



1029 West Third Avenue, Suite 300
Anchorage, AK 99501-1981
PHONE: 907.279.8561
FAX: 907.276.3108
www.perkinscoie.com

Thomas M. Daniel
PHONE: (907) 263-6950
FAX: (907) 263-6450
EMAIL: TDaniel@perkinscoie.com

**CONFIDENTIAL report regarding
Ethics Complaint pursuant to
Alaska Statute 39.52.340**

VIA EMAIL

July 14, 2009

Debra E. English, Chair
Alaska Personnel Board
9787 Middlerock Road
Anchorage, Alaska 99507

Re: Report Regarding Kim Chatman Ethics Complaint

Dear Debra:

This letter constitutes my report regarding the ethics complaint filed by Kim Chatman against Governor Sarah Palin, dated April 27, 2009. The complaint alleges that the governor has established a trust fund for the purpose of soliciting donations from members of the public, which will be used to pay for the governor's legal expenses for defending against allegations of misconduct. The fund, named the Alaska Fund Trust, has a website, <http://thealaskafundtrust.com>, which describes the fund in more detail:

The Alaska Fund Trust is the official legal fund created to defend the integrity of the Alaska Governor's Office from an onslaught of political attacks launched against current Governor Sarah Palin, the First Family, and state-employed colleagues. These baseless accusations have cost Alaska more than \$1 million in public monies to defend, and Governor Palin has incurred more than half a million dollars in personal debt defending her official actions as Governor.

57440-0005/LEGAL16518842.1

ANCHORAGE · BEIJING · BELLEVUE · BOISE · CHICAGO · DENVER · LOS ANGELES · MENLO PARK
OLYMPIA · PHOENIX · PORTLAND · SAN FRANCISCO · SEATTLE · SHANGHAI · WASHINGTON, D.C.

Perkins Coie LLP and Affiliates

The legal document creating the trust imposes the following restrictions on contributions to and expenditure of the trust funds. The maximum contribution to the fund is \$150 per person. Money donated to the trust cannot be used for campaign expenditures. The trust will not accept donations from registered lobbyists or anyone who has competitive commercial contracts for products or services issued to the State of Alaska. Donations can only be used for legal expenses incurred by counsel on behalf of the governor, her family, and staff as approved by the trustee. Donations cannot be used to pay personal expenses of the governor other than legal expenses and costs incurred in defending against allegations of misconduct. Any funds remaining after payment of the governor's legal expenses will be donated to a charitable organization.

The complaint alleges that creation of the trust fund violates two provisions of the Alaska Executive Branch Ethics Act: (1) the prohibition against a public officer's use of official position for personal gain, and (2) the prohibition against a public officer accepting gifts that are intended to influence the performance of official duties.

Analysis

A. Prohibition on Use of Official Position for Personal Gain

Alaska Statute 39.52.120(a) provides that a "public officer may not use, or attempt to use, an official position for *personal gain*" The regulations define "personal gain" as "a benefit to a person's or immediate family member's personal interest or financial interest." 9 AAC 52.990 (b)(6). A "financial interest" includes "an interest held by a public officer . . . from which, or as a result of which, a person has received or expects to receive a *financial benefit*." AS 39.52.960 (9)(A) (emphasis added). A "benefit" is defined very broadly in the Ethics Act to include "*anything that is to a person's advantage or self-interest*, or from which a person profits, regardless of the financial gain, including any dividend, pension, salary, acquisition, agreement to purchase, *transfer of money*, deposit, loan or loan guarantee, *promise to pay*, grant, contract, lease, *money*, goods, service, privilege, exemption, patronage, advantage, advancement, or *anything of value*." AS 39.52.960(3) (emphasis added). *Gain* is defined in the statute as "actual or anticipated gain, benefit, profit, or compensation." AS 39.52.960(10).

There is little doubt that the Alaska Fund Trust will provide "personal gain" to Governor Palin because the trust will provide a benefit to the governor's financial interest. The trust also provides a *benefit* because it is a "*promise to pay*" the governor's personally-incurred legal fees and costs in defending against ethics complaints. Moreover, when the trust actually pays the governor's legal fees, that will constitute a benefit to the governor because there will be a "*transfer of money*" that is to the governor's *advantage or self interest*. In the absence of the trust fund, the governor would be required to pay her own legal fees out of her own pocket. The fact that the trust fund is now going to pay those fees clearly provides a benefit to the governor.

The more difficult question is whether the first part of the statute is satisfied – did the governor "use or attempt to use, an official position" in order to obtain this personal gain? An attorney general's opinion concerning whether public officials could sit on a board of a non-profit organization established to raise funds for the preservation and maintenance of the governor's mansion, addressed whether the prohibition against a public officer using his position for personal gain found in AS 39.52.120(a) would be violated. 2003 Op. Att'y Gen. No. 665-04-0038 (Oct. 1, 2003). In interpreting the phrase "use, or attempt to use, an official position" the attorney general opined that, "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)." *Id.* at 2. The opinion goes on to state that if "neither the contacts for contributions nor the written appeal for funds depend upon or list the officer's status as a government official," there is no violation. *Id.*

Here, the Alaska Fund Trust quite clearly uses the governor's status as a public official to solicit donations. The very first sentence on the trust's web page states, "*[t]he Alaska Fund Trust is the official legal fund created to defend the integrity of the Alaska Governor's Office from an onslaught of political attacks launched against current Governor Sarah Palin, the First Family, and state-employed colleagues.*" The top of the first page on the trust's website states that it is "*the official website for the Governor Sarah Palin expense fund.*" In addition, the description of the trust on the website explicitly uses the governor's official position to solicit donations:

Halfway through her first term as Alaska's Governor, Sarah Palin has done so much for her state and her nation. She has been a champion for much needed transparency and accountability in government. She has sought to protect the fundamental freedoms ensured by our Constitution. And she has never forgotten the importance of lowering energy costs for Alaskans and striving for energy security for America. Still, there is much left to be done, so let's help Governor Palin continue the job she was elected to do without all these petty distractions.

See www.thealaskafundtrust.com/about/.

In sum, these statements, in the words of the 2003 attorney general's opinion, are indicative of "a public official who 'trades' on the fact that the officer holds a position in state government in order to raise funds" 2003 Op. Att'y Gen. No. 665-04-0038 at 2 (Oct. 1, 2003).

There remains the question, however, of whether the governor's supporters created the Alaska Fund Trust completely independent of any actions on the part of the governor. In that event, it would be difficult to conclude that the governor used her position to solicit the donations, as contrasted with supporters using her position to solicit the donations. If third parties created the

legal defense fund completely on their own, free from any direction, influence, or guidance from the governor, it would not seem that the governor "used her position" in violation of the statute.

According to the fund's website, it was created by Kristan Cole and other supporters of the governor who believe that the governor should not have to personally pay for legal fees incurred in defending against a series of ethics complaints. I interviewed Ms. Cole, who confirmed that she and other supporters of the governor came up with the idea of soliciting contributions to pay the governor's legal fees. Ms. Cole also stated that she and other supporters of the governor set up the Alaska Fund Trust. She also stated, however, that the governor gave her approval to create the trust as the "official" legal defense fund for the governor and authorized the use of her photograph on the trust's website. In light of the evidence that the governor expressly authorized the creation of the trust and the fact the trust website quite openly uses the governor's position to solicit donations, there is probable cause to believe that Governor Palin used, or attempted to use, her official position for personal gain in violation of Alaska Statute 39.52.120(a).

This interpretation of the Ethics Act is consistent with common sense. An ordinary citizen facing legal charges is not likely to be able to generate donations to a legal defense fund. In contrast, Governor Palin is able to generate such donations because of the fact that she is a public official and a public figure. Were it not for the fact that she is the governor and a national political figure, it is unlikely that many citizens would donate money to her legal defense fund. I recognize that some donors would contribute to a legal defense fund for Sarah Palin, not because she is the governor of Alaska, but because she has become a national political figure. However, the solicitation of donations to the Alaska Fund Trust is irretrievably intertwined with her position as governor of Alaska. Contributions are being solicited to defend against ethics complaints generated by her actions as governor – not her actions as a national political figure. It stands to reason that if the governor incurred the legal fees because of her actions as governor, she also is able to generate donations to pay for those legal fees because she is governor.

B. Prohibition Against a Public Officer Accepting Gifts Intended to Influence Performance of Official Duties

Alaska Statute 39.52.130(a) states,

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.

There is no doubt that the Alaska Fund Trust will provide a "gift" to the governor because the trust will provide *money* that is a *benefit* to the governor's *financial interests*. See discussion above.

1. Gift Reporting

The Ethics Act further requires that gifts with a value in excess of \$150 must be reported to the public officer's supervisor, along with the name of the giver, a description of the gift, and its approximate value,

- (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.

AS 39.52.130(b). Here, there is little doubt that the gifts are "connected to the public officer's governmental status," because the very purpose of the trust is to pay off legal bills incurred by the governor in "defending her official actions as governor." See description on web page. However, gifts to the trust are limited to \$150 each, so a preliminary issue is whether reporting these gifts is exempt from the Ethics Act.

The \$150 threshold has been interpreted by the attorney general as reflecting a legislative judgment "that gifts of lower value are unlikely to be intended to influence judgment." See 2000 Op. Att'y Gen. No. 663-00-0156 (Mar. 20, 2000) at 3. "Disclosure, analysis, and determination must be made if the value is above \$150 and the gift is either connected to the public officer's governmental status or the officer may take or withhold official action affecting the giver." *Id.* However, the attorney general recognized that the frequency of a gift may be reportable, even if each individual gift is less than \$150. "A designated supervisor's determination could change if a gift which by itself did not support an inference of intent to influence was, in fact, one of a series of gifts that, in the aggregate constituted substantial value." *Id.*

Although the Alaska Fund Trust limits contributions to \$150 each, the creators of the trust anticipate multiple gifts of that amount. Thus, this "series of gifts" of \$150 each, in the aggregate, will constitute substantially more than \$150. Moreover, donations to the trust will be used to pay off "more than a half million dollars in personal debt" that the governor has incurred in defending her actions as governor. See description of the trust on its web page. Although individual donations are limited to \$150, the gift that the trust will make to pay off the governor's legal bills will far exceed that amount. Thus, whether the trust is viewed as a series of \$150 gifts or one or more large gifts to retire a half million dollar debt, it is not exempt from the gift reporting requirement of the Ethics Act.

2. Prohibition on Receiving Gifts

Even though the gift here must be reported, the governor's receipt of the gift will not violate the Ethics Act unless the gift has been solicited, accepted or received "under circumstances in which it could reasonably be inferred that the gift is intended to influence the performance of official duties, actions, or judgment." AS 39.52.130(a). The attorney general has interpreted this provision as establishing a reasonable person standard.

Thus, the department does not ask whether in fact the giver is trying to influence the public officer. (Citations Omitted.) The statute looks to whether the gift is given "*under circumstances* in which it could reasonably be inferred that the gift is intended to influence the performance of official duties, action, or judgment." The decision then must turn on the facts and circumstances of the gift, including its value, the relationship between the public officer and the giver, and the extent to which the public officer can take or withhold official action that affects the giver.

2000 Op. Att'y Gen. No. 663-00-0156 (Mar. 20, 2000) at 1-2.

Here, it is not at all clear that the governor can take or withhold official action that will affect the giver or givers. If the "givers" are viewed as the numerous citizen donors who have contributed \$150 to the trust fund, the likelihood that the governor will reward them with some official action seems entirely speculative. Speculation cannot support an Ethics Act violation. *See* AS 39.52.110(b)(2) ("there is no substantial impropriety if, as to a specific matter, a public officer's . . . action or influence would have insignificant or conjectural effect on the matter.").

The giver might be viewed as the trust, which will make a gift to the governor by paying her legal fees. There again, the likelihood that the governor will take some action that will benefit the trust itself also seems speculative.

A more probable scenario is that the organizers of the trust hope to be rewarded by some official action of the governor in the future for having helped to pay off her legal bills. As the 2000 attorney general's opinion recognized,

[a] giver may generously bestow gifts on a public officer to develop and maintain friendly relations, with the intent that when policy decisions are made in the future, the officer will be favorably disposed to give more weight to the giver's viewpoint. Those facts could support a reasonable inference that the gifts were intended to influence the officer.

Id. at 2. As discussed in the previous section, the person primarily responsible for the creation of the trust is Kristan Cole, who is also the trustee of the trust. Ms. Cole is a long-time friend of the governor. The governor appointed Ms. Cole to the position of chairman of the Board of Agriculture and Conservation, a state agency in the Division of Agriculture. The governor also appointed Ms. Cole to the board of the Royalty Oil and Gas Commission. Ms. Cole also serves on the Creamery Board, a private corporation owned by the State of Alaska that formerly operated the Matanuska Maid dairy in Palmer.

The relationship between Ms. Cole and the governor could cause a "reasonable person" to conclude that the payment of the governor's legal fees is intended to influence the governor's performance of official duties, action, or judgment. I cannot read Ms. Cole's mind and therefore it is possible that her formation of the legal defense fund is entirely altruistic without an expectation of anything in return. But as explained above, the standard for interpreting this section of the Ethics Act is an objective one. The circumstances around the creation of the trust fund suggest that the organizers will expect "that when policy decisions are made in the future, the [governor] will be favorably disposed to give more weight to the [their] viewpoint." In addition, my role as independent counsel for the personnel board is only to decide whether there is probable cause to believe a violation of the Ethics Act has occurred – not to reach a definitive conclusion. *See* AS 39.52.320. The ultimate determination of whether the governor has violated the Ethics Act can only be made by the personnel board after a formal hearing and a report by a hearing officer. *See* AS 39.52.360-370.

In sum, I find probable cause to believe that payment of the governor's legal fees by the Alaska Fund Trust will violate the Ethics Act prohibition against a public officer accepting gifts intended to influence performance of official duties.

C. Is it Unfair to Prohibit the Governor From Accepting Donations to Pay a Huge Legal Bill Incurred to Defend Against Meritless Ethics Complaints?

I am sympathetic to the argument that the governor should not be required to be personally responsible for the enormous legal bills that she has incurred to defend against an onslaught of ethics complaints, most of which have been dismissed as unfounded. It may seem unfair to require the governor to hire a personal lawyer to defend against actions that arise from the fact that she is a public official, and at the same time, prohibit her from forming a private legal defense fund to help pay for the expense of private counsel.

Consequently, I asked the attorney general's office why the state did not pay for the governor's legal bills so there would be no need for a legal defense fund. The answer I received was that the attorney general does not provide a defense to public officials accused of violating the Ethics Act because the essence of an ethics complaint is an allegation that the officer took actions that elevated his personal interests over his official responsibilities, for which the officer may be subject to personal liability and penalties. According to the attorney general, allegations of

violations of the Ethics Act stand in contrast to allegations that an officer, while attempting to serve the state's interests in carrying out his state duties, violated the law. In the latter case, the attorney general does provide a defense for the governor. In addition, in most instances the attorney general is responsible for investigating and, if appropriate, prosecuting ethics complaints. As a result, the attorney general has never defended any state official against an ethics complaint.

Even though the attorney general may not be able to provide a defense to a public official accused of an ethics violation, there remains the question of whether the state could or should pay for the cost of the public official's private attorney, especially in cases where the ethics charges are dismissed. The attorney general's office has concluded that the state may reimburse a public official for the expense of hiring private counsel, perhaps capped by a dollar limit, where the following conditions are met: (1) the legal proceeding results in exoneration of the public official with respect to a code of conduct, (2) the public officer was acting within the scope of his office or employment, (3) the legal fees are reasonable, and (4) an appropriate source of funds is available to pay the expense. Whether these conditions are satisfied with regard to some or all of the ethics complaints filed against Governor Palin is beyond my authority to decide. This is an issue for the state to address. I mention this only to show that public officials may not always be required to personally incur the cost of private counsel to defend against unfounded ethics complaints.¹

In cases where an ethics complaint has been dismissed for lack of probable cause, it would seem particularly appropriate to require the state to pay for that expense rather than requiring the public official to pay it out of her own pocket. Perhaps the Ethics Act should be amended to specifically address this problem. But that is not for me to decide. I can only apply the Ethics Act as currently written, and as currently written, it does not allow a state official to use her position to solicit funds to pay for a private attorney or any other personal expense.

I also am aware of the fact that the creation of legal defense funds is a common practice for federal office holders. The website for the Alaska Fund Trust includes copies of the trust fund documents for former Senator Hillary Clinton, former Senator Ted Stevens, Senator John Kerry, and others. The ethics provisions governing members of the United States Senate and House of Representatives specifically permit members of Congress to have Legal Expense Trust Funds so long as they comply with certain restrictions similar to the ones that the Alaska Fund Trust has

¹ I would note here that the state hired outside counsel to represent Governor Palin in her official capacity with respect to the Legislative Council investigation concerning the firing of Public Safety Commissioner Monegan. The governor's counsel later advised he was terminating the contract because his efforts relating to claims against the governor in her official capacity could not be separated from those alleging personal misconduct. The attorney general advised that it expected to be billed for representation of the governor in her official capacity, but the attorney general has not received a billing from the governor's private attorney.

imposed. However, there is not a similar provision in the Alaska Executive Branch Ethics Act or its implementing regulations that allows state officials to establish legal defense funds. Perhaps there should be, but that is a matter for the legislature to address. My job is to apply the statute as currently written.

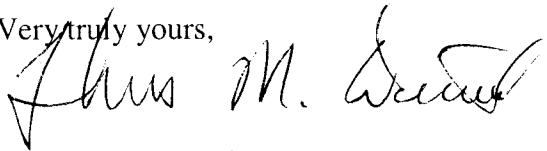
D. Recommendation of Corrective Action

I can recommend that corrective action be taken to resolve this complaint without the necessity of a formal hearing on the matter. *See* AS 39.52.330. My recommendation is that the governor should refuse to accept payment of her legal fees and costs from the Alaska Fund Trust and withdraw her authorization for the trust to be recognized as her "official" legal defense fund. I also recommend that she seek reimbursement from the state for the cost of defending the ethics complaints that have been dismissed.

I also recommend that the legislature consider amending the Ethics Act to require the state to reimburse a public official for reasonable legal fees and costs incurred to defend against an Ethics Act complaint that is dismissed.

Notice of this decision will be communicated to the governor and to Ms. Chatman. **However, this decision is confidential pursuant to AS 39.52.340, unless confidentiality is waived by the governor.**

Very truly yours,



Thomas M. Daniel

TMD:mlc