BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

In the Matter of: Opinion requested by: Peter G. Stone, City Attorney, San Jose	No. 77-003 June 9, 1977

BY THE COMMISSION: We have been asked the following question by Peter G. Stone, City Attorney of San Jose.

From time to time, private parties in San Jose provide services to city officials in connection with their duties. For example, free air transportation in a private plane was recently provided to the city attorney in connection with a court appearance and to a city councilman in connection with an appearance before the Legislature. In light of this ongoing practice, the Commission has been asked whether the receipt of free air transportation and similar services must be reported by the officials on their Statements of Economic Interests filed pursuant to San Jose's Conflict of Interest Code.

CONCLUSION

For the reasons set forth below, the councilman must report the receipt of free air transportation as a gift but the city attorney need not do so.

ANALYSIS

The Political Reform Act defines the term "gift" as:

> ... <u>any payment</u> to the extent that consideration of equal or greater value is not received....
>
> Government Code Section 82028.[1/]
> (Emphasis added.)

[1/] All statutory references are to the Government Code unless otherwise noted.

The term "payment" is defined in Section 82044 to include:

> ... a payment, distribution, transfer, loan, advance, deposit, gift or other rendering of money, property, services or anything else of value, whether tangible or intangible.

The Conflict of Interest Code for the City of San Jose is, with respect to income disclosure, identical to the provisions of Section 87207(a)(1) and (4) which requires that public officials disclose the receipt of gifts valued at $25 or more.

We have previously indicated that certain types of benefits are not gifts despite the broad language of Sections 82028 and 82044. In the opinion requested by Kenneth Cory, 1 FPPC Opinions 153 (No. 75-094-B, Oct. 23, 1975), we were asked whether Controller Cory had received a gift from a neighbor who had assisted him in repairing his fence. In providing that such services did not constitute reportable gifts, we stated:

> In any tolerable society, people lend assistance to their acquaintances and even to strangers in ways which have theoretical economic value but do not, in any real sense, represent economic transactions. It is absurd to suppose that the repairing of a fence by a neighbor, the offering of a ride, the fixing of a flat tire or hundreds of similarly friendly acts are "gifts" which must be reported under the Act....

The providing of free air transportation in a private plane may in certain circumstances be of a similar character. Many persons own or lease small aircraft purely for recreational purposes and they welcome the opportunity to take a friend on a flight. It is also not uncommon for a person who is utilizing the services of a private plane, whether for personal or business purposes, to offer a ride to someone who is coincidentally headed for the same destination. Public officials engaged in official business may be offered air transportation under these circumstances, and we think it would be mischaracterization of both the intent and effect of the event to label it a gift if nothing more than a gesture of friendship or neighborliness is involved. Such a situation contrasts with that, for example, where a corporation provides a private airplane to a city official to facilitate an appearance before an administrative agency

where he offers testimony that furthers the interests of not only his city, but also his corporate benefactor. Clearly, the corporation is motivated by something more than casual neighborliness; it is hoping for an economic return on its expenditure of corporate time and resources.

Between these two extremes lie a variety of situations which are not easily classified. While we do not think it useful to establish a mechanical formula for assessment of all cases, we do think that the following factors are relevant to determining whether a service provided to a public official is a nonreportable act of neighborliness or a gift. First, if it is the type of situation where one would expect the donor of the service to deduct the cost of the flight on his tax return as a business expense, we would ordinarily assume that an economic transaction, and not merely an act of neighborliness, is involved.[2/] Of course, the recipient of a trip will not ordinarily know how the donor of the trip prepares his tax return, but the knowledge most people have of what types of expenses qualify as business deductions can serve as a guide in this area. For example, it is safe to assume that most expenses incurred to operate a company-owned aircraft are considered by the owner of the plane to be business related.

Another factor to consider is whether the donor has, or in the foreseeable future may have, business before the official who receives the service. While the absence of this factor does not necessarily mean that no gift has been made, the presence of this factor will in most cases provide strong, if not conclusive, evidence that a gift has been made. It may be that the donor has no intent of attempting to influence the official, but the need to avoid even the appearance of possible impropriety is reason alone to require that a service provided to an official under these circumstances be disclosed.

Finally, whether or not the service is normally the subject of an economic transaction also is an important consideration. Providing a person with an occasional ride to work is not usually an economically based transaction whereas participation in a car pool or use of a car for a long period of time generally is such a transaction. The

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2/ If the cost of the trip is tax deductible because the donor is attending to business of his own unrelated to that of the official, and the official is a passenger on the plane only because he shares a common destination with the donor and an extra seat happens to be available, the tax consequences of the trip may not be a helpful indicator.

fact that the donor and the official frequently reciprocate the type of service in question or the existence of emergency circumstances also may be relevant in applying this standard.[3/]

Applying these guidelines to the situations at hand, we are advised of the following facts. The city attorney had an appointment on city business in Southern California just prior to a scheduled court appearance in San Francisco. He determined that he could meet both obligations only if he flew to San Francisco in a private non-commercial aircraft. He therefore requested that a friend of his provide this service. The friend made an airplane available even though he had no previous plans to fly the route that day. We are advised that the friend is a resident of San Jose and maintains his plane at the San Jose Municipal Airport. The city council of San Jose sets the rates which are paid by persons who keep their airplanes at the airport.

The city councilmember flew to Sacramento to testify on a bill in which the City of San Jose had an interest. Like the city attorney, the city councilmember initiated the request for the flight and the donor of the flight had no prior plans to fly to Sacramento that day. A local construction firm owned the airplane which it maintained at the San Jose Municipal Airport. In addition, the firm had business pending before the city council at the time of the flight.

In light of these facts, we conclude that only the councilman has received a reportable gift. We regard the city councilmember's flight as a gift in view of the fact that the trip was made at the official's request, the cost of the trip was likely the subject of a tax deduction and the donor of the flight had business pending before the city at the time of the trip.

We believe the city attorney, on the other hand, has not received a reportable gift. His flight was provided by a personal friend who used his personal airplane, not a company-owned plane, and, therefore, the flight was not the

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3/ This opinion does not modify our opinion in the matter of John Stephen Spellman, 1 FPPC Opinions 16 (No. 75-026, May 1, 1975), in which we stated that transportation provided as part of a plant tour is not a gift because it is in the nature of "informational material." The Act provides that the receipt of "informational material" need not be disclosed as a gift. Section 82028.

type that would ordinarily be considered to be tax-deductible to the donor. Moreover, an emergency of sorts existed in that Mr. Stone could not attend both hearings by traveling on a commercial airline. We do not consider the donor to have business before the city attorney merely because the city council sets the rates paid by persons who park their planes at the San Jose Municipal Airport. There is no indication that the owner of the plane is engaging in any special lobbying on the issue and, more importantly, we are advised that the city manager and the airport commissioner, not the city attorney, have principal responsibility for advising the city council on the setting of parking rates at the airport.

Even though we believe that the service to the councilman is a gift rather than a noneconomic gesture of friendship or neighborliness, it is still possible that the gift need not be reported if it is made solely to the city. When a city official receives free air transportation from private sources for use in performing his official duties, both the city and the official have received something of value. The city receives something of value because it saves the cost of the airline ticket it would have had to purchase for the official had he not received free transportation. The official may also be able to work more efficiently if private transportation shortens his trip, another possible benefit to the city.

The official, however, also receives something of value. Private transportation may allow him to leave home later or return home earlier, thereby freeing him for personal pursuits. In some situations, this may involve private employment or outside business activities.[4/] Even if no such time saving is involved, the official enjoys the intangible benefits that ordinarily accompany private air service, such as the added comfort and convenience and avoiding the aggravation that often attends commercial air travel. In addition, the city and the official receive a joint benefit when the trip would not even occur but for the existence of the free air transportation.

There may be some situations, however, where surrounding circumstances show that the gift was made to the city only, without providing any significant or unusual benefit to the official. In such a case, the official would

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4/ Mr. Stone informed the Commission in his letter of January 14, 1977, that the city officials in question traveled solely in connection with city business and did not pursue any personal business activities.

have no reporting obligation since whatever he receives, although free of charge to both him and the city, would be analogous to reimbursement for expenses or per diem from a state or local government agency, items which are not reportable. Section 82030(b)(2). While no immutable guidelines can be cast for determining when a gift of this nature is a gift to the city only, and not the official, we would require it to satisfy at least the following four criteria:

1. The donor intended to donate the gift to the city and not to the official;

2. The city exercises substantial control over use of the gift;

3. The donor has not limited use of the gift to specified or high level employees, but rather has made it generally available to city personnel in connection with city business without regard to official status; and

4. The making and use of the gift was formalized in a resolution of the city council (a written public record will suffice for administrative agencies not possessing the legislative power of adopting resolutions) which embodies the standards set forth above.

To the extent that the gift of free air transportation in the instant case satisfies the above standards it will not subject the city officials to any reporting obligation pursuant to the Political Reform Act. To the extent that these standards are not satisfied, however, the officials must report the receipt of such a benefit as a gift if its value is $25 or more.[5] It is our understanding that the free air transportation received by the San Jose city councilmember did not meet these four standards. It is therefore reportable on the official's Statement of Economic Interests if worth $25 or more. Sections 82028 and 87302(b).

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[5] Because the officials in question are local officials, the provisions of Chapter 6 of the Political Reform Act are not pertinent. However, if the officials in question are elected state officers, legislative officials, administrative officials or state candidates, lobbyists would be prohibited from making, arranging for the making or acting as agents or intermediaries in the making of gifts of $10 or more to such officials or from doing anything with the purpose of placing such officials under a personal obligation to either the lobbyist or his employer. See Sections 86203 and 86205(a). Moreover, these officials would be prohibited from receiving such gifts.

To determine the value of the services, the official should attempt to estimate the fair market value of the trip. Section 81011; Opinion requested by Kenneth Cory, 1 FPPC Opinions 153 (No. 75-094-B, Oct. 23, 1975). We recognize that in the instant case, it may be difficult to estimate the value of the intangible services received. Accordingly, the filer may utilize the commercial air rate or the charter rate divided by the number of passengers as guideposts in estimating the value of the flight. If the filer believes that this amount standing alone is misleading (since the city reaps part of the benefit), he may attach an explanatory note to his Statement of Economic Interests.

Approved by the Commission on June 9, 1977. Concurring: Lapan, Lowenstein, McAndrews and Quinn. Commissioner Remcho dissented in part.

Daniel H. Lowenstein
Chairman

Commissioner Remcho, concurring in part and dissenting in part.

The majority has decided that free private air transportation for a city employee on official business is a gift to the employee and not to the city, even though it is the city which would otherwise have to pay the plane fare. The city saves the money, but the employee has to report the savings as a gift to him. I respectfully disagree.

I concur with the majority's conclusion that the city attorney's airplane ride is not reportable. I do so because I think the gift is to the city and not to the city attorney personally. I also concur because I believe with the majority that if the ride were a gift to the city attorney, it qualified as an act of neighborliness under the Cory opinion, 1 FPPC Opinions 153 (No. 75-094-B, Oct. 23, 1975).

I dissent from the conclusion that the city councilmember's ride must be reported. I agree with the majority that it does not qualify as an act of neighborliness within

the meaning of the Cory opinion. That ride, like the city attorney's ride, however, is in my view also a gift to the city, not the official and therefore not reportable by the official.

In reaching the conclusion that the councilmember's ride was a gift to him, the majority creates a four-part test:

1. The donor intended to donate the gift to the city and not to the official;

2. The city exercises substantial control over use of the gift;

3. The donor has not limited use of the gift to specified or high level employees, but rather has made it generally available to city personnel in connection with city business without regard to official status; and

4. The making and use of the gift was formalized in a resolution of the city council (a written public record will suffice for administrative agencies not possessing the legislative power of adopting resolutions) which embodies the standards set forth above.

3 FPPC Opinions at 57.

I believe we have an obligation to provide reasonably precise criteria, but I frankly do not find these criteria realistic. If a donor provided free air transportation to a candidate's campaign manager, for example, I am sure the majority would insist that it be reported as a contribution to the campaign, even if (1) the donor intended it as a gift to the manager, (2) the campaign had no control over its use and (3) the gift was specifically limited to the use of one person. I believe the Commission would insist that it was a campaign contribution for sound reasons: It is the campaign and the manager who saves the money.

The Commission's fourth criterion -- a resolution by the city accepting the gift -- does nothing more than insure that all gifts of this nature will be considered gifts to the official. They are simply not worth the time or trouble to secure a resolution.

I would do away with these criteria and merely state that the person or entity which receives the financial gain is the recipient of the gift. In this case, the city saves the cost of air fare, so the city receives the gift. The majority concedes that it is the city which saves the cost of the airline ticket, 3 FPPC Opinions at 56, but it focuses on the "intangible benefits that ordinarily accompany private air services:"

> The official, however, also receives something of value. Private transportation may allow him to leave home later or return home earlier, thereby freeing him for personal pursuits. In some situations, this may involve private employment or outside business activities. Even if no such time saving is involved, the official enjoys the intangible benefits that ordinarily accompany private air service, such as the added comfort and convenience and avoiding the aggravation that often attends commercial air travel. In addition, the city and the official receive a joint benefit when the trip would not even occur but for the existence of the free air transportation.
> (Footnote omitted.)

For the reasons stated in my dissent in opinion requested by Annie M. Gutierrez, 3 FPPC Opinions 44, 47 (No. 76-081, June 7, 1977), I would not attempt to value the intangible benefits in this case. If the travel had been donated to the official for his personal use, I would have the official report it at the charter rate divided by the number of passengers. Here, however, the tangible gift is to the city and I would not ask filers to decide how much of the "intangible" benefits of air travel went to the official's well-being, how much went to the city, and how much each is worth. Nor would I consider it all a gift to the official simply because he takes some pleasure in the private travel. The Political Reform Act was directed at financial remuneration. The public is not served by attention to such intangibles as "avoiding the aggravation that often attends commercial travel."

I recognize potential for abuse. I suppose someone could make a jet available at all hours to a city official for use solely on official business. Such a luxury could well dispose its recipient kindly towards the donor. As a practical matter, however, gifts of that sort have not been a problem. As an administrative agency, this Commission has

a great deal of flexibility. We should decide that only intangibles with readily ascertainable commercial market value need be reported. If we were to perceive abuses of that rule we could then reconsider our position.

Joseph Remcho
Commissioner