestly would be absurd. To avoid such an absurdity as to the meaning and scope of the statute, it is proper and necessary, as a matter of simple and legal construction, to recognize and give due significance to the adjective clause, 'made by, to, or with him in his official capacity or

> employment, or in any public or official service,' which in the statute as worded (as appears in the portion thereof quoted above), follows the series of nouns which commences with the words 'purchase or sale' and ends with the words 'w warrant or receipt.' . . . Then, and then only, is the meaning of that portion of the statute free from absurdity and the scope of applicability within the limits of reason. Then the literal terms of the statute do not apply to every 'purchase, sale, contract,' etc. made by, to, or with the state or any of its governmental units in which some officer, agent, or clerk of either the State or a governmental unit has any pecuniary interest directly or indirectly so as to render every such officer, agent or clerk criminally liable by reason of his capacity in that respect.... Then it is not sufficient and the statute does not become applicable because such an officer, agent, or clerk was merely a participant on behalf of himself or others pecuniary interested with him in such a purchase or sale or contract which was in no respect made by, to, or with him in his official capacity or employment or in any public or official service. The words of the statute certainly afford no basis for concluding that its applicability to such an officer, agent or clerk is dependent upon his having participated, solely in his private capacity on behalf of himself, and his own pecuniary interest.

Id. (emphasis added). Based upon this analysis, the Court summarized its conclusions as follows:

1. Was the defendant an officer, agent or clerk within the meaning of Section 348.28? Yes

2. Does Section 348.28 make a criminal offense of a transaction as to which the defendant has no duty to perform? No

3. Did the defendant have an official duty to perform with reference to the sale here made within the meaning of Section 348.28? No

4. Does Section 348.28 make a criminal offense of a sale of land to the governmental unit where the contract is not made by, to or with the defendant in his official capacity? No

5. Was the sale of the real estate in question made by, to or with the defendant in his official capacity within the meaning of Section 348.28? No

Thus, it can be seen the logic of the Court's analysis in Bennett. The defendant must have been acting in the performance of some official duty which led to the pecuniary interest in question in order for the criminal statute to be triggered. Otherwise, every contract the defendant made, even in his private capacity, would be subject to criminal punishment. As the Court stated, "[i]t certainly was not intended by that statute that any officer, agent, or clerk of the state or a governmental unit 'who shall have . . . any . . . interest, directly or indirectly, . . . in any way or

manner, in any sale . . . of . . . real property . . . shall be punished.' That manifestly would be absurd." Id. at 301. Again, the Court in Bennett distinguished between a person holding an office and using that office for one's economic benefit.

Likewise, based upon the same analysis as these decisions, it would be illogical to read § 8-13-700(A) as making it a criminal offense for "every person who is a public official who obtains an economic interest for himself, a family member, in individual with whom he is associated or a business with which he is associated." Under such a broad, virtually unlimited reading, making the statute applicable even where there is no "use of official office, membership or employment," a public official, such as a legislator, could not make a living or engage in financial transactions with fellow public officials, who are likewise not acting in their official capacity, because the public official would always be limited by the fact that he is a public official. For example, if a legislator is in the real estate business and a fellow legislator asks if he knows of a good house on the market and that legislator agrees to serve as broker to the other legislator, no law is violated even though both are public officials and the broker benefits financially from the transaction. Our Court has often stated that a statute must be read with common sense in mind, and in a manner in which every word has meaning. See Florence Co. Dem. Party v. Florence Co. Repub. Party, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012) [the Court should seek a construction that gives effect to every word of a statute rather than adopting an interpretation that renders a portion meaningless].

As in Bennett, in this instance, based upon what you have submitted, no official duty is being exercised, nor any "use" of office involved. There is no official duty of legislators to obtain political campaign services for their reelection or for the Majority Leader to provide such services. Thus, such services are provided by the Majority Leader not in his legislative capacity, or official capacity, but in his individual capacity. Therefore, in our opinion, a court would likely conclude that § 8-13-700 is not violated. As the House Ethics Committee concluded, this activity is "collateral" to a Member's duties rather than being part of the Member's "official" duties.

Further, the United States Supreme Court's decisions regarding the "Speech and Debate Clause" illustrate vividly that not all activity taken by a legislator relates to "legislative" functions. Chief Justice Burger, in United States v. Brewster, 408 U.S. 501 (1972) wrote that

> [i]t is well known, of course, that members of the Congress engage in many activities protected by the Speech and Debate Clause. These include a wide range of legitimate 'errands' performed for constituents, the making of appointments with government agencies, assistance in securing government contracts, preparing so-called 'newsletters' to constituents, news releases, and speeches delivered outside the Congress. The range of these related activities has grown over the years. They are performed in part because they have come to be expected by constituents, and because they are a means of developing continuing support for future elections. Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the court in prior cases. But it has never been seriously

> contended that these political matters, however appropriate, have the protection afforded by the Speech and Debate Clause.

408 U.S. at 512 (emphasis added). Thus, political activity by a legislator is not "legislative" activity for purposes of the Speech and Debate Clause.

Likewise, SEC AO 92-023 (January 27, 1992) is worthy of note. There, the State Ethics Commission discussed the definition of "official capacity" in the context of § 8-13-715, which provides that "[a] public official, public member, or public employee acting in an official capacity may not receive anything of value for speaking before a public or private group." (emphasis added). The Ethics Commission noted that

> . . . "official capacity" is not defined in the Ethics Reform Act. For purposes of this Act, the Commission defines speaking engagements by public employees "in an official capacity" as those which (1) arise because of the position held by the employee, (2) involve matters which fall within the responsibility of the agency or employee, and are services the agency would normally provide and for which the employee would be subject to expense reimbursement by the public employee's agency. Official capacity also means those duties that are attached to a public office or employment by the Constitution, statutes, executive order, promulgated rules and regulations, published job description or agency directive. (emphasis added).

Legislative Caucus

We turn now to a discussion of the Majority Caucus activity in the context of § 8-13-700. A "caucus" is generally defined as "[a] meeting of a group, usually within a deliberative assembly, of people aligned by party or interest to formulate a policy." Black's Law Dictionary (9th Ed.) As one court has stated, caucuses "fit neatly" within the definition of "unincorporated associations" because they "are voluntary, they are a group of persons, they do not have a charter, they are not formed by mutual consent, and they meet to discuss and promote common objectives." Assoc. Press et al. v. Montana Senate Repub. Caucus, 951 P.2d 65, 69 (Mont. 1993).

We note that legislators who participate in a legislative caucus typically have been held not to be entitled to legislative immunity for actions taken by the caucus. For example, in Fowler-Nash v. Democratic Caucus of the Pennsylvania House of Representatives, 469 F.3d 328 (3d Cir. 2006), the Third Circuit applied the "functional text . . . [to conclude that] (t)he Democratic Caucus was not acting in a legislative capacity when it fired Fowler-Nash and should not be protected by absolute legislative immunity." 469 F.3d at 337. Moreover, in West v. Phillips, 883 F.Supp. 308 (S.D. Indiana 1994), the Court stated:

> [a]ccording to the allegations in the Complaint, Defendants fired West because of her conversations with the media and others about Smith's allegedly

> unethical use of House postage and letterhead. Firing an employee for such actions has nothing to do with the performance of legitimate legislative activity. The Defendants were neither affording a legislative hearing, subpoenaing documents, voting on legislation, nor speaking on legislation. . . . Furthermore, the firing of a single employee fails to include the characteristic of a legislative act. . . . Thus, the Defendants did not act in a legislative capacity when they fired West.

883 F.Supp. at 317 (emphasis added). Thus, to be entitled to legislative immunity, it is not sufficient merely that the person be a member of a legislative body or a legislator. As one court has recognized, "[w]hether absolute immunity [of a legislator] is available to an official does not depend on the official's job title or agency. . . . The focus is on the function that the official was performing when taking the actions that provoked the law suit." Pedrina v. Chun, 906 F.Supp. 1377, 1411 (D. Hawaii 1995), aff'd., 97 F.3d 1296 (9th Cir. 1996). This rule is a clear illustration of the fact that a legislator is not performing a legislative duty merely because he or she carries the title of legislator or member of the General Assembly.

Also instructive is Mountain Hill, L.L.C. v. Township of Middletown, 945 A.2d 59 (N.J. 2008). There, the Court concluded that a Municipal Republican Party caucus meeting, attended by all five members of the Township's governing committee, was not subject to the Open Public Meetings Act (OPMA), which exempted "typical partisan caucus" meetings. The Court noted that "[a]t the political caucus meetings, the group discussed campaign issues and campaign strategy." Moreover,

> [s]ometimes, political consultants attended the political caucus meetings. During at least one of the political caucus meetings, a Republican Club member was there and the discussion was generally about bumper stickers, lawn signs, and campaign platform issues.

945 A.2d at 62. However, it was admitted that there were discussions about Township Committee business at the caucus meetings. Id. at 63-64.

It was argued in Mountain Hill that the caucus attendees constituted a "public body" and that the gatherings were "meetings" for purposes of the OPMA. Rejecting such arguments, the New Jersey Court explained:

> [h]ere the group of Republicans that attended the political caucus meetings did not intend to discuss or act on the Township Committee's business. The trial court correctly concluded that the record demonstrated that the group met to discuss the political ramifications of events that were occurring in Middletown. Plaintiff's project is an enormous one, which caused a large degree of controversy in the town. There were clearly political issues surrounding

> Plaintiff's September 2000 application to the Zoning Board of Adjustment for a use variance.
>
> Because of the importance of the project, the matter was discussed at the political caucus meetings, but the testimony in the record reflects that the group discussed what the project meant in terms of "votes." The group members did not discuss how they were going to vote, and did not predetermine their position on Plaintiff's development project as the Township Committee but, rather as a political party.

Id. at 72-73 (emphasis added). Thus, the Mountain Hill Court distinguished the role of the Township Committee, which was designed to discuss and act upon official Township policy from the politically partisan nature of a political caucus which addressed the political ramifications of such policy. Clearly, in the Court's mind, the latter was not an official body and did not involve official action.

In short, the Mountain Hill case provides a good illustration of the function of a legislative caucus. As the New Jersey Court concluded there, the caucus in question primarily discussed politics and political strategy. The principal concern was the "political purse of the residents of the Township and how to 'spin' items of political importance in Middletown." 945 A.2d at 72. The Court was thus satisfied that the caucus meeting "did not go beyond typical partisan caucuses." In no sense, therefore, were the party caucus meetings the gathering of an official agency or an official body.

Moreover, in Thompson v. Powning, 15 Nev. 195 (1880), the Nevada Supreme Court considered, among other issues, whether a publication in defendant's newspaper regarding an ex-Senator was actionable per se. The Supreme Court affirmed the lower court's refusal to give a particular instruction regarding the alleged libel on the ground that the language in question was subject to more than one interpretation, and thus was for the jury. According to the Supreme Court of Nevada:

> [c]ertainly the inference is very strong that the ex-senator is charged with voting in his official capacity as a state senator, but is not the language susceptible of another and different meaning? Might it not be construed to mean that he cast such a vote in a political caucus, or in some meeting or convention, having no relation whatever to his official duties as a state senator? If the language is susceptible of different constructions, it was properly submitted to the jury, as a question of fact, whether it was libelous or not.

15 Nev. at 212 (emphasis added). The Court's language in Thompson strongly indicates that a political caucus bears no relationship to a legislator's "official duties as a state senator."

And, in Mele v. O'Dwyer, 382 N.Y.S.2d 912 (1976), two members of the minority caucus of New York City Council sued, claiming they were improperly excluded from the selection of a Minority Leader. The Court rejected such argument, concluding that ". . . the 'caucus' preceding Arculeo's election has not been shown to be anything more than a private meeting of political allies agreeing upon a course of action." 382 N.Y.S.2d at 914 (emphasis added). Moreover, the Court went on to say that the "petition must be dismissed upon a more fundamental ground." In the Court's view, the "basic precept of separation of powers between the three branches of government precludes this Court from interfering in the internal affairs of the City Council." According to the Court, the position of Minority Leader of the Council was not created by statute or law, but by rules of Council. Thus, the Court was loathe to intrude into the domain of the legislative branch, even though members of the Minority Caucus were also members of Council.

In addition, in Runyon v. Bd. of Trustees of Cal. State Univ., 229 P.3d 985, 992, n. 6 (Cal. 2010), the Court distinguished a partisan caucus from the Legislature itself. There, the Court noted:

> [a]nalyses prepared for members of partisan caucuses are not necessarily reliable indicators of legislative intent, as they may not be shared on an official basis with the whole of the legislative body. As will become clear below, we refer to the Republican analyses here only for the limited purpose of illuminating the substance of Republican objections to the bill objections the Democratic author later accommodated through the amendment at issue. (emphasis added)

Runyon emphasizes that a partisan caucus is not the body itself, but a group of like-minded legislators.

And, in Britt v. Niagara County, 440 N.Y.S.2d 790 (N.Y. 1981), the Court concluded that New York's Open Meetings law was not violated by the Majority Party's caucus meetings. The concurring Opinion of Justice Hancock is particularly instructive, as he observed:

> [a] party caucus is not a committee or subcommittee or other similar body of the legislature – the official public body. It is an unofficial meeting of legislators who belong to the same party. No quorum is required and no official business may be conducted.

Id. at 795 (Hancock, J. concurring). (emphasis added).

In addition, in our opinions, we have viewed a caucus as principally a political organization. In Op. S.C. Att'y Gen., 1999 WL 1390364 (December 10, 1999), we advised a municipal election commissioner to take a "cautious approach" regarding any political activities. With respect to party activities in which the commissioner could or should not be involved, we referenced a regulation of the Federal Election Commission, 5 C.F.R. § 734.409 (1999), entitled

"Participation in Political Organizations; Prohibitions." Pursuant thereto, employees of the Federal Election Commission and other federal agencies could not

> . . . (d) Address a convention, caucus, rally, or similar gathering of a political party of partisan political group in support of or in opposition to a candidate for partisan political office or political party office, if such address is done in concert with such a candidate, political party, or partisan political group.

Each of these authorities is entirely consistent with and supportive of the Opinion of the House Ethics Committee, which found that "[a]gain, because the Caucus does not meet the definition of 'official office,' this section (§ 8-13-700) would not apply to a use of membership in the Caucus to do anything, including providing services from which a Caucus member's personal business earns income." The Committee deemed a legislative caucus as merely "collateral" to legislative functions. While the term "legislative caucus committee" is defined in the Ethics Act, see § 8-13-1300(21), and "legislative caucus" by § 2-17-10(11), it is clear from these definitions that such a committee is "controlled by the caucus of a political party." See § 8-13-1300(21)(a) and 2-17-10(11). The duties of a "legislative caucus" are not defined by state statute but the Rules of the Chamber create the caucus. Each House is free, by Rule, to create a caucus, or the position of Majority or Minority Leader, but it is free also not to have such bodies or positions or to abolish them altogether. Rules of each house thus govern these party caucuses.

For example, House Rules provide that employees of legislative caucuses must remain behind the rail in the House Chamber. See Rule 10.1 Rules of the House of Representatives. Moreover, as the House Ethics Committee Opinion states, House Rule 3.13 provides that legislative caucuses using space in the Blatt Building or using a State-owned office or equipment may make payment therefor to the House Clerk. In addition, Rule 4.5 of the House states that "a legislative caucus as defined by Section 2-17-10 of the 1976 Code of Laws of South Carolina, as amended, and its meetings are not subject to" FOIA.

Furthermore, the House Ethics Committee, in its recent Opinion, also emphasized that "[t]he Caucus member's 'official function' as a legislator does not contain any authorization related to the agreement with the Caucus." We agree. As one authority has noted, "[t]he official duties of a legislator include the conduct of and participation in legislative investigations; discussion, persuasion and the influencing of other legislators; and the exercise of a power or authority derived from an actual relationship between a legislator as legislator and a particular matter." People v. Adams, 382 N.Y.S.2d 879, 881 (1976). And, in Richardson v. McGill, 273 S.C. 142, 255 S.E.2d 341, 343 (1979), our Supreme Court, in finding a legislator entitled to absolute legislative immunity, concluded that "as a member of the legislative delegation from Williamsburg County, respondent had an official interest in the proper operation of the county government and its agencies. . . ." In Op. S.C. Att'y Gen., 2014 WL 5439610 (October 16, 2014), we concluded that informal, as well as formal, information gathering was within the scope of a legislator's official duties.

On the other hand, we are aware of no official duties of a legislator or a member of the General Assembly which encompass attendance or participation in a caucus meeting or obtaining or providing campaign services to that Caucus. If the Caucus is a private, partisan body, as we think it is, we cannot see how participation in such meeting or provision of or receipt of campaign services by the Majority Leader to Caucus members is the "use" of a legislator's office to receive Caucus business. A member may choose not to participate in his or her particular caucus As one Court has observed, a legislative "caucus" is primarily a political gathering of legislators of the same party and "[t]he nature of such political meetings will often necessarily involve receiving information, deliberating expected issues, and holding discussions concerning anticipated official action and public business." Evansville Courier v. Willner, et al., 563 N.E.2d 1269, 1271 (Indiana 1990). The "Speech and Debate" Clause cases, such as U.S. v. Brewster, supra, make clear that "political matters" or campaign activities are not "legislative" in nature.

Nevertheless, you have submitted a Memorandum in which you argue that "[i]t is a violation of Section 8-13-700(A) for a Majority Leader to cause or influence the Caucus to hire and pay a business in which the Majority Leader has an economic interest." In support of your conclusion, you argue that "[t]here is no reasonable basis for excluding the Majority Leader from the Ethics Act because he remains a 'public official' as a member of the Caucus." You note that, as a member of the Caucus, the Majority Leader is a "public official" because "not only is his membership in the Caucus based upon the fact that he is a member of the House of Representatives, but his position within the Caucus is based solely upon his holding the Office of Majority Leader."

Furthermore, you reference our Opinion, Op. S.C. Att'y Gen., 2006 WL 1574910 (May 19, 2006) in support of the argument that § 8-13-700(A) is violated by the Caucus member who receives Caucus business. In that Opinion, we concluded that the House Republican Caucus is a "public body" for purposes of FOIA because it meets the definition contained in the FOIA (§ 30-4-20(a) because, we determined the Caucus was at that time "supported in whole or in part by public funds or expending public funds. . . ." Regarding that 2006 Opinion, you further state:

> [t]he Attorney General's Opinion further held the legislative caucus was subject to FOIA inasmuch it was supported by public funds and that it expended public funds to further is legislative purpose. For example, members of the caucus received office space in the Blatt Building rent-free; it used space, equipment and other resources provided to those members generally; and other House staff personnel, whose salaries were not paid by caucus funds but by the State, from time to time assisted the caucus. The Opinion concluded this support from public funds constituted the caucus as a "public body." Importantly, the Opinion drew no distinction between "insignificant" or "de minimis" support and substantial or significant support from public funds.
>
> While the Attorney General has often read FOIA very broadly and in favor of disclosure, any attempt to minimize its applicability to the Caucus here would

be frivolous. As noted previously, one cannot hold the office of Majority Leader without first being a member of the House of Representatives. That fact, along with the duties and the relationship of the members of the Caucus to the General Assembly, leads to the inescapable conclusion that action taken on behalf of the Caucus by the Majority Leader represents conduct in his "official capacity," which is subject to the Ethics Act. Consequently, the Majority Leader may not refer business to himself or to a business which he is associated and from which he makes a profit, as such is in clear violation of § 8-13-700(A).

This situation is similar to that addressed by the South Carolina Ethics Commission in an ethics advisory opinion issued on March 19, 2008. In SEC AO2008-006, the Commission addressed whether employment as a forensic pathologist performing autopsies for the medical examiner's office prohibited the pathologist's concurrent holding of the office of coroner under the Ethics Act. The Commission analyzed the issue under the provisions of §8-13-700(B) (prohibiting a public official from taking official action that effects the economic interest of a business with which he is associated):

> A public official is prohibited by Section 8-13-700(B) from participating in any action in which he, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated has an economic interest. Clearly, Pathology Associates of Greenville is a business with which the potential candidate for coroner is associated and his fellow employees at the practice are individuals with whom he is associated.
>
> A public official is required to follow the procedures of Section 8-13-700(B)(1) and (4) if an issue before him would affect the economic interests of his off-duty employer, i.e. requesting autopsies be performed by Pathology Associates of Greenville. Section 8-13-700(B) does not require that the public official have an economic interest in the matter in order for a conflict to be present. Clearly, Pathology Associates of Greenville has an economic interest in performing autopsies at the request of the coroner's office.

SEC AO2008-006 at 3. The Ethics Commission concluded the pathologist, if elected coroner, could not order autopsies to be performed by a business with which he was associated due to his off-duty employment with that business.

The Majority Leader's causing or influencing the Caucus to hire and pay a business in which the Majority Leader has an economic interest is prohibited by

> Section 8-13-700(A). In reaching this conclusion, we note that the S.C. House legislative Ethics Committee has issued a conflicting advisory opinion addressing this issue. See HLEC Adv. Op. 2015-2 (October 12, 2015). The Committee concluded that neither §8-13-700(A) or any other provision of the Act prohibits an officer or member of a House Legislative Caucus from referring Caucus business to himself or to a business with which the officer or member of the Caucus is associated or from which he makes a profit. However, the Committee's conclusion rested upon its findings that (1) the Caucus did not constitute an "official office" for purposes of the Act, (2) a Caucus member is not using his or her official office, i.e., the position as a member of the House of Representatives, to gain an economic benefit from a contract with the State or its subdivisions, and (3) the Caucus was not a "government entity" for purposes of the Ethics Act. In our view, the Committee' analysis is faulty in that it opinion misses the point. As previously noted, the Majority Leader is still using his "office" for economic benefit, not only because he remains a "public official" while in the Caucus, but also because – as the Legislature itself has recognized – the Caucus is a part of the Legislature similar to legislative committees. See §2-17-10(11).

We must respectfully disagree. First of all, we have already discussed above decisions which distinguish between a public official holding office and "using" that office for the economic benefit of himself or family. Other such decisions are discussed below. In no sense, is the Majority Leader "excluded" from the Ethics Act. But § 8-13-700 still requires the "use" of his Office as such. Because the activity which you question is part of a political caucus, which is neither governmental or an office, we know of no such "use" here.

Moreover, a group made up exclusively of public officials is often itself a private group, notwithstanding that the members are public entities or officials. For example, as Judge Gergel stated recently, the Municipal Association, made up of cities, is itself a private organization. Cole v. Montgomery, 2015 WL 2341721 (D.S.C. 2015). In Demetro v. Police Dept., 2011 WL 5873063 (D.N.J. 2011), the National Association of Bunco Investigators (NABI) was deemed "a private organization whose members are 'exclusively' law enforcement personnel or officials. . . ." And, in Florida Assn. of Counties, Inc. v. Dept. of Adm., 580 S.E.2d 641, 646 (Fla. 1991), the Court concluded that both the Association of Counties and the League of Cities

> . . . are private, nonprofit corporations, and neither is a "board or commission" under Section 268.011 Florida statutes (1989) [Open Meetings Law]. . . . Neither the Association nor League is controlled by any of the constituent local governments.

Likewise, our own opinions concur in this regard. In Op. S.C. Att'y Gen., 1967 WL 11924 (November 17, 1967), we described the South Carolina Law Enforcement Officers Association, made up of law enforcement officers, as a "loosely organized private association." Similarly, we

noted, in Op. S.C. Att'y Gen., 1977 WL 24382 (No. 77-39) (February 1, 1977) that the South Carolina School Boards Association, consisting of school board members, "is a private, non-profit, charitable non-sectarian organization" whose goal is "the improvement of the public schools of South Carolina. . . ." In Op. S.C. Att'y Gen., 1976 WL 30701 (March 8, 1976), we characterized the South Carolina State Employee Association and the South Carolina Education Association as "private organizations." See also Op. S.C. Att'y Gen., 1998 WL 993679 (December 21, 1998) [Municipal Association is a "private organization."]. As our Supreme Court recently observed, the South Carolina Association of School Board Administrators is "a non-profit corporation engaged in political advocacy. . . ." Disabato v. S.C. Assn. of School Administrators, 404 S.C. 433, 439, 746 S.E.2d 329, 332 (2013). Thus, the fact that an organization, such as a legislative caucus, is made up of public officials does not make that organization a public entity. Indeed, as demonstrated above, many courts deem a caucus as a private organization, the purpose of which is primarily political in nature.

In this same vein, our own courts have emphasized on numerous occasions the clear difference between a public official, acting in his or her official capacity, and that same public official acting individually. For example, a police officer who is beyond the territorial limits of his jurisdiction is generally acting as a private citizen, rather than as a public official. State v. Harris, 299 S.C. 157, 382 S.E.2d 925 (1989). The Court also held that a county treasurer who accepted a check in payment of his taxes was not "act[ing] as a public official, but was . . . act[ing] as the agent" of the taxpayer. American Surety Co. v. Hamrick Mills, 194 S.C. 221, 9 S.E.2d 433, 438 (1940).

Further, in Charleston Joint Venture v. McPherson, 308 S.C. 145, 417 S.E.2d 544 (1992), mall security officers and Charleston police officers were sued pursuant to 42 U.S.C. § 1983 by protesters for violation of their First Amendment rights. However, the Court concluded these authorities did not act "under color of State law" to deprive them of civil rights. According to the Supreme Court, the McPhersons left the mall upon police request, but no arrests were made. Thus, the Court concluded that "the police and security officers, having taken no action pursuant to their statutory authority, did not act under color of State law." 308 S.C. at 152, 417 S.E.2d at 543, citing Chiles v. Crooks, 708 F.Supp. 127 (D.S.C. 1989) [private security guard providing information to police is not action "under color of State law"] (emphasis added).

Secondly, our 2006 Opinion regarding FOIA cannot, in our view, be used for purposes of interpreting or applying § 8-13-700. FOIA is construed broadly while a criminal provision, such as § 8-13-700 is interpreted narrowly. Moreover, the wrongful conduct of § 8-13-700 must be "knowingly." Further, the 2006 Opinion is quite clear that the analysis therein is limited to the application of FOIA ("the Majority Caucus is a 'public body' for purposes of FOIA") and is governed by the definition of a "public body" contained therein. In the Opinion, we concluded:

> . . . FOIA [has] . . . no "de minimis" requirement, such that a certain minimum level of public funds must support or be expanded by an entity before FOIA is applicable.

By contrast, § 8-13-700 is inapplicable if there are no additional public expenses or if such expenses are de minimis. Our Supreme Court has also recognized that a statutory definition may not be applied to other circumstances. See Clemson Univ., 344 S.C. 310, 313, 543 S.E.2d 572 (2001) ["We find no indication the Legislature intended the Act's definition of the word 'park' as set forth in § 56-5-610 to apply to statutes outside of the Act."].

In addition, the 2006 Opinion expressly noted that application of the definition of "public body," contained in FOIA, was sufficiently broad that it could clearly apply to private entities, such as the University of South Carolina Foundation. We there noted that in Weston v. Carolina Research and Development Foundation, 303 S.C. 398, 401 S.E.2d 161 (1991), the Court rejected the distinction between "public" and "private" for purposes of FOIA. We stated with respect thereto:

> . . . the Weston Court made it clear that for purposes of whether or not an entity is a "public body" under FOIA, the fact that the entity or organization may be characterized as "private" is not controlling. Instead, the question is simply one of whether or not the entity or organization is "supported in whole or in part by public funds or [is] expanding public funds."

Thus, the fact that an entity is a "public body," for purposes of FOIA, does not determine that entity's status as either "public" or "private." As Weston made clear, a private entity may easily be a "public body" for the broad purposes of FOIA, even if it is not "public" for other purposes. Thus, reliance upon the 2006 Opinion here is, in our view, incorrect.

You are, however, correct that our 2006 Opinion referenced cases from other jurisdictions, which concluded that a caucus is a "public body" for purposes of FOIA. See e.g. Cole v. State of Colorado, 673 P.2d 345 (Colo. 1984) ["(w)hile a legislative caucus is not an official policy-making body of the General Assembly, it is, nonetheless, a 'de facto' policy-making body which formulates legislative policy that is of governing importance to the citizens of this. The intent of the Open Meetings Law is that citizens be given the opportunity to obtain information about and to participate in the legislative decision-making process which affects, both directly and indirectly, their personal interests."]. However, these decisions were again all rendered in the context of FOIA laws in other states, each of which, like South Carolina's FOIA, is required to be construed broadly because FOIA is designed to ensure transparency in the conduct of public business. However, interpretation of § 8-13-700, in the criminal context, requires that the "use" of the office be "knowingly" and that the provision does not apply where such use of public materials is 'incidental" and does not involve "additional public expense."

Further, you argue that, because the Majority Leader may not be selected for such position "without first being a member of the House of Representatives makes it 'inescapable' that the Majority Leader is acting in his 'official capacity. '" As seen above, this is simply not the case. If it were, every public official would always be acting officially even in the conduct of his or her

private life. The National Conference of State Legislatures requires members to be members of State legislatures, but it is a private organization. Further, with respect to legislators, courts consistently recognize that the mere fact that an official holds a legislative office does not mean he or she is always acting in a legislative capacity or is always performing legislative duties. For example, in Ferris v. Atan, 28 N.W.2d 899, 901 (Mich. 1947), the Supreme Court of Michigan noted that "[b]y the great weight of authority there is a distinction between legislative or governmental and personal expenses." Quoting with approval State ex rel. v. Turner, 233 P. 510, 511 (1925), the Ferris Court stated that legislative expenses "'are not those that are incurred by him [the legislative member] because he is at the capital city; They are those that are incurred by him in the performance of his duties.'" And, as the First Circuit Court of Appeals has also recognized, ". . . it is the nature of the particular act rather than the title of the office which governs whether [legislative] immunity attaches." Acevedo-Cordero v. Cordero-Santiago, 958 F.2d 20, 21 (1st Cir. 1992).

This same distinction has been made with respect to whether or not the acts of a legislator constitute bribery. In People v. Ginsberg, 364 N.Y.S.2d 260 (N.Y. 1974), the Court differentiated between the official duties of a legislator and that legislator's actions as a politician or as an individual. The legislator allegedly demanded and received remuneration for his "help in securing for Mr. DeMarco" the recovery of the designation as a Nassau County Towing Garage. He also was paid to assist another individual in obtaining contracts for cement work from the Town of Oyster Bay. The Court explained there was no correlation between the legislator's duties and the actions taken for which he was charged criminally. According to the Court,

> [e]ven assuming that the defendant was approached as a New York Assemblyman, there is no evidence that he possessed official power with respect to County Towing Garage designations or Town public works contracts. It is no easy task to identify the official powers and duties of an Assemblyman. Beyond Article III, Section 1 of the New York State Constitution which vests the legislative power in the Senate and Assembly, there is no specification of powers. Of course, under the American system of government all powers are divided up and distributed among the executive, legislative and judicial branches. . . . In that scheme the legislative power in its purest form is the power to enact or not enact laws. In the narrowest sense then, the official action of a legislator consists of his voting upon legislation.
>
> From the power to vote, however, a legislator derives other powers and duties. [These include:]
>
> 1) A vote upon a legislative measure;
> 2) A vote to confirm an appointee;
> 3) The conduct of or participation in a legislative investigation;
> 4) Discussion, persuasion and influence upon other legislators;

5) The exercise of a power or the performance of a duty expressly conferred by law upon the legislator as a legislator;
6) The exercise of a power of authority derived from an actual relationship between a legislator, as a legislator, and a particular matter.

The evidence adduced by the People not only fails to establish any actual power possessed by the defendant as an Assemblyman with respect to County Towing Garage designations and Town public works contracts, it also fails to establish any derivative power. Absent a relationship between his public office and the allegedly purchased conduct, the evidence is not legally sufficient. As the Appellate Division, Second Department said in discussing the jurisdiction of a special prosecutor:

> 'Clearly, the special Prosecutor would not be authorized under his grant of power to prosecute the defendant for any acts committed by him in violations of law just because he happened to be a judge. For instance, such violation of law as speeding or reckless driving or driving while intoxicated or numerous other criminal violations of law could readily be cited would not come within the purview of the Special Prosecutor's jurisdiction because they were acts performed by the judge in his official capacity and not as judge.' (Moritt v. Nadjari), 46 A.D.2d 784, 785, 361 N.Y.S.2d 20, 22. . . .

Here actions which would not be criminal if performed by either a political figure and lawyer who happens also to be a State legislator, if the actions are not within the scope of his official duties.

364 N.Y.S.2d at 266-267 (emphasis added). Thus, the charges against the legislator for use of his office were dismissed.

As noted, § 8-13-700 requires that the individual not only be a "public official," but that he or she must "use" their office to further their economic interest. Thus, in the circumstances raised by you, as we stated in the 2001 Opinion, discussed above, this is "action taken by the representative [which is] . . . unrelated to the activities performed in his official capacity as a State representative." While it is true that a Majority Leader of a political caucus and caucus members are all legislators, and must be to be in a caucus, these persons are not acting in a legislative capacity. These legislators are primarily serving their non-legislative, political interests, rather than their official interests. While they may discuss legislative matters in the caucus, such a discussion is in the political context, rather than in the legislative sense.

Further, § 8-13-700 clearly recognizes by insertion of the second sentence of subsection (A) that a public official is not "using" his office or performing his or her duties merely by the fact that he or she holds office or public employment. Such second sentence expressly states that the

prohibition of § 8-13-700 "does not extend to the incidental use of public materials, personnel, or equipment, subject to or available for a public official's, public member's or public employee's use that does not result in additional public expense." As discussed above, this is a recognition by the General Assembly that, in enacting § 8-13-700, the "broad policy . . . is to ensure that government employees do not gain personal financial advantage through their access to the assets and other attributes of government." Davidson, supra.

Our FOIA Opinion of 2006 is particularly enlightening in this regard. In that Opinion, we noted that "we have rejected any argument that there is a certain threshold level of support of an entity by public funds." While we readily acknowledged in the Opinion that the legislative caucus (Majority Caucus) was only using public materials incidentally with only a de minimis use of public funds (by virtue of "in kind" use of State resources), we concluded that FOIA would still apply. There, we explained that "the Freedom of Information Act does not draw a quantitative line between 'insignificant' or de minimis support and substantial or significant support from public funds."

While the broad, remedial design of FOIA, deems even such de minimis or "in kind" public funding sufficient to constitute a "public body" under the Act, the exact opposite is true for purposes of § 8-13-700, which prohibits its application where there is only "incidental" use of public funds and no additional public funds are involved. In other words, the conduct which § 8-13-700 proscribes is that of a public official, such as a legislator, who utilizes "public resources to provide a pecuniary benefit to the office holder or member of their family." Commonwealth of Pa. v. Veon, 109 A.3d 754, 756 (Pa. 2015). When use of public resources is "incidental," or "de minimis," amounting to no additional public funding, such conduct is expressly not prohibited by § 8-13-700. In that event, § 8-13-700 does not deem the official to be "exercising the power of [the office] in order to secure financially related personal gain. . . ." Id., quoting Commonwealth v. Feese, 79 A.3d 1101, 1138 (Pa. 2013).

It was the presence of this second sentence of § 8-13-700(A), providing an exception to its proscription, which led to the conclusion by this Office, as well as the State Ethics Commission, that a law enforcement officer, who uses his equipment and wears his uniform while working as a private security guard, does not violate § 8-13-700. See above, supra at _____. While the officer is undoubtedly a "public official," he is deemed not to be acting as such for purposes of § 8-13-700, where his actions are incidental to the office and there is no additional public expense. Moreover, in another opinion, SEC AO 92-228, the Ethics Commission referenced the second sentence of § 8-13-700(A) to conclude that it did not violate the Ethics Act for a law enforcement officer in the following circumstances:

> (1) receive payment for serving civil papers during their off-duty hours and using their personal vehicles; (2) work for a merchant during off-duty hours in plainclothes, working on collections and repossessions of property; and (3) work for a bank or loan company during off-duty hours in plainclothes with collection of accounts. The Judge also questions whether it is proper

> for a law enforcement officer to serve civil papers on off-duty hours while utilizing an unmarked county police vehicles which he drives at all times.

The Ethics Commission concluded that ". . . such equipment, when properly approved and which does not involve additional public expense may be utilized in accordance with the off-duty employment provisions of Section 23-24-210 (emphasis added). With respect to the question of additional compensation, the Ethics Commission referenced § 8-13-720 (prohibiting a public official from solicitation or receipt of money in addition to that received "for advice or assistance given in the course of his employment" as a public official). The Commission advised "that an off-duty law enforcement officer would not be prohibited from accepting compensation for serving civil papers on off-duty time if such service is not part of the officer's official responsibilities."

This exact parallel applies here. As referenced above, the House Ethics Committee relied in part upon this second sentence, noting that the activities "associated with a House Legislative Caucus" are no more than "incidental" to the duties of a member of the House. Moreover, the Ethics Committee concluded that no "additional public expense" is involved with Caucus activities. This is, we believe, the correct analysis.

We note also that the State of Pennsylvania has a similar "de minimis" exception to that contained in § 8-13-700 and that the decisions in that state conclude that the application of such exception precludes a finding that the public official violated the provision of the Ethics Act pertaining to the use of one's office for financial gain. In Bixler v. State Ethics Commission, 847 A.2d 785 (Pa. 2004), the Court addressed the applicability of this provision as follows:

> Bixler has served the Township as a Supervisor since March 4, 1997. He also works for the Township As a roadmaster. Further, he has been employed by Keystone Fleet Service, Inc. (Keystone) as a truck mechanic since 1998. On June 13, 2000, at a regular public meeting of the Board of Supervisors, Bixler suggested that the Township vehicles could be taken to Keystone for service. He made this suggestion in response to the fact that the garage that had previously serviced the Township's trucks would no longer do so. The Township solicitor was present at the meeting when Bixler made this suggestion. The Board discussed Bixler's recommendation and then voted unanimously to take the Township's trucks to Keystone for service. There is no dispute that Bixler is not a partner at Keystone, and he received no financial benefit from having the Township's vehicles repaired there. He also did not perform work on the vehicles while they were at Keystone for service. . . . After subtracting its costs, Keystone received a net profit of 561.77 for all its work on the Township vehicles.
>
> . . . .

Given all of the circumstances presented here, we agree that Bixler's actions fell within the de minimis exclusion of Section 1103(a) ["de minimis economic impact"]. In Kraines v. Pennsylvania State Ethics Commission, 805 A.2d 677, 680 (Pa. Cmwlth. 2002), petition for allowance of appeal denied, 572 Pa. 761, 818 A.2d 506 (2003), the Commission issued a final adjudication determining that Judith Kraines, the Berks County Controller, violated Section 1103(a) of the Ethics Act "by using the authority of her office for the private pecuniary benefit" of her husband, board-certified forensic pathologist, Dr. Neil Hoffman. Kraines had "participat[ed] in the approval process of payments to her husband for pathology fees which were in excess [of] the amounts set forth in the 1989 contract between Dr. Hoffman and the County." Id. This court reversed the Commission's determination that Kraines had violated Section 1103(a) of the Ethics Act. Among our reasons was the fact that "the payments received by her husband has an insignificant adverse economic impact on the County and, therefore, should have been classified as de minimis." Id. at 682. In reaching this conclusion, we noted, inter alia, that Dr. Hoffman was the most qualified pathologist in the county and that the fees he charged represented a savings to Berks County when compared with fees charged by other pathologists in South Central Pennsylvania. See also Salem Township Mun. Auth. v. Township of Salem, 820 A.2d 888, 893 (Pa. Cmwlth. 2003) (where we held that the actions of two Townships Supervisors in voting to dissolve the municipal authority did not amount to a conflict of interest because "[s]ewage construction and repair constituted, at most, a very minor part of the [the Supervisors'] construction businesses)."

Here, the Commission found that "Keystone realized a gross private pecuniary benefit of $2,548.10 and a net profit of $561.77 as a result of repairs to South Newton Township vehicles." Finding of Fact No. 34, Commission Final Adjudication (mailed September 29, 2003) at 7. Anthony Buziuk, one of Keystone's owners, testified that his gross sales in 2000 and 2001 were "about 1.9 million" dollars. N.T., Hearing of May 28, 2003 at 55. Buziuk also testified that his labor rate was $39.50 in 2000 and 2001, and that, because he serviced a lot of local trucking companies, he charged more of an "in-house labor rate," while other dealers in the area "doing heavy-duty truck repair would probably be in the range of $75 to $90 an hour. . . ." N.T. at 48-49. Buziuk further acknowledged that his company's work on the Township vehicles "was probably miniscule compared to the amount of work we generate." N.T. at 57-58. Moreover, Ronald Bouch, the Chairman of the South Newton Township Board of Supervisors, testified that both the Township's expenditures and receipts in 2000 and 2001 exceeded $200,000. N.T. at 92. Therefore, we hold that the $561.77 net profit received by Keystone as a result of Bixler's action had an insignificant effect on both Keystone and the Township and therefore de minimis in nature. . . .

847 A.2d at 786, 787-788 (emphasis added).

Likewise, in Seropian v. State Ethics Comm., 20 A.3d 534, 545 (Pa. 2011), the Court applied the "de minimis provision. There, the Court concluded:

> "We cannot say that Seropian's use of his government-owned computer for approximately two minutes per day for personal reasons that did not otherwise produce income or financial benefit to Seropian is more than a de minimis action or that such conduct is a violation of the Ethics Act. . . ."

In this instance, you recognize in your letter that the Caucus use of office space and other equipment is for "campaign services" and is a "de minimis" use of State resources. Apparently, according to House Rule 3.13, rent for such space and equipment must be paid to the Clerk of the House. Thus, in our opinion, this would clearly qualify as the "incidental use of public materials, personnel or equipment, subject to or available for a public official's, public member's or public employee's that does not result in additional public expense."

In addition, you reference an Opinion of the State Ethics Commission, dated March 19, 2008. You believe that Opinion is controlling here. You state as follows:

> [t]his situation is similar to that addressed by the South Carolina Ethics Commission in an ethics advisory opinion issued on March 19, 2008. In SEC AO2008-006, the Commission addressed whether employment as a forensic pathologist performing autopsies for the medical examiner's office prohibited the pathologist's concurrent holding of the office of coroner under the Ethics Act. The Commission analyzed the issue under the provisions of § 8-13-700(B) (prohibiting a public official from taking official action that effects the economic interest of a business with which he is associated).

However, we do not deem the referenced 2008 Ethics Opinion to be dispositive of this issue. In that situation, the coroner possessed a statutory duty to order autopsies. See § 17-7-10 [coroner of the county in which a body is found dead may order an autopsy]. Such decision, as to whether or not to order an autopsy, is a fundamental duty of a coroner. By contrast, there is, in this instance, no duty as a legislator to assign or provide Caucus business. As noted, most authorities deem a legislative caucus to be a non-public entity made up of public officials. Indeed, Caucus members may use any provider of services they desire. Such decision would rest with Caucus members, rather than with the Majority Leader. The Caucus is thus more of an extension of a political party than a committee or appendage of the General Assembly. Mountain Hill, L.L.C., supra [caucus purpose was to evaluate issues politically rather than legally]. As was stated in SEC AO95-011 (September 21, 1994), the General Assembly, in enacting the Ethics Act, "intended to avoid [an] . . . absurd result by allowing political parties, through their party committees or legislative caucus committees, to make individual contributions exceeding $3,500 for statewide

candidates or $1,000 for local candidates, provided the aggregate contribution limits of Section 8-13-1316(A) are not exceeded. (emphasis added). While a legislative caucus cannot operate as a "sham," to conduct public business or make public policy, it is, nevertheless, an appropriate use to gather like-minded members of the General Assembly to "caucus" on political or other concerns such a racial, ethnic or gender-based issues.

Finally, it is important to note that, pursuant to Art. III, Section 12 of the South Carolina Constitution, "[e]ach house shall . . . determine its rules of procedure. . . ." As discussed above, the House has adopted several Rules regarding legislative caucuses. Moreover, our Supreme Court has stated regarding this provision of the Constitution that:

> [t]he Constitution empowers each House to determine its rules and proceedings. Neither House may by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of procedure established by the rule and the result which is sought to be obtained, but within these limitations all matters of method are open to the determination of the House, and it is no impeachment of the rule to say that some other way would be better, more accurate, and come more just.
>
> The power to make rules is not one when once exercised is exhausted. It is a continuous power, always subject to be exercised by the House and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal. United States v. Ballin, 144 U.S. 1, 5, 12 S.Ct. 507, 36 L.Ed. 321.

State ex rel. Coleman v. Lewis, 181 S.C. 10, 186 S.E. 625, 630 (1936).

We emphasized the House's plenary rulemaking authority in our FOIA Opinion, discussed above, which you reference. Citing Coleman v. Lewis, we noted that ". . . courts in other jurisdictions have concluded that a legislative rule exempting caucuses from FOIA is within the power of either branch of the Legislature pursuant to its authority to make rules under the Constitution."

This deference to rules of either house has been recognized in several contexts. In Cornell v. Steve, 801 N.Y.S.2d 232 (2005), the petitioner who was former Majority Leader sought to annul the designation as such of his successor, contending that "a mid-term replacement is not sanctioned or permitted by the Legislature's governing Rules." The Court refused, stating as follows:

> [w]hether viewed as seeking an interpretation or enforcement of the Legislature's Rules, . . . this proceeding represents an attempt to involve the court in the internal affairs of the Cortland County Legislature. As recently noted by the Appellate Division, "it is not the province of the courts to direct the legislature how to do its work" (Matter of Fornario v. Clerk of the Rockland County Legislature, 307 A.D.2d 927, 929 (2003). . . . In the absence of any

> allegation that constitutional rights have been violated, or that a governmental body's action contravenes an applicable statute, law or ordinance, a legislature's governance of its internal affairs, which has been entrusted to it by law – including the question of whether the Legislature violated its own internal rules – should not be subject to court oversight. (see Blackwell v. City of Philadelphia, 546 Pa. 358, 365).

See also Abood v. League of Women Voters, 743 P.2d 333, 343 (1987) ["We conclude that the Framers of the Alaska Constitution did not intend that the Constitution require that committee and caucus meetings of legislative bodies be conducted in public."]; Mele v. O'Dwyer, supra [the "basic precept of separation of powers between the three branches of government" precludes a court's interference in internal affairs of the legislative branch]. In this instance, legislative caucuses, such as the Majority Caucus, are the creation of the Rules of the House. See e.g. Vander Jagt v. O'Neill, 524 F.Supp. 519, 521 (D.D.C. 1981) ["The actions of a caucus in the House are governed by the House Rules"]. The same is true in South Carolina. Thus, it is up to the House or Senate respectively as to whether there is even a Majority Caucus, or any caucus at all.

A case which well addresses all of the arguments made in your Memorandum is State v. Bowsher, 687 N.E.2d 316 (Ohio 1996). The defendant, a Toledo police officer, was convicted for "theft in office," an offense which involves a public official "us[ing] the offender's office in aid of committing the [theft] offense" or "permit[ting] or assert[ing] to its use in aid of committing the offense. . . ." The officer was also the volunteer treasurer of a charitable organization known as the Toledo Police-Fire Golf Benefit. The Ohio Court of Appeals noted that,

> Appellant concedes as a police officer he is a public official. . . . He does not contest that the facts alleged constitute a theft offense. . . . What he denies is that he in any way "used" his office or permitted others to "use" his office in aid of committing a theft offense. Appellant maintains that the fact that he was a police officer is only peripherally related to the alleged theft.

The State made the following arguments for why the officer had "used" his office in violation of the statute:

> Appellee responds that, had appellant not been a police officer, he would not have been involved with a police-firefighters charity, would not have had access to any account at the Toledo Police Federal Credit Union, and could not have collected funds for charity while in uniform, on duty, and in a Toledo police vehicle. This is sufficient, the State contends, to constitute a "use" of office pursuant to R.C. 2921.41.

687 N.E.2d at 319.

The Court rejected these arguments. According to the Court, there is a significant difference between "theft in office" and theft. With respect to the former, there must be a nexus between the office and the crime. Concluded the Court:

> [i]n this case, no such nexus exists between the crime charged and appellant's position as a police officer. Appellant took neither public funds nor public property. Furthermore, Count 5 of the indictment concerns itself only with the improper withdrawal of "$211 in cash from the account" – in effect, an embezzlement of nonpublic monies. The fact that appellant had solicited contributions while in uniform, on duty, and in a city police car, has little, if any relationship to a later improper withdrawal of funds from a private account. Finally, in following the time-honored maxim that criminal statutes should be construed narrowly against the State . . . we conclude that the facts fail to establish a theft in office in violation of R.C. 2921.41.

Id. at 320.

From an examination of the definition of a "legislative caucus committee," as contained in § 8-13-1300(21), it can readily be seen that such definition reflects the constitutional power of each house to determine its own rules and procedures. This definition recognizes and is, in reality, a codification of internal practices of the House or Senate. Subsection (a) of § 8-13-1300(21) defines a "legislative caucus committee" as

> (a) a committee of either house of the General Assembly controlled by the caucus of a political party or a caucus based upon racial or ethnic affinity or gender; however, each house may establish only one committee for each political, racial, ethnic, or gender-based affinity.

(emphasis added). Based upon this definition, it is evident that the establishment (or abolition) of a "legislative caucus committee," as defined, is a matter entirely with the discretion and province of "each house," as is constitutionally required by Att. III, § 12.

Further, it is important to note that the controlling criteria for membership in a particular caucus, as defined, is not merely membership in the General Assembly; the legislator must also be a member of a particular party, or have a particular "racial or ethnic affinity or gender.' Pursuant to these criteria, presumably, a male member of the General Assembly cannot be part of the "Women's Caucus" and a Democratic legislator a part of the Republican Caucus.

Moreover, the creation of those caucuses in the South Carolina House or Senate is a relatively recent historical phenomenon. There is no mention of any "caucus" in the 1962 Code or the 1953 Legislative Manual, for example. Caucuses were created, apparently, to discuss "campaign finance and caucus issues," as well as political strategy. See Augusta Chronicle, January 19, 2007. The Legislative Black Caucus, for example, was "formally organized in 1975."

Members "covered the costs of running the organization from $300 that each contributed from their annual $7000 salary." See, www.sclbc.org/history.php. As one court has recognized, "[t]he common understanding of a political caucus is to discuss political posturing on public issues. . . ." Buffalo News v. City of Buffalo Common Council, 585 N.Y.S.2f 275, 277 (N.Y. 1992). Thus, whether or not to even have legislative caucuses, what kind, and how many or its powers or limitations is left entirely to the choice of each house of the General Assembly to make in each legislative session. As we have previously concluded, ". . . because the power to determine procedural rules may be exercised by each house of the Legislature on a continuous basis, one legislature may not necessarily bind a succeeding legislature concerning its procedures. . . ." Op. S.C. Att'y Gen., 1985 WL 166031 (No. 85-61) (June 13, 1985).

Finally, constitutional limitations prohibit a "legislative caucus committee" from possessing governmental powers. Our Supreme Court, in Joytime Distributors and Amusement Co., Inc. v. State, 338 S.C. 634, 528 S.E.2d 647 (1999), concluded that legislative power cannot be delegated to private citizens. And, in Ashmore v. Greater Greenville Sewer Dist., 211 S.C. 77, 44 S.E.2d 88 (1947), it was held that a delegation to persons, groups, organizations unrelated to official government the power to nominate, appoint or elect public officers was unconstitutional as a violation of equal protection and due process under the State Constitution. Similarly, delegation of governmental powers to a political party has been held unconstitutional. United Citizens Party v. S.C. State Elect. Comm., 319 F.Supp. 784 (D.S.C. 1970). Thus, we cannot ascribe governmental powers or duties to a legislative caucus or to the Majority Leader without clear guidelines from the Legislature by statute or constitutional provision.

Accordingly, while we certainly understand and appreciate the arguments to the contrary, particularly that the Majority Leader is a "public official," because only legislators make up the Caucus, we agree with the House Ethics Committee's analysis that § 8-13-700(A) is not violated in the circumstances raised by you. We also have conducted our own research which fully supports the House Ethics Opinion.

Your Question Concerning Use of Campaign Funds

Your other question deals with "[w]hether it is a violation of South Carolina law for a Member of the South Carolina General Assembly to use his own campaign funds to pay for campaign services performed by a business in which either the Member or a member of the Member's family has an economic interest." You acknowledge in your Memorandum that ". . . the Member in this fact scenario is disbursing his campaign funds for a political purpose, e.g., to maintain his office and/or win his election. . . ." However, you argue that the Member

> . . . is, nonetheless doing so in a manner that privately benefits him or a family member through the receipt of campaign funds for any rendered services. This resulting benefit is a clear violation of § 8-13-700(A). Moreover, and depending upon the extent of the benefit conferred on the family member, these actions may arguably constitute the disbursement of campaign funds for

> personal use pursuant to § 8-13-1348 (prohibiting public officials from campaign funds for personal use).

You also reference the 2008 Ethics Commission Opinion concerning a coroner, discussed above. You state the following in this regard:

> [m]oreover, a public official is required to follow the procedures of Section 8-13-700(B)(1) and (4) if an issue before him would affect the economic interests of his off-duty employer, i.e. paying for political campaign-related services performed by a business in which the public official has an interest or which he works. Section 8-13-700(B) does not require that the public official have an economic interest in the matter in order for a conflict to be present. This situation is similar to that addressed by the South Carolina Ethics Commission in an ethics advisory opinion issued on March 19, 2008. In SEC AO2008-006, the Commission addressed whether employment as a forensic pathologist performing autopsies for the medical examiner's office prohibited the pathologist's concurrent holding of the office of coroner under the Ethics Act. The Commission analyzed the issue under the provisions of §8-13-700(B) (prohibiting a public official from taking official action that effects the economic interest of a business with which he is associated):
>
> > A public official is prohibited by Section 8-13-700(B) from participating in any action in which he, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated has an economic interest. Clearly, Pathology Associates of Greenville is a business with which the potential candidate for coroner is associated and his fellow employees at the practice are individuals with whom he is associated.
> >
> > A public official is required to follow the procedures of Section 8-13-700(B)(1) and (4) if an issue before him would affect the economic interests of his off-duty employer, i.e. requesting autopsies be performed by Pathology Associates of Greenville. Section 8-13-700(B) does not require that the public official have an economic interest in the matter in order for a conflict to be present. Clearly, Pathology Associates of Greenville has an economic interest in performing autopsies at the request of the coroner's office.
>
> SEC AO2008-006 at 3. The Ethics Commission concluded the pathologist, if elected coroner, could not order autopsies to be performed by a business with which he was associated due to his off-duty employment with that business.

> The situation here is no different. The Member's use of campaign funds to pay for services from a business for which he and/or a family member works has an interest does benefit the economic interests of the Member and/or a family member and, thus, is prohibited by Section 8-13-700(A).

We must again respectfully disagree. The prohibition contained in § 8-13-1348(A) relates to conversion of campaign funds "to personal use." However, the statute also expressly states that a candidate may not "use campaign funds to defray personal expenses which are unrelated to the campaign or the office is a candidate or officeholder. . . ." In SEC AO2003-006, the Ethics Commission, in its opinion stated the following with respect to § 8-13-1348:

> [a]s Section 8-13-1348 notes, campaign funds may be used for expenses related to the campaign or the office and campaign funds may be used to "defray any ordinary expenses incurred in connection with an individual's duties as a holder of elective office." Section 8-13-1348 gives the public official and candidate broad discretion in determining what is an ordinary expense or related campaign expense. Clearly, a candidate or public official may use campaign funds to pay for campaign advertising for himself, pay campaign workers, pay for polls, and pay the rent, on the campaign mailbox. Equally clear, a candidate or public official may not use campaign funds to pay his mortgage or car loan or groceries or his child's tuition. In addition, at no time may a candidate or elected official make an expenditure out of his campaign funds to another candidate's campaign.

(emphasis added).

Your Memorandum acknowledges that ". . . the Member in this fact scenario is disbursing his campaign funds for a political purpose, e.g., to maintain his office and/or win his election. . . ." Yet, your concern is that by paying himself with his campaign funds for the political services involved, "he is, nonetheless, doing so in a manner that privately benefits him or a family member through the receipt of campaign funds for any rendered services." In other words, your question is, in essence, whether the Member or a Member's family is absolutely proscribed from receipt of campaign funds in such a situation as a result of § 8-13-700(B), as well as § 8-13-1348.

Nothing, however, in § 8-13-1348 suggests that an officeholder or candidate may not use his own bona fide campaign services. A candidate's campaign and his or her business are, presumably, separate entities. Thus, so long as the services are for the purpose of the Member's campaign (and here you state they are), use of campaign funds for such bona fide services by this separate business entity are not prohibited by the Ethics Act. We must presume that if the General Assembly had intended such a prohibition, it would have so stated. See SEC AO1988-012 ("[T]he Chair . . . is not required by the S.C. Ethics Reform Act to resign prior to submission of an application for employment . . ." as Director of County Public Works). Inasmuch as a criminal

statute must be strictly construed against the State and in favor of the Defendant, we do not believe a court would imply such a requirement.

Carried to its logical conclusion, a candidate who owns a lawn service business could not retain that business, and pay for services with campaign funds, to care for the lawn of his or her campaign headquarters. The candidate would have to contract independently with another lawn service company. What would be legal under § 8-13-1348 (use of campaign funds for bona fide political campaign activity) would then become illegal under § 8-13-700. We do not construe the Ethics Act in this way or believe the Legislature intended this result. It is well recognized that the same conduct cannot be both legal and illegal at the same time. See Winslow v. Fleischner, 238 P.101, 102 (Ore. 1924) [". . . the same act cannot be both lawful and unlawful at the same place and time and under the same circumstances]; Mitchell v. City of Birmingham, 133 So. 13, 15 (Ala. 1931) ["one act cannot be both lawful and unlawful under the positive laws of the same sovereignty]; Kadirov v. Beers, 71 F.Supp.3d 519, 522 (E.D. Pa. 2014) ["the notion that one can be an 'unlawful lawful Permanent Resident' is an oxymoron, as one cannot be both lawful and unlawful at the same time."]; Drainage Commrs of Dist. No. 1 v. Drainage Commrs. of Dist. No. 7, 91 Ill. App. 241, 1900 WL 3301 (Ill. 1900) [". . . it would be absurd to say that the same act can be both lawful and unlawful at the same time."]; State v. Malone, 201 WL 2582730 (N.J. 2011) ["where the same conduct . . . constitutes both lawful and unlawful activity, a defendant must be found not guilty."].

Again, we deem the 2008 Ethics Commission Opinion concerning the coroner, discussed above, to be inapplicable on this point as well. That Opinion concluded that it is a violation of § 8-13-700(B) for a coroner to order an autopsy where he has a financial relationship with the forensic pathology firm which performs such autopsies for the Medical Examiner. There, such responsibility for ordering an autopsy is part of the coroner's official duties. There is no mention of campaign funds in the Ethics Opinion. Moreover, the coroner is expending county funds in performing such a duty. By contrast, we are aware of no duty of a legislator regarding the provision of services to a legislative caucus.

Further, as we discuss above, the text of § 8-13-700 requires the "use" of an official's office to obtain an economic interest for a violation thereof. However, performance as a political consultant for the Caucus or its members, including the Member in question, is not part of the official duties of a legislator. Sections 8-13-700 and 8-13-1348 serve entirely different purposes. One deals with the "use" of one's office; the other with the use of campaign funds.

It is also instructive in this regard to examine the Ethics Commission Order of Dismissal, dated March 21, 2012 involving Comptroller General Eckstrom. There, the Executive Director filed a Complaint against Comptroller General Eckstrom for using his campaign account to pay the "reasonable and necessary travel expenses, food and beverages consumed by Respondent while at, and in connection with the 2012 Republican National Convention." The alleged violation was that such constituted the use "of campaign funds for personal expenses resulting in violation of S.C. Code Ann. § 8-13-1348(A)."

The Commission, however, dismissed the Complaint, concluding that the alleged conduct was not a violation of § 8-13-1348(A). Thus, the Commission decreed these expenditures to have been to pay for a legitimate campaign purpose. In addition, however, the Commission concluded that the campaign expenditures did not otherwise violate any other provision of the Ethics Act. According to the Commission's Order,

> [a]fter carefully considering argument of counsel and reviewing the written submissions, the Commission concludes that the facts alleged in the Complaint do not constitute a violation of the South Carolina Ethics Act. S.C. Code Ann. 8-13-100 et seq. and that Respondent did not convert campaign funds to his own personal use in violation of S.C. Code Ann. § 8-13-1348(A). Accordingly, Respondent's Motion to Dismiss is granted.

(emphasis added). Thus, by concluding that Eckstrom's conduct did "not constitute a violation of the South Carolina Ethics Act," the Ethics Commission rejected the proposition that even if the use of campaign funds were valid under § 8-13-1348, such use might still violate another provision of the Act (such as § 8-13-700). The situation in Eckstrom, like the situation presented by you, involved a "public official." However, in expending his campaign funds, he was deemed not to be "using" his Office for his economic benefit even though he clearly benefitted financially by having his campaign pay for all his expenses in attending the Republican National Convention. Moreover, in contrast to the situation addressed in the 2008 Opinion involving the coroner, in which public funds were being expended, the Eckstrom situation involved use of campaign funds for what the Ethics Commission concluded was a legitimate campaign purpose. Thus, Eckstrom teaches that if the use of campaign funds are legitimate, no other provision of the Ethics Act is violated even though the candidate may have benefitted from such expenditure.

Opinions of the Federal Election Commission are also illuminating in this same regard. In AO 1995-8 (April 5, 1995), the Commission addressed the situation where a candidate's campaign committee wished

> . . . the rent as its headquarters the building that contains your [candidate's] former law office. The building is located two miles from your residence and is owned by your wife and you. Your committee will be the only occupant of the building. It will rent the entire office and pay a rent of $500 per month. You believe that this amount is "at or just below the fair market rental value of the building." . . . The building contains all of your campaign supplies and equipment. Your committee will also be responsible for all utilities, i.e. water, electricity and gas. Your wife and you as owners of the building will retain responsibility for the real estate taxes, maintenance and repair.
>
> In addition, your committee proposes to rent all the equipment of your former law office, Bart T. Stupak, P.C. the equipment includes a copier, FAX

> machine, telephone system, computers, printers, desks and "numerous" other items of office equipment. Your professional corporation would charge your committee a rent of $200 per month for the equipment.

The FEC noted that "under the Act and Commission regulations, a candidate and the candidate's campaign committee have wide discretion in making expenditures to influence the candidate's election." However, the candidate cannot convert campaign funds to "personal use of the candidate or any other person." According to the Commission, its regulations

> [p]ermits the use of campaign funds for the rental of property owned by the candidate or family member, where the property rented is for campaign purposes and is not part of a personal residence of either. A campaign committee may therefore rent for campaign use, part of an office building owned by the candidate so long as it pays no more than the fair market value.

The Commission further cautioned that the candidate should be careful to avoid undercharging of rent because such "would constitute something of value to the committee and would thus be an in-kind contribution from your spouse and you." With respect to the rental of equipment by the corporation, federal law prohibits a contribution by a corporation and thus the commission advised that "the amounts charged by your corporation should be based on how these items are grouped in the office rental market and the rental amount for such groups."

Accordingly, the Commission authorized the arrangement between a candidate and himself, as well as his P.C., so long as the candidate's committee paid the fair market value for the property received. There was no suggestion in the FEC's Opinion that, even if these bona fide rental charges were paid, the candidate would, nevertheless, subject himself as a sitting Congressman to criminal liability for the use of his office for his economic benefit.

Likewise, in AO 1995-47 (March 29, 1996), in an Opinion to Congressman Underwood, the FEC addressed the question of whether campaign funds could be used to pay expenses for the Congressman's as well as his wife's attendance to the 1996 Democratic Convention. According to the Opinion,

> [y]ou state that, as an elected official with unpledged delegate status, you will participate "in a manner which includes both campaign-related and official functions." You explain: "As a Member of congress, I represent my party and constituency on public policy and legislative matters, and will bring that responsibility and perspective to bear on platform deliberations." You also assert that the convention "presents significant political opportunities and demands related to any candidacy for reelection." Further, you note that constituents expect a candidate to attend the party's most significant event and that the convention provides media, fundraising, and other contacts helpful to your candidacy;

> You state that your wife will accompany you to the events scheduled throughout the convention week and will participate in them with you. These include functions related to your pending re-election campaign. When you cannot attend a meeting or function due to a scheduling conflict, your wife will attend in your place. You represent that your wife will "generally assist" you in your convention-related activities, including those helpful to your candidacy.

The FEC again advised that a candidate has "wide discretion in making expenditures to influence the candidate's election." In its Opinion, the FEC concluded:

> [y]our description of your activities at the convention indicates that, throughout the convention, you and your wife will engage in activities that are in furtherance of your campaign for re-election. At events and other meetings, you will attempt to maintain contacts and goodwill with persona who will support your campaign through fundraising assistance and contributions. In addition, you will attempt to communicate with constituents with respect to your campaign. You consider your wife's attendance at these events and meetings, alongside of you or in your place to be important, and you state that it will enhance your re-election effort. The Commission concludes, therefore, that the travel expenses for you and your wife in connection with the convention are directly related to your campaign and committee funds may be used for them. In making this conclusion, the Commission is mindful of the inherently political nature of the national nominating convention of a political party. Its conclusion as to your general description of the four types of activities in which you and your wife will engage is made in the context of that event. . . .

Again, the FEC's conclusion that the activities, as defined, "are directly related to your campaign and committee funds may be used for them" could not have also implied that the Congressman could also be criminally liable for the use of his office for his economic benefit. Thus, we perceive no per se prohibition in the Ethics Act against a public official, including a candidate. See § 8-13-100(27), using his campaign account for bona fide political services which economically benefit the candidate or a member of his or her family. Of course, each situation is fact-specific and must be adjudged by all the facts and circumstances. The service must be bona fide.

Conclusion

Based upon the foregoing authorities, as well as the information submitted by you, it is our opinion that a court would likely conclude that the answer to each of your questions is "no." With respect to your second question – whether it is a violation for a House Majority Leader to cause or influence the House Legislative Caucus to hire and pay a business in which the Majority Leader has an economic interest – we are required to defer to the recent Opinion of the House Ethics Committee, which concluded that the Ethics Act was not violated in this situation. Furthermore, as

we discuss above, the analysis in that Opinion is excellent and we agree with it. However, we stress that our conclusion is, by no means, based entirely upon that Opinion. Independent of the House Ethics Committee's Opinion, we have analyzed the issue, and concluded that the Opinion is correct, expanding herein upon the Committee's analysis.

With regard to your other question – whether it is a violation of South Carolina law for a Member of the General Assembly to pay for campaign services performed by a business in which the Member or a member of the Member's family has an economic interest – in our view, so long as the campaign services are bona fide expenditures, pursuant to § 8-13-1348, that is, the expenditures are for a legitimate campaign purpose, such services may be paid for by the Member's campaign account. In short, we know of no per se prohibition in the Ethics Act forbidding a candidate's campaign funds to be used to pay for bona fide campaign services provided by a business in which the candidate or a Member of the candidate's family has an economic interest. If the Legislature had intended such a per se prohibition, it certainly would have expressly so stated. Otherwise, to use a simple example, a candidate could not contract with a lawn service company which the candidate owns to care for the lawn of his campaign headquarters and pay for such services with his campaign funds. Of course, such services must be bona fide and not a sham, so as to benefit the candidate himself. Thus, each situation depends on all the facts involved. There is no suggestion in your request that such services are not bona fide. Assuming the provision of bona fide campaign services, such a payment with campaign funds for a legitimate campaign expense does not, in our view, become illegal because the services are provided by a business in which the candidate has an economic interest. Opinions of the State Ethics Commission, as well as the Federal Election Commission, referenced herein, fully support our conclusion in this matter.

Generally speaking, statutes such as § 8-13-700 contain limitations designed to avoid the absurdity that every contract by a public official in which he or his family benefits -- no matter whether that contract is made in the official's individual or private capacity and no matter how little public expenditures are impacted -- is a criminal offense. Indeed, § 8-13-700 requires that, in order to violate the statute, the public official must "use" his or her office for the economic benefit of the public official or his family. In other words, the public official must perform official duties or act officially to obtain such benefit. You are correct that a Majority Leader must be a member of the General Assembly to be a member of the Caucus, and that a member of the General Assembly is most certainly a "public official" for purposes of the Ethics Act. However, it is important to note also in this equation, as has been documented above, that a public official is not performing his or her official duties or acting in his official capacity twenty-four hours of each day. As one court has noted, while it is the general rule, even under the common law, that an officer may not contract in his official capacity for a matter in which he is interested, the contract must be "in point of fact a part of or germane to the official duties of his office. . . ." Polk Tp., Sullivan Co. v. Spencer, 259 S.W.2d 804, 805 (Mo. 1953). And, as the Court in Bennett, supra concluded, it is completely illogical to read a statute such as § 8-13-700 as applicable every time an official possesses an economic interest in an action, even where such action is not part of the

official's duties. The Bowsher case is also very clear that there must exist a clear nexus between the alleged wrongful conduct and the office. We do not believe there is such a clear nexus here.

In other words, it is not sufficient simply to be a "public official" to violate § 8-13-700. As a "public official," that official must also have "used" his office to reward himself or his family. The House Ethics Committee put it well by noting that, in order for § 8-13-700 to be triggered, "the activity or use must be related to the Caucus Member's official capacity, not something that is collateral to the activities." Our own opinions emphasize that where the activity is "unrelated" to official duties, § 8-13-700 simply does not apply. Based upon the information you have provided, such is the case here. We do not believe a Majority Leader "uses" his office to obtain a contract providing political services to other Caucus members. Such is not an "official" duty of a member of the General Assembly.

Indeed, many, if not most, members of the General Assembly have other jobs, such as the practice of law, serving as school officials, pharmacists, etc. As we recently noted, "[t]he office of a South Carolina legislator, like many other offices, is a part-time position. The legislature generally meets three days per week while in session. . . . Therefore, it is reasonable to conclude most legislators hold some other type of employment." Op. S.C. Att'y Gen., 2013 WL 4636665 (July 26, 2013). Accordingly, the mere fact that a person must be a legislator to be a member of the Caucus or Majority Leader thereof does not answer the question. Still, the legislator must be "using" his office to obtain Caucus business for himself. We know of no official duties of a legislator, including the Majority Leader, to provide political services to the Caucus any more than there is for a lawyer-legislator to provide legal services for a compensation to a fellow legislator. Each is done in the legislator's private capacity. A legislative caucus is a political body created by House or Senate rules and subject to each General Assembly changing those rules. See Evansville Courier v. Willner, supra [caucus is a "political meeting"]; Op. S.C. Att'y Gen., 2006 WL 1574910 (May 19, 2006) [Majority Caucus is subject to Rules of House]. Such partisan, political activities are generally not "public." See Op. S.C. Att'y Gen., 1963 WL 11390 (August 7, 1963) [public funds generally cannot be used for campaign purposes]. It is also our understanding that the Republican Caucus is a 527 "political organization," for purposes of the IRS. The Mountain Hill case distinguished a legislative body from a partisan caucus. And, the House Ethics Committee concluded that a legislative caucus is not part of a legislator's "official office" or "official capacity," but is collateral to those activities. We believe that Opinion's conclusion is correct.

It is especially important to emphasize that the Legislature assisted in defining the "use" of one's office or official position for economic benefit through the addition of the second sentence of § 8-13-700(A). Such provision states that "[t]his prohibition does not extend to the incidental use of public materials, personnel or equipment subject to or available for a public official's, public member's or public employee's use that does not result in additional public expense." (emphasis added). Such a "no additional public expense" exception -- added in 1991 as part of ethics reform and amendment of the "old" Ethics Act -- is a recognition by the Legislature that public funds may not be expended for private purpose. And, this exception allows public officials, such as law enforcement officers, to work in other capacities, so long as there is no public expense involved or

such expense is de minimis. Law enforcement officers, for example, are permitted by this provision to work and be paid in their off-duty hours, and to use their equipment, so long as there is no additional public expense. Similarly, based upon the information you have provided, a member of the Caucus may be compensated for the provision of political services to other members of the Caucus, provided no public expense is involved. As we noted in our 2006 FOIA Opinion, any public expenses related to the Caucus are, at most, de minimis. The House Ethics Committee cited and relied upon this second sentence of § 8-13-700 in concluding that there was no violation of the statute in this instance. We do so here as well. Case law in other jurisdictions is in accord.

It is significant also that the definition of "legislative caucus committee" contained in § 8-13-1300 (21) reflects the Legislature's emphasis upon the constitutional power of each house to determine its own rules and procedures. In stating that "each house may establish" committees (caucuses) for political, racial, ethnic or gender-based affinity, the Legislature recognizes it is within the discretion and province of "each house" by rule to create caucuses. Thus, whether or not to even have legislative caucuses, what kind, how many, and what duties caucuses might perform is left entirely to the discretion of each house in accordance with Art. III, § 12 of the Constitution. Indeed, the origin of caucuses in the South Carolina General Assembly is a relatively recent occurrence, with the Legislative Black Caucus being formally organized in 1975 in response to the civil rights movement.

Such caucuses, moreover, may not exercise governmental power, consistent with the Constitution, because they represent partisan or racial, ethnic or gender-based interests. Thus, a member of these caucuses is not "using" an office even though he or she is a legislator. In our opinion, § 8-13-700 is not violated in the circumstances raised by you.

Your other question is answered by the fact that this is a legitimate campaign expenditure for political consulting services pursuant to § 8-13-1348. As the State Ethics Commission has recognized, Section 8-13-1348 "gives the public official and candidate broad discretion in determining what is an ordinary expense or related campaign expense." Based upon that "broad discretion," once it is acknowledged that legitimate bona fide campaign services are involved, that should end the matter. We know of nothing in the Ethics Act which makes criminal a public official's expenditure of campaign funds for campaign services provided by his own business so long as such services are bona fide. It is well recognized that the same conduct may not be legal and illegal at the same time. Thus, if the expenditure is a valid campaign expenditure pursuant to § 8-13-1348, which is a fact-specific issue, and one which we are unable to address in an opinion of this Office, it is not rendered illegal by § 8-13-700. One provision concerns use of campaign funds, while the other, the misuse of one's public office or employment. One involves campaign funds (§ 8-13-1348), while the other, public funds (§ 8-13-700). As noted, Opinions of both the State Ethics Commission and the Federal Election Commission fully support our conclusion in this regard.

Thus, it is our opinion that based upon the information provided, the answer to each of your questions is "no." While we provide our opinion herein, we emphasize that the ultimate decision as to whether or not to prosecute in a given circumstance rests with you as Solicitor. The Solicitor is in possession of all the facts, which we cannot determine here. As you are well aware, a criminal prosecution for a violation of the Ethics Act requires the demonstration of a mens rea. Section 8-13-700(A) contains a "knowingly" requirement. The standard for a civil matter, such as a matter before the House Ethics Committee, is much lower than the "beyond a reasonable doubt" standard for criminal cases. Because the statutes in question carry criminal penalties, in the context of criminal prosecution, all doubt is resolved against the State. Moreover, an "accused may not be convicted on mere suspicion." State v. Dallaire, 182 A.2d 341, 342 (Conn. 1962). Thus, we provide this opinion for its value to you in assisting in making any prosecutorial decision.

Sincerely,

Robert D. Cook
Solicitor General