

# STATE OF ALASKA

## Department of Administration

### Alaska Public Offices Commission

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October 31, 2006

Linda Perez  
Administrative Director  
Office of the Governor  
PO Box 110001  
Juneau, Alaska 99811-0001

RE: Request for an advisory opinion about reporting and allocating the cost of collateral use of state-owned equipment in connection with a public officer's official duties and a public officer's political candidate campaign activities.  
AO-06-03-CD

Dear Ms Perez:

As you are aware the Commission, by a vote of 4-1, adopted this advisory opinion at a special meeting held today, October 31, 2006. The opinion is set out below:

You have requested an advisory opinion regarding whether APOC reporting and allocating are required when a public official, using state equipment, combines official state business with campaign activity. You have represented that the principal purpose of the travel is state business and any campaign activity is secondary or collateral to the principal official business purpose of the trip. Although unstated in your letter, it was clear from your statements to the Commission on September 20 that your request concerns the Governor's activities.

#### Short Answer

The short answer is that reimbursement and some reporting is required. The ban in AS 15.13.145 against the use of state money to influence the outcome of an election of a candidate for state office is not violated when a public official seeking reelection makes a detour during travel on official business for a campaign activity if the official's campaign reimburses the expense of that travel at a commercially reasonable rate within a commercially reasonable time. The state is not required to report the transaction as a campaign contribution or expenditure, but the campaign must report the reimbursement as a campaign expense. Although the law does not provide expressly for allocation, we do not rule out the possibility of allocating the expense between the official business and campaign activity to determine a rate for reimbursement if the amount and timing can be defended as commercially reasonable.

**Law**

**AS 15.13.074. Prohibited contributions.**

....  
(f) A corporation, company, partnership, firm, association, entity recognized as tax-exempt under 26 U.S.C. 501(c)(3) (Internal Revenue Code), organization, business trust or surety, labor union, or publicly funded entity that does not satisfy the definition of group or nongroup entity in AS 15.13.400 may not make a contribution to a candidate, group, or nongroup entity.

**AS 15.13.145. Money of the state and its political subdivisions.**

(a) Except as provided in (b) and (c) of this section, each of the following may not use money held by the entity to influence the outcome of the election of a candidate to a state or municipal office:

- (1) the state, its agencies, and its corporations;
- (2) the University of Alaska and its Board of Regents;
- (3) municipalities, school districts, and regional education attendance areas, or another political subdivision of the state; and
- (4) an officer or employee of an entity identified in (1) – (3) of this subsection.

(b) Money held by an entity identified in (a)(1) – (3) of this section may be used to influence the outcome of an election concerning a ballot proposition or question, but only if the funds have been specifically appropriated for that purpose by a state law or a municipal ordinance.

(c) Money held by an entity identified in (a)(1) – (3) of this section may be used

- (1) to disseminate information about the time and place of an election and to hold an election;
- (2) to provide the public with nonpartisan information about a ballot proposition or question . . . .

(d) When expenditure of money is authorized by (b) or (c) of this section and is used to influence the outcome of an election, the expenditures shall be reported to the commission in the same manner as an individual is required to report under AS 15.13.040.

**AS 15.13.400. Definitions.**

...  
(4) "contribution"

(A) means a purchase, payment, promise or obligation to pay, loan or loan guarantee, deposit or gift of money, goods, or services for which charge is ordinarily made and that is made for the purpose of influencing the nomination or election of a candidate, and in AS 15.13.010(b) for the purpose of influencing a ballot proposition or question, including the payment by a person other than a candidate or political party, or compensation for the personal services of another person, that are rendered to the candidate or political party;

(B) does not include

(i) services provided without compensation by individuals volunteering a portion or all of their time on behalf of a political party, candidate, or ballot proposition or question;

(ii) ordinary hospitality in a home;

(iii) two or fewer mass mailings before each election by each political party describing the party's slate of candidates for election, which may include photographs, biographies, and information about the party's candidates;

(iv) the results of a poll limited to issues and not mentioning any candidate, unless the poll was requested by or designed primarily to benefit the candidate; or

(v) any communication in the form of a newsletter from a legislator to the legislator's constituents, except a communication expressly advocating the election or defeat of a candidate or a newsletter or material in a newsletter that is clearly only for the private benefit of a legislator or a legislative employee;

....

(16) "public funded entity" means a person, other than an individual, that receives half or more of the money on which it operates during a calendar year from government, including a public corporation.

## **2 AAC 50.250. Contributions.**

(a) In AS 15.13 and this chapter, except as otherwise provided in this section, "contribution"

(1) has the meaning given in AS 15.13.400;

(2) includes a

(A) subscription, advance, transfer, forgiveness of all or part of a debt, relaxation of credit, or anything of value made or provided by a person, group, or nongroup entity for the purpose of influencing an election for state or municipal office or influencing the passage or defeat of a ballot proposition or question; and

(B) personal contribution as described in 2 AAC 50.254; and

(3) does not include

...

(G) provision of a service or facility to a candidate, group, or nongroup entity if the entity providing the service or facility is paid at a commercially reasonable rate within a commercially reasonable time or makes the service or facility available to all candidates for a particular office;

## **2 AAC 50.356. Use of public money.**

(a) Funds are specifically appropriated for the purposes of AS 15.13.145(b) if the appropriating body provides notice on the public record that the funds will be used to influence the outcome of an election.

(b) In the absence of a specific appropriation, an officer or employee of an entity who is identified in AS 15.13.145(a)(4) may use money held by that entity to communicate about a ballot proposition

or question if the communication is made in the usual and customary performance of the officer's or employee's duties.

(c) For the purposes of AS 15.13.145(c)(2), information is nonpartisan if it does not advocate a position in an election. Nonpartisan information includes the official language of a ballot question, a neutral ballot summary, if provided for all candidates seeking a particular office, the candidates' names, contact information, or statements.

(d) If an entity or individual identified in AS 15.13.145(a)(1) – (4) uses money held by the entity to make an election-related expenditures, the expenditure must be disclosed on a report of contributions or independent expenditures under AS 15.13.040(d) and (e) unless the expenditure is made only to disseminate information about the time and place of an election or to hold an election.

### **Facts**

We understand that the Governor has traveled for mixed purposes, combining official business with partisan campaign activity during his reelection campaign. Allowing the Governor to travel for both official and campaign business reconciles the need for the Governor to be available at all times to conduct the public's business with the political reality of running for reelection. The question of the Governor's travel for mixed purposes was addressed under the Alaska Executive Branch Ethics Act ("the Ethics Act") earlier this year. The Department of Law issued an opinion providing that the Ethics Act's prohibition against the use of state equipment for partisan political activity did not stop a public officer from participating in collateral partisan political activity after traveling on state aircraft for official business *if* the principal purpose of the travel was the performance of official duties. However, it also indicated that travel for the principal purpose of partisan political activity would violate the Act and that reimbursement to the state would not cure the violation. Your question now is how travel allowed under the Ethics Act should be reported, and whether the expenses should be allocated, under the campaign disclosure law. Thus, for purposes of this opinion, we assume that the principal purpose of the travel is official business and that campaign activity is secondary or collateral to that principal purpose.

### **Analysis**

The Alaska Public Offices Commission administers the campaign disclosure law, and it is empowered to issue advisory opinions concerning the application of that law. AS 15.13.030.

The campaign disclosure law, similar to the Ethics Act, limits the use of state resources for election campaigns. The limitation, which appears in AS 15.13.145(a), is on the use of "money held by" the state and its agencies to influence the outcome of the election of a candidate. The limitation clearly prohibits cash contributions and expenditures to influence the election of a candidate. Whether it extends to in-kind contributions, such as the use of state equipment or services, is less clear.<sup>1</sup> Although the legislative history on AS 15.13.145 is not particularly helpful,<sup>2</sup> we were able to rely upon

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<sup>1</sup> In contrast to AS 15.13.145(a), the limitation in the Ethics Act is quite explicit. AS 39.52.120(b)(6) prohibits "the use of state funds, facilities, equipment, services, or another government asset or resource for partisan political purposes."

<sup>2</sup> During a hearing before the House State Affairs Committee on House Bill 368, Representative David Finkelstein explained the intent of proposed section 15.13.145:

other provisions of the law to guide our interpretation of AS 15.13.145(a). We have concluded that AS 15.13.145(a) prohibits the use of state equipment or services if the use would be prohibited in the campaign finance law as a contribution or expenditure.

The campaign disclosure law lists the entities that may make contributions and expenditures for or against candidates and the state is not listed. AS 15.13.065 names only individuals, groups, nongroup entities,<sup>3</sup> and political parties as able to make contributions.<sup>4</sup> "Contribution" is broadly defined in AS 15.13.400(4)(A) to include the provision of goods and services, among other things, if the purpose is to influence the nomination or election of a candidate.<sup>5</sup> The meaning of "contribution" is further defined in 2 AAC 50.250(a)(3), which states, in part, that the term "contribution" excludes the

provision of a service or facility to a candidate, group, or nongroup entity if the entity providing the service or facility is paid at a commercially reasonable rate within a commercially reasonable time or makes the service or facility available to all candidates for a particular office . . . .<sup>6</sup>

Because other sections of the campaign disclosure laws prohibit the state from making contributions and expenditures, to be consistent, the restriction on the "use of [state] money" in AS 15.13.145(a) to influence the election of a candidate also should prohibit the state from providing an in-kind contribution such as travel. Relying on AS 15.13.400(4)(A) and 2 AAC 50.250, we conclude that the state may not provide travel services benefiting the governor's reelection campaign unless the campaign pays for the service or unless the state makes the service available to all candidates. From this analysis it follows that, if the governor's reelection campaign reimburses the state at a reasonably commercial rate within a commercially reasonable time for state-provided travel, state-provided travel would not be a prohibited contribution under AS 15.13.145(a).

Because reimbursement is required to avoid a violation of AS 15.13.145(a), we must address what constitutes a commercially reasonable rate for reimbursement. There are probably many possibilities. One obvious method might be to determine the state's actual costs and reimburse those costs. Another method is suggested in federal regulation, which addresses how to evaluate the cost of noncommercial travel for purposes of determining its value as a contribution in federal elections. The regulation applies commercial travel rates. A candidate using an airplane owned or leased by a corporation or individual has not received a contribution from the corporation or individual if the candidate pays for that travel at the prescribed rate within seven days of traveling. The rate

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REPRESENTATIVE FINKELSTEIN moving forward referred the committee members to Sec. 15.13.145, "MONEY OF THE STATE AND ITS POLITICAL SUBDIVISION." He explained the approach was to allow money spent by a government entity on ballot propositions based on the approval of the local government body. He cited a civic concern was a possible issue, however. The subsection banned contributions from government entities to candidates. He explained there was a case where a local government body gave a contribution to a candidate. He explained most felt it was inappropriate.

(Hse St. Affairs Comm. (Feb. 29, 1996) (considering the House version of SB 191, which became Ch. 48 SLA 96).)

<sup>3</sup> "Groups" and "nongroup entities" are defined in AS 15.13.400 and do not include government subdivisions.

<sup>4</sup> AS 15.13.067 limits the making of expenditures to elect candidates to candidates, individuals, groups, and nongroup entities.

<sup>5</sup> "Expenditure" for the purpose of influencing the nomination or election of a candidate is defined as the "transfer of money or anything of value, or promise or agreement to purchase or transfer money or anything of value." AS 15.13.400(6)(i).

<sup>6</sup> 2 AAC 50.250(a)(3)(G). The origin of the exclusion in 2 AAC 50.250(a)(3)(G) was Advisory Opinion AO97-09-CD at 2 (approved June 19, 1997). That opinion considered a labor union's questions about how the limits on union and corporate political activities (newly enacted in 1996) would be applied, and the Commission determined that the prohibition against a labor union's contributions to candidates did not prohibit the union from providing a service to a candidate if the union were reimbursed at a commercially reasonable rate and time or, alternatively, made the service available equally to any candidate.

paid is the cost of the lowest unrestricted and non-discounted first class air fare, if first class air fare is available. If first class air fare is unavailable, the rate is the lowest unrestricted and non-discounted coach class air fare. If neither first class nor coach commercial travel is available, the campaign must pay the charter rate for a comparable aircraft. 11 CFR § 100.93(c). Failure to pay for the travel results in an in-kind contribution from the provider. Using either of these methods for determining the value of state-provided travel would satisfy the requirement of payment at a commercially reasonable rate.

Both of these methods require the campaign to absorb the full cost of the travel, even though the purpose of the travel was mixed. You asked whether allocation is required. It is not. The campaign finance laws do not address allocating the expenses between official and campaign activities when paying for a service or facility, but we do not believe the law's silence necessarily precludes allocation. The question under 2 AAC 50.250(a)(3)(G) is whether, under the circumstances, allocation is commercially reasonable. We believe that it could be. For example, determining the actual expenses and allocating those expenses between activities and reimbursing the state for the campaign's share should satisfy the requirement in the regulation that payment be at a commercially reasonable rate.

In this opinion we have considered a couple of options to compute payment for state travel that would satisfy 2 AAC 50.250(a)(3)(G) and avoid AS 15.13.145(a)'s prohibition against the state's use of money to influence the election of a candidate. There are likely other payment methods that would be reasonable. Determining a method for computing payment seems better suited to the regulatory process, but until the Commission is able to adopt regulations, we provide the following method as commercially reasonable: an unrestricted, nondiscounted first class fare for any traveler who participates in the secondary or collateral campaign activity. If first class commercial travel is unavailable, payment should be at the fare for unrestricted, nondiscounted coach commercial travel. Charter rates for a comparable aircraft would be appropriate if commercial travel is unavailable to the particular destination. We do not preclude other methods, however, and leave the option open to the campaign and affected state agency to propose a rate for reimbursement that can be defended as commercially reasonable.

The final question is whether the use of, and reimbursement for, state equipment must be reported. AS 15.13.145(d) requires the state to report any authorized use of state money "to influence an election." We have concluded that the use of state equipment for an official purpose that may have the collateral or incidental effect of assisting an official's reelection campaign is not prohibited under AS 15.13.145(a) if it is reimbursed at a commercially reasonable rate and time. Because the expenditure is not intended or used "to influence an election," the state is not required to report it under AS 15.13.145(d).<sup>7</sup>

This does not mean, however, that the campaign fund or candidate paying for the travel is exempt from reporting. The reimbursement would be covered as a campaign expenditure and be reported as provided in AS 15.13.040.

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<sup>7</sup> But see Advisory Opinion AO97-03-CD (approved Feb. 27, 1997), which interpreted AS 15.13.145(d) to require the Alaska Judicial Council to report to the Commission as expenditures the costs of the judicial evaluations that AS 22.10.150 requires the Council to conduct and distribute before judicial retention elections. The approval notice notes that "the advice in this opinion applies only to the specific activity for which the advice was requested."

## Conclusion

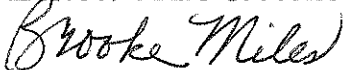
If an elected public official travels for the principal purpose of official business and also engages in collateral campaign business while traveling, the prohibition in AS 15.13.145(a) against the use of state money to influence an election is not violated if the campaign pays a commercially reasonable rate for the travel within a commercially reasonable time.

Only the Commission has the authority to approve an advisory opinion. 2 AAC 50.905. The Commission will rule on staff's proposed advice at a teleconferenced meeting on Tuesday, October 31. If you wish to testify when the Commission considers this matter, please let me know. The Commission may approve, disapprove, or modify the proposed advice. An advisory opinion must be approved by an affirmative vote of at least four members or it will be considered disapproved. Both staff's proposed advice and the Commission's final advisory opinion apply only to the specific facts and activity for which the advice was requested.

If you rely on staff's proposed advisory opinion in good faith, and the Commission subsequently rejects the proposed advice, staff will take no enforcement action on activities up to that point if you acted under the specific facts described. If you have any additional questions or would like to discuss this proposed advice, please contact me at (907) 276-4176.

Sincerely,

ALASKA PUBLIC OFFICES COMMISSION



Brooke Miles, Executive Director

cc: Commission Members  
Jan DeYoung, Asst. Atty. General  
Senior Staff

A0-06-03-CD

FRANK H. MURKOWSKI  
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August 7, 2006

ARRIVED

AUG 09 2006

APOC-ANCH  
PM/HC FAX  
8-7-06

Ms. Brooke Miles  
Director  
Alaska Public Offices Commission  
2221 E. Northern Lights Blvd. Room 128  
Anchorage, AK 99508-4149

Dear Ms. Miles:

This is a request for an advisory opinion from the Alaska Public Offices Commission (APOC) regarding whether APOC reporting and allocation are necessary for that portion of a trip in which a public officer participates in political activities which are collateral official duties which are the primary purpose of the trip.

On June 12, 2006 I received the enclosed memorandum from David T. Jones, Senior Assistant Attorney General-Opinions, Appeals, and Ethics section.

Jones opined:

"If performance of official duties is truly the purpose of a trip, the public officer will not violate the Ethics Act by using state aircraft for the trip. That is true even if the officer also participates in collateral partisan political activities while at the destination."

We are thus seeking an advisory opinion from APOC regarding how such partisan political activities collateral to the primary, official purpose of such a trip should be reported.

We would appreciate your prompt attention to this matter.

Very truly yours,

Linda Pérez  
Administrative Director

Enclosure



# MEMORANDUM

## State of Alaska

### Department of Law

TO: Linda Perez  
Director  
Division of Administrative Services  
Office of the Governor

DATE: June 12, 2006

FILE NO.: 661-06-0042

TEL. NO.: (907) 269-5169

THROUGH: David W. Márquez  
Attorney General

SUBJECT: Use of State Aircraft

FROM: David T. Jones  
Senior Assistant Attorney General  
Opinions, Appeals, and Ethics Section, Anchorage

You asked whether the Alaska Executive Branch Ethics Act prohibits the use of state aircraft to travel for campaign or partisan political activities. In short, it does.

The Ethics Act provides that a public officer may not “use or authorize the use of state funds, facilities, equipment, services, or another government asset or resource for partisan political purposes.”<sup>1</sup> The only two exceptions to this prohibition are that (1) meetings to discuss political strategy may be held at the governor’s residence, and (2) communications equipment in the governor’s residence may be used so long as there is no special charge to the state for the use.<sup>2</sup>

The fact that the legislature provided only these two narrow exceptions demonstrates an intention to establish a broad ban against the use of state assets for partisan political purposes. That ban includes prohibiting the use of state aircraft for campaign and other partisan political activities.

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<sup>1</sup> AS 39.52.120(b)(6). The Act defines “partisan political purposes” as “having the intent to differentially benefit or harm a (i) candidate or potential candidate for elective office; or (ii) political party or group,” but it “does not include having the intent to benefit the public interest at large through the normal performance of official duties.” AS 39.52.120(b)(6)(A) and (B).

<sup>2</sup> AS 39.52.120(b)(6).

Because the Ethics Act prohibits the **use** of state equipment for these purposes, a public officer could not avoid a violation simply by reimbursing the state for the cost of using state aircraft. We approved reimbursement to avoid ethics violations in other contexts, but that option is unavailable for partisan political activities. We previously advised that spouses of administration officials may accompany the officials when they travel on state aircraft for state business so long as the spouses reimburse the state for the benefit provided.<sup>3</sup> However, that conclusion was based on an analysis of the Ethics Act's provision prohibiting grants of unwarranted benefits.<sup>4</sup> By contrast, the provision relevant here bars the **use** of state equipment for partisan political activities, subject only to the two exceptions noted previously. Consequently, reimbursement would not avoid a violation.

Travel undertaken for mixed purposes may present some close questions, and exercising good judgment in those situations is especially important. If performance of official duties is truly the primary purpose of a trip, a public officer will not violate the Ethics Act by using state aircraft for the trip. That is true even if the officer also participates in collateral partisan political activities while at the destination.<sup>5</sup> However, it is important to apply careful judgment in determining the primary purpose of a trip. Indiscriminate use of state aircraft for trips combining official duties and partisan political activities will risk both violating the Ethics Act and inviting public criticism.

Accordingly, individuals traveling for the primary purpose of participating in partisan political activities should not use state aircraft for that travel. Likewise, it would be inappropriate to use state aircraft to transport more than incidental amounts of partisan political materials, such as campaign bumper stickers, buttons, or brochures.

If we can assist further in addressing these issues, please contact us.

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<sup>3</sup> Memorandum from B. Ritchie to J. Clark (Sept. 30, 2004).

<sup>4</sup> *Id.* at 1 (citing AS 39.52.120(a)).

<sup>5</sup> Public officers other than the governor and lieutenant governor may participate in partisan political activities only while on approved leave or otherwise off government time. AS 39.52.120(d); *see also* AS 39.25.160(j) (prohibiting campaigning on government time by state employees other than governor, lieutenant governor, and members of legislature).

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AD 06-03-CD

August 7, 2006

Ms. Brooke Miles  
Director  
Alaska Public Offices Commission  
2221 E. Northern Lights Blvd. Room 128  
Anchorage, AK 99508-4149

ARRIVED

AUG 07 2006

APOC - ANCH  
PM HC FAX

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Administrative Director

Enclosure

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**Department of Law**

**TO:** Linda Perez  
Director  
Division of Administrative Services  
Office of the Governor

**DATE:** June 12, 2006

**FILE NO.:** 661-06-0042

**TEL NO.:** (907) 269-5169

**THROUGH:** David W. Márquez  
Attorney General

**SUBJECT:** Use of State Aircraft

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The fact that the legislature provided only these two narrow exceptions demonstrates an intention to establish a broad ban against the use of state assets for partisan political purposes. That ban includes prohibiting the use of state aircraft for campaign and other partisan political activities.

<sup>1</sup> AS 39.52.120(b)(6). The Act defines "partisan political purposes" as "having the intent to differentially benefit or harm a (i) candidate or potential candidate for elective office; or (ii) political party or group," but it "does not include having the intent to benefit the public interest at large through the normal performance of official duties." AS 39.52.120(b)(6)(A) and (B).

<sup>2</sup> AS 39.52.120(b)(6).

Linda Perez  
A.G. file no. 661-06-0042

**CONFIDENTIAL**

June 12, 2006  
Page 2

Because the Ethics Act prohibits the use of state equipment for these purposes, a public officer could not avoid a violation simply by reimbursing the state for the cost of using state aircraft. We approved reimbursement to avoid ethics violations in other contexts, but that option is unavailable for partisan political activities. We previously advised that spouses of administration officials may accompany the officials when they travel on state aircraft for state business so long as the spouses reimburse the state for the benefit provided.<sup>3</sup> However, that conclusion was based on an analysis of the Ethics Act's provision prohibiting grants of unwarranted benefits.<sup>4</sup> By contrast, the provision relevant here bars the use of state equipment for partisan political activities, subject only to the two exceptions noted previously. Consequently, reimbursement would not avoid a violation.

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