



INQUIRY INTO THE ALLEGED MISUSE OF  
NEW YORK STATE RESOURCES BY THE  
OFFICE OF GOVERNOR ELIOT SPITZER  
AND THE DIVISION OF STATE POLICE

OFFICE OF THE ALBANY COUNTY DISTRICT ATTORNEY

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This report of the *Inquiry into the Alleged Misuse of New York State Resources*  
by the Office of Governor Eliot Spitzer and the Division of State Police,  
conducted by the Office of the Albany County District Attorney, was prepared by:

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## INTRODUCTION

In June 2005, the Office of the Albany County District Attorney P. David Soares (the "ODA") announced a new unit, the Public Integrity Unit, which actively investigates possible corruption cases. On June 21, 2005, DA Soares stated: "We will have only one system of justice here in Albany County. We will prosecute based on the evidence. Issues of who you are and who you know will no longer be factored into the decision-making process as to who we indict and eventually who we prosecute." Part of 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. Once there is a criminal allegation, the ODA will inquire and, if appropriate, prosecute the criminal misconduct.

In early July 2007, the Office of New York State Attorney General Andrew M. Cuomo (the "OAG") commenced an investigation into Senate Majority Leader Joseph L. Bruno's use of aircraft owned by the State of New York. As part of that investigation, the OAG also examined "the Governor's alleged misuse of State resources in connection with State Police surveillance of Senator Bruno's activities." On July 23, 2007, the OAG released a report entitled Investigation into the Alleged Misuse of New York State Aircraft and the Resources of the New York State Police (the "OAG Report"). The OAG Report concluded that no crime

occurred with respect to both parts of the OAG's investigation. The New York State Office of the Inspector General Kristine Hamman (the "IG") conducted a separate investigation before ultimately concurring with the OAG Report. The ODA reviewed Senator Bruno's use of state owned aircraft and concurred with the OAG's and IG's conclusion that no crime occurred.

Shortly after release of the OAG Report, the ODA determined that a preliminary inquiry into the alleged misuse of New York State resources by the New York State Office of the Governor Eliot Spitzer (the "Executive Chamber") and the New York State Division of State Police (the "State Police") was warranted. That inquiry is the subject of this report.<sup>1</sup>

The ODA was provided with materials compiled by the OAG and the IG during their separate investigations. These materials included transcripts and audio recordings of interviews, e-mails, records and other documents collected during their investigations. The ODA was also provided with records from the Executive Chamber and the State Police. The ODA reviewed the relevant materials that were provided and conducted independent interviews with pertinent witnesses. We interviewed: Secretary to the Governor Rich Baum, Communications Director Darren Dopp, Assistant Secretary for Homeland Security William Howard, State Police Acting Superintendent Preston L. Felton, and Press Secretary to the Governor Christine Anderson. Governor Eliot Spitzer also offered to sit for an interview with the ODA. Although the Governor was not

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<sup>1</sup> It should also be noted that the New York State Ethics Commission (the "Ethics Commission") and the New York State Senate Committee on Investigations and Government Operations (the "Committee on Investigations") have commenced separate inquiries.

an essential witness for the ODA's inquiry, his input completed the final chapter of our record. All witnesses voluntarily agreed to be interviewed and provided all documents requested by the ODA.<sup>2</sup> This report sets forth the conclusion of the ODA's inquiry.

Part I of this Report illustrates the ODA's internal review process upon receiving complaints alleging criminal activity. As explained in Part I, after a complaint is received by the ODA, a preliminary inquiry is commenced. Depending on the nature and circumstances of the complaint, evidence may be gathered, interviews may be conducted, witness and complainant credibility and cooperation are evaluated. Upon reviewing these factors, the ODA makes a decision either to terminate the criminal inquiry, with leave to reopen if new evidence is discovered, or to pursue criminal charges. The rationale behind the ODA's procedures is also briefly examined.

In Part II of this Report, the background of the instant controversy is presented. Additionally, the factual accounts of each witness are objectively set forth. As explained in Part II and Part III, although inconsistencies were discovered during our inquiry, these inconsistencies are immaterial to our conclusion that no crime occurred.

Part III of this Report is the ODA's legal analysis of each actor's conduct. Although other criminal statutes have been evaluated internally, the most

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<sup>2</sup> It should be noted that the ODA requested to interview Times Union Capitol Bureau Reporter James M. Odat; however, the parent company of the Albany Times Union, the Hearst Corporation, and Odat each refused the interview citing the New York State Shield Law. Additionally, the ODA requested to interview New York Post Reporter Fredric Dicker. Dicker agreed to respond to written interrogatories, but after further inquiry by the ODA, it became obvious that his input was unnecessary.

relevant statute in this case is Official Misconduct, which is codified at Penal Law § 195.00. As explained in Part III, the ODA concluded that no "unauthorized exercise of an official function" was committed by any member of the Governor's Office or the State Police. In light of this finding, further inquiry or investigation would be entirely academic.

## PART I

### INTERNAL REVIEW PROCESS

The present controversy is unique. A criminal inquiry by the ODA generally does not follow two separate investigations that both resulted in a conclusion that no criminal activity occurred. Additionally, the media interest and political nature of this controversy take it outside the realm of the conventional criminal case. However, none of these factors alters the issue at hand: whether a crime was committed.

Analytically, a criminal case can be broken into three separate phases. The first can be referred to as the "preliminary inquiry." This phase usually begins with the receipt of a complaint alleging a crime took place. Upon receipt of the complaint, the recipient law enforcement agency, here the ODA, must determine whether the allegations, if true, constitute a crime. If the alleged conduct constitutes a crime, then the complainant's credibility and willingness to cooperate will be evaluated. In evaluating the complainant's credibility, law enforcement may, among other things, interview potential witnesses and examine physical evidence.<sup>3</sup>

Further investigation is warranted when the facts gathered during the preliminary inquiry tend to corroborate the allegations made in the complaint and establish that a crime was committed. This is when the criminal case enters the second phase. As part of this criminal investigation, the ODA may seek to convene a grand jury. Following a presentation by the ODA, which generally

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<sup>3</sup> The ODA does not generally place witnesses under oath during a preliminary inquiry.

includes testimonial evidence given under oath and the introduction of physical evidence, the grand jury votes on whether to indict a person. This indictment is the grand jury's mechanism for formally accusing an entity of committing a crime. If the grand jury chooses to indict, the criminal case enters the third phase: the formal prosecution.

A grand jury is not convened in all criminal investigations. Grand juries should not be overly burdened with allegations of criminal conduct before a preliminary inquiry has been conducted. The Fifth Amendment of the Constitution of the United States provides, in relevant part, that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ."

The founders of this country created the grand jury mechanism to guard against unfair, arbitrary, and/or unwarranted governmental prosecutions. However, the simple fact that a person is being called before a grand jury can subject that individual to public humiliation and substantial damage to their reputation.

Apart from the investigatory process, prosecutors are ethically obligated to commence some form of preliminary inquiry before filing criminal charges. It would be improper for the ODA to commence a criminal action when it is obvious that the charges alleged are not supported by probable cause (see 22 NYCRR § 1200.34). Necessarily inherent in this regulation is an obligation on the part of the ODA to make a preliminary inquiry to determine whether a crime took place. The Supreme Court of the United States has observed that the prosecutor:

"is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one" (Berger v United States, 295 US 78, 88).

## PART II

### WITNESS INTERVIEWS

#### A. Background

On January 1, 2007, Eliot Spitzer was sworn in as the fifty-fourth governor of the State of New York. Interviews with senior officials in his administration revealed that, as part of Governor Spitzer's new agenda, he pledged greater transparency in government. The senior officials relayed that in furtherance of this objective, they were made more available to the media and strict compliance with formal FOIL procedures was relaxed.<sup>4</sup>

Governor Spitzer also pledged greater accountability by his administration. Senior officials emphasized that one recurring dilemma facing New York residents was and is the misuse of state travel resources. According to senior officials, the topic dates back to Governor Mario Cuomo's Administration and has cropped up recently in the Comptroller Alan Hevesi matter. In order to protect the taxpayers from the misuse of these valuable resources, the Spitzer administration instituted a new procedure for the handling of requests for state aircraft in January 2007.<sup>5</sup> Specifically, Governor Spitzer implemented a "certification policy" for the use of state aircraft. When Governor Spitzer took office, he changed the procedure for officials seeking to use state aircraft, now

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<sup>4</sup> To illustrate, in March 2007, Dicker telephoned the State Police and requested various travel documents. The State Police informed Dicker that he would have to submit a written FOIL request as his paper had done in the past. In response, Dicker complained about the formality and cited the Executive Chamber's "new open government policy." Dicker was eventually provided with the information without submitting a written FOIL request.

<sup>5</sup> The Executive Chamber is responsible for overseeing the use of state aircraft while the State Police is responsible for the actual operation of the aircraft.

requiring the applicant to "certify" that the purpose of the trip was for official state business. Once a request for state aircraft is received, the Executive Chamber is charged with approving or denying the request.

On July 1, 2007, a story appeared in the Times Union reporting that "Senate Majority Leader Joseph L. Bruno has used taxpayer-funded state aircraft to fly to political fundraisers in Manhattan while certifying he was on official state business, according to documents obtained by the Times Union" (James M. Odat, *State Flies Bruno to Fundraiser*, ALBANY TIMES UNION, July 1, 2007) (hereinafter the "article"). This article prompted a host of responses by Senator Bruno. Senator Bruno claimed he used the State Police because he had received death threats. Senator Bruno also complained that he was being illegally spied on by the Executive Chamber and the State Police.

The OAG and IG commenced an investigation into this matter. The OAG and IG found, among other things, that:

"The Governor's Office planned to obtain information concerning Senator Bruno's use of state aircraft for the purpose of giving this information to the media. Under the pretext of responding to a Freedom of Information Law ("FOIL") request, the Governor's liaison caused the Acting Superintendent of the State Police to (1) create documents detailing where the State Police had driven Senator Bruno, and (2) report details of Senator Bruno's requests for ground transportation, upcoming schedules, and changes to those schedules. This conduct deviated from State Police standard operating procedures and past practices, and was not required by FOIL" (OAG Report at 2).

However, the OAG and IG ultimately concluded "that the conduct at issue here is not unlawful" (OAG Report at 40).

Subsequent to the OAG report, the ODA began an inquiry into this matter. Of course, the ODA's inquiry is not limited or constrained by the OAG and IG findings. That being said, the sole issue under consideration is whether a crime occurred. The principal allegation in this matter is that 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. It is alleged that upon generation and receipt of this information, Executive Chamber employees illegally solicited and procured a FOIL request from Odato for the purpose of writing a story that smeared Senator Bruno politically.

**B. Overview**

The Governor is the head of the Executive Department and the State Police is a division of the Executive Department (see Exec Law §§ 30-31; 210). Upon taking office, Governor Spitzer appointed David Nocenti as Counsel to the Governor and Rich Baum as Secretary to the Governor. Nocenti and Baum report directly to Governor Spitzer. The Governor also appointed Marlene Turner as his Chief of Staff and Darren Dopp as his Communications Director.<sup>6</sup> Press Secretary Christine Anderson reported directly to Dopp. William Howard, a former senior official with the Pataki Administration, now served as the Assistant Deputy Secretary to the Governor for Homeland Security.<sup>7</sup> Because of his experience in the Pataki Administration, Howard interacted with senior officials in the Spitzer Administration. Although Howard's immediate supervisor was Deputy

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<sup>6</sup> It should be noted that following the issuance of the OAG Report, Dopp was suspended indefinitely.

<sup>7</sup> It should be noted that following the issuance of the OAG Report, Howard was reassigned to a new position.

Secretary for Public Safety Michael Balboni, at times he would interact with other senior members in the Executive Chamber, including Baum and Dopp. Finally, Acting Superintendent of the New York State Police Preston Felton reported directly to Howard.

**C. Interviews**

A number of witnesses were interviewed for this inquiry and pertinent portions of their interviews are summarized below. Some of the witnesses had previously been interviewed by the OAG and IG, while others were being interviewed for the first time. For this report, witness accounts are presented in descending order of the witnesses with the most knowledge of and involvement in the matter at hand.

**1. Communications Director Darren Dopp**

According to Dopp, on or about May 1, 2007, several reporters, including Odatto, visited his office and asked whether Governor Spitzer had used the state airplane to travel to California for a political fundraiser. Dopp believed the catalyst for these inquiries was a May 1, 2007 internet blog. Dopp explained that Senator Bruno "blast[ed] Governor Spitzer for being off on a trip to California for fundraising" (see Rick Karlin, *Still Bitter After All These Hours*, TIMES UNION CAPITOL CONFIDENTIAL, May 1, 2007, www.timesunion.com). Although it was later revealed that Governor Spitzer did not use state aircraft for this trip, Dopp did not know the answer at that moment and informed the reporters that he would check into it.

At about this time, Odatto asked Dopp which officials had access to the

aircraft. During this conversation, Odató also asked what records would be available for officials who used the plane. Dopp informed Odató that flight records and manifests would be available.

On or about May 3, 2007, Odató learned that there was a political fundraising event that night in New York City. According to Dopp, Odató asked him if he knew how Senator Bruno "got there" and if it was possible he used state aircraft. Dopp told him he was unsure and that he would check into it.

After that, according to Dopp, he started to accumulate the documents at issue because of the media inquiries. Dopp indicated that he had two reasons for collecting these documents: (1) to conduct an internal review of his principal's use of state aircraft; and (2) to comply with what he anticipated to be a future FOIL request. Dopp explained that he knew Odató would file a formal FOIL request once everything calmed down within the Executive Chamber. As Dopp stated, the month of May is one of the most hectic periods for reporters covering politics and once things settle down, reporters tend to cycle back to their unfinished editorials. Dopp explained that it is his job, as a senior advisor to the Governor, to anticipate stories and to avoid negative press. Dopp emphasized his belief that Odató would press the issue at a later date.

Following these inquiries, Dopp turned to Chief of Staff Marlene Turner and asked her to produce the Governor's schedules. Dopp also asked Howard to produce the flight manifests which were maintained by the State Police. According to Dopp, he turned to Howard and asked "[w]hat do you have that would be pursuant to a FOIL request on his travel." Dopp was adamant that he

specifically said this to Howard. However, as will be discussed later, Howard does not recall "FOIL" ever being mentioned to him until on or about June 28, 2007.

Dopp recalled that, in the meantime, he met with Odatto regularly at Dopp's office. On or about May 14, 2007, according to Dopp, Odatto asked what types of documents were going to be available. Dopp told him that the manifests and schedules for the Governor would be available. As Dopp recollected, Odatto then asked if he could get schedules for all officials that used state aircraft. Unsure, Dopp told him that he would check on that.

Once these documents were gathered, Dopp remembers meeting with Baum and Turner to review the Governor's flights. Dopp believed this review occurred sometime between May 1, 2007 and May 17, 2007. Once the trio concluded that Governor Spitzer's use of state aircraft was appropriate, the focus shifted to Senator Bruno and Lieutenant Governor Paterson. According to Dopp, this was an appropriate concern because the Executive Chamber is responsible for approving requests to use state aircraft.

On May 17, 2007, there was an exchange of e-mails between Howard and Dopp. Apparently, Dopp verbally asked what C.V. Starr was and Howard responded via e-mail with an explanation. C.V. Star is one of the locations on Senator Bruno's May 17 and 18, 2007 itinerary. Howard later e-mailed Dopp with times and places for other locations on Senator's Bruno's itinerary for those days.

Later that day, Dopp sent a proposed press statement via e-mail to

Baum.<sup>8</sup> Dopp recommended an internal review of Senator Bruno's use of the state aircraft. Dopp explained that he believed Senator Bruno's use was "improper" because it did not appear to be consistent with the "certification policy" the Spitzer Administration had implemented. Nevertheless, the press statement was not released because Baum and Nocenti did not believe there was sufficient evidence that Senator Bruno was violating any law.

According to Dopp, there was a series of conversations that took place within the Executive Chamber following the proposed press release. Dopp was trying to determine whether he was required to refer Senator Bruno's use of the state aircraft to an investigatory agency. Dopp stated that he was influenced by Howard, who suggested that Senator Bruno's use of state resources was inappropriate.

On May 23, 2007, Dopp e-mailed Baum informing him that:

"Bill H[oward] says the records exist going way back. Itineraries [sic] showing where the individual was taken and who was in the

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<sup>8</sup> "STATEMENT BY DARREN DOPP, COMMUNICATIONS DIRECTOR FOR THE GOVERNOR, REGARDING SENATOR BRUNO'S USE OF STATE AIRCRAFT

Our office has received inquires [sic] regarding Senate Majority Leader Joe Bruno's use of state aircraft.

Our policy regarding use of the aircraft is clear: The state plane and helicopter may be used only for official state business.

The Senator makes periodic requests for use of a state helicopter and did so recently for use today. At the time he made the request, the Senator attested that he and his staff required transportation to New York City for 'legislative meetings.'

Based upon this claim, use of the state helicopter was granted for the Senator and three staff members to depart late this morning and return early tomorrow morning.

Today, our office learned that Senator Bruno's 'legislative meetings' were to be held at C.V. Starr & Co. at 12:30 pm and the Sheraton Hotel at 3:30 pm. We have asked the Senator to verify that these meetings involve official state business.

Subsequent to receiving his reply, we will determine what action is necessary and appropriate."

car. Bill has the last two trips in his possession [*sic*]. Also, I think there is a new and different way to proceed re media. Will explain tomorrow."

Dopp explained that the "new and different way to proceed re media" was a reference to referring the matter to the IG instead of releasing the documents to Odatto. According to Dopp, Director of Policy Peter Pope informed him that he had an obligation to report this matter to the IG. However, when Dopp brought Pope's comment to the attention of Baum and Nocenti, they told him that Senator Bruno's use of the state aircraft was a non-issue. Dopp remembered Nocenti referencing *Ohrenstein*<sup>9</sup> which was understood to stand for the proposition that as long as there is some governmental business, the trip was legal. Notably, Dopp's and Baum's recollections differed as to the second part of this e-mail.

It is not entirely clear when the Executive Chamber received the three May "synopses." Synopses are the documents reflecting Senator Bruno's use of State Police drivers for ground transportation. According to interviews conducted by both the OAG and IG, these synopses were assembled from the drivers' memories and/or notes. Dopp stated that after he asked Howard to gather all of Senator Bruno's 2007 itineraries for the impending FOIL request, Howard returned with one itinerary (presumably the May 17, 2007 itinerary). This, however, is not consistent with Howard's recollection. Dopp then asked him what happened to the other 2007 trip schedules since he was under the impression that the "records exist going way back." As Dopp recalled, Howard did not know why there was only one itinerary and said he would check into it. Some time later, Howard returned with three synopses and informed Dopp that

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<sup>9</sup> People v Ohrenstein, 77 NY2d 38.

the State Police were not in the habit of retaining these itineraries.<sup>10</sup> According to Dopp, Howard told him the synopses were based on longhand notes given to the State Police investigators so they would know where to take Senator Bruno. Dopp stated that once Howard provided this information to him, Dopp asked Howard if these documents would be subject to a FOIL request. Dopp claimed that Howard told him these were public documents and, as such, were subject to a FOIL request. As noted later, Howard did not recall this conversation.

On June 25, 2007, Dopp created a document analyzing Senator Bruno's use of state aircraft. In the document, Dopp stated: "[t]his political activity would appear to conflict with restrictions in state law and policy that the state aircraft be used only for 'official business.' This political activity would also appear to conflict with the Majority Leader's written claim that the purpose of the trips was 'legislative business meetings.'" Later in the document, Dopp stated, "[a] close examination of the facts in this situation may reveal that there was little or no 'legislative business' and that the Majority Leader may be guilty of both misrepresenting himself and misusing state assets."

When asked about this document, Dopp stated that it was a cover letter he prepared for Nocenti for the purpose of referring the issue to an investigatory agency. Dopp explained that at the time, he was going back and forth about whether Senator Bruno's use of state aircraft was appropriate. When confronted with the sentence that states "political activity would appear to conflict with

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<sup>10</sup> The State Police turned over to the ODA documents that included Senator Bruno's itineraries for years 2004-2005. A State Police official advised the ODA that in previous years a senior investigator handling transportation assignments routinely kept the itineraries.

restrictions in state law and policy . . . ,” Dopp relayed that although Nocenti and Baum had reached an internal conclusion that nothing appeared to be illegal, the issue would ultimately need to be resolved by the appropriate authority. Dopp further noted that there was simply not enough information to determine whether Senator Bruno was violating any law and that a further investigation would be necessary.

On June 26, 2007, Dopp was informed by e-mail that Odatto was on his way to a speech by the Governor and Odatto wanted some “prep” from Dopp. Dopp forwarded this e-mail to Press Secretary Christine Anderson with the following comment: “Can you give him a buzz? Need to be nice to him. Gonna ask a big favor of him soon.” Anderson replied, “No problem.” When asked about this e-mail, Dopp explained that the favor concerned a FOIL request which dealt with a wholly unrelated issue.<sup>11</sup> Dopp asked Odatto to stand down on this other FOIL request as a favor because Dopp did not have a reason to reject the request. According to Dopp, Odatto agreed to rescind his unrelated FOIL request and, in turn, asked Dopp if he had compiled the travel documents they had previously discussed. Dopp informed him that he had the documents, but needed Odatto to submit a written FOIL request. Dopp requested a formal FOIL because of the nature of this request.

The following day, Dopp e-mailed Turner asking her to “fax me the latest flight request from Bruno[.]” During that same day, Dopp e-mailed Turner again asking, “Do we have any requests from Malcolm Smith, Jim Tedisco, Tom

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<sup>11</sup> Dopp explained that Budget Director Paul Francis had made a “handshake promise” to “legislative leaders not to release [personal expenditures for their members].” Dopp stated that he believed Odatto was entitled to these records.

Dinapoli or David Paterson to use state aircraft?"

Later that day, Odatto submitted via e-mail the FOIL request to Dopp.<sup>12</sup>

The documents were subsequently turned over.<sup>13</sup>

On July 1, 2007, Odatto's article appeared in the Times Union. Although he believed the article would depict Senator Bruno unfavorably, Dopp explained that he was surprised by Senator Bruno's response to the accusations in the article. Later that morning, Dopp drafted the following statement:

"On the record[:]

The Times Union findings are very troubling. Our office approved the use of the aircraft based upon written claims by Sen. Bruno that it was needed for legislative meetings. We are reviewing the situation carefully to determine the appropriate course of action."

Off the record:

We will probably move quickly, perhaps as early as

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<sup>12</sup> "Dear Mr. Dopp: Under provisions of the New York Freedom of Information Law, please provide me records identifying the use of the state aircraft by Gov. Eliot Spitzer, Lt. Gov. David Paterson, Comptroller Thomas DiNapoli, Senate Majority Leader Joseph Bruno, Assembly Speaker Sheldon Silver, Assembly Minority Leader James Tedisco and Senate Minority Leader Malcolm Smith. I seek the material for calendar year 2007.

Please include any materials that explain the purpose of the trips, itineraries, manifests and the schedules for Gov. Spitzer and Lt. Gov. Paterson for the days in which they used the state aircraft for any purpose. Please provide any and all materials relating to this request as soon as possible.

Thank you.

Sincerely,

James M. Odatto

Reporter

Albany Times Union"

<sup>13</sup> The following information was turned over: "records for January through May 2007, unless otherwise indicated: (1) monthly State Police aviation reports for the Governor, Lieutenant Governor and Senator Bruno; (2) six flight request forms for helicopter use by the Governor (four unsigned and two signed by the Chief of Staff); (3) preflight confirmation and aircraft manifests showing travel by the Governor, Lieutenant Governor, and Senator Bruno; (4) a typed list of dates on which the Lieutenant Governor had used state aircraft; (5) schedules for the Governor and Lieutenant Governor for a variety of days; (6) nine flight request forms all signed by Senator Bruno; (7) two documents entitled "Transportation Assignment for Senator Joseph Bruno" for May 2-3, 2007, and May 24, 2007; and (8) Senator Bruno's itinerary for May 17-18, 2007" (OAG Report, at 6 n 3).

tomorrow, to have appropriate authorities (IG, AG, DA) investigate. It's a very serious situation involving possible violations of law. Best handled by others . . . ."

On July 2, 2007, Felton forwarded Howard an e-mail discussing Senator Bruno's use of ground transportation in New York City on June 27, 2007. On July 10, 2007, Dopp asked Odatto to submit a new FOIL request for the month of June. In a separate e-mail sent minutes later, Dopp explained that "the lawyers believe there is some question as to whether the original request covers June." Later that day, Odatto submitted another FOIL request.

Dopp emphasized that any allegation that he "concocted" media interest in this travel issue is absurd. To make this point, Dopp provided the ODA with numerous commentaries written by Odatto and others addressing the abuse of state travel resources. Dopp dismissed the suggestion that he solicited a FOIL request from Odatto. Finally, Dopp asserted that everything he did was ethical and legal.

## **2. Assistant Deputy Secretary to the Governor William Howard**

According to Howard, mid-May was the first time that he recalls Dopp contacting him about obtaining documents. Although he has recollection of assisting Dopp in collecting certain documents, Howard does not recall Dopp telling him that this was pursuant to a FOIL request or media inquiry. Howard believes that he never heard anything about a FOIL request until on or about June 28, 2007. However, this is inconsistent with Dopp, as noted above, and Felton, as discussed later. Instead, Howard explained that he was simply getting this information because Dopp, his superior, asked him to get it.

Howard recalled that, on or about May 17, 2007, Dopp contacted him about a Leaders' Meeting that was scheduled close to that day. Howard explained that Dopp informed him that Senator Bruno could not attend the meeting because he was attending a fundraiser in New York City. According to Howard, Dopp asked him if he thought Senator Bruno was going to use a state helicopter to travel to this meeting. Howard stated that Dopp asked him to see if Senator Bruno's schedule was available. Howard contacted Felton for the information, and later sent Dopp an e-mail which relayed parts of Senator Bruno's May 17 and 18, 2007 schedule. On a later date, Howard remembered receiving Senator Bruno's entire May 17 and 18, 2007 itinerary by fax, which he forwarded to Dopp. Howard believed that Dopp was collecting these records to conduct some sort of internal review.

Howard did not understand why Dopp e-mailed Baum, on May 23, 2007, stating that "Bill H[oward] says the records exist going way back . . . ." Howard speculated that Dopp must have misunderstood him. Howard surmised that he may have told Dopp that the aviation records exist going way back, but not the itineraries.

Howard was also e-mailed by Felton on May 23, 2007. Howard forwarded this "unsolicited" e-mail to Dopp. According to Howard, Dopp asked him to get the itinerary connected to that request.

Howard also had only a passing recollection of discussions regarding the synopses. Howard remembered communicating with Felton and being informed that the drivers generally did not keep the itineraries after each trip. According to

Howard, Felton told him they could collect that information and put it together for the Executive Chamber. Howard explained that this was the catalyst that led to the synopses being created. Howard recalled that once he was provided with the synopses, he ultimately concluded that the synopses did not present security concerns. Howard believed that these synopses had been based upon the drivers' notes. Furthermore, Howard maintained that at the time he asked Felton for this information, he was not aware that the synopses were going to be turned over to Odatto.

Howard was also questioned about the June 3, 2007 e-mail from himself to Baum stating, "The impending travel stuff implies more problems – particularly in the tax area I think. I think timing right for that move." Howard explained that he did not actually know about any "move," whether it be a "media move" or a "referral" to an investigatory agency. Rather, Howard believed that Dopp might be planning to turn the information over to an agency because it appeared that Senator Bruno was engaged in some sort of wrongdoing. Howard explained that the political use of the transportation could have financial implications for him in a tax sense. Howard does not recall Baum ever responding to this e-mail.

As noted earlier, Howard stated that Dopp informed him for the first time on or about June 28, 2007 that the documents were going to be released pursuant to a FOIL request. Turning to his conversations with Felton, Howard had no recollection of Felton telling him that these were not public documents and not subject to a FOIL request. Felton's account contradicts this.

According to Howard, he contacted Felton and advised him of the FOIL

request. Shortly thereafter, Howard received a package that contained the travel documents, the synopses and itineraries. When Howard delivered these documents to Dopp, he recalled telling Dopp that they contained synopses. In contrast to Dopp's recollection, Howard does not remember Dopp asking if the synopses were public documents or if it was appropriate to turn them over pursuant to a FOIL request. Howard did not find it odd that the information that was ultimately requested in the FOIL request was the same information that he had been collecting for Dopp.

When Howard delivered the synopses to Dopp, he believed that he called them "synopses" and that the notes used to put these synopses together were no longer available. Howard recalled that Dopp responded "okay" to this statement. Howard did not recall ever conveying to Dopp that these were public documents. According to Howard, he assumed attorneys would be examining these documents. Howard emphasized that his recollection of this subject matter was not perfect because these events only took a fraction of his time and he was concerned with more important matters.

3. **Acting Superintendent of the New York State Police Preston L. Felton**

According to Felton, Howard contacted him in mid-May about a FOIL request. Felton remembered Howard telling him that the Executive Chamber was working on a FOIL request and that they wanted some flight manifests for Senator Bruno and the Governor. Although he believed these documents were subject to FOIL, Felton checked with Counsel's Office to be sure. Felton then had the records forwarded to Howard. Felton recalled being contacted by

Howard sometime later for additional flight manifests. Felton provided Howard with the records he requested.

In mid-May, Howard contacted Felton and requested Senator Bruno's May 17 and 18, 2007 schedule. Once he provided this itinerary to Howard, Felton e-mailed Howard and informed him that Senator Bruno made another request for ground transportation. Felton explained that he e-mailed Howard because he wanted to make sure the State Police were still going to provide transportation for Senator Bruno. Felton also explained that he did not check with counsel to see if this itinerary was subject to FOIL because he did not see a difference between a flight record and a ground transportation record.

On May 23, 2007, Felton provided Howard with Senator Bruno's May 24, 2007 itinerary via e-mail. Howard forwarded this, as well as a subsequent schedule change notification e-mail, to Dopp.

At some point thereafter, as Felton relayed, Howard contacted him requesting three itineraries for trips by Senator Bruno during the month of May. By this time, Felton believed this request was both pursuant to a FOIL request and an internal audit. Felton's basis for this belief was in part because Howard had been inquiring into the costs associated with the use of state aircraft. Felton later informed Howard that these itineraries did not exist. According to Felton, Howard then asked him if he could find out what the drivers did on the days they drove Senator Bruno. In response to Howard's question, Felton called Troop NYC and asked them to gather this information. Felton explained that the information was written up and sent back to him. According to Felton, Howard

never asked him to have the drivers interviewed; he simply asked if he could find out what they did each day.

Felton remembered that he sent the documents to Howard and explained that the synopses provided an accounting of State Police actions and were not to be used as Senator Bruno's itineraries. In fact, once Felton learned that these documents had been turned over pursuant to a FOIL request, he stated that he became angry. However, Felton conceded that it was the Executive Chamber's decision whether to release the documents. Felton explained that he did not believe these documents constituted State Police "records."

Felton did not recall ever being asked for any pre-May itineraries. Thus, the basis for Dopp's May 23, 2007 e-mail to Baum stating "Bill H[oward] says the records exist going way back" is unclear.

Felton stated that during this time period, there were a number of pressing issues going on within the State Police, such as the Bucky Phillips incident that involved the shooting of two State Troopers. Felton relayed that, in comparison, the travel issue was trivial.

#### 4. Secretary to the Governor Rich Baum

Baum recalled that Dopp approached him in April or May 2007, informing him that there had been comprehensive requests for records of air and land transportation for the Governor and Senator Bruno. Baum was not informed who made the request, which he explained was not uncommon because he generally was not informed of such details. However, Baum assumed the request was from a reporter.

Baum explained that Dopp would inform him about significant requests that could end up in the press. According to Baum, the travel records request was simply not an important issue. At some point before the documents were turned over, there was a discussion within the Executive Chamber about the Governor's, Senator Bruno's and the Lieutenant Governor's use of state travel resources. After reviewing the Governor's use, Baum recalled the focus shifted to Senator Bruno. Baum believed that this shift was because some initial documents collected by Dopp seemed to indicate that Senator Bruno used state aircraft to travel to political events.

Baum recalled seeing Dopp's May 17, 2007 proposed press statement. After reviewing the statement, Baum decided not to release it because he did not believe Senator Bruno was violating any law.

When asked about the May 23, 2007 e-mail, which contains Dopp's comment about a "new and different way to proceed re media[,]" Baum explained that he thought it was a reference to the Leaders' Meetings which were being portrayed negatively by the media. Furthermore, Baum did not recall receiving Howard's June 3, 2007 e-mail. Baum explained that he receives a lot of e-mails each day and it is common for him not to respond. Baum also did not recall any discussions with Pope about referring Senator Bruno's possible misuse of state aircraft to the IG.

Lastly, Baum recalled that, a day or two before the story was printed, Dopp told him that Senator Bruno would be negatively depicted in the article.

5. Governor Eliot Spitzer

Governor Spitzer was aware that the use of state aircraft had been a focus during his campaign. Prior to taking office, Governor Spitzer had a conversation with Senator Bruno in which Senator Bruno expressed his discomfort and dissatisfaction that Governor George Pataki had on occasion withdrawn his permission. Governor Spitzer informed that so long as the use of the aircraft was appropriate, he would not deny Senator Bruno's request. After taking office in 2007, Governor Spitzer recalled that a certification policy had been implemented by his staff.

Governor Spitzer recalled being apprised in mid-May by Dopp that there had been media inquiries into Senator Bruno's use of state aircraft. In fact, Governor Spitzer specifically recalled a conversation with Dopp, and perhaps Baum, in which it was relayed to him that Senator Bruno was using state aircraft to travel to political events. Governor Spitzer informed Dopp (or Dopp and Baum) that the law was so porous and, as such, Senator Bruno's acts were probably not illegal. Governor Spitzer also believed that any response would be an unnecessary distraction. Although Governor Spitzer did not remember seeing the May 17, 2007 proposed press statement, he surmised that it may have been the basis for this conversation.

Governor Spitzer did not recall being a party to any conversations that took place prior to July 1, 2007, about affirmatively referring Senator Bruno's use of transportation to the IG. However, Governor Spitzer became aware of discussions, but was not a party to them, within the Executive Chamber about

referring the matter to the IG or other agencies after the publication of the July 1, 2007 article. Governor Spitzer was unaware of any conversations about referring the matter to the FBI.

Governor Spitzer stated that he did not direct the gathering of any documents concerning Senator Bruno's use of state transportation at anytime. Furthermore, although Governor Spitzer urged his staff to be responsive to media requests, he did not direct the release of any documents at any time to the media concerning Senator Bruno's use of state transportation.

Governor Spitzer was not aware of any changes in State Police procedures regarding the use of State Police resources. Finally, Governor Spitzer stated that he did not direct any surveillance on Senator Bruno.

**6. Press Secretary Christine Anderson**

Anderson stated that it is common for reporters to ask for documents without providing a formal FOIL request. In fact, Anderson recalled that although Odatto had requested documents from her in the past, he had never actually submitted a FOIL request to her.

Turning to the issue at hand, Anderson was aware that Dopp was gathering documents for a FOIL request by Odatto. Although Anderson did not assist Dopp in collecting these documents, she did know that the article could be embarrassing for Senator Bruno. Anderson recalled that Dopp appeared upset that his May 17, 2007 proposed press statement was not going to be released.

With regard to the June 26, 2007 e-mail exchange between Dopp and Anderson, she never knew what "big favor" he planned to ask Odatto.

D. Inconsistencies are Immaterial to Our Analysis

The ODA commenced this inquiry because Senator Bruno claimed that the Executive Chamber directed the State Police to conduct illegal surveillance on him.

It is not at all uncommon for the ODA to encounter some inconsistencies during an inquiry or investigation. Inconsistencies are commonplace because witness perceptions, interpretations and/or recollections differ. On the other hand, inconsistencies may also arise from misleading statements and/or intentional lies.

In many criminal cases, the ODA must make a preliminary finding of facts in order to determine whether a crime has occurred. For example, in the classic "he said/she said" criminal case, the ODA must make a preliminary determination as to which witness is credible before further pursuing the investigation. However, there is an exception to this rule: when the complainant's allegations, if true, fail to constitute a crime.

During our inquiry, we discovered some inconsistencies and/or facts that we are unable to reconcile or resolve. Some significant inconsistencies and unresolved facts include: (1) Whether Odatto made an oral document request; (2) Whether Dopp solicited the FOIL request from Odatto; (3) Whether the document request was for the 2007 calendar year or for specific dates; and (4) When was Howard informed of the FOIL request.

For the reasons discussed in Part III, the inconsistencies and unresolved facts in the instant case are immaterial to the issue of whether a crime has

occurred. Our investigatory powers are constitutionally and ethically intertwined with our legal authority. It is not the ODA's role to resolve or reconcile inconsistencies when they are immaterial to whether a crime has occurred. In light of the aforementioned, and as described in Part III, further inquiry into this matter would constitute a fishing expedition.

## PART III

### OFFICIAL MISCONDUCT

#### A. Substantive Law

Official misconduct is defined as follows:

"A public servant is guilty of official misconduct when, with intent to obtain a benefit or deprive another person of a benefit:

He [or she] commits an act relating to his [or her] office but constituting an unauthorized exercise of his [or her] official functions, knowing that such act is unauthorized;

...

Official misconduct is a class A misdemeanor" (Penal Law § 195.00 [1]).

When the Legislature wrote the current official misconduct statute, it "erect[ed] high barriers to prevent a criminal court from reviewing mere errors of judgment on the part of public officials" (People v Feerick, 93 NY2d 433, 448). The Legislature sought to avoid "the possibility that the misconduct was the product of inadvertence, incompetence, blunder, neglect or dereliction of duty, or any other act, no matter how egregious, that might more properly be considered in a disciplinary rather than a criminal forum" (id.). Thus, to prove official misconduct, the prosecutor "not only must show that the public servant knew his or her acts were an 'unauthorized exercise of his [or her] official functions' but also must show that the public servant did so with the 'intent to obtain a benefit or deprive another person of a benefit'" (id. at 466 n.4 [quoting Penal Law § 195.00 [1]]). The failure to establish any one element of the crime will defeat the prosecution (see People v Hochberg, 87 Misc 2d 1024, 1031, affd 62 AD2d

239, lv denied 44 NY2d 953 [stressing that "the defining statute requires *in addition* to the corrupt motive that the act itself be unauthorized and without the scope of the defendant's official duties"] [emphasis in original]; see also People v Esposito, 160 AD2d 378, 378, lv denied 76 NY2d 787 ["demonstration that defendant knew such acts to be unauthorized . . . is a necessary element of (official misconduct)"].

Even assuming an impure intent could be proven beyond a reasonable doubt to a jury, a significant assumption, it must next be determined whether any of the individuals committed an act that was "an unauthorized exercise of his official functions" (Penal Law § 195.00 [1]). To further this review, it is essential to know those official functions.

The Governor is the head of the Executive Department, and the State Police is a division of the Executive Department (see Executive Law §§ 30-31; 210). The State Police has been delegated responsibility for state aircraft. However, as an exception to this delegation, the Executive Chamber retains responsibility for approving non-State Police use of the state aircraft. This policy is articulated in an internal aviation procedures guide.

The Legislature has found that "a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions" (Public Officers Law § 84). Further, the Legislature has concluded that "it is incumbent upon the state . . . to extend public accountability wherever and whenever feasible" (Public Officers Law § 84).

**B. Analysis**

Based on the above, the Executive Chamber is responsible for the use of state aircraft. In furtherance of that responsibility, the Executive Chamber implemented a certification requirement on the transportation request form to ensure that the aircraft was being used for official purposes. Additionally, the Executive Chamber oversees the State Police, which is also responsible for the usage of state aircraft. Moreover, the Executive Chamber and the State Police, as enunciated by the Legislature, have an obligation to account for the usage of that aircraft to the public. Thus, it would be within the authority of the Executive Chamber to collect information from the State Police concerning the usage of the aircraft. This authority would include gathering information on the ground transportation portion of a trip to verify that the aircraft is being used for official state business. Further, the Acting Superintendent of the State Police would be within his scope of duties by compiling this information in compliance with the Executive Chamber's request.

Turning to the dissemination of the collected information to the media: The job responsibilities of the Executive Chamber's Communications Director include "maintaining relations between the Governor's Office and the various press media" (Executive Chamber Administrative Practices Manual 2007). As such, he would appear to be acting within the scope of his authority by turning over to the press information that the public has a right to know.

Furthermore, even assuming an "unauthorized exercise" of "official functions," it does not appear that anyone knew that their "act[s] [were]

unauthorized" (Penal Law § 195.00 [1]). The evidence showed that Dopp was aware that the Executive Chamber had oversight of state aircraft usage. The evidence further revealed that Dopp was aware of prior scandals involving the abuse of state resources by public officials. Dopp also knew that the Spitzer Administration implemented the certification policy in January 2007. Considering all this, it is not unreasonable for Dopp to believe his actions were authorized. In addition, it is extremely unlikely that the ODA could prove otherwise beyond a reasonable doubt. Turning to Howard and Felton, they each explained that they were simply following their superior's direction to obtain and/or create the documents. Based on this, it would be difficult to attribute to them knowledge of an unauthorized act.

For the purposes of the ODA's analysis, we assumed a hypothetical worst case scenario where the evidence was evaluated in a light most unfavorable to each witness. This means we assumed, for purposes of this analysis, that the Executive Chamber directed the State Police to gather information on Senator Bruno's use of state transportation for the specific purpose of releasing information to the media to "smear" him. Further, such a view entailed assuming that there was no FOIL request in existence when the information was gathered. Rather, the FOIL request was assumed to have been a pretext to cover up the true purpose for collecting the information. Even making these assumptions, the ODA concludes that no crime occurred.

We emphasize that these assumptions are not the ODA's finding of the facts but, rather, exist solely for analytical purposes. Further, the factual

discrepancies, however slight or significant, are immaterial to our analysis because they have no bearing on whether a crime occurred. The ODA is simply not the appropriate authority to further investigate or resolve the underlying factual issues. This task is more appropriately reserved for other agencies.

C. **FOIL**

Another, and less egregious, view of the facts is that Dopp acted outside of his authority by gathering documents for the media before a *written* FOIL request was submitted, and that William Howard and Preston Felton acted outside of their authority by soliciting the *creation* of the synopsis documents. However, this argument, too, fails to constitute criminal conduct.

The Freedom of Information Law (FOIL) is the bare minimum that the government must comply with in the release of documents to the media and public. There is nothing which prohibits the government from providing more than what the FOIL requires. Indeed, the Court of Appeals has stated that it has "consistently interpreted the statute liberally to implement" its broad purpose of governmental accountability to its citizens (Matter of Weston v Sloan, 84 NY2d 462, 466).

Further, the requirement that a FOIL request be made in writing is not an absolute. Rather, "agencies may choose to accept oral requests for records and act in an informal manner in their responses to requests for records" (Comm on Open Gov't OML-AO-2791). Although the FOIL does not require an agency "to prepare any record not possessed or maintained by such [agency]," nothing in the FOIL prohibits an agency from so doing (Public Officers Law § 89 [3] [a]).

Thus, Dopp, Howard and Felton going beyond the FOIL to provide accountability for the use of state transportation is not conduct of a criminal nature.

D. Conclusion

In sum, the most appropriate Penal Law Section potentially applicable to the facts at hand is Section 195.00 [1] official misconduct.<sup>14</sup> To be guilty of official misconduct, one must knowingly act to "obtain a benefit or deprive another of a benefit," and knowingly commit an "unauthorized exercise of his [or her] official functions." There can be no crime if all elements are not met. Here, the compiling of information on the use of state resources and turning it over to the media do not appear to be an improper exercise of official function. That these actions may have been done with ill intent does not turn a lawful action into an unlawful one. Neither does the fact that the individuals involved acted outside of the FOIL. However, we would again emphasize that our assumption of ill intent here was solely for the purpose of our analysis. As we find no evidence of unauthorized action and, thus, no official misconduct, it is not necessary for us to go any further. Therefore, we make no finding on whether ill motive existed.

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<sup>14</sup> Based upon our review of the OAG's and IG's records, we conclude that there was no illegal surveillance by the State Police. Accordingly, we concur with the finding on this issue in the OAG Report.