New York State
Joint Commission on Public Ethics

Ethics Forum:

Third-Party Gifts

March, 2021

Topic Overview

- AO 20-02
- Review of Gift Rules
- Examining the Solicitation
- Factors Considered
- Enforcement Actions
- Questions/Discussion

Advisory Opinion No. 20-02

ADVISORY OPINION SUMMARY

A gift solicited by a public official from an Interested Source is presumptively prohibited.

The Advisory Opinion provides guidance for:

- identifying a gift, and
- whether the presumption can be overcome by examining the circumstances surrounding the gift.

ADVISORY OPINION SUMMARY

Third-party gifts require additional scrutiny– specifically, consideration of whether there is a connection between the gift and the public official.

The Advisory Opinion identifies specific factors JCOPE will consider in determining whether the gift is prohibited by law.

Review-
Gift Rules

WHAT IS A “GIFT?”

$15 and under

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General Rule: Acceptable, as long as it doesn’t create the appearance of a conflict of interest

INTERESTED SOURCES

- Regulated by or appears before you or your agency
- Contracts with, or seeks contracts with, you or your agency
- Registered lobbyist or client, or the spouse or the minor child of either a registered lobbyist or client that lobbies your agency
- Involved in ongoing litigation that is adverse to you or your agency
- Received or applied for funds from your agency at any time during the previous year, up to and including the date of the proposed or actual receipt of the gift
- Attempts to influence you or your agency in an official action

Public Officers Law (POL) § 73(5)(a):

No soliciting or accepting a gift where:

- the gift was intended or could be expected to **influence** the official

or

- was intended as a **reward** for official action

POL § 73(5)(b):

Prohibits gifts from a **lobbyist or client**—

unless it's not reasonable to infer that the gift was intended to influence or reward

POL § 73(5)(c):

Prohibits public official from permitting or directing the solicitation or acceptance of any gift-

from a registered lobbyist or client to a **third party**

PUBLIC OFFICERS LAW § 74

The Code of Ethics contains standards of conduct that must also be considered when soliciting or accepting gifts, including:

- No use of State job to obtain unwarranted benefit for yourself or someone else (§ 74(3)(d))
- Avoidance of situations that may suggest improper influence over you in your State job (§ 74(3)(f))
- Behaving in a manner that does not suggest misconduct (§ 74(3)(h))

LOBBYING ACT § 1-M:

Prohibits lobbyists and clients from:

- offering or giving a gift to a public official
- *unless* circumstances don't permit reasonable inference that gift was intended to influence or reward

Gift Regulations-
Part 933: State Employees

A gift from an Interested Source is *prima facie* impermissible *unless* there is no reasonable expectation of influence on the public official or reasonable inference of intent to reward the public official for official action.

GIFT REGULATIONS-
Part 934: Lobbyists

The regulation presumptively prohibits a lobbyist or client from giving any gift to a public official, unless:

(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.

EXAMINING THE SOLICITATION

EXAMINING THE CIRCUMSTANCES- WHO IS SOLICITING?

The restrictions on third-party gifts are not limited to personal solicitations by public officials.

Identifying a gift made at an official's ***direction, designation, recommendation, or on their behalf***, requires examining the **circumstances** surrounding the gift.

CIRCUMSTANCES SURROUNDING GIFT

Soliciting gift through an **intermediary**:

- Designated, authorized, or knowingly permitted to act on the official's behalf, or
- Self-identifies as connected to, or acting on, official's behalf

CIRCUMSTANCES SURROUNDING GIFT

A third-party solicitation may occur where public official:

- acknowledges the gift, or
- evidence shows the offeror's understanding that solicitation was made on official's behalf or that the official would be aware of the gift

Circumstances surrounding gift

Insulation from liability?

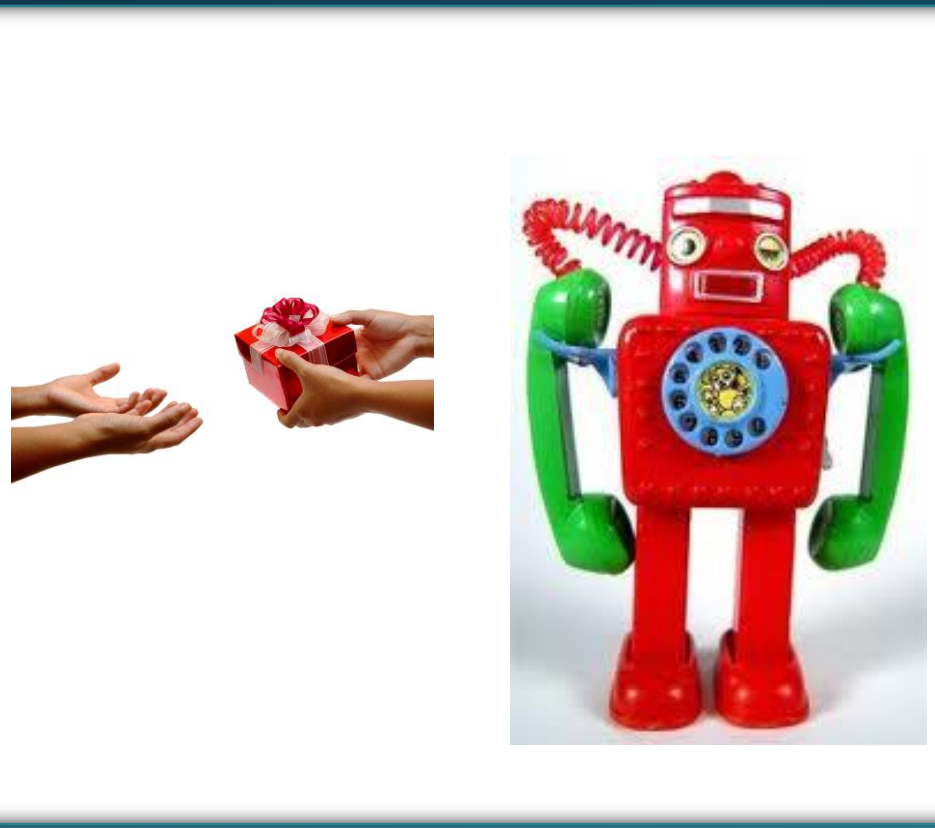
Willful blindness

What if the third-party gift comes from an interested source?

A gift given by an Interested Source at the behest of a public official –– presumptively prohibited

- Presumption can be overcome upon analysis of totality of the circumstances surrounding the gift

Factors considered: Nature of Solicitation



Is it a mass solicitation or a robocall ?

or

Is it a personal request from the official or intermediary?

Factors considered: Substance of Communication

Any communication that looks like a *quid pro quo* is a red flag implicating the gift restrictions

May identify a third-party organization, or discusses supporting a cause promoted by the official

Factors considered: Substance of Communication

Any suggestion that a gift could facilitate access to the official or staff will raise a concern.

Evidence that the offeror *gained access* to the official– *especially if arranged by an intermediary* – would be weighed in determining intent to influence.

Factors considered: Nature and Purpose of Gift

Consider the value of the gift, and relative significance of the gift to the offeror and the public official.

Does the gift serve a philanthropic purpose *or* further the official's policy or political goals?

Factors considered: Nature and Purpose of Third-Party Recipient

Consider extent to which interests of the public official coincide with those of third-party recipient.

Is the official or a relative involved in managing the organization?

Is the official publicly associated with the organization?

Factors considered: Public Official's Knowledge

Does the official know the identity of those who respond to a solicitation?

If there is a "blind" process, gift may be permissible.

Factors considered:
Nature of Pending Business

Does the offeror have pending business before the official?

What's the status of the business?

What's the significance of that business to the offeror?

Factors considered:

connection between Solicitation and Pending Business

Consider timing of the solicitation and offer; status of the pending business; and public official's role with respect to that business.

Did offer occur close in time to a pending or recent matter before the official?

Factors considered: Offeror's History

Offeror's history of making gifts to same or similar organizations will be relevant to the analysis.

Was the donation made to support a cause that offeror has supported over time?

Was it independent of any solicitation connected to the public official?

Was donation similar in amount to prior donations?

Enforcement Actions

Beginning in 2015, JCOPE learned of lobbyists and clients who, while lobbying New York City officials, including the Mayor, donated to Campaign for One New York (CONY), a not-for-profit formed in late 2013.

Through that entity, the Mayor sought and obtained support for his legislative and policy objectives.

Enforcement Actions

- Greenpoint Landing Developers' affiliate, Park Tower, retained lobbyists to lobby the City of New York.
- A Park Tower executive attended a meeting with the Mayor and Offinger, where Offinger spoke about fundraising for the Mayor's priorities.
- Offinger later provided details to the executive for donating to CONY, who then made a $50,000 donation.

Enforcement Actions

In April 2018, the Commission settled allegations of Lobbying Act violations with James Capalino, individually and on behalf of his business, James F. Capalino and Associates, Inc. for $40,000.

SUMMARY

- Identify the gift and who is offering it.
- Examine the circumstances surrounding the solicitation to determine if the third-party gift was directed by a public official.
- Determine whether solicitation of a gift from an Interested Source is ever permitted.

YOUR QUESTIONS

JCOPE Contact Information

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