

STATE OF NEW YORK
JOINT COMMISSION ON PUBLIC ETHICS

Advisory Opinion No. 20-XX:

Applying the gift restrictions in the Public Officers Law and the Lobbying Act to a gift made to a third party at the direction, or at the designation or recommendation, or on behalf, of a public official

INTRODUCTION

The Joint Commission on Public Ethics (“Commission”) issues this Advisory Opinion pursuant to its authority under Executive Law § 94 and § 1-d(f) of the Legislative Law Article 1-a (the “Lobbying Act”) to address issues raised in several recent requests for guidance regarding the permissibility of contributions (“gifts”) given to third parties at the solicitation of public officials. This Advisory Opinion addresses the restrictions on gifts that a public official may direct to a third party, and gifts that are made or offered to a third party on a public official’s “designation or recommendation or on his or her behalf.”¹

Pursuant to the Lobbying Act, the Public Officers Law, and the Commission’s regulations, a gift that is solicited by a public official from an Interested Source – either through personal solicitation, an intermediary with the official’s knowledge, or other conduct demonstrating the official’s awareness of the solicitation or acknowledgement of the gift – is presumptively prohibited. This Advisory Opinion provides guidance to all persons and entities under the Commission’s jurisdiction including public officials, lobbyists, and their clients, as to how to identify such a gift, and to determine whether the presumption of impermissibility can be overcome by examining the circumstances surrounding the gift. The Commission expects that this will promote awareness of these issues in the public-at-large, and that the information and guidance provided will help all regulated parties² conduct themselves lawfully.

BACKGROUND

The public should have confidence that the official decisions of public officials are based on the public interest. When a public official³ receives a gift, particularly when it comes from a party with a private interest in business pending before the official, an impression can arise that

¹ See Public Officers Law § 73(5)(c); 19 NYCRR Part 933.3(d) and Part 934.3(e).

² The Commission shares jurisdiction over lobbyists and clients with various governmental entities that regulate local lobbying, including New York City’s Conflicts of Interests Board and Lobbying Bureau. Lobbyists and clients registered with the Commission to lobby at the local level have an obligation to understand the State rules and follow them, and they are accountable for knowing and willful violations of such laws, notwithstanding any conflicting guidance issued by local governmental bodies.

³ As used in this Opinion, “public official” encompasses State elected officials, State employees, and local officials in the State. “State official” refers to State elected officials and State employees only.

the official's decisions are motivated by considerations other than the public interest. A gift offered or given to a third party at the behest of a public official can also give rise to such a perception and damage public confidence in government. The ethics laws and regulations that are in place to prevent such conflicts apply to both direct gifts and indirect third-party gifts.

The Commission has issued regulations to clarify the laws that apply to offering, soliciting, and accepting gifts. In so doing, the Commission interpreted two different statutes, the Public Officers Law (POL) and the Lobbying Act, which apply to different categories of actors, respectively - State officials on the one hand, and lobbyists and clients, on the other.⁴ Each statute prescribes activities only of those actors to which it applies⁵ but the core issue – whether it can reasonably be inferred that the gift was intended to influence the public official – is the same. The gift regulations set forth a clear analysis for all regulated parties to follow.⁶

The permissibility of a gift to a third party requires additional scrutiny that is not involved in the context of a direct gift; namely, consideration of whether there is a nexus between the gift and the public official. This Advisory Opinion first reviews the statutory and regulatory framework for third-party gifts. It then identifies and discusses specific factors the Commission will consider in determining whether such a gift (and related solicitation) is prohibited by law.⁷

⁴ The Commission regulates lobbying activity on the state level and in jurisdictional subdivisions of the State with a population of 5,000 or more. *See* Lobbying Act § 1-c(k). The gift restrictions in the POL, however, do not apply to officials or employees of municipalities as defined in the Lobbying Act. Therefore, while the Commission has jurisdiction over the conduct of lobbyists and clients engaged in local lobbying, it does not have jurisdiction over the conduct of the local public officials who are lobbied in those municipalities.

⁵ There is one important distinction in how the law applies to these actors – the standard for enforcing the law. To proceed against a State official, the Commission must establish that the individual acted “knowingly and intentionally.” POL § 73(18). To proceed against a lobbyist or client, the Commission must establish that the conduct was “knowing and willful.” Lobbying Act § 1-o. The latter, higher standard, requires the Commission to prove that the individual engaged in the conduct with knowledge that it was unlawful. *See generally Gormley v. New York State Ethics Comm’n*, 11 N.Y.3d 423, 427 (2008) (discussing the difference between “knowing and intentionally” as compared to “knowingly and willfully”) (citing *Bryan v. United States*, 524 U.S. 184 (1998)).

⁶ *See* Title 19 NYCRR Part 933 (Gift Regulations for Public Officers) and Title 19 NYCRR Part 934 (Gift Regulations for Lobbyists and Clients). Executive Law § 94(17)(a) authorizes the Commission to promulgate rules concerning limitations on the receipt of gifts by persons subject to its jurisdiction. The gift regulations represent the Commission's statement on how it intends to interpret and administer the gift restrictions in the Public Officers Law and the Lobbying Act. Noncompliance with the rules, in and of itself, does not establish a violation as a matter of law.

⁷ While this Advisory Opinion addresses the ethical restrictions that apply to contributions to charities at the direction of public officials, it does not intend to undermine the general policy favoring charitable acts and charitable donations. *See, supra* at p. 9.

Public Officers Law § 73(5)⁸

Section 73(5)(a) of the Public Officers Law (POL) restricts a State official from soliciting, accepting, or receiving any gift where the circumstances reasonably permit an inference that the gift was intended or could be expected to influence the official, or was intended as a reward for official action on the State official's part.⁹ It also restricts any person from offering or making a direct or indirect gift to a State official under such circumstances.¹⁰

POL § 73(5)(b) presumptively prohibits State officials from soliciting, accepting, or receiving any gift from a registered lobbyist or client, *unless* under the circumstances it is not reasonable to infer that the gift was intended to influence the State official.¹¹

POL § 73(5)(c) restricts State officials from permitting the solicitation, acceptance, or receipt of any gift from a registered lobbyist or client to a *third party*, including a charitable organization, under circumstances that reasonably permit an inference that the gift was intended or could be expected to influence the official.¹²

Gift Regulations for Public Officials

Title 19 of the New York Code of Rules and Regulations (NYCRR), Part 933, regulates public officials' solicitation, receipt, and acceptance of gifts. The regulations utilize the concept of an "Interested Source" to identify gifts that are presumptively prohibited. An Interested Source can be a lobbyist or client, or a party that does or seeks to do business with the public official or the official's agency, or a party that has some other private interest in influencing the public official.¹³ A gift from an Interested Source is *prima facie* impermissible *unless each of*

⁸ The Public Officers Law and its attendant regulations do not apply to officials, officers, or employees of jurisdictional subunits of the state. Therefore, if a local official were to receive a prohibited gift from a lobbyist, the lobbyist would be subject to the Commission's jurisdiction, but the Commission has no statutory authority to investigate or penalize the local official.

⁹ POL § 73(5)(a).

¹⁰ *Id.*

¹¹ POL § 73(5)(b).

¹² POL § 73(5)(c).

¹³ The term "Interested Source" is defined at 19 NYCRR Part 933.2(l):

- (l) *Interested Source* shall mean any person or entity who on his or her own behalf, or on behalf of an entity, satisfies any one of the following:
 - (1) is regulated by, negotiates with, appears before in other than a Ministerial Matter, seeks to contract with or has contracts with, or does other business with: (i) the Legislative Member, the Legislative Employee, or the State Officer or Employee, in his or her official capacity; (ii) the State Agency with which the State Officer or Employee is employed or affiliated; or (iii) any other State Agency when the State Officer or Employee's agency is to receive the benefits of the contract; or
 - (2) with respect to a Legislative Member or a Legislative Employee, is required to be listed on a statement of registration pursuant to § 1-e(a)(1) of article 1-A of the Legislative Law, or is the spouse or unemancipated child of any person required to be listed on a statement of registration pursuant to § 1-e(a)(1) of article 1-A of the Legislative Law; or
 - (3) with respect to State Officers and Employees, is required to be listed on a statement of registration pursuant to § 1-e(a)(1) of article 1-A of the Legislative Law and lobbies or attempts to influence

the following criteria is met:

- (1) it is not reasonable to infer that the Gift was intended to influence the public official; and
- (2) the Gift could not reasonably be expected to influence the public official in the performance of his or her official duties; and
- (3) it is not reasonable to infer that the Gift was intended as a reward for any official action on the public official's part.¹⁴

A non-Interested Source is a person or entity that has no particularized interest in influencing the public official. A gift from a non-Interested Source is *prima facie* permissible *unless* one or more of the following three criteria is met:

- (1) it could reasonably be inferred that the Gift was offered or given with the intent to influence the Covered Person, or
- (2) the Gift could reasonably be expected to influence the Covered Person in the performance of his or her official duties, or
- (3) it could reasonably be inferred that the Gift was offered or given with the intent to reward the Covered Person for any official action on his or her part.¹⁵

The regulations specifically prohibit public officials from evading the gift restrictions by channeling to any third party a gift that would otherwise be prohibited under the applicable criteria above:

Directing Impermissible Gifts to Third Parties Prohibited. A [State official] may not direct a Gift that is impermissible under sections 933.3(a) or (b) to any third party, including a Charitable Organization.¹⁶

Accordingly, a State official is presumptively prohibited from directing a gift from an

actions, decisions, or policies of the State Agency with which the State Officer or Employee is employed or affiliated; or

- (4) with respect to State Officers and Employees, is the spouse or unemancipated child of any individual satisfying the requirements of section 933.2(1)(3); or
- (5) is involved in any action or proceeding, in which administrative and judicial remedies thereto have not been exhausted, and which is adverse to either: (i) the State Officer or Employee in his or her official capacity; or (ii) the State Agency with which the State Officer or Employee is employed or affiliated; or
- (6) has received or applied for funds from the State Agency with which the Covered Person is employed or affiliated at any time during the previous 12 months up to and including the date of the proposed or actual receipt of the item or service of more than Nominal Value.

¹⁴ 19 NYCRR Part 933.3(a).

¹⁵ 19 NYCRR Part 933.3(b).

¹⁶ 19 NYCRR Part 933.3(d); *also see* POL § 73(5)(c), which prohibits a public official from “permit[ing] the solicitation, acceptance, or receipt of any gift, as defined in section one-c of the legislative law, from (a lobbyist or client) to a third party . . . on such official's designation or recommendation or on his or her behalf, under circumstances where it is reasonable to infer that the gift was intended to influence him or her.”

Interested Source, including a lobbyist or client, to any third party.

State Code of Ethics

The State Code of Ethics, which is codified at POL § 74, includes standards of conduct for State officials that must be considered in the context of soliciting and accepting gifts:

No officer or employee of a state agency, member of the legislature or legislative employee should use or attempt to use his or her official position to secure unwarranted privileges or exemptions for himself or herself or others....¹⁷

An officer or employee of a state agency, member of the legislature or legislative employee should not by his or her conduct give reasonable basis for the impression that any person can improperly influence him or her or unduly enjoy his or her favor in the performance of his or her official duties, or that he or she is affected by the kinship, rank, position or influence of any party or person.¹⁸

An officer or employee of a state agency, member of the legislature or legislative employee should endeavor to pursue a course of conduct which will not raise suspicion among the public that he or she is likely to be engaged in acts that are in violation of his or her trust.¹⁹

Lobbying Act § 1-m

Section 1-m of the Lobbying Act presumptively prohibits registered lobbyists and their clients from offering or giving a gift to a public official *unless* the circumstances do not permit a reasonable inference that the gift was intended to influence the public official. It also restricts lobbyists and clients from offering or giving a gift to the spouse or unemancipated child of a public official, and the spouse or unemancipated child of a lobbyist or client from giving a gift to a public official, where it is reasonable to infer that the gift was intended to influence the public official.²⁰

Gift Regulations for Lobbyists and Clients

The regulations at 19 NYCRR Part 934 presumptively prohibit a lobbyist or client from giving any gift to a public official, *unless* each of the following criteria is met:

- (1) it is not reasonable to infer that the Gift was intended to influence the

¹⁷ POL § 74(3)(d).

¹⁸ POL § 74(3)(f).

¹⁹ POL § 74(3)(h).

²⁰ Lobbying Act § 1-m.

- public official; and
- (2) the Gift could not reasonably be expected to influence the public official in the performance of his or her official duties; and
- (3) it is not reasonable to infer that the Gift was intended as a reward for any official action on the public official's part.²¹

The same criteria for overcoming the presumptive prohibition apply to a gift that is offered or given by a lobbyist or client to a third party on behalf of, or at the designation or recommendation of, a public official:

- (e) No Lobbyist or Client shall offer or give a Gift to a third party, including a Charitable Organization:
 - (1) on behalf of a Public Official (or a Public Official's spouse or unemancipated child), when such Gift cannot be offered or given to such Public Official (or the spouse or unemancipated child of such Public Official) under section 934.3(a); or
 - (2) at the designation or recommendation of a Public Official (or a Public Official's spouse or unemancipated child), when such Gift cannot be offered or given to such Public Official (or the spouse or unemancipated child of such Public Official) under section 934.3(a).²²

Accordingly, lobbyists and clients are presumptively prohibited from offering or giving a gift to a third party on behalf of, or at the designation or recommendation of, a public official.

Summary of the Applicable Law

In enacting the gift regulations, the Commission recognized that the Lobbying Act §1-m and POL § 73(5) create a statutory framework that must be read as a whole. For example, while the Lobbying Act prohibits a lobbyist or a client of a lobbyist from offering or giving a gift to a public official, one must look to POL § 73(5)(b) and (c) for the prohibition on a State official soliciting or accepting a gift from a lobbyist or client.

As set forth in the regulations, lobbyists and their clients, who are actually engaged in the business of influencing public officials, are presumptively prohibited from offering or giving gifts to public officials, and State officials are presumptively prohibited from soliciting or accepting such gifts.²³ A gift from any other Interested Source is also presumptively prohibited.²⁴ A gift from a non-Interested Source is permissible unless the circumstances dictate

²¹ 19 NYCRR Part 934.3(a)(1) - (3).

²² 19 NYCRR Part 934.3(e).

²³ See Lobbying Act § 1-m and POL § 73(5)(b), respectively.

²⁴ 19 NYCRR Part 933.3(a).

otherwise.²⁵ A State official may not designate or recommend a third party to receive a gift, and no prohibited gift may be offered to, or received by, a third party under circumstances in which it would be reasonable to infer the gift was intended to influence a public official.²⁶ In other words, an Interested Source is presumptively prohibited from giving a gift to a third party, even a charity, at the behest of a public official.

DISCUSSION

This Advisory Opinion focuses on identifying prohibited gifts to third parties. A gift that would be prohibited if directly given to a public official is no less unlawful if made to a third party at an official's direction, designation, recommendation, or on the official's behalf. The gift restrictions cannot be evaded by arranging to have a third party receive a gift that is meant to influence a public official.

Any gift made by an Interested Source to a third party upon a public official's personal solicitation is presumptively prohibited. In such a case, both the solicitation itself, as well as any gift in response could violate the law depending on the totality of the circumstances. However, the restrictions on third-party gifts are not limited to personal solicitations by public officials. Identifying a gift that was made at an official's direction, designation, recommendation, or on the official's behalf, will also require examining the circumstances surrounding the gift.

A public official may not use an intermediary, such as someone whom the public official has designated, authorized, or knowingly permitted to act on their behalf, to solicit a gift that would be prohibited if it were solicited directly. Nor may a public official evade the gift restrictions by making a general request for support while letting it be known that an intermediary will follow up with a specific request. As examples and without limitation, an intermediary could be someone who openly self-identifies as connected to the official, or someone whom the solicited party understands to be acting for the benefit of the official or on the official's behalf. A prohibited third-party solicitation can also be identified where the public official acknowledges the gift, or evidence demonstrates the solicited party's understanding that the solicitation was made at the behest of a public official or that the official would be aware of the gift. The basic principle is that a State official cannot be insulated from liability by knowingly using an intermediary to solicit an otherwise impermissible gift. Similarly, when the facts clearly demonstrate that an intermediary is, by all appearances, acting for a public official, the solicited party cannot rely on willful blindness of the relationship to evade the gift restrictions.

Moreover, it is possible for a regulated party to violate the gift restrictions even in the absence of a public official's solicitation. While an unsolicited gift would be presumptively permissible, that presumption could be overcome if there is evidence, and the totality of the

²⁵ 19 NYCRR Part 933.3(b).

²⁶ POL § 73(5)(a) and (c); 19 NYCRR Part 933.3(d); 19 NYCRR Part 934.3(e).

circumstances indicate, that the gift was intended to influence a public official.

A gift given by an Interested Source at the behest of a public official – either through personal solicitation, an intermediary with the official’s knowledge, or other conduct demonstrating the official’s awareness of the solicitation or acknowledgement of the gift – is presumptively prohibited. This presumption can be overcome upon an analysis of the totality of the circumstances surrounding the gift. Such circumstances can include, but are not limited to the nature of the solicitation; the substance of the solicitation; the nature and purpose of the gift; the nature and purpose of the gift recipient; the public official’s awareness of the gift; the nature of the gift offeror’s business before the official; the nexus between that pending business, the public official, and the gift; and the offeror’s history with respect to similar gifts. The weight given to any factor may vary between public officials, lobbyists, and clients, as their perspectives, understanding of the facts, and motives are distinct.²⁷

Nature of Solicitation: A solicitation may take many forms, and it need not specifically request a financial contribution or any other specific item or favor. How a solicitation is made is relevant to determining whether a gift is expected to influence or reward a public official. Prior Advisory Opinions have addressed how public officials may solicit contributions on behalf of charitable entities and political campaigns.²⁸ Generally, State officials may not knowingly solicit an Interested Source, but may seek support for third parties via mass solicitations – such as form letters – sent to a general population that may incidentally (and unknown to the official) include Interested Sources. Responding to a mass solicitation or a robocall may be viewed differently from responding to a personal request from a public official or his or her intermediary.

Substance of Communication: The specific discussion between the public official (or his or her intermediary) and the gift offeror is significant. Any communication that looks like a *quid pro quo* is a clear red flag implicating the gift restrictions, but there are no specific phrases or words that *per se* implicate the ban. A prohibited gift could be solicited via a communication that merely identifies a specific third-party organization, or more generally discusses supporting a cause or initiative promoted by the public official. For example, depending upon the totality of the circumstances, a public official’s mere reference to a specific charity, organization, or public cause while communicating privately with an Interested Source could constitute directing, designating, or recommending that a gift be tendered to a third party.

Similarly, a suggestion that a gift could facilitate access to the public official or his or her staff for advocacy purposes²⁹ (or any other benefit) will raise a concern. Similarly, evidence that

²⁶ For example, an unsolicited gift could be permissible from the perspective of the public official subject to the Public Officers Law, yet still constitute a violation of the Lobbying Act if the donor is a lobbyist or client.

²⁸ New York State Joint Comm’n on Pub. Ethics Advisory Op. No. 16-02; New York State Ethics Comm’n Advisory Op. Nos. 97-28 and 98-12.

²⁹ The Commission has held that reportable lobbying activity occurs when a person acts on behalf of a client to secure the client access to a public official for advocacy purposes. *See* New York State Joint Comm’n on Pub.

the offeror did, indeed, gain access to the public official after making the gift – and especially if arranged through the intermediary – would be weighed in determining whether the gift was intended to influence the official.

Nature and Purpose of Gift: The value of the gift, and the relative significance of the gift to the offeror and the public official, are clearly relevant. Additionally, the Commission would consider whether the gift serves a general philanthropic purpose, or furthers an individual’s policy or political goals. For example, an official’s solicitation in support of a toy drive during holiday season would probably be permissible, but an official’s personal solicitation of an Interested Source for money to support the official’s policy agenda is likely prohibited.

Nature and Purpose of Third-Party Recipient: The factors to consider here generally center upon the extent to which the interests of the public official coincide with that of the third-party gift recipient. For example, there is a clear and significant distinction between a gift to a charity that serves the general public interest,³⁰ and a gift to a 501(c)(4) organization that was formed in coordination with a public official in order to further the official’s political agenda. Other considerations include whether the public official or a relative is involved in operating or managing the organization, and whether the official is publicly associated with the organization.

A gift made to a governmental entity or to the public at large upon a public official’s request is also subject to review and could be impermissible, depending on the overall circumstances. Previous Advisory Opinions address the permissibility of gifts to state agencies generally,³¹ but if a public official solicits such a gift, the gift restrictions are implicated.

Public Official’s Knowledge: Also relevant is whether the public official knows or will know the identity of those who respond to a solicitation. If there is a “blind” process by which the official will not learn of donations, the gift may be permissible as long as no other circumstances demonstrate an intent to influence the official. That said, in some cases the official will inevitably learn of the donation (such as the donor being present at an event indicating that a contribution for admission was made). While not dispositive, this fact would be considered in determining the donor’s intent to influence along with the other factors discussed in this opinion.

Nature of Pending Business: A key consideration is the nature of the offeror’s pending

Ethics Advisory Op. No. 16-01. Using a gift to secure such access clearly violates the principles underlying the ban on gifts.

³⁰ A brief list of examples of such charitable activities includes cancer screening; heart disease prevention; domestic violence awareness and prevention; energy conservation; organ donation; emergency or other disaster relief; programs designed to encourage reading; job training and job fairs; and fund drives for charitable activities. See 19 NYCRR Title 940.3(b) (regulations regarding proper usage of public service announcements).

³¹ New York State Ethics Comm’n Advisory Op. Nos. 97-10, 97-06, 96-02, 95-38, and 92-01. These opinions primarily address the conditions on which State agencies may accept gifts from outside entities or individuals. They do not address the circumstances under which individual public officials may solicit such gifts.

business before the official, including, among other things, the status of the business and the significance of that business to the offeror. For example, it is relevant to consider whether such business is a routine license application or advocacy for new legislation; if it is legislation, it is relevant to consider its status, whether it is of specific application to the offeror or of general interest, and whether the offeror has actively lobbied on the matter such that the public official is aware, or reasonably should be aware of the offeror's interest. While not dispositive, this will be considered if other evidence tends to establish that the gift was intended to influence the public official.

Even a pending matter of general application may render a solicitation or a gift to be impermissible, if such matter could specifically benefit the solicited party's interests, or the solicited party's interest in the matter is otherwise known to the public official.

Nexus between Solicitation and Pending Business: The Commission must consider any nexus between the solicitation and the pending business, including but not limited to the timing of the solicitation and offer, the status of the pending business, and the public official's role with respect to that business. Evidence that the solicitation or offer occurred close in time to a pending or recent matter before the public official would be weighed in determining whether the gift was intended to influence the official. For example, it will likely be difficult to overcome the presumption if the gift is given while such matter is pending or close in time to when a decision is made, or if access to the public official is granted close in time to the solicitation, payment, or receipt of the gift, or if there are communications connecting the gift to the matter.

Offeror's History: Finally, an offeror's history of making gifts to similar organizations or supporting similar causes will be relevant to the analysis. For example, if the donation is made to support a cause or charity that the offeror has consistently supported over time, independent of any solicitation connected to the public official, and if the donation is commensurate in amount to prior donations, such factors may support a finding that the gift is permissible. Conversely, if the donation is out of the ordinary for that offeror, it may support a finding that the solicitation and the gift are impermissible.

CONCLUSION

An indirect gift to a public official through a third party can readily give rise to the appearance of a conflict of interest. When the solicited party is an Interested Source, the Public Officers Law and the Lobbying Act prohibit such a solicitation and gift, absent circumstances that are sufficient to overcome the presumption that the gift is intended to influence the public official. All those who are subject to the jurisdiction of the Commission are urged to refer to this Advisory Opinion when considering soliciting a gift to a third party or making a gift to a third party singled out by a public official. The Commission will determine, on a case-by-case basis consistent with this Opinion, whether such conduct violates the law.