

# New York State Ethics Commission

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**Advisory Opinion No. 97-3:** Application of Public Officers Law §73(5) with respect to reimbursement for travel and tickets received by a State officer or employee.

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## INTRODUCTION

The following advisory opinion is issued in response to a request by Michael C. Finnegan, Counsel to the Governor, regarding the application of the Public Officers Law to his acceptance from Senator Ronald Stafford of transportation and tickets to attend the Super Bowl in New Orleans.

Pursuant to the authority vested in it by Executive Law §94(15), the New York State Ethics Commission ("Commission") hereby renders its opinion that since Finnegan promptly reimbursed Stafford for the market value of the benefit he received and promptly, although after the fact, made inquiry of the Commission and requested this formal opinion, he did not receive a gift from Stafford. Thus, there was no violation of the Public Officers Law. The Commission need not determine whether his receipt of the flight and tickets would have been permissible had Finnegan not made reimbursement, as that inquiry presents only a hypothetical situation.

## BACKGROUND

On Sunday, January 26, 1997, Finnegan and his son flew to New Orleans on a chartered plane leased by Senator Ronald Stafford ("Stafford") to attend the Super Bowl. Finnegan advised the Commission that, on or about January 22 or January 23, 1997, Stafford, with whom he has "enjoyed a friendship for some years," invited him to attend the game after Stafford had apparently learned that two seats on the plane and two tickets to the game were available. Finnegan, who was not involved in planning the trip, accepted the invitation the next day. On the flight with Finnegan and his son were Stafford, Senator George Maziarz and two other individuals, former Senator Douglas Barclay and Pat Barrett.

In his letter of request, Finnegan stated that Stafford had informed him that Stafford had paid for the plane and the tickets out of his personal funds. Finnegan noted that, although Stafford is engaged in the private practice of law with a firm of which he is a partner or a member, he was advised that the plane and the tickets were not paid for by the firm. Finnegan was also informed that Stafford's firm is not involved in any litigation against the State nor does it lobby the State, and that Stafford has no other personal business interests with the State.<sup>(1)</sup>

On Monday, January 27, 1997, the first business day after the trip, First Assistant Counsel James M. McGuire ("McGuire") telephoned the Commission on behalf of Finnegan to discuss the trip and the tickets. Finnegan said that on that day he decided to reimburse Stafford to avoid any

appearance of impropriety. He has since sent Stafford \$3,150, which represents the value of two round trip, first-class tickets to New Orleans plus tickets to the the game.

Finnegan stated that he knew from prior conversations with McGuire, ethics officer for the Executive Chamber, that it was permissible to accept the invitation, seek a determination from the Commission, and, in the event that the Commission determined that he could not accept the trip, reimburse Stafford.

Based on the above representations, Finnegan has requested a formal opinion from the Commission on the following questions:

"(1) Was it improper for me to have reimbursed Senator Stafford for travel expenses on the basis of the cost of the first-class tickets?"

"(2) On the facts presented above, and given my friendship with Senator Stafford predating my appointment in the Administration, if I had not made reimbursement would it have been impermissible for me to have accepted Senator Stafford's invitation?"

"(3) Am I correct that under the ethics laws it is permissible to accept an invitation such as the one I received from Senator Stafford on a conditional basis and promptly seek thereafter a ruling of the Commission?"

### **APPLICABLE LAW**

Public Officers Law §73(5) provides:

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.

### **DISCUSSION**

The three questions posed by Finnegan raise some important issues concerning the receipt of gifts by State officers and employees. Public Officers Law §73(5), quoted above, makes unlawful certain gifts of \$75 or more. The Commission has interpreted this statute and explained how it is to be applied in its lengthy [Advisory Opinion No. 94-16](#). Both the statute and the opinion must be considered when questions arise concerning gifts to State officials.

The Commission begins its analysis by looking at the fundamental question of what is a gift? In [Advisory Opinion No. 94-16](#), the Commission defined a gift to include

anything of value given to a state officer or employee. It may be in any form, such as money, service, loan, travel, meals, refreshments, entertainment, hospitality, promise, discount or forbearance; it may be provided in kind, or by purchase of a ticket, payment in advance or reimbursement for an expense that has been incurred. A gift does not include:

(1) anything for which a State officer or employee pays market value . . . .

Under this definition, Finnegan, to have received a gift, must have received a benefit for which he did not pay market value. Since he unquestionably received something of value -- travel and tickets to the Super Bowl -- the question is whether he paid market value. Thus, Finnegan has correctly asked whether his reimbursement was for the appropriate amount.

Since the flight on which Finnegan traveled was a charter, his inquiry presents the issue of the amount to be paid when a State officer or employee receives a seat on a chartered plane. As with any travel received by a State official, the inquiry is the value of the benefit. Here, the benefit received by Finnegan was travel by air to and from New Orleans.<sup>(2)</sup>

Since a round trip to New Orleans by air has a market value, the amount that Finnegan was required to reimburse can be determined. He chose to reimburse at the first class rate, which is the highest category of the various airfares charged by commercial carriers. Thus, his reimbursement covered the value of his benefit -- seats on a flight to and from New Orleans.

This conclusion is consistent with the rule applicable to federal employees, set forth in 41 CFR Part 304-1.9(a)(4). Part 304-1.9 provides that each federal agency shall report to the Director of the Office of Government Ethics the value of all travel payments received by its employees from non-federal sources. Its rule for valuing transportation by chartered aircraft, set forth in subdivision (a)(4), reads as follows:

Valuation of noncommercial benefits furnished by a non-Federal source -- (i) Transportation. In the case of transportation on a chartered, corporate or other private aircraft, report the first-class rate that would have been charged by an air common carrier at the time the transportation was provided or, if common carrier transportation was unavailable between the two locations, report the cost of chartering a similar aircraft using a commercially available source.

The Commission has, since its inception, looked to federal statutes and regulations for guidance where State law is not dispositive of a matter.<sup>(3)</sup> Here, the federal regulations are consistent with the Commission's own analysis, set forth above. Both lead to the conclusion that Finnegan's reimbursement of the first class airfare was appropriate and represents the market value of the benefits he received.

If Finnegan had paid Stafford prior to the flight, there would be no question that he did not receive a gift. However, since his payment and his first contact with the Commission was after he traveled to the Super Bowl, the second issue presented is whether he received a gift despite his later reimbursement. This leads to a discussion of another of the questions Finnegan presents -- is it permissible to accept an invitation on a conditional basis and promptly thereafter seek a ruling of the Commission?

As has been noted, if a State officer or employee accepts something of value and does not pay for its value, he or she has received a gift. In contrast, if an item, entertainment or other benefit is received and payment of its market value is made prior to or simultaneously with receipt, there is no gift. Between these two situations is one where the officer or employee receives the benefit but pays for it at a later date or asks the Commission for an after the fact determination. That is the situation presented here.

In [Advisory Opinion No. 94-16](#), the Commission said that when an officer or employee receives a gift without having received prior advice, he or she should report the gift after the fact for approval. If it is then determined that the gift was inappropriate, the recipient should be directed to return it or pay the donor its market value.

The process of requesting approval after the fact is also authorized by the federal regulations. 5 CFR 2635.205 sets forth the rule regarding the proper disposition of a prohibited gift, and paragraph (c), dealing with after the fact advice, provides as follows:

(c) An employee, who, on his own initiative, promptly complies with the requirements of this section will not be deemed to have improperly accepted an unsolicited gift. An employee who promptly consults with his agency ethics official to determine whether acceptance of an unsolicited gift is proper and who, upon the advice of the ethics official, returns the gift or otherwise disposes of the gift in accordance with this section, will be considered to have complied with the requirements of this section on his own initiative.

These precedents allow for some flexibility. Here, Finnegan, through his staff, contacted the Ethics Commission on the first business day succeeding his trip; he initiated the contact; he shortly afterward reimbursed Stafford; and he then requested this formal opinion. Under these circumstances, the inquiry, reimbursement and opinion request were within a time period and under circumstances that allow the Commission to conclude that they were closely connected to the trip. In other words, the request and the payment were not removed or remote in time from the entertainment received by Finnegan.

While Finnegan avoided a potential violation of Public Officers Law §73(5) by seeking the Commission's advice promptly after the fact, as well as by his reimbursement and opinion request, the Commission issues a note of caution. It is far better practice for officers and employees to seek advice prior to receiving anything of value which might be an unlawful gift.<sup>(4)</sup> The uncertainties created by Finnegan's after the fact request could have been avoided by his having taken the same actions prior to his leaving for New Orleans. In other situations, the Commission may not find a close connection between the acceptance of the benefit and the request to the Commission or the payment, especially where the time interval is longer. Certainly, a payment made in response to Commission action may not be deemed to be a payment that relieves the recipient from a possible violation. In sum, the Commission is prepared to allow some flexibility where neither payment is made nor advice sought on or before the day the benefit is received, but that flexibility is limited, and determinations will be made according to time and circumstance.

One other consideration is worthy of mention. Among the Commission's most important functions is to give advice, both formal and informal, to State officers and employees. It customarily receives several thousand calls each year, and routinely gives informal guidance over the telephone. In this manner, the Commission serves those who are within its ambit. If the Commission were to ask the motive of each caller in seeking advice, it would discourage these inquiries, which the Commission believes are extremely important to the implementation of the State's ethics laws. Therefore, the Commission welcomes all inquiries.

Having determined that Finnegan reimbursed Stafford for the market value of the flight and the tickets within a permissible time frame, the Commission concludes that Finnegan did not receive a gift. Therefore, there was no violation of the Public Officers Law.

Finnegan's final inquiry is, in essence, whether he could have accepted the travel and tickets if he had not reimbursed Stafford. This question is not easily answered, as it presents several difficult issues, both factually and legally.

First, there is the question of whether Stafford is a "disqualified source" as to Finnegan. In [Advisory Opinion No. 94-16](#), the Commission determined that gifts of more than \$75 to a State officer or employee from certain sources are *per se* violations of §73(5). Basically, a disqualified source is "an individual who, on his or her own behalf or on behalf of a non-governmental entity, or a non-governmental entity on its own behalf" has certain relationships "with the state agency with which the State officer or employee is employed."<sup>(5)</sup> From this definition, it is clear that an individual must represent himself or herself or a private entity to be considered a disqualified source. Stafford, as noted in the background section of this opinion, is both a Senator and an attorney. In addition, a review of the latest financial disclosure statement he filed with the Legislative Ethics Committee shows that he has a number of outside interests, including a seat on the Board of Directors of KeyCorp.

If Stafford's invitation to Finnegan was given in his capacity as a Senator, he would not be a disqualified source.<sup>(6)</sup> However, if it was extended in his private capacity, it would have to be determined whether he, his firm or an entity in which he is interested has any disqualifying relationship with the Governor's office.

Even if Stafford were a disqualified source as to the Governor's office, his gift to Finnegan might still be appropriate. There is a recognized exception contained in Advisory Opinion No. 94-16 which permits the receipt of gifts from a disqualified source in the following circumstances:

(2) Any thing given by a person or entity with a family or personal relationship with the State officer or employee when the circumstances make it clear that it is that personal relationship, rather than the recipient's State position, that is the primary motivating factor. In determining motivation, the following factors shall be among those considered: (a) the history of the relationship between the donor and the recipient, including whether or not items have previously been exchanged; (b) whether the item was purchased by the donor; (c) whether the donor at the same time gave the same or similar items to other State officers and employees. The giving of an item shall not be considered to be motivated by a family or personal relationship if the donor

seeks to charge or deduct the value of such item as a business expense or seeks reimbursement from a client.

In his request for this opinion, Finnegan has represented that he and Stafford "have enjoyed a friendship for some years." Whether this friendship could bring Stafford's gift within this exception would depend upon a number of factors. The Commission would have to examine their history as friends, the motivation for Stafford's invitation and Finnegan's reasonable belief in accepting the invitation.

Finally, if Stafford were not a disqualified source and the personal exception were not applicable, there might be an unlawful gift based upon the circumstances surrounding its offering.<sup>(7)</sup> Here, again, there is some confusion because of Stafford's dual role as a member of the Senate and an individual with private interests.

While the Commission has used this opportunity to explain the issues regarding the acceptance of the gift had Finnegan not made reimbursement, it is not necessary for it decide that issue. Since Finnegan has, in fact, reimbursed Stafford, the question is purely hypothetical. Following the well tested approach of the courts, the Commission has refrained from responding to questions that do not relate situations that require resolution.<sup>(8)</sup> The Commission's opinions address only questions that will actually govern an individual's behavior. This is equivalent to the case and controversy requirement imposed by the courts. Since the Commission's responses to the first two questions have resolved the matter, it need not answer this final, and rather complex, inquiry.

## **CONCLUSION**

The Commission concludes that Finnegan, by reimbursing Stafford for the cost of first class tickets to and from New Orleans, paid market value for the seats he received on a round trip charter flight to that city. It further concludes that because of Finnegan's prompt, after the fact inquiry to the Commission, his reimbursement to Stafford and his opinion request, he did not receive a gift from Stafford. It need not formally respond to Finnegan's hypothetical question of whether the gift would have been permissible had he not reimbursed Stafford.

This opinion, until and unless amended or revoked, shall be 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 supported documentation.

All concur:

Evans V. Brewster,  
Angelo A. Costanza,  
Robert E. Eggenschiller,  
Donald A. Odell, Members

Dated: February 10, 1997

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## Endnotes

1. The Commission has independently obtained confirmation that Stafford paid with his personal funds and that Stafford's firm neither lobbies the State nor is in litigation with the State.
2. Since the tickets had a fixed face value, there is no question with regard to the amount to be reimbursed for the tickets.
3. In [Advisory Opinion No. 94-16](#), the Commission noted that its interpretation of the State statutes applicable to gifts was guided by the concepts embodied in the Federal regulations and the rulings of the Office of Government Ethics.
4. In [Advisory Opinion No. 94-16](#), the Commission said: "Preferably, a State officer or employee would not accept any gift without seeking prior approval."
5. [Advisory Opinion No. 94-16](#) defines a "disqualified source" as "an individual who, on his or her own behalf or on behalf of a non-governmental entity, or a non-governmental entity on its own behalf which: (1) is regulated by, or regularly negotiates with, appears before other than in a ministerial matter, does business with, seeks to contract with or has contracts with the state agency with which the State officer or employee is employed or affiliated; or (2) lobbies or attempts to influence action or positions on legislation or rules, regulations or rate-making before the State agency with which the State officer or employee is employed or affiliated; or (3) is involved in litigation, adverse to the State, with the State agency with which the State officer or employee is employed or affiliated, and no final order has been issued; or (4) has received or applied for funds from the State agency with which the State officer or employee is employed or affiliated, including participation in a bid on a pending contract award, at any time during the previous year up to and including the date of the proposed or actual receipt of the gift; or (5) seeks to contract with or has contracts with a State agency other than the agency with which the State officer or employee is employed or affiliated when the officer or employee's agency is to receive the benefits of the contract."
6. This is consistent with §73(7)(d), which provides that the restrictions imposed on members of the legislature with regard to appearing before State agencies do not prohibit them "from participating in or advocating any position in any matter in an official or legislative capacity, including, but not limited to, acting as a public advocate whether or not on behalf of a constituent."
7. In [Advisory Opinion No. 94-16](#), the Commission stated that for gifts that are not *per se* unlawful, as are gifts from a disqualified source, it "considers on a case-by-case basis the circumstances surrounding the offering, solicitation or receipt of a gift, as well as its value to determine whether it is permissible under the Public Officers Law."
8. See, for example, [Advisory Opinion No. 96-20](#), where the Commission declined to respond to a question posed in the abstract.