

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 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 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:

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