

# New York State Ethics Commission

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**Advisory Opinion No. 95-38:** Restrictions on the Department of Environmental Conservation's acceptance of donations from businesses and organizations whose owners and individual members may engage in activities which are licensed and regulated by the Department.

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## INTRODUCTION

The following advisory opinion is issued in response to an inquiry from the Department of Environmental Conservation ("DEC") concerning its acceptance of offers of donations of equipment or money from individuals, businesses and not-for-profit organizations.

Pursuant to the authority vested in the New York State Ethics Commission ("Commission") by Executive Law §94(15), the Commission hereby renders its opinion that DEC may accept donations from individuals, businesses or organizations whose activities are subject to its jurisdiction. However, it may not accept donations from individuals or entities under investigation by or in litigation with the agency. Decisions as to the propriety of a donation must be made by the Commissioner on a case-by-case basis, considering its source, timing and amount. While donors may freely advertise donations to DEC, use of logos or other identifiable markings on the donated equipment, while not prohibited, should be discreet. DEC may not accept donations where the equipment or money donated is conditioned upon its use in a particular geographic region.

## BACKGROUND

DEC, in its request to the Commission, submitted by its Acting General Counsel, Frank Bifera ("Bifera"), advised that it periodically receives offers of donations of equipment or money for a variety of agency purposes. For example, potential donations include snowmobiles, boats, and smaller types of equipment. These offers are often intended to meet the needs of Environmental Conservation Officers ("ECOs"), who are responsible for enforcing a wide range of provisions of the Environmental Conservation Law ("ECL"). Each ECO has the status of "police officer,"<sup>(1)</sup> thus charging him or her with responsibilities similar to those of others in law enforcement.<sup>(2)</sup>

Sources of offers of donations vary. According to DEC, businesses which sell equipment that may be of use to ECOs have offered to donate or loan such equipment. In some instances, the potential donors are not regulated by DEC, although it is possible that some aspect of any business operation may become subject to the Department's jurisdiction.

Other sources of possible equipment donations may be not-for-profit organizations. One potential donor is the Lake George Association Fish and Game Committee, a citizen's group devoted to advocating comprehensive management of the Lake George Basin. While it is

unlikely that these not-for-profit organizations would be regulated by DEC, Bifera advises that their individual members may engage in activities, such as fishing and hunting, which are licensed and regulated by the agency.

Bifera asks that the Commission provide guidance as to the circumstances under which donations may be made to DEC in compliance with the relevant provisions of the Public Officers Law. He also asks whether a business which makes a donation may use this fact in its advertising, whether donated equipment may display the logo or other identification of the donor, and whether DEC could commit to maintaining donated equipment for use only in a specified geographic area.

### **GUIDING STATUTES**

Environmental Conservation Law ("ECL") §3-301(2) authorizes the DEC Commissioner to:

. . . acquire real or personal property, including acquisition by condemnation, appropriation, *gift*, grant, devise or bequest. . . (emphasis added).

Public Officers Law §73(5) provides as follows:

No statewide elected official, state officer or employee, member of the legislature or legislative employee shall, directly or indirectly, solicit, accept or receive any gift having a value of seventy-five dollars or more whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him, in the performance of his official duties or was intended as a reward for any official action on his part. No person shall, directly or indirectly, offer or make any such gift to a statewide elected official, or any state officer or employee, member of the legislature or legislative employee under such circumstances.

This section prohibits an individual State officer or employee from directly or indirectly soliciting, accepting or receiving any gift worth \$75 or more under circumstances in which it could be inferred that the gift was intended to influence him or her, or could reasonably be expected to influence him or her, in the performance of official duties, or was intended to reward official action. It also prohibits any person from directly or indirectly offering or making such a gift to a State officer or employee. Thus, it is applicable both to a donor and a donee.

Portions of the State's Code of Ethics, contained in Public Officers Law §74, are applicable to gifts in certain circumstances. The provision that sets forth the rule with respect to conflicts of interest is found in subdivision (2), which reads as follows:

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

These subdivisions of §§73 and 74 of the Public Officers Law apply to all State officers and employees, whether or not paid. In [Advisory Opinion No. 94-16](#), the Commission offered a general interpretation of the gifts restrictions contained in these subdivisions and it established standards to guide State officers and employees. However, in that opinion the Commission specifically excluded from its scope gifts given to a State agency. The Commission is now asked to address such a circumstance.

## DISCUSSION

Both Public Officers Law §§73 and 74 are specifically applicable to gifts made to individual State employees. They are not enforceable with respect to gifts to agencies. In [Advisory Opinion No. 94-16](#), in which the Commission discussed in detail how these sections are to be interpreted and applied, it stated that the opinion was inapplicable to gifts to agencies.

Since the DEC Commissioner is specifically authorized by ECL §3-301(2) to accept gifts, it is important to understand the distinction between a gift to an agency and one to an individual, especially because, as will be seen, the applicable rules are different. Critically, an agency gift must remain with the agency no matter what personnel changes take place. For example, if the agency accepts a donation of a snowmobile and assigns it to a particular ECO, that snowmobile must remain with the agency after the ECO leaves State service. If it were given to the ECO, it would be a personal gift governed by §§73(5) and 74.

While these sections are not enforceable in terms of gifts to agencies, they can serve as guidelines. In [Advisory Opinion No. 92-1](#), the Commission considered gifts to an agency where the agency head, like the DEC Commissioner, has the authority to accept gifts for the agency. There, the Commissioner of Agriculture and Markets was authorized to accept private contributions to fund a program. The Commission set forth the limitations of his authority as follows:

While it is not the Commission's intent to eliminate the pool of potential donors, we believe the following guidelines will assist the commissioner to avoid violating the spirit or letter of the law. First the Commission considered, and rejected, the notion that the commissioner should not accept contributions from any regulated individuals or entities. We note that, when enacting the Agriculture and Markets Law §156(i), the Legislature was cognizant of the commissioner's dual role as a regulator and promoter of the agricultural industry in New York State. Furthermore, logic indicates that those most likely to be interested in promoting New York farm products are those involved in their production, distribution, etc.; that is, those subject to the regulation of the Department.

The Commission concludes that the commissioner may accept contributions from regulated persons and entities, but not when those individuals and entities are involved in litigation with the Department or under the Department's investigation. In such adversarial situations the Department's impartiality is especially important. The commissioner should assume the responsibility of establishing procedures designed to guard against his accepting a contribution from inappropriate sources.

The Commission next considered other easily identifiable categories of donors (such as entities doing business with the Department, lobbyists, applicants for licenses, permits, etc.) whose gifts, due to the donor's relationships to the Department, might raise the specter of impropriety. In such cases, the commissioner must carefully consider the source, timing and amount of the contribution before accepting it.

In conclusion, the Commission urges the commissioner to take care in how he speaks of the Fund and acknowledges contributions to it, lest he or the Department be perceived by the public as favoring donors or pressuring others to give.

While these guidelines are, of necessity, general, they should be carefully considered when a donation of equipment or money is offered to and accepted by DEC.

Clearly, it would be impossible to list every type of donor whose donation might raise suspicion. As indicated in Opinion No. 92-1, contributions and donations from entities which are under DEC investigation or in litigation with the agency should not be accepted. Otherwise, due consideration should be given to the circumstances surrounding the offering, solicitation, or receipt of a donation, as well as its value.<sup>(3)</sup> Decisions should be made on a case-by-case basis, following these guidelines. The agency is always welcome to consult with the Commission.

In Bifera's request, he specifically asks about equipment donations from individuals, or from unregulated not-for-profit organizations with individual members, who might, from time to time, engage in activities, such as fishing and hunting, that are licensed and regulated by DEC. Since [Advisory Opinion No. 92-1](#) authorizes DEC to accept gifts from regulated entities, it may also, in general, accept gifts from persons or entities potentially subject to its jurisdiction and from organizations which have members regulated by the agency. Certainly, such ministerial acts as obtaining fishing or hunting licenses are not sufficiently regulated activities for the Commission to conclude that donations from such persons are prohibited.

As with a business organization, if an individual or a not-for-profit organization is under investigation by or actively involved in litigation with DEC, donations from that individual or organization should not be accepted. Similarly, if an individual or organization contracts with DEC, lobbies or attempts to influence agency action or has applied for funds from DEC, the Commissioner should evaluate whether the timing and the value of the donation are such that the public would perceive the donation as an attempt to improperly influence the agency in the administration of its public duties.

In his request, Bifera asks not only about the circumstances under which a donation may be accepted, but also about some possible conditions that may be attached. First, he asks whether an organization or business making a donation may use the fact of the donation in its advertising. It appears to the Commission that the State cannot prevent a donor from doing so as long as the advertising is truthful. Any additional restrictions could raise constitutional issues under the First Amendment to the Federal Constitution.<sup>(4)</sup>

As to a business or organization seeking to place its logo on the donated equipment, the State has greater control. Here, the equipment will belong to the State, which should not be in the business

of advertising for private entities. On the other hand, the State can discreetly acknowledge that the donor has contributed the equipment. This may include display of a company logo or other identifiable marking. Because circumstances may differ from case to case, the Commission does not hold that display of a logo is always impermissible.<sup>(5)</sup> Nevertheless, identification of the donor through the use of a logo or other identifiable marking should be limited to situations where it used to acknowledge the donation; it should not serve primarily as a means of advertising.

Finally, Bifera asks whether DEC may accept a donation of money or equipment subject to a commitment that it be used in a particular geographic area. The Commission concludes that donations made to DEC must be available for agency use as the Commissioner deems appropriate. To hold otherwise would unduly restrict the Commissioner in applying agency resources as circumstances require, and could result in those employed in certain DEC regions enjoying better working conditions or having better equipment than those employed elsewhere. A donor cannot, in essence, make a donation to DEC in exchange for better services in its area. The Commissioner must be free to determine the allocation of the agency's resources statewide based upon his or her best judgment.

## **CONCLUSION**

The Commission concludes that DEC may accept donations from individuals, businesses or organizations whose activities are subject to its jurisdiction. However, it may not accept donations from individuals or entities under investigation by or in litigation with the agency. Decisions as to the propriety of a donation must be made by the Commissioner on a case-by-case basis, considering its source, timing and amount. While donors may freely advertise donations to DEC, use of logos or other identifiable markings on the donated equipment, while not prohibited, should be discreet. DEC may not accept donations where the equipment or money donated is conditioned upon its use in a particular geographic region.

This opinion, until and unless amended or revoked, is binding on the Commission in any subsequent proceeding concerning the person who requested it and who acted in good faith, unless material facts were omitted or misstated by the person in the request for opinion or related supporting documentation.

All concur:

Joseph M. Bress, Chair

Angelo A. Costanza,  
Robert E. Eggenschiller, Members

Dated: December 19, 1995

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## **Endnotes**

1. Criminal Procedure Law §1.20(34).
2. Executive Law §835 defines "police officer" as "a member of a police force or other organization of a municipality who is responsible for the prevention and detection of crime and the enforcement of the general criminal laws of the state. . . ."
3. This consideration should include whether the agency is being lobbied on legislation or the adoption or amendment of regulations affecting the donor. The donor should not be seen as attempting to curry favor.
4. The agency might have to return the gift if any advertisements stated or implied that the donor now has a special or positive relationship with DEC as a result.
5. For example, a snowmobile, boat or automobile may have the logo included as part of the product. Special insignia, decals or other advertisements which hold out the gift as an advertisement for the donor should not be added.