

MEMORANDUM

State of Alaska Department of Law

TO: Linda Perez
Director
Office of the Governor

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Designated Ethics Supervisors
Executive Branch Agencies

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FROM: Judy Bockmon
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Opinions, Appeals and Ethics

SUBJECT: Kenai River Classic: Participation
and Gift Disclosure

In July, the Kenai River Sportfishing Association (KRSA) holds a fundraiser called the Kenai River Classic. In past years, state officers have been invited to attend at KRSA's expense. We understand that some state officers may attend the Classic in the course of their official duties. It is important that your agency officers understand their obligations under the Executive Branch Ethics Act regarding these invitations and participation in the Classic.

KRSA is a private nonprofit organization which seeks to preserve habitat and promote access to the sport fisheries of the Kenai River. We understand that KRSA works with state and federal agencies to determine educational or conservation programs it wishes to develop and/or support. KRSA regularly submits regulatory proposals to the Board of Fisheries and takes positions on other proposals before the board affecting Cook Inlet and Kenai sport fisheries. The Kenai River Classic fundraiser, now in its 14th year, has raised millions of dollars to support KRSA purposes. The event typically has numerous corporate sponsors and individual contributors and participants have included the state's United States senators, governors, legislators and other officials. According to the event website, this year's Classic begins with a welcome dinner followed by two full days of events, including fishing, various meals, and social activities.

The Ethics Act is intended to ensure that public officers will not base their official decisions and actions upon their own personal or financial interests.¹ A purpose of the Act is to ensure that "public officers conduct the public's business in a manner that preserves the integrity of the governmental process and avoids conflicts of interest."²

¹ AS 39.52.010.

² AS 39.52.010(a)(4).

The Act acknowledges that public officers should be free to pursue personal and financial interests, as long as the interests do not interfere or conflict with the officers' public responsibilities. The Act speaks principally to actual substantial conflicts of interest, not the appearance of conflict alone.³ However, when a public officer is given a gift, we ask whether, under the circumstances, it is reasonable to infer that the giver intended to influence the officer's official action. If so, the gift is improper and must be refused.⁴

The Ethics Act gift provision, AS 39.52.130, reads in pertinent part:

(a) A public officer may not solicit, accept, or receive, directly or indirectly, a gift, whether in the form of money, service, loan, travel, entertainment, hospitality, employment, promise, or in any other form, that is a benefit to the officer's personal or financial interests, under circumstances in which it could reasonably be inferred that the gift is intended to influence the performance of official duties, actions, or judgment.

(b) Notice of the receipt by a public officer of a gift with a value in excess of \$150, including the name of the giver and a description of the gift and its approximate value, must be provided to the designated supervisor within 30 days after the date of its receipt

- (1) if the public officer may take or withhold official action that affects the giver; or
- (2) if the gift is connected to the public officer's governmental status.

A "gift" is "a transfer or loan of property or provision of services to a public officer for less than full value."⁵ Therefore, there are three types of gifts: 1) those that must be refused; 2) those that may be accepted and if worth over \$150, reported; and 3) those that may be accepted and not reported.

Gifts that must be refused meet two conditions: First, the gift benefits a public officer's personal or financial interests. Second, the gift, regardless of value, is given

³ 9 AAC 52.010; *1993 Inf. Op. Att'y Gen.* (Jan. 1; 663-93-0113), 1993 WL 595769 (Alaska A.G.) at *2-3, 5. We nevertheless recommend that public officers consider whether their personal activities may give the appearance of a conflict with their state position.

⁴ *2000 Inf. Op. Atty. Gen.* (March 20; 663-00-0156), 2000 WL 875887. Actual intent to influence is not required. *Id.*

⁵ 9 AAC 52.060(a).

under circumstances in which it could reasonably be inferred that the gift is intended to influence the performance of official duties, actions, or judgment.⁶

Gifts that must be reported are those with a value in excess of \$150, whether affording a personal or financial benefit to the public officer or not, if connected to the public officer's governmental status or if the public officer may "take or withhold official action that affects the giver." This disclosure triggers the designated ethics supervisor's review and determination whether receipt of the gift may violate the Ethics Act.

Gifts that may be accepted and not reported are those with a value of up to \$150 received in circumstances that do not require that they be refused. Gifts of less than \$50 are presumed not to be given under circumstances in which it could reasonably be inferred that the gift is intended to influence official action, unless rebutted by other evidence.⁷

Attendance as a guest at an event, such as the Classic, at someone else's expense may be permissible so long as participation does not violate the Ethics Act and appropriate disclosure is made of the benefits received.⁸ It is critical for each public officer to understand that he or she may not accept gifts, whether in some tangible form,

⁶ If the public officer is uncertain whether a gift may be accepted, the officer should seek an ethics determination from the agency's designated ethics supervisor or if the officer is the commissioner, Linda Perez, Director of the Office of the Governor.

⁷ 9 AAC 52.060(a). The original threshold for disclosure was \$50. It was raised to \$150 on January 1, 1999. We have observed that the legislature's identification of a threshold value reflects a policy that gifts of lower value are unlikely to be intended to influence judgment. It also reflects recognition that, within a certain range, it is neither uncommon nor improper for individuals or organizations to provide meals, gifts or entertainment to recognize, honor, or be cordial to a public officer. On the other hand, identification of a threshold also means that a public officer may not assume that similar gifts valued above the threshold are proper. *2000 Inf. Op. Atty. Gen.* (March 20; 663-00-0156), 2000 WL 875887 at 2-3.

⁸ Ordinarily, a public employee should use approved personal leave to attend a private event during regular duty hours. *See* AS 39.52.120(b)(3) & (d). We understand that in the past some public employees have attended Classic activities as part of their official duties. We assume that a determination was made that attendance would benefit the state and mission of the agency. However, if a public employee attends in an official capacity and neither the state nor the employee pays for activities in which the employee participates or for gifts received, then gift disclosures must be made of benefits and gifts received, where the value totals in excess of \$150.

such as fishing gear, or in the form of benefits or services, such as transportation, meals, lodging or guided fishing, if, under the circumstances, an impartial person could reasonably infer that the gift, regardless of its value, is intended to influence official actions or judgment.⁹

Prior to accepting an invitation to participate in an event, such as the Classic, at no cost, or other tangible gift, a public officer should consider several questions.¹⁰

1. Can I take or withhold official action that affects the giver?

Under the Ethics Act, the term “official action” means “recommendation, decision, approval, disapproval, vote, or other similar action, including inaction.”¹¹ We consider the circumstances at the time of the gift. At one end of the spectrum, if the officer can take no action that affects the giver, there is little to support an inference that the gift was intended to influence the officer. At the other end, it can be reasonably inferred that a gift is intended to influence if an important decision is currently pending directly before the officer.¹² Gifts may usually be accepted and disclosed, if valued at \$150 or more, when no actual action is presently pending, even when it is possible that some action affecting the giver may come before the board in the future.¹³ However, specific circumstances may make a gift improper even if no action is pending.

2. Is the gift given to me in my personal capacity or in my capacity as a public officer?

The answer to this question is specific to the public officer and may depend on the officer’s personal interests. We consider the circumstances of the gift giving. For example, we look at whether the gift is given by a family member or friend or someone with business before the officer’s agency. We consider whether a gift marks a personal occasion where gifts are customarily given.

⁹ 2000 *Inf. Op. Atty. Gen.* (March 20; 663-00-0156), 2000 WL 875887 at 3.

¹⁰ *Id.* at 2-3. These are the questions that designated ethics supervisors and the Department of Law ask when reviewing the propriety of gifts received and disclosed.

¹¹ AS 39.52.960(14).

¹² 2000 *Inf. Op. Atty. Gen.* (March 20; 663-00-0156), 2000 WL 875887 at 2.

¹³ 1988 *Inf. Op. Atty. Gen.* (April 21; 663-88-0465), 1988 WL 249450.

3. What is the value of the gift?

Value is “full value” to the recipient—not a discounted value or the cost to the giver.¹⁴ As a general rule, the greater the value, the stronger the inference is that it was intended to influence. We also consider frequency. A single small gift may not support an inference of intent to influence, but a series of small gifts, which in the aggregate represents a substantial value, may.¹⁵

Participation in all Classic activities would clearly have a value of more than the \$150 threshold for reporting gifts, although individual activities, such as a meal may not rise to that value.¹⁶ A public officer may be given in kind the value of the fishing, meals, or entertainment in which the officer participates and hotel accommodations and travel. We understand that KRSA may distribute Classic gift bags. It is incumbent upon each public officer who attends to appropriately assess the value of his or her own participation or gifts received and make a gift disclosure, if required by the Ethics Act.

As the above discussion suggests, we weigh many factors when considering the propriety of a particular gift. We may ask whether the circumstances suggest that the giver simply intends to maintain a cordial working relationship or whether the giver is so generously bestowing gifts on the public officer that one may infer the intent to influence the officer to give more weight to the giver’s viewpoint in some anticipated future action.¹⁷ If others, who are not state officers, are given the same gift, the giving of the gift may be less likely to suggest an intention to specifically influence the individual recipient. We may weigh the importance of the pending action to the giver. Is it a routine matter where the public officer has little discretion? Or will the decision have a significant impact on the giver or another third party? We may examine the benefit to the state of participation.¹⁸

¹⁴ 9 AAC 52.060(a).

¹⁵ 2000 *Inf. Op. Atty. Gen.* (March 20; 663-00-0156), 2000 WL 875887 at 3.

¹⁶ According to the Classic website, persons registering to participate in the Classic this summer are asked to make a \$4000 donation. A non-fishing participant, who accompanies a fisher, is asked to donate \$2000. These amounts as “donations” do not necessarily equate to the value of the benefits.

¹⁷ 2001 *Inf. Op. Att’y. Gen.* (September 12; 663-02-0010) *discussing* 2000 *Inf. Op. Atty. Gen.* (March 20; 663-00-0156), 2000 WL 875887.

¹⁸ *See* 2000 *Inf. Op. Atty. Gen.* (March 20; 663-00-0156), 2000 WL 875887.

We also want to make clear that participation in the Classic or similar events sponsored by private individuals or groups may not involve gifts or may trigger other Ethics Act considerations depending on the circumstances. A public officer, who supports the KRSA or another group or simply desires to attend a fundraiser, may participate at his or her own expense using approved personal leave for time when the officer would ordinarily be at work without violating the Ethics Act. If a public employee is a KRSA member¹⁹ and volunteers to assist KRSA in putting on the Classic on the employee's own time, the Ethics Act requires the employee to make an outside services disclosure, if the employee will receive any form of compensation (including meals, travel or free participation), so that potential conflicts with the employee's state duties may be evaluated.²⁰

If you need additional advice concerning the circumstances of any individual agency officer, who may attend the Kenai River Classic, and the application of the Ethics Act, please let us know.

¹⁹ If a public officer's interest and involvement in KSRA rises to a "personal interest" or "financial interest" as those terms are used in the Act, there is an additional ethics concern. The officer may need to refrain from action in his or her state position, if the action may affect those interests. AS 39.52.120(b)(4). *1999 Inf. Op. Att'y Gen.* (Sept. 23; 663-99-0232); 1999 WL 1454824 (Alaska A.G.) at *2-3, *citing to 1994 Inf. Op. Att'y Gen.* (Nov. 29; 661-95-0214).

²⁰ AS 39.52.170. This provision applies to every "public employee." It does not apply to volunteer board and commission members. Heads of principal executive branch agencies are prohibited from outside employment for compensation. AS 39.52.170(c).