

July 6, 1993

Mr. William H. Scott
Executive Director
Alaska Permanent Fund Corporation
P.O. Box 25500
Juneau, Alaska 99802

Subject: Social Events Involving the
Alaska Permanent Fund Corporation
Our File No. 663-93-0397

Dear Mr. Scott:

You have requested our advice on the legal issues raised by various types of social events involving the Alaska Permanent Fund Corporation.

AS 37.13.040 establishes the Alaska Permanent Fund Corporation (APFC) and a board of trustees to manage the corporation. The purpose of the corporation is "to manage and invest the assets of the permanent fund and other funds designated by law" in accordance with AS 37.13. AS 37.13.040. AS 37.13.120 sets forth guidelines for the board to follow when exercising its investment responsibilities.

These statutes do not address the questions you have raised: whether participation by APFC board members or staff in social events, such as receptions or dinners for civic or municipal leaders, or meals for visiting dignitaries from global financial institutions, could violate the Open Meetings Act (OMA), AS 44.62.310• 44.62.312, or the Executive Branch Ethics Act (Ethics Act), AS 39.52, and whether such events may be funded from the APFC's operating funds. We have enclosed a copy of the Ethics Act and the OMA for your reference.

Specifically, you have asked the Attorney General's office to respond to the following questions:

1. May the APFC host a reception for community civic, business or municipal leaders at which public attendance is by invitation only and during which no official business is transacted?

2. To what extent can the APFC expend operating funds for catering for a reception at which attendance is by invitation only, or for a public reception that is advertised?
3. May the APFC board attend a reception or dinner given in its honor without violating the OMA or the Ethics Act? May four or more board members be hosted for dinner or lunch by managers under contract to the APFC, provided no business is transacted?
4. May investment managers who are on contract with the APFC sponsor the APFC's annual meeting dinner and associated social functions?
5. May operating funds be expended for alcoholic beverages or must alcoholic beverages be provided only by a no-host bar?
6. May the APFC use operating funds to pay for meals or drinks for special guests such as visiting dignitaries from global financial institutions?
7. May board members have meals together while on travel status?
8. May APFC staff members and business associates have board members to their homes for after work social gatherings and meals?
9. May a board member host a private cocktail party at his or her home for the board and members of the business community?

Your questions will be answered in the order presented.

1. The APFC may host a community reception to which the public is invited provided no business is conducted during the reception; however, such receptions should not be by invitation only.

As a general rule, public funds may be used only for a public purpose; public funds may not be used for private purposes. See Alaska Const. art. IX, • 6. The term "public purpose" cannot be defined precisely. As stated by the Alaska Supreme Court, "It is a concept which will change as changing conditions create changing needs. Whether a public purpose is being served must be decided as each case arises and in the light

of the particular facts and circumstances of each case." DeArmond v. Alaska State Dev. Corp., 376 P.2d 717, 721 (Alaska 1962) (footnote omitted); accord, Walker v. Alaska State Mortgage Ass'n., 416 P.2d 245, 251 (Alaska 1966).

You state that the reason for holding invitation-only receptions for civic and business leaders is to "mak[e] friends for the Permanent Fund as part of [the APFC's] public information program." Holding public receptions as a form of community outreach to the shareholders of the Permanent Fund (the people of Alaska) is reasonably related to the fiduciary and public accountability responsibility of the board, and therefore, is a legitimate expenditure of public funds. However, the use of public funds to host an "invitation only" social event is more problematic. The "general public relations" purposes to be achieved by a reception to which only selected members of the public are invited are not readily apparent, and such an event could be viewed as more private than public in nature. While good public relations and an effective public information program are undoubtedly important for the APFC and are furthered by community outreach activities, it is recommended that such activities involve the public generally and not just selected members of the public.

Question 1, as well as several of the other questions you raise, asks whether attendance at social events by the APFC board would violate the OMA. The OMA does not cover social gatherings so long as they remain social gatherings. However, if a board or groups of board members get together at a social gathering and discuss a matter of public business, they may be denying the public the right to observe all steps of the deliberative and decision-making process. This could be a violation of the OMA.

The OMA is broadly construed by the courts to ensure that its purposes are effectuated. The Alaska Supreme Court has held that a "meeting" under the OMA "includes every step of the deliberative and decision-making process when a governmental unit meets to transact public business." Brookwood Area Homeowners Ass'n v. Municipality of Anchorage, 702 P.2d 1317, 1323 (Alaska 1985). AS 44.62.312 states that not only government action but also government deliberation must be conducted in public. "Action" encompasses "fact-gathering and deliberative sessions relating to public business." Brookwood at 1323. And, in Brookwood, the court stated that private sessions with members of a public body may violate the OMA. "Without public access to the [session with members of the body], the 'people's right to be informed' under the OMA was severely limited." Id. Finally, the court indicated that, given the strong statement of public policy

in AS 44.62.312, the question is not whether a quorum of the body is present. "Rather, the question is whether the activities of public officials have the effect of circumventing the OMA." Id. at 1323 n.6. However, the OMA does not prohibit members of the public from discussing APFC issues with individual members of the board. Brookwood at 1323 n.7.

You state that one of the purposes of these social gatherings would be to "provide the public with an opportunity to ask questions and voice their opinions and concerns about the Permanent Fund to the Board." So long as these gatherings are open to the public and advertised, they may be used for this purpose without violating the OMA. Board members and the APFC staff may also use these gatherings as an opportunity to discuss matters relating to the APFC's duties and responsibilities with members of the public.

The Ethics Act prohibits the use of public time, property, equipment, or other facilities to benefit personal or financial interests. AS 39.52.120. Since the "invitation only" receptions you describe would be for the benefit of "community civic, business and/or municipal leaders" rather than the individual board members' personal interests, the expenditure of public funds probably would not violate the Ethics Act. However, for the reasons discussed above, it is recommended that receptions hosted by the APFC be open to the public generally.

2. It is recommended that the APFC not expend operating funds for catering for a reception at which attendance is by invitation only; operating funds may be expended for a public reception that is advertised.

The answers to the Ethics Act and public funds issues raised by this question are the same as in our response to Question 1. With respect to public receptions, we recommend that the catering be modest in nature. The APFC could be subject to criticism if such functions are lavish or excessive, even if the expenditure is not illegal.

3. Board members may attend receptions given in their honor or accept dinner invitations by managers under contract to the APFC if no business is discussed during these social events and the event is not given under circumstances in which it can reasonably be inferred that it is intended to influence the performance of a board member's official duties, actions, or judgment.

Under AS 39.52.130 of the Ethics Act, a gift, whether

in the form of service, travel, entertainment, hospitality, or any other form, that benefits an officer's personal or financial interest is improper if it is given under circumstances in which it could reasonably be inferred that the gift is intended to influence the officer's performance of official duties, actions, or judgments. A meal or reception for board members may be construed as a gift. Therefore, board members should (1) carefully consider, before accepting such invitations, whether a reasonable person could find that the gift was intended to sway their official judgment or actions, and (2) report receipt of all gifts worth \$50 or more, whether in the form of meals or other entertainment, to their designated ethics supervisor.¹ Please note that whether a gift is improper turns on a "reasonable person" standard, not on whether the gift actually influenced the member's official action or judgment.

With respect to the OMA issues, the answer is the same as in our response to Question 1. However, you state that "interaction between the APFC and its various investment managers is necessary to improve managers' performance, thereby enhancing Permanent Fund earnings and long-term stability." The OMA does not prohibit social interaction between APFC board members and investment managers at social gatherings; if, however, the interaction involves specific APFC business, such as ways to improve the managers' performance, there could be an OMA issue. Again, the key is that the OMA does not cover social gatherings that remain social in nature.

4. Investment managers on contract with the APFC may sponsor the APFC's annual meeting dinner and associated social functions provided certain conditions are met.

Sponsorship by investment managers of the APFC's annual meeting dinner would not violate the Ethics Act as long as it is not given under circumstances in which it could reasonably be inferred that the sponsorship is intended to influence the performance of official duties, actions, or judgment. Thus, while the APFC board may accept offers of sponsorship, it should never solicit them. The board should make clear to all that

¹ Under proposed regulation 9 AAC 52.130(b), travel or lodging received in connection with a trip taken as part of a public officer's official duties is not improper if the monetary value of the travel or lodging is comparable to the cost that the state would have had to pay and either the head of the agency determines that the gift is to the state, or the travel or lodging is incidental transportation by or hospitality at the residence of an individual.

whether or not an investment management firm makes such an offer will have absolutely no bearing on the board's decision to grant or renew investment contracts with the firm. Finally, the board should take steps to insure that its selection criteria for granting or renewing contracts with investment management firms precludes consideration of such gifts.

The annual meeting dinner the investment managers would be sponsoring has a legitimate public purpose: the dinner is an annual event that the APFC gives as part of its official duties, the APFC executive director and the outgoing and the incoming chair make remarks at the dinner, and a guest speaker makes a presentation on a topic of interest to the APFC. Again, however, care should be taken to insure that the activities that the managers sponsor are not so lavish or excessive that they can be construed as gifts to individual board members rather than sponsorship of a legitimate APFC function. If board members receive a personal or financial benefit from such a function, i.e., if the function or item is one a board member would have otherwise personally paid for, the gift provisions of AS 39.52.130(a) may apply. In any case, it would be advisable for the board members to make a report under AS 39.52.130(b). This issue is discussed in our response to Question 3 above.

With respect to investment managers' sponsorship of "associated social functions," please see the discussion on the gift issue in our response to Question 3, above.

The OMA issues raised by this question are answered in our responses to Questions 1 and 3, above.

5. We recommend against the use of operating funds for alcoholic beverages.

We presume that the APFC's expenditure of operating funds for alcoholic beverages would be made for a reception or dinner given in connection with legitimate APFC activities. If so, the Ethics Act does not prohibit such expenditures. However, we recommend against the use of operating funds for alcoholic beverages. The public purpose for such an expenditure is questionable, particularly given the lack of a budget line item specifically for entertainment. This issue is discussed further in our response to Question 6 below.

6. We recommend against the use of operating funds to pay for meals or drinks for official guests such as visiting dignitaries from global financial institutions.

As long as the expenditure is made in connection with

legitimate APFC business and not to benefit an individual member's personal or financial interests, there is no ethical bar to using public funds to pay for meals or drinks for official APFC guests. Once again, however, given the lack of a budget line item for entertainment, we recommend against the use of operating funds for this purpose. The federal government has long ruled that appropriated funds may not be used for entertainment except when specifically authorized by statute and or approved by proper administrative officers. The basis for the rule is that entertainment is essentially a personal expense even where it occurs in some business-related context. U.S. General Accounting Office, Principles of Federal Appropriations Law 3-74 (1st ed. 1982). We recommend that the APFC follow the federal rule in this regard. The APFC budget item for "meeting rooms and related costs" does not, in our view, provide sufficient authority for the use of operating funds for meals, drinks, and similar entertainment activities.

7, 8, and 9. The OMA does not cover social gatherings of board members so long as the events are, in fact, social gatherings.

Questions 7, 8, and 9 all ask whether members of the APFC board may attend or host social gatherings without violating the OMA. The answer to these questions is the same as that given in our responses to Questions 1 and 3 above. In short, the OMA does not prohibit board members from attending social functions provided they remain, in fact, social functions.

Please let us know if you have further questions.

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enclosure