

EXECUTIVE CHAMBER POLICY ON EXECUTIVE USE OF STATE AIRCRAFT

This shall constitute the Executive Chamber's policy for use of State aircraft by or at the direction of the Governor or Lieutenant Governor ("Executive use").¹ Executive use of State aircraft is subject to review by Counsel and approval by the Secretary to the Governor.

Permitted Travel by the Governor and Lieutenant Governor for State Purposes

- The Governor and the Lieutenant Governor have a Statewide constituency and Statewide responsibilities. Consequently, they and State officers serving as their aides and designees, may use State aircraft to facilitate performance of State business and fulfill their responsibilities to persons throughout New York State.
- State aircraft may be used to transport the Governor, Lieutenant Governor, State officers serving as their designees or aides, staff, and security detail to/from any location (including, but not limited to their homes or official workstations) to conduct State business at any location.
- The primary purpose of any trip must be a bona-fide State purpose that is not merely a pretext for engaging in non-State business. This means that the trip must be for the purpose of discharging the State officer's public responsibilities and must directly relate to conducting bona-fide-State business.
- State aircraft may not be used to transport the Governor, Lieutenant Governor, or State officers serving as their designees, aides, staff, or security detail, as the regular or standard mode of daily commuting between any person's homes and official workstations, unless a security assessment by the Governor's or Lieutenant Governor's security detail or other division of the State Police warrants such use.

Permitted Travel by Others

- State aircraft may be used to transport State personnel providing professional support for the Governor or the Lieutenant Governor for the bona-fide-State purpose of the trip.
- The Governor's or Lieutenant Governor's immediate family² may accompany the Governor or Lieutenant Governor on the State aircraft.

¹ This policy is based on the Public Officers Law and interpretations thereof by the Joint Commission on Public Ethics and its predecessors.

² For purposes of this policy the "immediate family" includes the Governor's or Lieutenant Governor's spouse, domestic partner, the Governor's or Lieutenant Governor's adult children and their spouses, the Governor's or Lieutenant Governor's minor children, or minor children for whom the officials are serving as "in loco parentis". Other family members like parents or brothers and sisters may accompany the Governor or Lieutenant Governor when that family member is serving an official role that benefits the people of the State of New York.

- In specific circumstances, the Counsel to the Governor may approve a non-State person to join the Governor, Lieutenant Governor, or a State officer serving as their designee, so long as the non-State person is traveling in furtherance of a bona-fide-State purpose.

Reimbursable Travel for “Mixed Purpose”

- When the State aircraft is used to facilitate a “mixed purpose” trip, reimbursement shall be made. Again, the primary purpose of the “mixed purpose” trip must be a bona-fide-State purpose that is not merely a pretext to engage in non-State business.
- When State aircraft is used to transport any passenger for a State purpose and a non-State purpose (a “mixed purpose”), the State officer shall make a clear record of time spent on State and non-State purposes, apportion the time spent between such purposes (not including incidental personal time) and promptly reimburse the State, based on current charter costs, not commercial flight rates for the portion of such trip attributable to non-State use.
 - Incidental personal time or “down time” includes activities such as eating or resting, between government activities. Incidental personal time is not counted towards the total hours of the day for apportionment purposes. There is no reimbursement required for incidental personal time.
- An official State trip may conclude when the Governor or Lieutenant Governor or the State officer serving as their designee, reaches their official workstation or their home, so long as the aircraft is not used for the remainder of the day.
- The Executive Chamber has established a protocol for the review of Executive aircraft use to ensure that appropriate reimbursements are being made promptly. The review will be conducted on a monthly basis, and reimbursement will be made by the end of the following month. For example, reimbursement should be made by the last day of February for any State aircraft use that requires reimbursement for the month of January.
- Executive Chamber staff involved in the Governor and Lt. Governor’s schedule, should ensure that their schedules are accurate for apportionment purposes.
- In calculating apportionments for reimbursement, the following guidelines should be used:
 - The State Police flight log to be used as the most accurate time of flight departure.
 - The long form calendar to be used as the most detailed schedule, and should be reviewed for purposes of determining the length of the specific events attended during the relevant travel period.

- Assume the Governor/Lt. Governor is conducting State business other than the times where the schedule indicates personal, political, or incidental personal use. However, the travel time between two or more consecutive non-State events should be considered time for non-State purposes and should be included for apportionments towards reimbursement.
- Reference to the ethic agencies' Advisory Opinions 13-02, 07-05, and 07-03 or any subsequent advisory opinions should be made. Any questions should be directed to the Executive Chamber's Ethics Counsel.

Attachments

- Appendix A: Aviation Request Form (Submit to State Police)
- Appendix B: State Aircraft Purpose Approval Form (Approvals Required)
- Appendix C: Reimbursement Review Checklist and Sign-off Sheet
- Appendix D: Advisory Opinions 13-02, 07-05, 07-03

Appendix A

AVIATION REQUEST FORM

TO: New York State Police - Aviation

FROM: Devan Cayea, Director of Scheduling 518-369-1697

SUBJECT: STATE AIRCRAFT REQUEST

DATE OF REQUEST:

SPECIFY AIRCRAFT REQUESTED: King Air Helicopter Sikorsky Helicopter

**** NOTE:** Aircraft (helicopter or plane) request is subject to schedule and weather changes. ******

REQUESTING OFFICE: State of New York Executive Chamber

OFFICE CONTACT:

(Contact name and phone number for requesting office)

DATE OF TRAVEL	TIME	DEPART FROM (airport)	ARRIVE AT (airport)

PASSENGERS: (INCLUDE TITLES):

Governor Kathy Hochul

Executive Chamber staff (list separately by name and title):

Other passengers (list separately by name and agency/title if applicable):

NYSP Protective Detail (list by name/rank):

Appendix B

STATE AIRCRAFT PURPOSE APPROVAL FORM

To: Elizabeth Fine, Counsel to the Governor & Karen Persichilli Keogh, Secretary to the Governor

From:

Date:

Subject: Use of State Aircraft

This memorandum requests use of State aircraft consistent with the Executive Policy on State Aircraft on the following basis:

Travel to/from home or official work station from a location other than official work station for State business (specify):

Travel to/from location(s) other than home or official work stations to conduct State business (specify):

Time and circumstances warrant, and the public good would benefit from, the use of State aircraft for travel between official work station and home to facilitate the conduct of State business and the fulfillment of official responsibilities (specify):

Other Travel: (specify):

Persons on State aircraft

Provide copy of Aviation Request Form.

If non-Executive Chamber staff on flight, state reason for traveling in State aircraft:

Note any expectations:

Potential mixed use of State aircraft which may require reimbursement.

If there is mixed use, attach proposed schedule(s) for the dates State aircraft is being used.

APPROVED by:

Elizabeth Fine, Counsel
Dated:

Karen Persichilli Keogh, Secretary
Dated:

Appendix C

STATE AIRCRAFT CHECKLIST FORM

Task	Form Used	Owner(s)	Sign off (initials)	Sign off Date
Date(s) of Mixed-Use Flight(s):				
Enter Date Here				
Collection of supporting documents for reimbursement:				
Review Aviation Request Form	Aviation Request Form	Counsel		
Review Aviation Purpose Form & Approvals Were Signed	Aviation Purpose Form	Counsel		
Confirm long form schedule is accurate		Scheduling		
Obtain State Police Flight Log		Scheduling		
Obtain travel Letter provided by State Police		Scheduling		
Post-flight review by Scheduling & calculate reimbursement		Scheduling		
Obtain flight cost		Scheduling		
Post-flight review by Counsel		Counsel		
Request for reimbursement	Email	Counsel		
Confirm reimbursement by end of the follow month		Special Counsel		

Appendix D

Advisory Opinion 13-02

STATE OF NEW YORK

JOINT COMMISSION ON PUBLIC ETHICS

Advisory Opinion 13-02: General standards for the use of State aircraft by the Governor of New York State.

INTRODUCTION

The Executive Chamber has requested guidance from the Joint Commission on Public Ethics (“Commission”) on the use of State aircraft by the Governor of the State of New York (“Governor”) under Public Officers Law §74(3)(h). Specifically, the Executive Chamber requested that the Commission provide guidance in each of the following four scenarios:

1. Flights from the Governor’s home in Westchester, New York to conduct State business in a location other than Albany, New York.
2. Occasional flights between the Governor’s home in Westchester and Albany.
3. Whether minors entrusted to the care of the Governor may accompany the Governor on State aircraft without reimbursement to the State for their travel?
4. When does a one-way trip using State aircraft end if the destination is the Governor’s official business location (Albany and New York City) or his home (Westchester)?

These questions are answered below. As explained in Section II, in addressing the issues raised by the Executive Chamber, the Commission has established a general standard for the use of State aircraft by the Governor as well as clarified the application of certain rules set forth in Advisory Opinions 07-03 and 07-05, guidance that was issued by the Commission’s predecessor agencies.

I. BACKGROUND

Security concerns dictate that when the Governor travels his transportation is arranged by the Protective Services Unit (“PSU”). The PSU is a division of the New York State Police (“NYSP”) and is responsible for providing protection to the Governor, Lieutenant Governor, visiting dignitaries, and other persons designated by the Superintendent of the NYSP. Given that New York spans more than 47,000 square miles of land, questions concerning the logistics of the Governor’s travel, including the appropriate mode of transportation, regularly arise. The two most common, if not exclusive, forms of transportation that the Governor uses are cars and aircraft (planes and helicopters).

With respect to travel by aircraft, the NYSP has a fleet of airplanes and helicopters in Albany that is used for a variety of State police purposes. Within this fleet, the King Air B200

plane and the Bell 430 helicopter are typically used to transport the Governor. The King Air B200 is a turboprop plane that can accommodate two crew members and up to seven passengers. The Bell 430 is a twin engine helicopter that can accommodate two crew members and up to four passengers.

The State's aircraft are purchased and maintained by the NYSP, which is also responsible for all the operational and maintenance costs of the aircraft, including the salaries of pilots and other personnel responsible for maintenance and operations. The NYSP's use of its aircraft, as well as these associated costs, are unrelated to use by the Governor. The only significant additional costs to the State associated with the Governor's utilization of State aircraft are fuel expenses.¹

II. DISCUSSION

A. Public Officers Law §74

The use of State aircraft by public officials, including the Governor, implicates the provisions of Public Officers Law §74. This portion of the State's code of ethics addresses both actual and apparent conflicts of interest and sets forth the standards against which State officers and employees must conduct their activities. As the Office of the Attorney General explained more than three decades ago, underlying Section 74 is the principle that public officials have an obligation to avoid even the appearance of a conflict between their official duties and private interests:

A public official must not only be innocent of any wrongdoing, but he must be alert at all times so that his acts and conduct give the public no cause for suspicion. He must give no appearance of a potential conflict between his duties and personal activities even though an actual conflict is not present.²

To this end, Public Officers Law §74 contains a number of provisions governing the conduct of public officials. Two of those provisions are applicable here. First, Public Officers Law §74(3)(d) prohibits a public official from securing unwarranted benefits through the use of State resources:

No officer or employee of a state agency, member of the legislature or legislative employee should use or attempt to use his or her official position to secure unwarranted privileges or exemptions for himself or herself or others, including but not limited to, the misappropriation to himself, herself or to others of the property, services or other resources of the state for private business or other compensated non-governmental purposes.³

¹ This and other information concerning State aircraft was provided to the Commission by the Executive Chamber.

² 1979 Op. Atty. Gen. 66.

³ Public Officers Law §74(3)(d).

Second, Public Officers Law §74(3)(h), obligates a public official to conduct himself in a manner that will not raise suspicion that he has violated the public trust:

An officer or employee of a state agency, member of the legislature or legislative employee should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust.⁴

B. Standard for General Use of State Aircraft by the Governor

It is well-established that in order for the Governor to fulfill the responsibilities of the office he must travel throughout the State. From a Public Officers Law perspective, then, the use of State resources for such travel is clearly appropriate and does not violate Section 74. Thus, the issue raised by the questions posed to the Commission is the use of a particular *mode* of travel – aircraft – by the Governor and its implications with respect to the Governor’s obligations under Public Officers Law §74.

As a general matter, the Commission’s predecessor agencies – the New York State Ethics Commission (“NYSEC”) and the Commission on Public Integrity (“COPI”) – implicitly recognized that the Governor’s use of State aircraft to travel for State business does not violate the Public Officers Law. Acknowledging the scrutiny that non-commercial aircraft use elicits, NYSEC, in Advisory Opinion 07-03, and COPI, in Advisory Opinion 07-05, set forth guidelines regarding when and how public officials (including the Governor) are to reimburse the State for the use of aircraft when the trip is for a so-called “mixed purpose,” *i.e.*, both State and non-State business are conducted on the trip.

The NYSEC and COPI opinions did not directly address the conditions under which the general use of State aircraft by the Governor comports with the Public Officers Law. Consequently, and in order to resolve any ambiguities that may exist with respect to the matter, the Commission provides that standard here:

- (i) the primary purpose of the trip is for *bona fide* State business;
- (ii) the trip is not being used as a pretext to engage in non-State business;⁵ and
- (iii) use of State aircraft is consistent with an internal written policy, approved by Counsel to the Governor, which provides clear guidelines for such use.⁶

⁴ Public Officers Law §74(3)(h).

⁵ Non-State business includes both personal and political activities. Pursuant to Advisory Opinion 07-05, it does not include “incidental personal time or ‘down time’ between government” business.

⁶ In Advisory Opinion 07-03, NYSEC established criteria for a “mixed purpose” trip, including that “there must be a *bona fide* State purpose for the trip” and that the “State purposes must be the primary reason for the trip.” Advisory Opinion 07-03. These two criteria are contained within the first requirement above. Additionally, Advisory Opinion 07-03 states that the Public Officers Law would be violated if “the State business reason

The Commission is not prescribing a specific policy. Rather, the requirements above constitute the minimum standard for a policy pursuant to which the use of State aircraft by the Governor would comply with Public Officers Law §74.

C. Question No. 1: Use of State Aircraft by the Governor for Transportation Between Home and Locations Other than Albany

The specific question posed by the Executive Chamber is whether the use of State aircraft by the Governor for travel from his home in Westchester to locations other than Albany for State business is appropriate under the Public Officers Law. This question is answered by the application of the standard set forth in Section II.B. Consequently, the Governor's use of State aircraft between his home in Westchester and locations other than Albany does not violate the Public Officers Law as long as such travel meets the standard above.

D. Question No. 2: Occasional Use of State Aircraft by the Governor for Transportation Between Albany and Westchester

The next question asked by the Executive Chamber is whether occasional transportation between the Governor's home in Westchester and his workplace in Albany using State aircraft comports with Public Officers Law §74. Certainly, State resources can and should be used to transport the Governor to and from work, especially given security concerns. The use of State aircraft for such travel, then, is also governed by the standard in Section II.B. For example, the occasional use of State aircraft by the Governor for travel between Westchester and Albany based on security or scheduling needs, if consistent with an internal policy approved by Counsel, would satisfy the standard in Section II.B above. However, given that the use of State aircraft has the potential to generate appearance issues that implicate Public Officers Law §74, the use of State aircraft as the standard mode of daily commuting, in the absence of other facts and circumstances justifying the need for travel by plane or helicopter, would not satisfy the standard in Section II.B.

E. Question No. 3: First Family and Certain Minor Children on State Aircraft

The specific question posed by the Executive Chamber is whether minor children entrusted to the Governor's care and protection may accompany him on State aircraft. This requires that the Commission address formally a larger question on which a predecessor agency had provided informal guidance: What members, if any, from the Governor's family may travel with the Governor on State aircraft?⁷

proffered for the trip is nothing more than a pretext to permit ... the use of State aircraft for non-State activities." This condition is encompassed by the second requirement above. This Advisory Opinion, then, is to be construed as adding a requirement – that the use of State aircraft is consistent with a written policy approved by the Governor's Counsel – to the criteria and conditions identified in Advisory Opinion 07-03.

⁷ One of the Commission's predecessor agencies issued an informal, non-published opinion, in response to a request from the then-sitting Governor, in which it held that the Governor does not violate the Public Officers Law when the "First Family" (defined in the informal opinion as "immediate family") travels with the Governor on State aircraft. This Advisory Opinion makes formal that conclusion while providing a more concrete definition of First Family.

With respect to this larger question, the Commission finds that the First Family may travel with the Governor on State aircraft without the need for the Governor to reimburse the State. The First Family is defined to include the children (natural, adopted, and step-children) and spouse or domestic partner of a Governor.⁸

Permitting the First Family to accompany the Governor on State aircraft when he is traveling for a *bona fide* State purpose does not run afoul of the Public Officers Law. It is well-recognized that members of the First Family receive, along with the Governor, certain services and amenities that accompany the State office. By way of example, the First Family may be protected by the PSU and may receive security when traveling. Additionally, the First Family may live with the Governor in the Executive Mansion without raising Public Officers Law concerns. The Commission finds that travel with the Governor on State aircraft falls well within these generally accepted practices.

The answer to the narrower and more specific question presented by the Executive Chamber follows from the general rule pertaining to travel by the First Family. The Commission finds that when the Governor's use of State aircraft meets the standard in Section II.B, minor children who are not part of the First Family may accompany the Governor on State aircraft without the need to reimburse the State provided that the Governor is acting, during the relevant time, as the custodian or guardian of such children or is otherwise primarily responsible for their care.

F. Question No. 4: Specific One-Way Trips Where State and Non-State Business Are Conducted

The fourth question posed by the Executive Chamber concerns Advisory Opinions 07-03 and 07-05 and the issue of when a trip using State aircraft concludes. By way of background, in those opinions, NYSEC and COPI established rules and a framework by which public officials are to reimburse the State for the use of aircraft when the trip is for both a State and a non-State purpose (referred to as a "mixed purpose" trip). Advisory Opinion 07-03 sets forth the rule that for a mixed purpose trip, the State official "must make an accurate apportionment of the time spent on State and non-State business and be responsible for promptly reimbursing the State for the portion of the flight that is allocable to non-State business."⁹ Additionally, such reimbursement is to be made at "rates based on current charter costs."¹⁰

⁸ New York recognizes that domestic partners are entitled to certain benefits and rights. For example, the State Department of Civil Service allows an enrollee in the New York State Health Insurance Program to provide coverage to his or her domestic partner. *See* State of New York Department of Civil Service PS-425 (dated May 2011). Additionally, the New York State Family Health Care Decisions Act empowers a domestic partner to be a surrogate for his or her partner with respect to health care decisions. *See* N.Y. Pub. Health Law §2994-d (2012). The statute also contains a definition of "domestic partner," *see* N.Y. Pub. Health Law §2994-a(7) (2012), which informs the Commission for purposes of determining the composition of the First Family.

⁹ Advisory Opinion 07-03.

¹⁰ *Id.* The requirement that reimbursement to the State is based on charter flight rates is premised on the value of the benefit to the individual utilizing the aircraft. It is not based on the costs incurred by the State from the flight. As noted above, the additional cost to the State associated with a given individual's use of State aircraft is primarily the fuel consumed on the trip. For instance, the fuel cost for a plane trip between Westchester and Albany is approximately \$375 for the thirty minute flight. The same trip using a helicopter is approximately \$280. If the

In Advisory Opinion 07-05, COPI addressed questions concerning applications of the rule established in Opinion 07-03. Specifically, COPI stated that “if a public official engages in a political activity after he or she has returned on the State aircraft to the point of departure for the trip, the trip has *concluded* and there is no need to reimburse the State.”¹¹ The opinion also set forth the rule for one-way trips, stating that “if the aircraft is used for one-way of a trip, the official must reimburse the cost that would be charged by a private charter company for a one-way trip comparable to the State official’s trip.”¹² Finally, for multi-day trips, COPI established that any required apportionment is to be made on a daily basis, determined by the State and non-State activities conducted each day of the trip.¹³

The Executive Chamber has asked the Commission to provide guidance as to when a one-way trip has concluded where the destination of the flight is either New York City, where the Governor has an official office, or Westchester, where the Governor lives. As noted above, Advisory Opinion 07-05 recognized the concept that no reimbursement to the State is required after a trip has concluded. It also established that one-way trips, like other trips using State aircraft, are subject to the apportionment and reimbursement rule. The Opinion left open, however, the question of when, if at all, a one-way trip using State aircraft concludes for the purposes of determining if reimbursement to the State is required.

The Commission rules that when the Governor uses State aircraft consistent with the standard in Section II.B for a trip to one of his official work locations (New York City and Albany) or his home (Westchester) **and** does not use State aircraft for the remainder of that day, his trip is deemed to have concluded upon his arrival at any of these three locations. Consequently, and consistent with Advisory Opinion 07-05, non-State business conducted after the trip has concluded on that day does not require the Governor to reimburse the State. Examples of the application of this rule for the Governor’s use of State aircraft consistent with the standard in Section II.B follow:

Example 1: After having conducted State business in Buffalo, the Governor flies to New York City. While in New York City, the Governor conducts State business and attends a political fundraiser. Later that same day, the Governor travels home to Westchester by car. This trip concludes when the Governor arrives in New York City. Consequently, the Governor is not required to reimburse the State for any portion of the plane trip.

Governor travels by car, the trip for him and his security team takes approximately two hours and uses approximately \$50 in fuel. Conversely, charter flight rates are substantially higher, in part, because they typically account for operational and other costs, as well as profit margins.

¹¹ Advisory Opinion 07-05 (emphasis added).

¹² *Id.* To the extent that Advisory Opinion 07-05 appears to require that a public official must reimburse the State for the total cost of a one-way mixed purpose trip and not apportion the trip between State and non-State business as is required for round-trip or multiple day travel, this requirement would be completely inconsistent with the apportionment rules set forth within the opinion itself and in Advisory Opinion 07-03. Thus, the Commission interprets the language in Advisory Opinion 07-05 concerning one-way flights as mandating that, to the extent apportionment is required, it is to be based on “the cost that would be charged by a private charter company for a one-way trip comparable to the State official’s trip.” Advisory Opinion 07-05.

¹³ *Id.*

Example 2: After having conducted State business in Buffalo, the Governor flies to New York City. While in New York City, the Governor conducts State business and attends a political fundraiser. Later that same day, the Governor flies to Albany. This trip concludes when the Governor arrives in Albany. Consequently, the Governor must reimburse the State for a portion of the cost of the plane trips from Buffalo to New York City and then to Albany. The reimbursement is based on the apportionment of State and non-State business conducted during the trip.

Example 3: The Governor flies from his home in Westchester to Syracuse to conduct State business. After the State business is concluded, he attends a political fundraiser. *Later that same day*, the Governor flies home to Westchester. This trip concludes when the Governor arrives back in Westchester. Consequently, the Governor must reimburse the State for a portion of the cost of the round trip from Westchester to Syracuse. The reimbursement is based on the apportionment of State and non-State business conducted during the trip.

Example 4: The Governor flies from his home in Westchester to Syracuse to conduct State business. After the State business is concluded, he attends a political fundraiser. *The next day*, the Governor flies home to Westchester. This trip concludes when the Governor arrives back in Westchester. The Governor must only reimburse the State for a portion of the cost of the flight from Westchester to Syracuse on the first day of the trip, however, because apportionment is done on a daily basis. The reimbursement is based on the apportionment of State and non-State business conducted during the first day of the trip.

Example 5: The Governor flies from Albany to Syracuse where he conducts both State and non-State business. That same day, the Governor drives to Utica and stays there overnight. Because the Governor is not returning to his home or one of his two official work locations, the trip has not concluded. Consequently, the Governor must reimburse the State for a portion of the cost of the flight from Albany to Syracuse. The reimbursement is based on the apportionment of State and non-State business conducted during his time in Syracuse.

This rule is merely an extension of the rationale in Advisory Opinion 07-05 as to when a trip using State aircraft concludes. The logic behind a rule that considers a trip to have concluded when the Governor returns on State aircraft to the “point of departure” applies equally to a trip where the Governor ceases to use State aircraft after arriving at his home or work locations. In both instances, the Governor’s use of State aircraft has concluded. It should make no difference if the Governor is physically present on the State aircraft when it returns to the

point of departure. The operative factor, instead, is when the Governor's use of State aircraft ceases.

This opinion is issued pursuant to the Commission's authority under Executive Law §94(16). The opinion, until and unless amended or revoked, is binding on the Commission in any subsequent proceeding concerning the person who requested it and acted in good faith unless material facts were omitted or misstated in the request for opinion.

Concur:

Hon. Janet DiFiore, Chair

Daniel J. Horwitz

Patrick J. Bulgaro

Marvin E. Jacob

LaShann M. DeArcy

Seymour Knox, IV

Hon. Vincent A. DeIorio

Gary J. Lavine

Mitra Hormozi

Hon. Mary Lou Rath

Absent:

Hon. Joseph Covello

George H. Weissman

David A. Renzi

Ellen Yaroshefsky

Dated: March 28, 2013

Advisory Opinion No. 07-05

Extension of Advisory Opinion No. 07-03: standards for the use of State aircraft by public officials for State and non-State travel.

Introduction

The Governor's Office ("Office"), in a letter dated September 19, 2007, has requested clarification of Advisory Opinion No. 07-03 (cited as "Opinion"), which pertains to the use of the State aircraft by public officials when a trip by the State official involves both State and non-State business.

Pursuant to the authority vested in it by Executive Law §94(15), the New York State Commission on Public Integrity ("Commission") renders its opinion that State officials and employees may use State aircraft provided they abide by the standards set forth in this opinion.¹

Background

In Advisory Opinion No. 07-03, the Commission established standards for use of the State aircraft by public officials for State and non-State travel. The Commission concluded that when a State official uses State aircraft for a mixed-purpose trip, the following requirements must be met to satisfy the provisions of the Public Officers Law: (i) there must be a bona fide State purpose for the trip; (ii) the State purpose must be the primary reason for the trip; (iii) the public official must make an accurate apportionment of the time spent between State and non-State business and promptly reimburse the State for that portion of the trip not related to State business; (iv) such reimbursement must be based on current airplane charter costs, not commercial flight rates; and, (v) the State official must report to the Executive Chamber details of the activities engaged in by the official while on a mixed-purpose trip using State aircraft, and the information should be made available to the public through the Freedom of Information Law ("FOIL") request, except to the extent the public disclosure would jeopardize the security of the public official.

The Commission also stated that Public Officers Law §74 "would be violated if the State business proffered as the reason for the trip is nothing more than a pretext to permit the State official's use of State aircraft for non-State activities, particularly partisan political activities." The Commission concluded that these standards satisfied Public Officers Law §74 and further indicated that "[p]ublic officials must follow the letter and the spirit of these guidelines."

The Office seeks clarification as to the application of these standards in six areas. First, the Office asks whether reimbursement is necessary only when the non-governmental business is attendance at a political event, or whether reimbursement is required for time spent on any non-governmental business, political or otherwise. For example, the Office asks if an official who uses State aircraft to travel from Albany to Rochester for six hours of governmental meetings must reimburse for time spent having lunch or for "down time" between scheduled official meetings. The Office notes that the federal government does not require reimbursement for

personal activities engaged in during such official trips nor, in its opinion, should a public official incur personal, financial costs for these activities.

Second, the Office states that a public official, such as the Governor, may travel to different locations over several days, and asks how to allocate the time the Governor would spend on non-governmental, non-political matters such as eating, sleeping or being with his family. Further, when there is multi-day travel, the Office asks how to calculate the time spent on political activities if a political event occurs on one-day of a multi-day trip.

Third, in its letter, the Office states that the standards in Advisory Opinion No. 07-03 do not address whether other passengers accompanying the official on a mixed-use trip, such as staff members, are also required to reimburse the State. The Office observes that once an official has reimbursed the State for the political portion of a mixed-use trip, there is no need for additional reimbursement because the State has been made whole. The Office asks whether this is correct.

Fourth, the Office asks whether the source of the reimbursement for non-State business may be from personal or campaign funds.

Fifth, the Office seeks clarification on calculating reimbursement for non-State business when a public official uses the State aircraft to travel one-way without use of the aircraft for the return trip. In its letter, the Office states that it is not possible to "make an accurate apportionment of the time spent on State and non-State business" as there is no "end-point" for the trip.

Finally, the Office observes that there may be situations when use of the State aircraft is the only means of transportation available to permit a public official to attend a State meeting or event. The Office posits that if there are political events later in the day after the governmental business, it would appear that no reimbursement to the State is necessary if the sole basis for using the aircraft is to attend to State business, since the official would not have otherwise used the aircraft.

Similarly, the Office seeks clarification for a situation in which a public official, such as the Governor, uses the State aircraft to fly home following meetings or events that were official State business, and thereafter attends a political event in the evening on the day of the flight, but after the trip has concluded. The Office asks whether attendance at the political event requires reimbursement since, the Office observes, the Governor would have used the State aircraft to return home even if there were no political event.

Discussion

The Commission will address each of the questions in order.

1. Incidental Personal Time Spent During Government Trips

Assuming the standards enunciated in Advisory Opinion No. 07-03 are met, a State official will not have to reimburse the State for incidental personal time or "down time" between government meetings. This is consistent with federal regulations.²

Thus, in the example described in the Office's letter, if an official uses the State aircraft to travel from Albany to Rochester for six hours of official meetings in the morning and afternoon, reimbursement is not required for the two hours between the meetings when no State work is undertaken, because the two hour block was necessitated by the scheduling of the official State business events.

2. Multi-Day Travel

The Office asks how to allocate non-governmental, non-political time, such as eating, sleeping, or being with family, when a public official, such as the Governor, is traveling for more than one day.

The same standards discussed in Section One above apply to this situation as well. If the Governor's travel plans are for a bona fide State purpose, the State purpose is the primary reason for the trip, and the reason for the trip is not a pretext to permit engaging in non-State activities, then reimbursement is not required for time spent on non-State business such as eating, sleeping or being with family. The trip is considered official State business.

The Commission held in Advisory Opinion No. 07-03 that public officials must comply with the letter and the spirit of its standards for the use of State aircraft. Accordingly, if the trip, in fact, is arranged to facilitate personal activities, a reasonable perception is created that the public official is using State resources for personal gain.

With respect to the methodology for calculating the time spent on political activities if a political event occurs on one-day of multi-day travel, the Commission considers each day of a multi-day trip independently. For example, if a public official spends seven hours on official government business on Monday in Syracuse, six hours on official business and two hours on political activity on Tuesday in Buffalo, and then seven hours on official business in Rochester on Wednesday before returning to Albany, the official must apportion the costs of the use of the State aircraft from Syracuse to Buffalo and Buffalo to Rochester. Since one-fourth of the total activity time in Buffalo, or two hours of the eight hours, was spent on political activity, the public official must reimburse the State one-fourth of the costs for that portion of the trip to Buffalo. The public official need not reimburse the State for the trip from Rochester, where only State business was conducted, to Albany.

3. Multiple Passenger Travel

The Office requests clarification concerning the allocation of costs in those instances when staff of an official accompanies the official on the aircraft. Reimbursement is not required when staff travels with the official to provide assistance during the State business portion of the trip. Consistent with the federal regulations, reimbursement also would not be required for those staff who attend a political event because they are required, in the course of their duties, to accompany the public official, such as security personnel.³

The Commission noted that the standards set forth in Advisory Opinion No. 07-03 are binding on the respective staffs of the four elected officials. See, endnote 3. Therefore, to the extent that a

staff member is engaged in the political portion of a trip, reimbursement to the State is required. Such activities also must not be in violation of Public Officers Law §74, the Code of Ethics. See, e.g., Advisory Opinion Nos. 92-16, 97-4, 98-12.

When there are staff members who travel with a State official to engage in political activity not in the course of their State duties, the amount to be reimbursed to the State for the use of the State aircraft must be divided by the number of these individuals who are on the flight. For example, if the Governor and three staff members engage in political activity for two hours of a trip, the cost allocated for the political portion of the trip should be divided by four. However, the total amount to be reimbursed is not to exceed the total cost for the non-State business portion of the flight. It is not the purpose of Advisory Opinion No. 07-03 to generate profit for the State. Rather, the purpose of the Advisory Opinion's standards is to require those who incur the costs for using State property for non-State purposes to reimburse the State for those non-State costs.

4. Sources of Reimbursement

With regard to sources of reimbursement, the State official must take steps to ensure that the State is correctly reimbursed for the use of State resources for non-State purposes. With regard to seeking reimbursement from campaign committees, the State official must seek guidance from those authorities that regulate the use of campaign funds.⁴

5. One-Way Travel

The Office asks how to calculate costs between State business and non-State business in those instances when an official uses the State aircraft to fly only one-way of the trip.

As stated in Advisory Opinion No. 07-03, the Commission considers the use of the State aircraft to be akin to traveling by private charter aircraft. Therefore, if the aircraft is used for one-way of a trip, the official must reimburse the cost that would be charged by a private charter company for a one-way trip comparable to the State official's trip.⁵

6. "Sole Purpose" Aircraft Usage

The Office further asks whether there is to be reimbursement if the aircraft is the sole available means to attend the State related meeting, and there are political events attended by the State official later in the day after the conclusion of the governmental business. Whether the mode of transportation is the only available mode is not relevant to the determination of whether reimbursement is necessary.

No reimbursement is required if State aircraft is used solely to conduct State business. However, if the official spent a portion of the time on political activity in connection with the use of State aircraft, then reimbursement is required and apportionment of time must be undertaken under Advisory Opinion No. 07-03 in order properly to determine the reimbursement amount.⁶ Otherwise, the official will have used a State resource for a non-State purpose. Finally, if a public official engages in political activity after he or she has returned on the State aircraft to the point of departure for the trip, the trip has concluded and there is no need to reimburse the State.

Conclusion

The Commission concludes that: (1) a State official will not be required to reimburse the State for incidental personal time or the time between government meetings; (2) reimbursement is not required for time spent on non-State business, such as eating, sleeping or being with family, during multi-day trips provided that the standards in Advisory Opinion No. 07-03 are otherwise met; (3) reimbursement is required for the staff of public officials who attend political events, unless they are required as part of their official duties to accompany the public official, such as security personnel; (4) the State official must take steps to ensure that the State is correctly reimbursed for the use of State resources for non-State purposes, and must seek guidance from those authorities that regulate the use of campaign funds if seeking to reimburse from campaign funds; (5) if the aircraft is used for one-way of a trip, the official is to look to the cost that would be charged by a private charter company for a one-way trip comparable to the State official's trip; and (6) the unavailability of other modes of transportation is not relevant to the determination of whether reimbursement to the State is necessary when the State official, who is using State aircraft, attends political events during the trip. This opinion, until and unless amended or revoked, is binding on the Commission in any subsequent proceeding.

All concur:

John D. Feerick,
Chair

Daniel R. Alonso

Virginia Apuzzo

John M. Brickman

Andrew G. Celli, Jr.

Richard D. Emery

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David L. Gruenberg

Hon. James P. King

Hon. Howard A. Levine

Loretta E. Lynch

John T. Mitchell

Date: December 11, 2007

footnotes:

1. The Public Employee Ethics Reform Act of 2007 created the New York State Commission on Public Integrity. The new thirteen-member Commission assumed the powers and duties of the New York State Ethics Commission and the New York Temporary State Commission on Lobbying. See, Chapter 14 of the Laws of 2007. Executive Law §94(1) states that "[t]his section shall not revoke or rescind any regulations or advisory opinions issued by the state ethics commission and the temporary lobbying commission in effect upon the effective date," i.e., September 22, 2007.

2. 5 C.F.R. '734.503(c)(1) states, in part: "An employee covered under this subpart must apportion the costs of mixed travel based on the time spent on political activities and the time spent performing official duties. Prorating the cost of travel involves determining the "total activity time" which is the amount of time actually spent by the employee in meetings, receptions, rallies, and similar activities. Time spent in actual travel, private study, or rest and recreation is not included in the computation of total activity time. (Emphasis added).

3. 5 C.F.R. '734.503(b)[3] and [4], state, in part: "(b) For the purposes of this section, costs associated with a political activity do not include any costs that the Government would have or have incurred regardless of whether the activity was political. Examples of such costs are: [3] The compensation and expenses of any Government employee that is required in the performance of his or her duties to accompany or assist the person engaging in the political activity; and [4] The cost of special security arrangements for the person engaging in the political activity, including special transportation vehicles or methods."

4. It should be noted that a State official may not obtain reimbursement if the payment to the State is from a disqualified source, as defined in Advisory Opinion No. 94-16, or if reimbursement constitutes an unlawful gift pursuant to Legislative Law §1-c(j).

5. For example, a private charter company's cost may be different depending on whether the aircraft returned empty or with other passengers.

6. See, 5 C.F.R 734.503(c)(2). (2) The allocation method must be applied to all of the relevant costs of mixed travel.

New York State Ethics Commission

Advisory Opinion No. 07-03: Guidelines for the use of State aircraft by public officials for State and non-State travel

Introduction

The New York State Ethics Commission ("Commission") has been asked to provide guidelines on the proper use of State aircraft when a trip by a State official involves both State and non-State business ("mixed-purpose trip")⁽¹⁾ and the extent to which the official must reimburse the State for the portion of the trip not involving State business.⁽²⁾ Executive Law §94(15) authorizes the Commission to render advisory opinions on the requirements of Public Officers Law §§73, 73-a, and 74. Having now reviewed this subject, the Commission issues this opinion to inform State officials of the Commission's interpretation of the provisions of the Public Officers Law applicable to the use of State aircraft for mixed-purpose trips.⁽³⁾

The Commission concludes that when a State official uses State aircraft for a mixed-purpose trip, the following requirements must be met to satisfy the provisions of the Public Officers Law: (i) there must be a *bona fide* State purpose for the trip; (ii) the State purpose must be the primary reason for the trip; (iii) the public official must make an accurate apportionment of the time spent between State and non-State business and promptly reimburse the State for that portion of the trip not related to State business; (iv) such reimbursement must be based on current airplane charter costs, not commercial flight rates; and, (v) the State official must report to the Executive Chamber on the details of the activities engaged in by the official while on a mixed-purpose trip using State aircraft. The Commission expects that this information will be available to the public through the Freedom of Information Law ("FOIL") request, except to the extent the public disclosure would jeopardize the security of the public official.

BACKGROUND

The New York State Police maintains the State's aircraft fleet, which includes both fixed wing aircraft and helicopters. According to the State Police Aviation Unit Manual, there are fourteen authorized uses for State aircraft, including law enforcement operations, disasters, searches for criminal or noncriminal suspects, aerial firefighting operations, and official transportation of personnel when approved.

Historically, the Executive Chamber of the Governor's Office approves the use of State aircraft for executive travel. Under the current administration, in order to request use of State aircraft, a public official must complete a "Flight Request Information" form, which requires the following information: the date, departure and arrival times, the passengers traveling, the purpose of the flight, including a reference to the official State business being conducted, and a certification by the State official to the truth and accuracy of the information provided, together with approval by the Governor's Chief of Staff.

The Commission, in applying Public Officers Law §74, sets forth the following guidelines on the use of State aircraft for mixed-purpose trips. These guidelines shall apply prospectively only.

APPLICABLE STATUTE

The provision that provides the rule with respect to conflicts of interest for Executive Branch officials is found in Public Officers Law §74 subdivision (2), which reads as follows:

No officer or employee of a state agency, member of the legislature or legislative employee should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his duties in the public interest.

The Commission must examine the conduct of State officials and the use of State resources in light of Public Officers Law §74(3)(d) and (h), which state the relevant standards of behavior:

d. No officer or employee of a state agency. . . should use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others.

h. An officer or employee of a state agency should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust.

Section §74, the State's code of ethics, addresses both actual and apparent conflicts of interest, and this code sets forth the standards against which State officers and employees in the Executive Branch must conduct their activities. The State's code addresses the conflict between an employee's official duties and obligations and his or her private interests. As the Attorney General stated in a 1979 opinion applying Public Officers Law §74:

A public official must not only be innocent of any wrongdoing, but he must be alert at all times so that his acts and conduct give the public no cause for suspicion. He must give no appearance of a potential conflict between his duties and personal activities even though an actual conflict is not present . . . (1979 Op. Atty. Gen 66).

DISCUSSION

State supplies, equipment, personnel and other resources must be used only for government purposes and not for private gain or partisan politics.

In other contexts, the Commission has addressed the conflict between a State employee's official duties and his or her partisan political activities. In Advisory Opinion No. 93-9, in which the Commission considered the application of §74 to a State employee seeking elective office, the Commission recognized that such a campaign might require the substantial expenditure of time and resources. The Commission held that "[n]o State resources of any type, including telephones, office supplies, postage, photocopying machines or support staff assistance," could be used in the furtherance of a State employee's campaign.⁽⁴⁾ In Advisory Opinion No. 98-12, addressing whether State employees could work on political campaigns, including fund-raising, the Commission reaffirmed this basic principle and barred the use of State resources for political purposes, stressing that, "[a]t all times the State employee shall avoid conduct which promotes

the perception that his actions as a State employee may be influenced by his political activities.”

The Commission has taken action to enforce §74(3)[d] and [h] when State officials have misused State resources (see, *In the Matter of Alan G. Hevesi, Comptroller of the State of New York*, finding that Mr. Hevesi improperly used State resources, a State employee, to provide transportation to his wife; *In the Matter of James Bailey, an employee of the New York State Housing Finance Agency*, finding Mr. Bailey improperly used State resources in engaging in his outside law practice.)

The Commission recognizes that, on occasion, a State official will want to combine a State business trip on State aircraft with a trip involving activities not related to State business. When State officials use State aircraft for such mixed-purpose trips, the Commission recognizes that a question is raised as to whether the public official is using State property for non-State business, thereby obtaining a benefit from the air travel at the taxpayers’ expense, securing unwarranted privileges or exemptions for the official or others, and otherwise pursuing a course of conduct that may raise suspicion among the public that he or she is acting in violation of his or her trust [See, Public Officers Law §74 (3)(d) and (h)].

Accordingly, when a State official uses State aircraft for a mixed-purpose trip the Commission concludes that Public Officers Law §74 requires that the official satisfy five conditions. First, in all instances, a mixed-purpose trip must satisfy a *bona fide* State purpose; that is, the trip must involve the discharge of the State officer’s public responsibilities and directly relate to the conduct of State business. For example, §74 would be violated if the State business proffered as the reason for the trip is nothing more than a pretext to permit the State official's use of State aircraft for non-State activities, particularly partisan political activities.

Second, the *bona fide* State purpose must be the primary reason for the trip.

Third, the State official must make an accurate apportionment of the time spent on State and non-State business and be responsible for promptly reimbursing the State for the portion of the flight that is allocable to non-State business. This guideline is similar to the rule applied by the federal government in connection with the use of government aircraft. In the past, the Commission has looked to federal ethics laws for guidance (see, Advisory Opinion Nos. 94-16, 05-01 and 06-01). The federal regulations require federal officials to reimburse the federal government for the portion of the trip on government aircraft related to non-governmental business when the trip is mixed with official business (see, 11CFR §9034.7 (1998); 5 CFR §734.503 (1998); “*Improving the Management and Use of Government Aircraft*,” Office of Management and Budget Circular No. A-126 (Revised) [May 22, 1992]).

Because the Commission considers the use of State aircraft to be the equivalent of traveling by private charter aircraft, State officials must reimburse the State for the non-governmental portion of flights by State aircraft at reimbursement rates based on current charter costs, not commercial flight rates.⁽⁵⁾ In these cases, the allocation made between the State and non-State business and the basis for the allocation should be made available to the public, for example, on the "Flight Request Information" form provided to the Executive Chamber.⁽⁶⁾ The Commission expects that the public will have access to this information through a FOIL request, except for those portions

exempt from disclosure, i.e., when disclosure would jeopardize the security of a public official. In this regard, if an official cites security concerns as a basis for a mixed-use trip on State aircraft, the trip should be permitted only when the public official can support such a claim with sufficient specific facts to justify use of State aircraft and the matter has been reviewed beforehand by the appropriate law enforcement authority.

Public officials must follow the letter and spirit of these guidelines. The Commission concludes that these guidelines satisfy the standards expressed in Public Officers Law §74. Whether New York State should ban outright any use of State aircraft for any non-State business is a matter for the Legislature to decide.

CONCLUSION

The Commission concludes that when a public official uses State aircraft for State and non-State travel, the following requirements must be met: (i) there must be a *bona fide* State purpose for the trip; (ii) the State purpose must be the primary reason for the trip; (iii) the public official must make an accurate apportionment of the time spent between State and non-State business and promptly reimburse the State for that portion of a trip not related to State business; (iv) such reimbursement must be based on current airplane charter costs; and (v) the official must provide the Executive Chamber with the details of the activities upon which the allocation between State and non-State business is based, information that the Commission expects will be available to the public through a FOIL request, except to the extent public disclosure would jeopardize the security of the public official.

This opinion, until and unless amended or revoked, is binding on the Commission in any subsequent proceeding.

All concur:

John D. Feerick,

Chair

Robert J. Giuffra, Jr.

Carl H. Loewenson, Jr.

Lynn Millane

Susan E. Shepard,

Members

Dated: August 16, 2007

Endnotes

1. This opinion deals with reimbursement for the cost of the use of State aircraft. However, the guidelines set forth herein apply to other expenses associated with such a mixed-purpose trip.

2. In 1995, Governor Pataki's administration requested clarification from the Commission of the rules governing the use of State aircraft for mixed-purpose trips. The Commission's then-Executive Director responded informally to this request, stating that officials were not required to reimburse the State for the portion of a mixed-purpose trip that involved non-State business, as long as the government portion of the trip was for a bona fide State purpose. Commission staff reiterated this informal advice to Governor Pataki's administration in 2001. On July 5, 2007, the Commission received a request from four groups: Citizens Union of the City of New York, Common Cause, League of Women Voters and New York Public Interest Research Group, asking that the Commission set forth a clear policy on the use of State aircraft for travel in connection with political activities. More recently, on July 23, 2007, the Office of the Attorney General issued a report requesting guidelines on the use of State aircraft for mixed-purpose trips (see, Report of Investigation into the Alleged Misuse of New York State Aircraft and the Resources of the New York State Police, at pgs. 2 and 53).

3. This opinion is binding on the Governor, Lieutenant Governor, Comptroller, Attorney General and their respective staffs [see, Public Officers Law §73(1)(h)]. The Ethics Commission does not have jurisdiction over members of the State Legislature, although the Governor's Office should apply these guidelines in approving the use of State aircraft by others, including the members of the Legislature.

4. The Commission routinely reminds State officers and employees of this prohibition when approving outside activity requests, such as running for elected office and engaging in outside employment. Governor Spitzer's Executive Order No. 1, dated January 1, 2007, also prohibits the use of State resources for non-governmental matters.

5. By way of example, the Commission surveyed the costs of a private charter flight from Albany to New York City. A private charter company estimates the cost of a one-way trip presently to be \$2,172.

6. To illustrate, if a public official travels to attend a two-hour meeting with a mayor for a *bona fide* State purpose and then spends four hours participating in a partisan political event, the calculation for reimbursement to the State should be based on the following: the total activity times is 6 hours; 67% of the public official's time is spent conducting non-State business. If the private charter cost of the trip is \$10,000, the public official must reimburse the State \$6,700 for the non-State portion of the trip. Any question that might arise as to the fair allocation between State and non-State business should be resolved in favor of the State.