

MEMORANDUM

State of Alaska
Department of Law

TO: Scott J. Nordstrand
Deputy Attorney General
Civil Division

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SUBJECT: Friends of the Alaska
Governor's Mansion
Foundation

THRU: Barbara J. Ritchie
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Opinions, Appeals & Ethics

FROM: Paul R. Lyle
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Introduction

You have asked for a review of issues that may arise under the Executive Ethics Act (AS 39.52) if public officers serve on the board of the Friends of the Alaska Governor's Mansion Foundation. You have also asked whether there are ethics act concerns if the governor's house is the site of fund raising events or board meetings for this organization.

Facts

The first lady is forming a charitable and educational non-profit corporation for the purpose of educating the public about the governor's house and to raise funds for its preservation, maintenance and enhancement. The board of directors will be composed of the sitting governor's spouse serving ex officio, three members appointed by the governor, and one member each appointed by the attorney general, the education commissioner and the Alaska Historical Commission.

Individuals appointed to the board may be private citizens or public employees. Public employees will be appointed to the board on a voluntary basis and will not be on official business when attending board meetings. The executive director of the governor's house will be invited to serve as the state's liaison to the board and will also serve as registered agent for the corporation.

Legal Analysis

Membership of public officers on the board of directors for this corporation raises several issues under the ethics act.

1. Fund Raising

AS 39.52.120(a) precludes a public officer from using an official position for personal gain. A "personal gain" is defined as a "benefit to a person's or immediate family member's personal interest or financial interest." 9 AAC 52.990(b)(5). "Personal interest" is defined to include membership in a non-profit organization. "Benefit" is defined to include "anything that is to a person's advantage or self-interest ... or anything of value."

If a public official is a board member of a private non-profit corporation, and uses his or her status as a public officer to obtain contributions to that non-profit, the official has obtained a "personal gain" because the officer has secured a contribution to a private organization of which the officer is a member. A public official who "trades" on the fact that the officer holds a position in state government in order to raise funds for a non-profit on whose board the officer sits violates § .120(a).

However, a public officer may engage in independent pursuits so long as those pursuits do not "interfere with the full and faithful discharge of an officer's public duties and responsibilities." AS 39.52.110(a). This general rule must be balanced against the specific prohibition of AS 39.52.120(a). Therefore, we conclude that a public officer who sits on the board of a charitable organization may engage in fund raising for that charity if neither the contacts for contributions nor the written appeal for funds depend upon or list the officer's status as a government official.

If public official directors of the Friends of Alaska Governor's Mansion Foundation engage in fund raising, they must make it clear that they are acting in their personal capacity. Their names should not appear in conjunction with their government titles on any fund raising materials or corporate letterhead. They

should avoid referring to their official positions in any conversation soliciting contributions to the organization.¹

In addition to avoiding the use of official position to obtain contributions to the Friends of Alaska Governor's Mansion Foundation, public official board members must also be cognizant of the gift provisions of the ethics act. AS 39.52.130(a) prohibits a public officer from soliciting a gift that benefits the officer's personal interest "under circumstances in which it could reasonably be inferred that the gift is intended to influence the performance of official duties, actions, or judgment."

If a public officer board member solicits a donation to the Friends of the Governor's Mansion Foundation from a person who has a matter pending before the agency the officer serves, the solicitation of the gift may violate AS 39.52.130(a) where the officer is in a position to influence the decision. Therefore, a public official board member may not solicit contributions from individuals or entities that have matters pending before the agency that the officer serves if the officer can influence the agency's decision in those pending matters.

2. Use of State Equipment and Facilities

AS 39.52.120(b)(3) precludes public officers from using "state time, property, equipment, or other facilities to benefit personal or financial interests." The use of state time, equipment or offices by public official members of the board to conduct board-related business is precluded by § .120(b)(3).

The ethics regulations allow a public officer to use state time and property to benefit a personal interest if the officer's designated supervisor determines that the use is insignificant and the attorney general has not issued either a general opinion against the use or advised the officer against the use. 9 AAC 52.050. The designated supervisor's determination must be made in advance of the use and, where use of state time is requested, must take into account the public official's work schedule. AS 39.52.120(d). Therefore, a public official may use state time and property to conduct board business if the use is insignificant, approved in advance by the officer's designated ethics supervisor, and the use remains within the parameters set by the supervisor.

¹ Fund raising by a public official hosted at the governor's residence and attendance of board meetings at the governor's residence is addressed below in section 6.

3. Possible Conflicts Stemming from Divergent Views of the Public Interest

The draft articles of incorporation require the non-profit to “conduct its business and base its decisions solely in the best interests of the State of Alaska, and to be guided in that regard by the elected and appointed officials of the State.” Nevertheless, it is conceivable that private citizen board members may have a different view of the state's best interests than the public official board members. In that event, a public official board member may find that the position taken by the majority of the board of directors diverges from the position taken by the state. These conflicts potentially implicate two sections of the ethics act, AS 39.52.160 and AS 39.52.170.

a. AS 39.52.160

AS 39.52.160(a)(2) precludes a public official from engaging in volunteer representation, advice or assistance to a person in any matter pending before the “administrative unit” of government served by the officer if the outside representation would benefit a personal interest of the officer. An “administrative unit” is a “subdivision of an agency.” AS 39.52.960(1).

If a “best interest” conflict arises between the board and a subdivision of a state agency served by a public officer board member, then the officer could not be involved in trying to convince the agency to change its position without violating the ethics act. 1995 *Inf. Op. Att'y Gen.* at *5 (Jan. 11; 665-95-0310) (“a serious potential for conflict exists” where a non-profit board member also works for a state agency with which the non-profit has a contract).

b. AS 39.52.170

A “best interest” conflict may also violate AS 39.52.170 and 9 AAC 52.090, both of which preclude outside employment (including volunteer service) by a public officer if it is incompatible with the officer's state duties or limits the scope of the officer's duties.

In appointing public officers to this board, we recommend that care be taken to avoid appointing officers whose official duties require or potentially require the officers to be involved in the development or implementation of policy concerning the maintenance and preservation of the governor's residence. If potential conflicts cannot be avoided through the appointment process, then the affected public officer board members must resign from the board if a conflict actually arises.

Under AS 39.52.170, the state may prohibit outside employment that generates a potential conflict if the potential conflict would have more than an insignificant or conjectural effect on a matter were the conflict actually to occur. 1997 *Inf. Op. Att'y Gen.* (Mar. 24; 661-97-0495), 1997 WL 1089541 at *3. Therefore, before beginning service on the board, public officers whose duties potentially conflict with board service should obtain a ruling from their designated ethics supervisor as to whether their board service is compatible with their official duties.

4. Coercion of Public Officers

AS 39.52.120(b)(5) precludes a public official from coercing a subordinate to benefit a personal interest and prohibits a public official from requiring another state employee to perform services for the private benefit of the public officer. Because service on this board will not be considered part of a state officer's official duties, state officials who appoint public employees to the board must ensure that service on the board is strictly voluntary.

We recommend that public officers approached to serve on this board be advised in writing that their service is voluntary and that no adverse action will be taken against them if they decline to serve.

5. The Role of the Executive Director of the Governor's Residence

The executive director of the governor's residence will be invited to be the state's liaison to the board and will serve as registered agent of the non-profit. The executive director will not be paid for these services. We assume that because the executive director will not be a board member this official will not be involved in fund raising for the corporation.

a. Liaison

The executive director of the governor's residence may serve as a liaison so long as the views of the board and the state as to how best to maintain and preserve the residence do not diverge. However, because the executive director's official duties are closely related to the work of this non-profit, her continued service to the board as a liaison may constitute incompatible outside employment under AS 39.52.170 if a "best interest" dispute develops between the board and the state. The executive director's designated ethics supervisor will have to make a compatibility determination under § .170 if such a dispute arises.

b. Registered Agent

A registered agent's duty is to provide notice to the officers of a corporation that the corporation has been served with legal process. AS 39.52.120(b)(4) precludes a public officer from taking or withholding official action affecting a matter in which the officer has a personal interest. The executive director's receipt of service of process against the corporation by a private individual presents no conflict situation.

Service of process from the state or a state agency could be served on the executive director if, for example, the corporation is given notice of intent to dissolve for failure to file a biennial report. The executive director would not violate § .120(b)(4) by accepting service of process because the executive director of the governor's residence can not take or withhold official action for the state on those matters. However, in the unlikely event the state were to file suit against the board, the executive director might need to resign as registered agent after service of process is accepted if her continued service as registered agent were determined to be incompatible with the her official duties.²

c. Use of Donations for Executive Director's State Salary

Although no proposal to this effect has been made, we caution that donations from the non-profit to the state may not be used to pay the salary of the executive director or any other staff of the governor's residence. AS 39.52.120(b)(2). In addition, because the executive director's official duties and involvement with the board are closely related, the executive director of the governor's residence may not be compensated for her services as liaison or registered agent to the non-profit. 1986 *Inf. Op. Att'y Gen.* (Sept. 25; 661-86-0576), 1986 WL 81197. An occasional gift from the board to the executive director or residence staff of under \$50 would be permissible under 9 AAC 52.060(a). However, gifts to the executive director or residence staff of greater amount or more frequent occurrence should be avoided.

6. Use of the Governor's House for Fund Raising for the Corporation or for Meetings of the Board of Directors

² Depending upon the cause of action and the official duties of the public official board members, the public official members of the non-profit may also need to resign if the state sues the non-profit.

You have asked whether the first lady may host fund raising events and board meetings in the governor's residence to benefit the corporation. The governor and public official board members would attend the fundraising events along with invited guests. Public official board members would attend board meetings hosted by the first lady during their off-duty hours.

There is a tension between the status of the governor's house as both the first family's home and "state property." The ethics act precludes the use of state property or state facilities to benefit the personal interests of public officials. AS 39.52.120(b)(3). Thus, we must examine the ethics act implications of using the governor's residence for charitable fund raising and board meetings.

a. Use of the Residence for Charitable Fundraising

(i) The First Lady

The first lady is not a "public official" under the ethics act. Therefore, the strictures of the act do not apply to her. AS 39.52.960(20). The governor's house has traditionally been used for charitable fundraising and other charitable endeavors by Alaska's first ladies. The first lady is free to host fundraising events in the residence for charitable purposes if she so desires.

(ii) The Governor

The dual status of the residence – as the personal home of the governor and "state property" – requires analysis of § 120(b)(3) as it applies to the governor's use of the residence. The governor is a "public official" subject to the strictures of the ethics act. AS 39.52.120(b)(6) specifically exempts from the operation of § .120(b)(3) the use of the governor's residence and its communications equipment for partisan political purposes. However, the ethics act contains no other exception for the personal use of the residence by **any** public official, including the governor. The question, then, is whether the legislature intended § .120(b)(6) to express the sole exception to the use of the governor's residence by the governor. We conclude that it did not.

If § 120(b)(3) were literally applied to the governor's personal use of the residence, he would violate § .120(b)(3) by using the residence for the very purpose for which it is provided to him. The state has long provided a home for the governor and his family and the legislature could not have intended § .120(b)(3) to preclude the governor from making use of the residence to advance his otherwise lawful personal or financial interests.

Therefore, we conclude that the specific exemption for partisan political uses of the governor's residence found in § .120(b)(6) was not intended by the legislature to be the only lawful personal use of the residence that the governor may make under the ethics act.³

Because the governor's house is provided to the governor as a personal residence, the governor is free to invite anyone he chooses to the residence and is free to undertake any activity within the residence that is in keeping with tradition and the exercise of sound discretion and mature judgment. Specifically, the governor is free to attend, and to be a part of, charitable fundraising events held in the governor's residence.

(iii) Public Official Board Members

As to public officials other than the governor, the governor's residence is "state property," not a personal residence. Public officials other than the governor are **not** free to use the governor's residence for private purposes. Except for the express exception for political activity set out in § .120(b)(6), AS 39.52.120(b)(3) prohibits public officials from using the governor's residence to raise funds for Friends of the Alaska Governor's Mansion Foundation.

³ The legislative history of § .120(b)(6) provides some support for this conclusion. The legislature added § .120(b)(6) to the Executive Ethics Act to make it "more closely correspond to the Legislative Ethics Act." Twentieth Alaska Legislature, *Minutes of the Alaska House Finance Committee on SB 105* (March 24, 1998). Section .120(b) parallels AS 24.60.030 of the Legislative Ethics Act. *Id.* The act that added § .120(b)(6) to the Executive Ethics Act also amended AS 24.60.030 to allow some personal and non-legislative uses of a legislator's "private" state office. *See* §§ 13, 81 ch 74 SLA 1998. AS 24.60.030 also addresses allowable political activity in state legislative offices. Because the two ethics statutes are *in pari materia* and address the same subject matter, where the Executive Ethics Act is otherwise silent or ambiguous, we may look to AS 24.60.030 for guidance when interpreting AS 39.52.120. *Bullock v. State Dep't of Community and Regional Affairs*, 19 P.3d 1209, 1214-15 (Alaska 2001).

AS 24.60.030 allows personal use by legislators of their state offices and equipment if those uses do not interfere with the performance of official duties and there is no additional cost to the state other than the cost of utilities and minimal wear and tear. AS 24.60.030(a)(2)(E); AS 24.60.030(a)(5)(A) – (E). Since the legislature intended AS 39.52.120(b) to parallel AS 24.60.030 – and since AS 24.60.030 allows legislators to make private use of their principal offices – it is highly unlikely that the legislature intended § .120(b)(6) to express the sole exception to the ethics act for the personal use of the residence by the governor.

The fact that contributions are solicited for charity is immaterial under the ethics act. The definition of "personal interest" specifically includes membership in a charitable organization. AS 39.52.960(18). The fact that the funds will be used in the state's best interest is also immaterial under the ethics act. The law does not exempt from the ethics act those actions of public officials that, although covered by the terms of the act, are deemed to be within the state's best interests.

The ethics act *does* exempt conflicts that are "minor or inconsequential," conflicts concerning personal or financial interests of a public officer that are "insignificant," and those conflicts where the public officer's action or influence would have an "insignificant or conjectural effect on the matter". AS 39.52.110(a)(3); AS 39.52.110(b). However, we can not reasonably conclude that siting a fundraising event in the governor's house will have a minor, insignificant, inconsequential or conjectural effect on the personal interests that public official board members possess in the non-profit and in obtaining private donations to benefit the non-profit.

The ethics regulations allow public officials to use state property to benefit a personal or financial interest so long as the use of the state property is itself insignificant. 9 AAC 52.050. This regulation focuses on the significance of the **use** of the property, not the significance of the personal or financial interest held by the public officer. In the context of fundraising, the use of the residence is significant in terms of the amount of time the structure is used, the area of the structure used, and the preparation of the structure for a large gathering. We conclude that a public official board member's use of the governor's residence to raise funds that benefit the officer's private, charitable interests is not an "insignificant" use of the executive residence.

While public official board members may attend a charitable fundraising event for the Friends of the Alaska Governor's Mansion Foundation hosted by the first lady and the governor at the executive residence -- and may socialize with other guests -- they may not personally solicit funds for the Friends while they are on the premises of the residence. Although this limitation may seem artificial, we believe it strikes the proper balance between the right of the governor and first lady to invite whom they please to the executive residence when pursuing their personal charitable interests and the requirement that public officials other than the governor avoid making a significant personal use of state property.

b. Use of the Residence for Board Meetings

The first lady may host board meetings of the non-profit at the governor's residence for the reasons stated above in section 6(a)(i). Public officials may attend those meetings without violating the ethics act.

As stated above, public officials may use state property to benefit a personal or financial interest without violating AS 39.52.120(b)(3) so long as the use of the property is "insignificant" and the officer's designated supervisor gives advance approval for the use. 9 AAC 52.050. Unlike the use of the residence for fund raising, attendance by a public official board member of a board meeting held at the governor's residence is an insignificant use of the structure itself by the public official. Conducting a board meeting at the residence for one hour does not cost the state money, uses only one room of the house and requires little or no preparation of the house for that use.

If you have any questions concerning this advice, please do not hesitate to contact us.