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STATE OF NEW YORK  
EXECUTIVE CHAMBER  
ALBANY 12224

August 8, 2007

By Hand

Hon. P. David Soares  
District Attorney  
6 Lodge Street  
Albany, NY 12207

Dear Mr. District Attorney:

This letter responds to your request that we provide our views as to whether the conduct detailed in the recent report of the Attorney General, if true, would constitute the crime of official misconduct in violation of Penal Law § 195.00. For the reasons set forth below, and as both the Attorney General and the Inspector General have found, such conduct is not illegal.

We are not in this letter addressing whether good judgment was used. It clearly was not, and the conduct at issue has resulted in serious disciplinary action against Executive Chamber employees. It also remains the subject of a preliminary inquiry by the New York State Ethics Commission.

A. Background.

As you know, the core allegation in this matter is that Executive Chamber employees solicited and received information from the State Police relating to the transportation of Senator Bruno, and then distributed that information to the press, for the purpose of embarrassing the Senator for political purposes. For the purposes of this analysis, we are assuming that all of the factual allegations in the Attorney General's report are true.

The Attorney General and Inspector General both correctly concluded that there was no violation of law in connection with the events that were described in the Attorney General's Report of Investigation into the Alleged Misuse of New York State Aircraft and the Resources of the New York State Police ("the Report"), in which the Inspector General concurred.

EXHIBIT  
Commission  
#1167 3/19/08

In particular, the facts do not make out a violation of the Official Misconduct statute, Penal Law § 195.00(1). The official misconduct statute is "intended to encompass flagrant and intentional abuse of authority by those empowered to enforce the law." People v. Feerick, 93 N.Y.2d 433, 445 (1999). The Court of Appeals stated that the statute was drafted to exclude "misconduct [that] 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. at 448. The Court continued, "The statute thus erects high barriers to prevent a criminal court from reviewing mere errors of judgment on the part of public officials." Id.

Penal Law § 195.00(1) provides:

A public servant is guilty of official misconduct when, with intent to obtain a benefit or deprive another person of a benefit: (1) He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized.

In this case, there can be no crime because as to each actor there is an element failure as a matter of law as to whether the conduct "constitut[es] an unauthorized exercise of his official functions." Moreover, because of the nature of this failure, no additional factual inquiry can alter the legal conclusion.

Specifically, for a state Director of Communications to seek, obtain, and publicize information about a state elected official who uses state police helicopters to attend fundraising events is not and cannot be an "unauthorized exercise of his official functions." Nor can it be an unauthorized exercise of official functions for the liaison to the State Police to seek the collection of such records, or for the Superintendent of the State Police to collect and provide them. As set forth below, this is true as a matter of law notwithstanding motive or intent.<sup>1</sup>

The Report describes the following relevant acts:

- State employees "caused" the State Police to create documents detailing where troopers had driven Senator Bruno and to report details of Senator Bruno's requests for ground transportation, upcoming schedules, and changes to those schedules. Report at 2.
- They did so under the "pretext" of responding to a Freedom of Information Law ("FOIL") request. Id.

<sup>1</sup> For the sake of this analysis, we assume the same intent for each of the actors, although the report suggests that different actors might have had different knowledge and different intent. Even if you assume the most impure intent on the part of each actor, there is still no crime as a matter of law.

- The motive described in the report was that "persons in the Governor's office planned to generate press coverage of Senator Bruno's use of state aircraft to attend fundraisers and other political events." *Id.* at 8

The report points out that these acts "deviated" from past State Police practice, *id.* at 2, were "not required by FOIL," *id.*, and drew the State Police into politics, *id.* at 40.

Taken together or separately, these acts do not violate a criminal statute.

In analyzing whether the conduct at issue is "unauthorized," it is important to start from two basic propositions: (1) government resources should be used for government purposes; and (2) the public has a right to know how government officials are using government property. This is true even if the whistleblower has less than pure motives.

**B. It violates no law to ask for accurate records of the use of state resources. A mixed motive does not change this.**

There are government functions that are, by law, secret. For example, on the state level, these include the workings of the grand jury, Criminal Procedure Law §190.25(4)(a), and eavesdropping warrants and tapes, Criminal Procedure Law §§ 700.55, 700.65; Penal Law §250.20. On a federal level, they include classified information that can damage the security of the nation.

But the activities of elected officials who use state airplanes to travel to political fundraising events are not shielded by any such statute. Nor should they be. To the contrary, this is a subject where particular transparency is warranted, so that the public can judge the fitness of its elected officials, as well as the efficacy of the laws that govern when and why they fly at taxpayer expense.<sup>2</sup>

As a matter of law, it cannot be "unauthorized" for the Superintendent of the State Police to cause troopers to create accurate records accounting for their use of their time or their planned use of time, or for members of the Executive Chamber to direct such action. It is perfectly legal for Troopers to memorialize who they were transporting in state-owned vehicles and when and where.<sup>3</sup> Where and when the State Police flew and drove Senator Bruno are simple facts, and it is no crime to write facts down. Nor does the failure to keep records in the past criminalize recordkeeping today.

<sup>2</sup> Indeed, the public has expressed intense interest in the flights of government officials for years. See, e.g., K. Sack, 'Air Pataki' Replaces 'Air Cuomo' as Family Members Ride, *New York Times* (May 11, 1995); Associated Press, *Pataki a frequent flyer on state aircraft*, *Associated Press State and Local Wire* (Dec. 19, 1999); K. Murphy, *Gov's Travel Makes People Talk*, [www.stateline.org](http://www.stateline.org) (Mar. 19, 2002) ("Want to dodge congested airline counters and long security lines? Fly on government aircraft or corporate jets? You might - if you get yourself elected governor."); F. Dicker, *Pataki's 10G Bill for Jet Hits Turbulence*, *New York Post* (Jan. 15, 2007); K. Lovett, *Spitz Jets off to Chase Calif. \$\$*, *New York Post* (May 2, 2007).

<sup>3</sup> There is no falsification of business records at issue, see P.L. § 175.05, because the whole point of the records was that they be true and accurate records of Senator Bruno's travels.

Indeed, the Report itself acknowledges that part of the effort underway was to see whether Senator Bruno was complying with a certification that he made to the Executive Chamber. It found: "The various documents and information collected by the Superintendent at the request of Howard were all highly pertinent to whether Senator Bruno's use of state aircraft was in fact in connection with legislative business in New York City, as Senator Bruno had certified." Report at 5. Checking the accuracy of a certification regarding the proper use of state aircraft is legal and proper. It is legal for the Superintendent whose agency resources are being used, it is legal for the Executive Chamber liaison to the State Police, and it is legal for a communications director who is regularly asked about the use of state aircraft.

The legal question then becomes whether bad motive can convert lawful conduct into an unauthorized act. It cannot, as a look at the text of the statute itself shows; motive and intent are relevant to two other elements, but not this one. Specifically, in addition to the action being objectively "unauthorized," the actor must also have an "intent to obtain a benefit or deprive another person of a benefit," and must know that his "act is unauthorized." But these knowledge and intent elements are additional; each must be independently proved. See People v. Hochberg, 87 Misc. 2d 1024, 1031 (Sup. Ct. Albany Co. 1976), aff'd, 62 A.D.2d 239 (3d Dep't), app. denied, 44 N.Y.2d 953 (1978) (emphasizing that the statute "requires *in addition* to the corrupt motive that the act itself be unauthorized and without the scope of the defendant's official duties"). Thus by the very terms of the statute, state of mind does not convert otherwise lawful conduct into a crime. Instead, the way that that statute is drafted, there must be both bad intent and an objectively unauthorized official act.<sup>4</sup>

Here, it may well be that there was bad intent, but, as a matter of law, the conduct at issue is not objectively "unauthorized." It is inescapable that memorializing state action is legal and proper.<sup>5</sup> Providing information to the press is likewise not

<sup>4</sup> The Legislature "incorporated not one but two *mens rea* requirements into the statute": the public servant must know that his or her acts were an unauthorized exercise of his official functions, and must act with the intent to obtain a benefit or deprive another person of a benefit. Feerick, 93 N.Y.2d at 446. These twin requirements serve to avoid the criminalization of misconduct that "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. The statute thus erects high barriers to prevent a criminal court from reviewing mere errors of judgment on the part of public officials." Id. at 448; see People v. DiMatteo, 261 A.D.2d 412 (2d Dept.), app. denied, 94 N.Y.2d 861 (1999) (overturning official misconduct conviction for soliciting political contributions from subordinates); People v. Mackell, 47 A.D.2d 209, 218 (2d Dept. 1975), aff'd, 40 N.Y.2d 59 (1976) (noting that official acts can be unreasonable or even stupid but not motivated by a criminal intent meeting the requirements of official misconduct). Here, because there is a failure as a matter of law of the "unauthorized exercise" element, it is unnecessary to conduct the additional inquiry into whether the intent elements have been met.

<sup>5</sup> As the Comptroller General of the United States has written, "[S]ound decisions on government programs and policies are nearly impossible without timely, accurate, and useful information." D. Walker, Transparent Government and Access to Information: A Role for Supreme Audit Institutions (June 26, 2007).

"unauthorized."<sup>6</sup> To the contrary, "[m]eeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation." Doolan v. BOCES, 48 N.Y.2d 341, 347 (1979). Thus, here, bad motives may cause otherwise legal conduct to be scandalous, but not criminal.

Further support is found in the Attorney General's report. Among its findings, the Report stated that the State Police had been drawn into politics. The Governor has publicly condemned this, and has sanctioned the Executive Chamber employees who were involved. But, from the standpoint of the criminal law, the Report makes an additional, important point. New York State lacks a policy or protocol forbidding this conduct, and the Report, therefore, recommended that such a policy be adopted. Report at 3. If the top legal officer of New York State has reached this conclusion, these facts certainly cannot sustain a criminal prosecution in its absence.

The official misconduct statute as drafted comports with good public policy. A rule that a mixed motive could somehow criminalize an instruction to keep accurate records would have a severe chilling effect. Anyone who insisted on good recordkeeping or a sound audit trail would have to fear that someone would later claim that his true motive was embarrassment or political gain. The only safe course of action under such a regime would be to allow abuses to go unchecked. This cannot be the law.

C. Providing more information than the FOIL statute requires is not "unauthorized," particularly for a communications director.

It was also lawful to release the government records in question to the press. It is beyond dispute that a government official may gather and release documents to the public in the absence of a FOIL request.

The obligations imposed by the FOIL statute constitute a floor guaranteeing a minimum level of public access to documents; they are not a ceiling on such access. While an agency cannot conceal something it is otherwise required to disclose, it is not limited by FOIL from providing information or records that it is not required to disclose.<sup>7</sup>

In his report, the Attorney General similarly endorsed disclosures that go beyond mere FOIL requirements: "Informal disclosures that go beyond the strict requirements of

<sup>6</sup> As set forth in the legislative findings to the FOIL statute: "The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government." Public Officers Law §84.

<sup>7</sup> The New York Post made that point to this administration early in its tenure. Specifically, reporter Fred Dicker orally requested flight manifests from the State Police in March 2007. When the State Police public information officers told him to file a FOIL request, Dicker objected. As memorialized in an email from the State Police to the Executive Chamber press office, "Fred [Dicker] insisted that under this Governor's new open government policy, that he was not required to make a written request and that he should be able to make an oral request to receive such records. He then said he would check with the Governor's office." E-00001. Dicker subsequently received the documents (and a sheet summarizing them) from the Executive Chamber press office without filing a written FOIL request.

FOIL (such as accepting oral requests for information) help remove barriers between the press and public information, and are to be encouraged where appropriate. Impediments to access under FOIL should be removed where possible because they frustrate the democratic process." Report at 2 n.2.

Thus, disclosure of documents without a written FOIL request would be permitted by the practice of the administration, the expectations of the press, the terms of the FOIL statute, and principles of good government as described by the Attorney General in his report. Of course, as the Report sets out, the information here was not actually disclosed until after the Albany Times Union filed a FOIL request.<sup>8</sup> But either way, the release of the documents was lawful, and certainly not a crime.

Indeed, from a public policy standpoint, it cannot be the law that a motive to embarrass a state official converts the disclosure of government documents into a crime. If so, never again would political contribution records, travel records or voting records see the light of day, because anyone with a colorable motive to embarrass an opponent could face prosecution. This would undermine basic notions of open government.

Finally, it is of no effect if, as the Report suggests, one state employee may have misled others as the records were being collected.<sup>9</sup> Specifically, the report states that employees were told that records were being collected in connection with a "FOIL" request before the newspaper had submitted a written document. Assuming arguendo that this was an intentional fabrication rather than a colloquial way of describing an oral press request, it does not change the analysis. It is simply not a crime for a state employee to mislead co-workers. Nor would a lie to co-workers magically convert into a crime the otherwise lawful acts of requiring Troopers to create accurate government records or providing those records to the press.

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The conduct of Executive Chamber employees here was inappropriate. In the words of the Attorney General's report, they drew the State Police "squarely into the middle of politics, precisely where they do not belong," and, for that, employees have been sanctioned.

But, as intended by the drafters of the statute, an "error[] in judgment" is not a crime. Feerick, 93 N.Y.2d at 448. Under the elements of this carefully drawn law, a bad or a mixed motive does not convert the otherwise legal conduct here into a criminal

<sup>8</sup> The Report found that a written FOIL request was received on June 27, 2007, and that documents were produced on June 28 and 29. See Report at 6, 9.

<sup>9</sup> See, e.g., Report at 40 n.23.

offense.<sup>10</sup> And because of this legal doctrine, because of the failure of an element of the crime as a matter of law, no amount of additional factual investigation can alter the outcome.

Finally, the consequences of making any other criminal charging decision in this case would be grave. If finding and reporting questionable conduct by a government employee becomes a criminal offense, then this country will have traveled to a dangerous place, one where an official's repeated abuses of government privileges can be kept secret through the threat of criminal prosecutions. The Legislature had the good sense to draft a statute that does not permit this.

We hope that you find the foregoing analysis responsive to your request. As you know, this office does not represent any Executive Chamber employees in their personal capacity in connection with your inquiry, but we are happy to provide any information, documents or analyses that you think will assist you in any way. Please feel free to let us know if there is anything else that you need relating to this matter.

Sincerely,

*Peter B. Pope*

Peter B. Pope  
Special Counsel

cc: David Nocenti

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<sup>10</sup> Note that for this analysis, we assume that the actors all had improper motives. In fact, the Report notes that both Superintendent Felton and William Howard testified that they believed that they were responding to a FOIL request. Report at 25-30. And the report is silent as to whether or not Darren Dopp began gathering material after an oral press request. But, as noted above, whether the motives were legitimate, illegitimate or mixed, there still is no crime.