



INVESTIGATION "D"

OFFICE OF THE ALBANY COUNTY DISTRICT ATTORNEY

March 28, 2008



Background

In June 2005, the Office of the Albany County District Attorney P. David Soares (the "DA") announced a new unit, the Public Integrity Unit, which actively investigates possible corruption cases.¹ The objective of this unit is to promote the credibility of and public confidence in State and County Government. The citizens of Albany County have the right to expect that their elected and appointed officials will carry out their duties in a lawful manner. To achieve this goal, the Public Integrity Unit conducts inquiries and investigations into allegations of governmental corruption and misconduct.

Following a report issued by the Office of the Attorney General (hereinafter "OAG") and joined by the Inspector General, the DA commenced an inquiry into the alleged misuse of New York State resources by the Executive Chamber and the State Police. The core issue of the inquiry was whether "it was criminal for members of the Executive Chamber and State Police to solicit, receive and generate information regarding Senator Bruno's use of state travel resources" (DA Report at 10). It became evident after several interviews and review of numerous documents that there had been no violations of the Penal Law. We did discover inconsistencies and contradictions during our investigation; however, we opted to leave these unresolved because they were immaterial to our conclusion that no criminal conduct had occurred. Specifically, we stated:

"The [DA] is simply not the appropriate authority to further investigate or resolve the underlying factual issues. This task is more appropriately reserved for other agencies" (DA Report at 34).

¹ In our Troopergate report, we referred to ourselves as the "ODA." In this report, we are the "DA."

Our inquiry was then closed and the Public Integrity Commission (hereinafter the "Commission") continued its investigation into the matter. It should also be noted that the New York State Senate Committee on Investigations and Government Operations has commenced a separate inquiry.

During the course of the Commission's continued investigation, Darren Dopp, the former Communications Director for the Spitzer Administration, testified that he did not believe a portion of his prior written statement that was submitted to the OAG on his behalf. After concluding that Dopp may have perjured himself, the Executive Director of the Commission, Herbert Teitelbaum, stopped the Commission's investigation, brought the matter to the DA, and the DA commenced an investigation. The scope of our investigation was narrow: whether Executive Chamber personnel, including former Communications Director Darren Dopp, committed any crimes on July 22, 2007, the date when he executed his written statement.

Shortly after the matter was brought to our attention, members of the DA met with Dopp and his attorney, Terence Kindlon. Because Kindlon was present when Dopp gave his testimony before the Commission in which he possibly admitted committing perjury, we informed them that Kindlon should not continue representing Dopp because he may be a witness against his client (see DR § 5-102). We also informed Dopp of the charges under consideration at the time, including: Perjury in the Second Degree; Perjury in the Third Degree; Making an Apparently Sworn False Statement in the First Degree; Making an Apparently Sworn False Statement in the Second Degree; Offering a False Instrument for

Filing in the First Degree; and Offering a False Instrument for Filing in the Second Degree.

After reviewing Dopp's Commission testimony, the DA became concerned that Dopp may have been illegally coerced into signing the OAG statement by Peter Pope, David Nocenti and Sean Patrick Maloney -- the Executive Chamber attorneys in the room at the time. Further, the DA examined whether anyone present in the room may have solicited Dopp to perjure himself. Moreover, during our investigation, evidence developed which indicated that David Nocenti might have committed a crime under Executive Law § 135-a(2).

Investigation

During our investigation, the DA was provided with materials compiled by the Executive Chamber and independent witnesses. The Executive Chamber voluntarily turned over some documents, and turned over other documents in response to grand jury subpoenas. As part of our investigation, we interviewed: Secretary to the Governor Rich Baum, Counsel to the Governor David Nocenti, Policy Director Peter Pope, First Deputy Secretary to the Governor Sean Patrick Maloney, former Communications Director Darren Dopp, Darren Dopp's wife Sandy Dopp, one of Darren Dopp's attorneys -- David Weinraub, Communications Director Christine Anderson, and Chief of Staff Marlene Turner. Key witnesses were interviewed under oath. The DA also met with OAG Chief of Staff Steven Cohen and Deputy Counselor Benjamin Lawsky, as well as Commission Executive Director Herbert Teitelbaum. Darren Dopp's former attorney, Terence Kindlon, refused our request for an interview.

The DA has completed a comprehensive report. In that report, we analyzed and detailed the possible criminal culpability of each individual present when Dopp signed the July 22, 2007 statement. In order to properly investigate that matter, the Executive Chamber and the DA executed a number of limited waiver agreements on what would otherwise have been privileged communications and, thus, unavailable to us. Without these waivers, the DA would have been unable to review documents and question Executive Chamber employees on areas that were necessary for us to determine whether any crimes had occurred. However, due to the terms of these agreements, we are unable to release the full report detailing our analysis until privilege issues of first impression are resolved with former Governor Spitzer and Governor Paterson. Further, any materials obtained pursuant to grand jury subpoena are not included in this report.

In our report, we conclude that Dopp did not commit perjury, but may have committed two other misdemeanor crimes: Offering a False Instrument for Filing in the Second Degree (Penal Law § 175.30) and Making an Apparently Sworn False Statement in the Second Degree (Penal Law § 210.35). Further, we concluded that the Executive Chamber attorneys present on July 22nd did not coerce Dopp into signing the statement or solicit perjury. Lastly, we concluded that there was no viable prosecution of Nocenti under Executive Law § 135-a(2).

Darren Dopp, through his attorney, Michael Koenig, approached the DA with information that former Governor Eliot Spitzer was more involved in releasing Senator Bruno's travel records to the media than previously known.

After careful review and analysis of the evidence that Darren Dopp had committed a crime, the DA concluded that: 1. A successful prosecution of Dopp was highly unlikely, and 2. Such a prosecution would not further the interest of justice. Instead, looking at bigger policy considerations, Albany County District Attorney P. David Soares determined that the People of Albany County and the State of New York would be better served by uncovering the truth in this matter rather than by an unsuccessful prosecution of a former communications director. As such, the DA agreed to immunity for Dopp on February 5, 2008 in exchange for his truthful, under oath testimony on what occurred during "Troopergate." As part of his immunity agreement, Dopp is required to cooperate with the DA "in the preparation and investigation of all cases relevant to this matter." Further, Dopp is obligated to tell the truth pursuant to the agreement, and if he doesn't, Dopp would be subject to criminal prosecution.

Dopp's Sworn Interview

On February 5, 2008, Dopp described how in early May 2007, reporters, particularly Jim Odatto from the Times Union, began making inquiries about the use of State aircraft. During the first week of May, Dopp advised Governor Eliot Spitzer that:

"a number of reporters were interested in the use of the aircraft for political trips, and that it pointed specifically to his [Spitzer's] use of the aircraft in connection with a trip that he had taken to California for fund raising purposes."

Dopp told Spitzer that he'd "pull the records" and let him know what was found. In response to this, Spitzer said "good, get to the bottom of it and then we'll talk about it." After this conversation, Dopp said that he, Rich Baum and

Marlene Turner "sat in Rich's office and analyzed the available records to see what we regarded as . . . possible problems for the Governor." In follow up to this review, Dopp testified that during the second week of May, he advised Spitzer of their findings, and that "the most problematic day was a trip to Rochester where he had appeared at a political fundraiser, not for himself, but for the local Democratic party." Dopp recalled that at one point during his interaction with the Governor, Spitzer asked him how he went about obtaining the records. Dopp informed him that he got them from "Mr. Howard . . . the liaison of the State Police."

Dopp also recalled Odatto coming back to him and asking about other users of the State aircraft. In response to this, Dopp advised Spitzer, Baum and Turner of Odatto's inquiry. Dopp said that it was at this time that "Mr. Bruno [came] up for the first time." Dopp related that upon hearing Mr. Bruno's name, the Governor told him that in December or January, "Mr. Bruno made a request of the Governor that he not be, in Mr. Bruno's terms, jerked around on the use of the helicopter, and Mr. Spitzer said that he promised that he wouldn't be doing that."

In response to Odatto's expanded inquiry, it was agreed that everyone's use of the aircraft would be reviewed. Dopp stated that Spitzer was aware of this and, in fact, the "notion that we now would be turning to examine [Bruno's] use of the aircraft" was "the catalyst for him telling this story" about his conversation with Bruno. Shortly thereafter, it was noticed that there potentially were problems with Bruno's use of the state aircraft because he appeared to be "holding fundraisers

in New York City [that] also corresponded . . . with the days that he was . . . using the helicopter to fly to New York City." Around this time, Spitzer asked Dopp "what's new on the plane analysis?" to which Dopp replied that "Mr. Bruno might not be living up to the spirit of the disclaimer" that the Executive Chamber had been using to ensure proper aircraft usage. In response, according to Dopp, the Governor advised him to raise the issue with other Senior Staff and get their input on the matter. Dopp recalled that this conversation with Spitzer occurred in the Governor's office prior to the 17th of May.

In accordance with the Governor's instructions; Dopp stated that he took the information about Bruno "to everyone who [he] thought was relevant on the second floor," which included Baum, Nocenti, Pope and Richard Rifkin. Dopp said that in response, he received "conflicting opinions" as to whether the matter "was significant or not."

Dopp stated that after gathering the varying opinions on Bruno's use of the aircraft, he reported the information to Baum. Baum advised Dopp that they should discuss the matter with the Governor. This resulted in a meeting with the Governor on May 17th. In advance of the meeting, Dopp drafted a proposed press release which discussed concerns about Senator Bruno's use of the aircraft. Dopp believed that in addition to himself, Baum and the Governor, Nocenti may also have been present at this meeting. During the discussion, Dopp reviewed his proposed press release with the Governor and the others at the meeting. Dopp stated that during the May 17th discussion, the Governor looked at Dopp's proposed press statement and said "I don't want to proceed - I

don't want to do this at this particular time." Further, Dopp stated, the Governor said that "absent a review of Mr. Bruno's schedule, we really didn't know what he was doing." According to Dopp, the Governor "agreed that there was an open question," but he didn't "want to proceed with some kind of internal investigation." Moving forward, Dopp said the Governor just wanted to "monitor the situation" and "see what happens later on," but that the Governor felt the issue was a "distraction," and he didn't "want anything to interfere with the possible . . . conclusion of the Legislative session."

Dopp recalled a conversation he had with Peter Pope a couple of days after May 17, 2007 with respect to whether the matter regarding Senator Bruno's use of the aircraft should be referred to the Inspector General. Dopp remembered Pope bringing up the Inspector General's website on Dopp's computer and showing him a "particular section" on the website that indicated that he was "obligated" to turn the matter over to the Inspector General and potentially "criminally liable" if he did not do so. Pope's conversation made an impression on Dopp and, as a result, he turned to Nocenti and Baum to discuss the matter further. However, Dopp said that Nocenti and Baum dismissed Pope's comments. During this same time, according to Dopp, William Howard was periodically sending him information on Senator Bruno's use of the aircraft. Further, Dopp said, "Odato made it clear to me that [the matter] was something that he was very interested in and that he would be coming back to it." Thus, Dopp said that he continued to gather the travel records.

At one point, Dopp stated, he and Baum spoke with the Governor about referring the matter to another agency for investigation. The Governor was not interested in doing this, Dopp explained, because he felt that "it's too much of a distraction." In response to this comment, Dopp told the Governor that he didn't "like sitting on the thing," because "when the reporter asks again, you know, we're going to face a question as to whether we want to release the documents," or refer the matter, or do an internal review. Dopp stated that the Governor responded to this by asking Dopp if he could buy them some time because he just didn't "want to deal with this right now" because "it's so disruptive" to concluding the Legislative session." After that, Dopp stated that he continued to quietly gather the travel records, waiting for the reporter to contact him.

Dopp recalled that in early June 2007, Pope approached him again after seeing a newspaper article about Bruno being investigated by the federal government. According to Dopp, Pope told him that they could refer the Bruno matter to the "Feds." Dopp said that he mentioned this idea to Nocenti, Baum and Spitzer, and they reacted "in a more dismissive way than the previous suggestion by Mr. Pope."

At the end of June, and at the conclusion of the Legislative session, Dopp stated that Odató returned, looking for the aircraft records. In response to this, Dopp stated that he told Baum and the Governor about Odató's return, and asked them "what do you want to do?" Dopp said that they did not give him an answer immediately, explaining that they wanted to think about it. Dopp recalled that the next day, on either June 25th or 26th, Baum told him that "Eliot wants you

to release the records." Dopp, surprised by this response, advised Baum that he was "going to go talk" to the Governor.

Dopp stated that he walked from Baum's office to the Governor's office and said to Spitzer, "boss, you're okay with the release of the plane records?" According to Dopp, the Governor replied "yeah, do it."

Still inquiring further, Dopp asked Spitzer "are you sure?" Spitzer replied that he thought Dopp wanted to release the records. Dopp said "Joe probably will be pissed." To this, the Governor replied, in reference to Senator Bruno: "fuck him, he's a piece of shit, shove it up his ass with a red hot poker." Dopp stated that during this conversation with the Governor, the Governor was "frustrated" and "angry" and "he was letting it rip against Mr. Bruno." Dopp also testified that the Governor had "turned a little red and . . . he was drinking a cup of coffee and . . . as he was saying it, he was like spitting a little bit. He was spitting mad." Dopp explained that, in an effort to try to defuse the Governor's anger, in reference to the "shove it up his ass with a red hot poker" comment, Dopp jokingly inquired "sideways" boss? Dopp stated that no one else was present during this conversation.

When asked why the Governor was angry, Dopp replied:

"Frustration had been building with the inability to get an accord to conclude the Legislative session. It was the people's business that he wanted to advance. He frequently became frustrated with Mr. Bruno. He frequently, you know, used salty language to describe his dealings with him, but I had not heard up until this point so angry, you know, exchange pointed toward Mr. Bruno."

Dopp stated that "in retrospect," he believed the Governor gave him the "okay at that time to release the records" because the "talks with the Majority Leader and the Senate had collapsed."

When asked whether he considered the Governor telling him to release the records a directive, Dopp stated that "[y]ou couldn't mistake that based upon the words that were used."

Dopp said that after he finished his conversation with the Governor, he walked back into Baum's office and told him "I'll release the records. I've got them pretty much done and, you know, the FOIL will be here any moment based upon what the reporter was telling me, and I'll check with Nocenti right now." Dopp explained that in response to his comment, Baum "sort of put his hands up and said, that's what he wants." The FOIL arrived from Odatto on June 27th.

Dopp stated that prior to this conversation with the Governor, sometime during the second or third week in May, the Governor inspected the travel records. Dopp stated that he "brought the records into [the Governor's] conference room" and he "arrayed them on the table." Further, Dopp explained, he showed the Governor the records, including "flight manifests" and "travel assignments." Dopp stated that, at the time, at least two of Senator Bruno's travel itineraries were included in the records. When asked if the Governor actually saw Bruno's itineraries, Dopp said that he did because either he or the Governor commented "that they were unremarkable." Dopp also recalled another time when the Governor saw the travel records. Dopp stated that it was toward "the time when the records were about to be released." At that time, the

Governor came into Dopp's office, picked up the records, and "looked at them briefly."

Dopp stated that between the time the Governor directed him to release the records, and the time of the July 1st Times Union article, the Governor called Dopp at home and at work, inquiring about the status of the story, when it would be printed, how did he think it would turn out, and what questions was the reporter asking.

Dopp testified that after the Times Union story appeared on July 1st, the Governor instigated media coverage on Senator Bruno's use of State aircraft during the Pataki administration. Specifically, Dopp stated that on July 8th or 9th, the Governor told him that he had Press Secretary Christine Anderson arrange for former State Police official Dan Wiese to "talk to a reporter from the New York Times . . . and Mr. Wiese would confirm that [the State Police] had long held concerns about Mr. Bruno's use of the aircraft." Dopp provided the DA with a copy of the story that resulted from that meeting, which was a July 10, 2007 article written by New York Times reporters Nicholas Confessore and Danny Hakim entitled, "3 Say Bruno and Troopers Were Concern in Pataki Years." Dopp further stated that the Governor and Peter Pope worked with Dan Wiese when they were employed at the Manhattan District Attorney's Office.

During Darren Dopp's statement to the DA, and testimony to the Commission, he stated that prior to the "Troopergate" controversy, he and Andrew Cuomo, who he had known from his time working in the Mario Cuomo administration, spoke to each other by telephone. Dopp recounted a

conversation he had with Andrew Cuomo one weekend in May 2007. Dopp testified that during the conversation, he told Cuomo that the Executive Chamber was looking into usage of the State aircraft, including the Governor's and other elected officials' use. Cuomo seemed familiar with this from the Mario Cuomo Administration. We note that the Attorney General has stated publicly that he has no recollection of such a conversation with Dopp and that it would have been meaningless to him given that he did not use State aircraft.

Dopp advised the DA that he continued writing a journal that he had started prior to resigning from his position with the Executive Chamber, and he turned a copy of that journal over to the DA. In an August 19, 2007 entry in his journal, Dopp lamented his situation, writing: "Releasing public records on public official use of public aircraft? Doing it at direction of boss? Doing it after discussing it to death internally?" In an August 22nd entry of his journal, Dopp recounted a telephone conversation he had with David Nocenti that day. In answer to Dopp's question of "why didn't we disagree with [Andrew Cuomo] report?" Dopp wrote that Nocenti responded: "We didn't want to be ambushed . . . he would have charged us with perjury." In an August 23rd journal entry, Dopp wrote that Nocenti "asks about hot poker comment out of [the] blue." In a September 30th entry, Dopp wrote about Nocenti coming to visit him at his home, at which time they threw a "football around for a while and then we talk[ed]." Dopp recounted how, during that conversation, Nocenti expressed that he wanted Dopp to "return to the second floor."

The DA interviewed other witnesses in an attempt to corroborate Dopp's testimony. In an interview with Sandy Dopp, Darren Dopp's spouse, she related that the Governor was calling their residence to speak with her husband every morning from June 28th to July 4th. Mrs. Dopp vividly recalled this time frame because July 1st is her birthday. Mrs. Dopp remembered these calls because, although it wasn't unusual for the Governor to call Dopp at home, during this time, the Governor called "every single morning at about ten after seven." Mrs. Dopp stated that she never remembered the Governor calling "that many days in a row so early in the morning and just like so intent to talk to" her husband. Mrs. Dopp remembered overhearing her husband's part of the conversation, and that they were talking about "travel records." She stated that one time she asked her husband what he and the Governor were talking about and he replied "oh, Bruno stuff, Bruno shit."

Mrs. Dopp also related that after her husband was suspended in July, he told her about the Governor's remark that Bruno could "shove it up his butt with a red hot poker" when they were discussing releasing the records. Mrs. Dopp also recalled David Nocenti coming to their house during her husband's suspension. Mrs. Dopp stated that at the time, she was getting ready to leave the house with her girlfriend. However, she was so angry about the way her husband had been treated, that she told Nocenti that "you guys screwed this thing up so bad," my girlfriend "and I could have handled it better than you guys," and "like we're housewives."

In an interview with David Weinraub, one of Darren Dopp's legal advisors, he recalled a meeting he had with Dopp in early September. Weinraub stated that Dopp began the meeting by "noting that the Governor lied three times." Specifically, Weinraub stated, Dopp claimed that the Governor lied when he said he: didn't "know" about the Bruno matter, was "misled" about the Bruno matter, and was "cooperating fully" in the Bruno matter. Weinraub further stated that Dopp explained to him that Baum "told him to release the travel records. [Dopp] asked to check with the Governor and he did so, and then the Governor directed him to release the travel records."

Weinraub stated that in a subsequent meeting he had with Dopp, Dopp relayed to him that when the Governor directed him to release the travel records, the Governor said "'shove it up his ass with a red hot poker,' presumably referring to Senator Bruno."

During his interview with the DA, Dopp also stated that he told his attorney, Terence Kindlon, about Spitzer's involvement with release of the travel records, including his "red hot poker" statement with regard to Senator Bruno. Dopp explained that he told Kindlon about this in August 2007.

E-mails turned over to the DA by the Executive Chamber during the Troopergate matter showed communications between Spitzer, Baum and Dopp during the early morning hours of July 1, 2007 – the day of Odat's Times Union article. In an e-mail titled "TU," Spitzer, communicating from his private e-mail address, wrote to Dopp: "Haven[']t seen paper yet. How does i[t] look?" To this,

Dopp replied: "Gotta see to believe. Think we need to move quickly to refer it to proper authorities."

In another e-mail communication from Spitzer early that morning, he asked Dopp: "Will other media pick up on Bruno story?" To this, Dopp replied: "Working it now. Call when you have a moment." In response to this, Spitzer asked: "U at home?"

In a separate set of e-mails early in the morning on that date, Spitzer asked Rich Baum: "So how do u think Confessore came out? And have u seen times [union on Bruno?]" To this, Baum replied:

"Thought Confessore story was what you said - fine but not how should have been written. Amazing what they pass off as analysis. Bruno story is very bad for him I think. Really puts him in a bad spot. Can't believe it won't have some legs. What you think?"

Spitzer responded:

"Agree. Confessor[e] was just so superficial, but our side is there, and headline and lead are ok. Focus is we are trying to shift the game. I just want us to get away fr[om] wasting time on the legislature. I agree Bruno has a problem. And the NYRA story on top of it will be a probl[e]m. When will we get dollar figures ab[ou]t repub part[y]? Will fit well with the ti[m]es regional edit: sewer money, which was typical ti[m]es but helpful. Agree?"

Former Governor Spitzer's DA Interview

As part of our Troopergate inquiry, we interviewed then Governor Spitzer.

During that examination, the following colloquy took place:

"Q: Okay. Did you direct the gathering of any documents concerning Senator Bruno's use of state transportation at any time?

A: No.

Q: Did you direct the release of any documents at any time to the media concerning Senator Bruno's use of state transportation?

A: No, other than to the extent that the overarching directive that in response to the media would be fulfilled. So if you asked me did I specifically ever address this issue the answer is no. Had I said, as per our conversation about transparency, respond to the media, yes. I don't want the 'no' to be interpreted to mean that I did not back in January or December say, respond to the media when they asked general questions."

If Dopp's testimony is credited, then former Governor Spitzer's answers were not truthful. Accordingly, we intended to present these conflicting accounts to a grand jury.

Grand Jury Consideration

After granting Dopp immunity on February 5, 2008, the DA considered submitting this controversy to a grand jury. By statute, "[a] grand jury may hear and examine evidence concerning the alleged commission of any offense prosecutable in the courts of the county, and concerning any misconduct, nonfeasance or neglect in public office by a public servant, whether criminal or otherwise" (CPL § 190.55 [1]). Furthermore, CPL § 190.85 (1)(a) provides, in part, that:

"The grand jury may submit to the court by which it was impaneled, a report: [c]oncerning misconduct, non-feasance or neglect in public office by a public servant as the basis for a recommendation of removal or disciplinary action."

We emphasize that this provision only applies to "public servants" (CPL § 190.85 [1] [a]). Indeed, "[i]t is well settled that the name of a public servant contained in a Grand Jury Report who has resigned from his position must be deleted from that Report" (Morgenthau v. Cuttita, 233 AD2d 111). Also noteworthy is that the

"misconduct, non-feasance or neglect" must form the "basis for a recommendation of removal or disciplinary action" (CPL § 190.85 [1] [a]).

Because of Governor Spitzer's unforeseeable resignation, he is no longer a "public servant" (see Morgenthau v. Cuttita, 233 AD2d 111). As such, a "report [would] no longer contain[] a viable recommendation of either removal or disciplinary action" (see id. [quoting Matter of Report of Tenth Special April-May 1994 Grand Jury, 233 A.D.2d 111]). Accordingly, this statutory vehicle is "no longer acceptable" (Id.).

Conclusion

This report should not be read as an endorsement of anyone's conduct. We are simply concluding that the interests of New York State and Albany County are better served with Dopp's cooperation and truthful testimony. The alternative, a misdemeanor prosecution against Dopp, would not serve the interests of justice in the instant case. Further, we wish to emphasize that the new information in this report does not change the conclusion of our "Troopergate" report – that no New York State Penal Laws were broken as pertains to the release of information to the press on the use of State aircraft. Indeed, in that report, we assumed a worst case scenario of political plotting and still found no breach of the Penal Law. To the extent that there may be "misconduct, non-feasance or neglect," considering the recent, unforeseeable resignation of Governor Spitzer and other senior aides, the DA does not have a statutory vehicle to address the matter. Let us be clear, political plotting and games are not in the best interest of New York State. Further, the State of New

York needs finality and this can be achieved only with Dopp's full and complete cooperation.