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Use of City-owned Vehicles

Charter Sections: 2601(5), 2604(b)(2), 2604(b)(3)

Advisory Opinion No. 2009-1

The Conflicts of Interest Board (the "Board") has received a request, made on behalf of certain elected officials, for guidance concerning the appropriate use of City-owned cars and City personnel as drivers that are allotted to such officials for use in connection with their official duties. The advice is requested in light of the provisions of Chapter 68 of the City Charter and the Board Rules promulgated pursuant thereto, which specifically prohibit the use of official position for personal gain and the use of City resources for non-City purposes. Given those provisions and rules, under what circumstances may such cars and drivers be used for other than official business purposes?

In this opinion, we limit our guidance to those *elected* officials who currently have use of City-owned cars and, where applicable, City employees as drivers. As of the date of this opinion, those fifteen officials are the Mayor, the City Council Speaker and Minority Leader, the Public Advocate,

the Comptroller, the Borough Presidents, and the District Attorneys (hereinafter “Elected Officials”).

The Board has sought in this opinion to develop principles consistent with Chapter 68 that could be uniformly and easily applied and thus has divided these Elected Officials into two categories for purposes of this opinion:

1) Elected Officials for whom the New York City Police Department (“NYPD”) has determined that requirements of personal security dictate, at a minimum, that provision of a City-owned car and security personnel is necessary; and 2) all other Elected Officials who currently have use of a City-owned car and, in some cases, a City employee as a driver.

Background

The furnishing of cars to Elected Officials to facilitate government business, including for purposes of safety and administrative efficiency, is derived from long-standing tradition and practice, rather than any one specific provision of law. Some Elected Officials use vehicles provided by the NYPD; others use vehicles paid for out of the budget of their offices or the City’s Department of Citywide Administrative Services. Those officials for whom the NYPD has determined that the provision of security is required are driven by and/or accompanied by NYPD personnel. Elected Officials who have drivers, but for whom the NYPD has not provided security, hire drivers specifically for that job, and their salaries are paid for out of the budget of the Elected Official’s office.¹

¹ Out of a concern for the safety of those Elected Officials who are not provided with security, we have not identified which officials use vehicles provided by the NYPD.

In order to help identify the issues raised by these Elected Officials' use of official vehicles for purposes not directly related to their official duties, the Board consulted with representatives of the Elected Officials and canvassed state, federal, and local authorities to ascertain potential uses that might raise issues under Chapter 68 and to identify any rules, court cases, administrative rulings, and policies that could shed light on these issues. In addition, the Board communicated with representatives from the New York State Governor's Office, the Pennsylvania Ethics Commission, the Philadelphia Ethics Board, the Chicago Ethics Board, the Los Angeles City Ethics Commission, the San Francisco Ethics Board, and the Massachusetts Ethics Commission.

Relevant Law

Charter Section 2604(b)(2) prohibits public servants from engaging in any "business, transaction or private employment, or hav[ing] any financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his or her official duties." In Board Rules Section 1-13, the Board has specified certain conduct that constitutes a violation of Section 2604(b)(2). That rule prohibits public servants from, among other things, performing personal and private activities on City time and using City letterhead, personnel, equipment, resources, or supplies for any non-City purpose.

Charter Section 2604(b)(3) prohibits public servants from using or attempting to use their City positions to obtain any financial gain, contract, license, privilege, or other private or personal advantage, direct or indirect, for themselves or for any person or firm with whom or with which they are associated. Charter Section 2601(5) defines a person or firm "associated"

with a public servant to include “a spouse, domestic partner, child, parent or sibling; a person with whom the public servant has a business or other financial relationship; and each firm in which the public servant has a present or potential interest.”

Relevant City Policies

Separate and apart from the Charter and Board Rules Section 1-13, the City has adopted a City Vehicle Driver Handbook, most recently updated effective February 2009, that specifies:

Drivers are not allowed to use City Government vehicles for personal activities, except for required rest periods, meals, and brief stops incidental to the conduct of official City business. Such stops do not entitle drivers to use the vehicle for shopping, recreation, or to transport others....For those elected officials for whom the New York City Police Department has determined that personal security is necessary, it is recognized that they will be required to conduct certain personal activities while using a City Government vehicle. Such activity shall be consistent with the determinations of the New York City Conflicts of Interest Board.

See City of New York, City Vehicle Driver Handbook, rev. February 2009, at 4. No official pronouncements as to the scope of such permissible “incidental” use exist, other than as contained in the handbook itself, nor are there any formal opinions of the Law Department on the issue of the appropriate use of official vehicles.

The City has also adopted an “Acceptable Use Policy” (“AUP”) relating to the use of City telephones, computers, fax machines, photocopiers, and other similar equipment – but *not* cars and drivers. This policy permits, in relevant part:

limited personal use of the City’s office and technology resources if the use is not prohibited pursuant to this or another applicable

agency policy,² does not otherwise interfere with or otherwise impede the City's operations or employee productivity, and involves no more than a minimal additional expense to the City.

AUP, Article I.

Even if the use involves more than "minimal" expense, the AUP also permits personal use in certain circumstances with reimbursement by the employee, provided that such use is also permitted by the agency. See AUP at 4. For example, many agencies permit managerial employees to make long distance calls from office phones, provided that reimbursement is made to the City for the actual cost of the calls.

New York State Authorities

As a general matter, the New York State Constitution prohibits counties, cities, towns, villages, and school districts from giving or loaning any money or property to or in aid of any individual or private corporation, association, or undertaking. See N.Y. CONST. ART. VIII, Section 1. This provision has long been construed as generally prohibiting a municipality from permitting an individual employee to use a municipal automobile for private purposes, since personal use would constitute a gift in violation of Article VIII. See, e.g., Fox v. Employers' Liability Assur. Corp., Ltd., of London, England, 243 A.D. 325, 276 N.Y.S. 917 (4th Dep't), aff'd, 267 N.Y.2d 609 (1935). However, not every private or personal use of an official vehicle is prohibited. See, e.g., Opns St. Comp., 1980 No. 79-850, 1980 WL 7955 (N.Y. St. Cptr.). Where the official is given full-time use of a city-owned vehicle as part of his or her

² Examples of prohibited use include using any of these City resources for outside business purposes, sending harassing emails, accessing or downloading sexually explicit material, or engaging in political activities.

compensation in exchange for services rendered, generally, there is no gift, and thus no violation of the Constitution. See id., at 1, (citing City of Rochester v. AFSCME, Local 1635, 54 A.D.2d 257, 388 N.Y.S.2d 489 (4th Dep't 1976)). Similarly, where the official is subject to being called to perform official duties in emergency situations that occur after his or her regular business hours, the public official may be permitted, in the public interest, to have a municipal vehicle on a full-time basis to insure his or her ready availability in such situations (see General City Law Sections 20(5), (13), (23)). Reasonable personal use of the municipal vehicle under those circumstances would be a private benefit that is incidental to a legitimate public purpose and thus not a violation of the constitutional section. Id. at 2 (citing New York Tel. Co. v. Second Bros. Inc., 62 Misc. 2d 866, 309 N.Y.S.2d 814 (Sup. Ct. Erie Co.), aff'd, 35 A.D.2d 779 (4th Dep't 1970)); see also Opns. St. Comp, 1987 No. 87-25, 1987 WL 61247 (N.Y. St. Cptr.).

Although Article VIII does not apply to the state government, a similar prohibition against gifts of “the money ... and credit” of the state for private purposes is found in the State Constitution at Article VII, Section 8. Consistent with this provision, then Governor Eliot Spitzer, in Paragraph 4 of Executive Order 1 of 2007, entitled “Prohibition Against the Use of State Property,” declared that:

State vehicles shall be used for official business or incidental use associated with business away from an employee's official work station. Individuals who are authorized by their agency or public authority to use a vehicle for personal purposes shall keep records of such use, and the value of such use shall be calculated and reported as personal income to such individuals for tax purposes.

Pursuant to the State's Budget Policy and Reporting Manual, the individuals referenced in Executive Order 1 as being authorized to use a state vehicle for personal purposes are: “[s]tate

officials of cabinet rank and heads of agencies.” Those officials are afforded “unrestricted use of their assigned vehicles,”³ but are required to keep records concerning their personal use of the vehicles, including commuting. The value of that use is imputed to the state official as a taxable fringe benefit for income tax purposes.⁴

Other Jurisdictions

Federal officials are, in general, prohibited from using official vehicles for any personal purposes; even commuting is prohibited, subject to very limited exceptions.⁵ The list of individuals for whom use of an official vehicle for commuting is authorized is specific and very narrow and includes the President and Vice President, the Justices of the Supreme Court, and other high ranking members of the Executive Branch. See 31 U.S.C. Sections 1344(b) and (c).

Most states and local governments whose authorities the Board reviewed specifically prohibit any use of official vehicles other than for official purposes.⁶ However, representatives from those state and municipal ethics boards or commissions that the Board consulted reported that their agencies had not addressed this issue in depth.

³ See State Budget Policy and Reporting Manual, rev. Sept. 23, 2003, at ¶ 3.

⁴ Office of the State Comptroller, Memorandum re: Reporting on the Taxable Value of Personal Use of State Provided Vehicles and Chauffeurs for 2007 (July 2, 2007).

⁵ 31 U.S.C. § 1344, entitled “Passenger carrier use” provides, in pertinent part:

Funds available to a Federal agency. . . . may be expended by the Federal agency for . . . any passenger carrier, only to the extent that such carrier is used to provide transportation for official purposes. . . . [T]ransporting any individual other than the individuals listed in subsections (b) and (c) of this subsection between such individual’s residence and such individual’s place of employment is not transportation for an official purpose.

⁶ See, e.g., Use of State Automobiles, Management Directive, Commonwealth of Pennsylvania, Governor’s Office, Section 39.95; Los Angeles Municipal Code Section 63.106(a); Office of the Mayor, Tulsa, Oklahoma, Executive Order No. 2003-01: Take Home Vehicle Policy and Procedures, Section 3.A.

In Los Angeles, despite the general prohibition against use of official vehicles for personal purposes, the L.A. Municipal Code (“LAMC”) contains an exception permitting elected officials, including the Mayor, City Attorney, Controller, and Members of the City Council, to use municipal cars for both official and personal purposes within Los Angeles County (see LAMC Section 63.106(d)); all other Los Angeles County employees are subject to a restriction that prohibits any use other than for official business (see LAMC Section 63.106(a)).⁷ The rationale supporting such use by elected officials is that those officials are effectively on call at all times, so that unrestricted local use of their city vehicles would enable them to respond most effectively to emergencies and otherwise discharge their “24/7” responsibilities.⁸

Discussion

With this background, we turn to the issues presented by the request the Board has received from New York City Elected Officials. As noted above, the groups of vehicle users covered by this opinion may be divided into two categories:

Category 1 – Elected Officials Under Law Enforcement Protection

The first category is comprised of Elected Officials for whom the NYPD has determined that the provision of some form of personal security, including but not limited to a City-issued car and NYPD personnel, is necessary. In order for an Elected Official to qualify for inclusion in this category, the NYPD must have made a determination that a need for security exists and as to

⁷ See Memorandum from L.M. Pelham, Interim Director, Los Angeles City Ethics Commission, to Heads of All City Departments (Dec. 1, 2000).

⁸ See Memorandum of Los Angeles City Attorney Burt Pines to Councilman Bob Renka (July 6, 1978) (hereafter, the “Pines Letter”), at 3.

the level of security needed. Such a determination by the NYPD that security is warranted will conclusively place a public official within this category.

In assessing the appropriate uses that an individual within this category may make of the assigned official vehicle and personnel, the Board starts with the recognition that the official's need for protection and security remains the same whether the official ventures forth to perform a personal rather than an official task or to attend a private social function rather than a public event. For that reason, officials within this category are strongly advised by the NYPD to use the security personnel assigned to them, in the manner prescribed by the NYPD, whenever they move about, whether for public or private purposes. Accordingly, there can be no effective restriction on these officials' "personal" use of City cars and drivers.

For the same reason, such Elected Officials may also use City vehicles, drivers, and security personnel when they attend political events, such as campaign fundraisers, and personal non-City business events, provided that the official's participation in such activities does not otherwise result in a conflict of interest. The Elected Official may even use the car and driver to travel outside the City, if consistent with security determinations by the NYPD. That conclusion also reflects sound public policy, because it will encourage public officials to follow and adhere to security recommendations, and not ignore them in order to avoid violating the ethics law.

Persons, such as spouses or guests who might appropriately accompany the Elected Official to official events, will also be permitted to ride as passengers. Similarly, if the Elected Official is travelling out of town, for example to a weekend home, a guest or guests may accompany the official in the car, if the presence of such person or persons would not interfere

with the prescribed security arrangements. However, the conclusion stated above relates *only* to the Elected Official's *own* use of a City car and driver for transportation purposes. Absent an independent security need as determined by the NYPD, a public official within this category may *not* send a City car with security personnel or a City driver on personal errands for the official or utilize the car and/or driver to transport members of the official's family to and from their own daily pursuits; taking the official's children to school or the dentist, or dropping the official's spouse off at a destination, is not permitted, unless the Elected Official is in the car at the time or unless, as noted, the NYPD has determined that the official's family member has an independent security need.

The Board considered whether these Category 1 Elected Officials must nevertheless reimburse the City for use not deemed "official" and concluded that such reimbursement is not required. Since officials in this category are subject to security determinations by the NYPD requiring them to use City vehicles to the maximum extent possible for all local transportation, official or otherwise, it would be unfair to require them to pay for any use deemed unofficial. Moreover, given these officials' constant use of the required vehicles, an effort to determine what use must be reimbursed would require an almost limitless parsing and costing to determine how much of that use is "official," or incidental to official business, and how much is in no way related to official business. Any such attempt, particularly if applied to officials who, as recognized in Los Angeles, are on call essentially every hour of the day and night, seems both an impossible and an unfair accounting burden on all involved. Thus, the Board concludes that for Category 1 Elected Officials, for whom the NYPD has determined that the provision of security

is necessary, any use of a City-issued car and security personnel *by that public servant*, whether for official or for personal purposes or for any combination of the two, is consistent with Chapter 68, and no reimbursement to the City for such use is required.

The Board does not opine on whether use of a City car and driver for personal purposes will result in the imputation of income for tax purposes or whether use to attend political events may have implications under the relevant election or campaign finance laws. It is incumbent upon the Elected Official to comply with any such applicable laws. Of course, even absent relevant legal obligations, Elected Officials are free to reimburse the City for non-City use of their City vehicles for example, to reimburse with campaign funds for political use.

Category 2 – Other “Elected Officials”

The second category is comprised of all remaining Elected Officials, as that term was previously defined herein – *i.e.*, those for whom the NYPD has not made a determination that the provision of security is required. Nevertheless, the duties of these Elected Officials do regularly require them to appear in their official capacities at functions and events, to respond to emergencies, or to otherwise attend to the needs of their constituents, outside of normal business hours.⁹

Category 2 Elected Officials must often take care of personal appointments, errands, and meetings in between official duties during the day; moreover, official appearances and other

⁹ Elected Officials described within Category 1 who opt not to utilize the depth of security prescribed by the NYPD will be considered to fall within this second category since their duties and responsibilities require them to respond to emergencies. Similarly, Category 1 Elected Officials who are not provided with security 7 days a week will be expected to follow the rules for the Category 2 Officials at times when they are using an official car and/or driver but are not accompanied by a NYPD security detail.

obligations frequently occur outside of normal business hours, in the evenings and on weekends, and before or after personal engagements. Requiring these public officials to switch from official vehicles to personal vehicles or to public transportation in order to attend personal functions, and then back to City vehicles to pursue official duties, would defy common sense and might impede their ability to respond expeditiously to the needs of their constituents.

Thus, as in the case of Category 1 Officials, it is the view of the Board that it will not violate Chapter 68 for these Category 2 Elected Officials to use their City cars for personal as well as official purposes, recognizing that their full and varied schedules makes changing from official to personal vehicles impracticable and inefficient. This permissible use, however, must be consistent with its rationale-- namely, to promote the ready presence of these officials at the myriad meetings, functions, events, or emergencies that occupy their official lives. Thus, the City car may be used by the Category 2 Elected Official only within the five boroughs or within a sufficiently close geographic range thereof to permit timely return to the City in cases of emergencies.

There remains the question of reimbursement by Category 2 Elected Officials for any permitted use for a non-City purpose. Here, as in the case of the Category 1 Officials, the Board considered this question and was ultimately persuaded that, as in Los Angeles, a bright line rule permitting unreimbursed use within the five boroughs is not only consistent with the rationale for permitting these officials to have City cars, but is also, in light of their particularly mixed schedules of personal and official travel, by far the most practicable. In fact, a rule requiring these officials to keep track daily of the breadth and duration of non-City use ultimately would

devolve into a complex of such minute detail as to be incomprehensible or unworkable, or both. Thus, for these Category 2 Officials, lawful use within the five boroughs will require no reimbursement to the City, including use for non-City business and political activities.

Conversely, any use of City vehicles by Category 2 Officials outside the five boroughs will be presumptively considered personal and will thus require reimbursement to the City.¹⁰ Nevertheless, upon a showing that a particular trip outside the City is clearly and exclusively for an official purpose, no such reimbursement will be necessary. As noted above concerning Category 1 Elected Officials, the Board's determination is based only on the requirements of Chapter 68, and cannot and should not be read as reflecting in any way upon possible requirements of the tax laws (which might impute income for unreimbursed personal use) or of campaign finance laws (which might require reimbursement for use deemed to be in support of a political campaign).

This approach, as noted, is consistent with the statutory scheme in Los Angeles, where the rationale underlying the decision to permit certain designated elected officials unrestricted use of their official cars within Los Angeles County is the recognition that those elected officials are effectively "on call" at all times.¹¹ It is also consistent with the New York State practice,

¹⁰ It is the opinion of the Board that, when reimbursement is required, an appropriate reimbursement rate would be the rate prescribed by the Comptroller's Office to reimburse City employees for the use of their personal vehicles for official business, currently 28 cents per mile. It seems only fair that public servants should not have to pay more for personal use of a City car than they would receive in reimbursement from the City for using their own cars on City business. If any applicable City, state, or federal law prescribes a different rate, the reimbursement made must comply with such rate.

¹¹ See Memorandum of the Los Angeles City Attorney cited in n. 8, *supra*, at 2: "Although elected City officials might not be actively engaged in City business at all times, they are at least theoretically 'on call' at all times. Therefore, the City automobiles assigned to them are equipped with communications equipment permitting them to be reached and permitting them to reach others in connection with the exercise of their official duties. In order to

which allows senior officials in the executive branch unrestricted use of State-owned vehicles.

See discussion, supra, at pp. 5-7.¹²

As with Category 1 Officials, it would be inappropriate for Category 2 Elected Officials to permit any other person to ride in or use the car, unless the official is himself or herself making a permissible use of the car.¹³ So, again, when use of the official vehicle and/or driver is permitted for an Elected Official in this second category, the official's spouse or partner may travel in the City car with the Elected Official to an evening personal social function, or to an evening official event, if the Elected Official is also in the car; but use of the car for either of those purposes without the public official being present in the car would not be permissible. Similarly, the Elected Official may use his City car to drive his children to a school within the City limits or may ride in the City car with his children to their school. However, the official car may not be sent to pick up the spouse or partner prior to picking up the public official, nor may

ensure their accessibility, and to enable them to more efficiently perform their official duties, they are permitted to drive their City-assigned automobiles within Los Angeles County while engaging in both official and personal business.”

¹² Interestingly, the City's prior policy, in effect from 1990-1997, permitted unrestricted documented personal use of City-owned vehicles and drivers by the Mayor, Deputy Mayors, and agency heads. Other employees in “critical law enforcement, public safety, or other positions who must be available for contact at all times” could also be authorized to make unrestricted use with written approval from the Mayor, First Deputy Mayor, or Agency Head. The value of such use was imputed to those officials as income. See City of New York, Procedures for the Assignment and Use of City Vehicles, Mayor's Office of Operations (May 1990) at 3.

¹³ Such limitation is also consistent with the Los Angeles approach. The Pines Letter at 2 further notes: “ the following would not be considered personal uses permitted under the . . . rule: use by the elected official's staff, family members or associates; use on extended absences from official duties, including vacation, when beyond the range of the installed emergency communications equipment in the vehicle.”

the children travel to or from school in the City car when not accompanied by the Elected Official.¹⁴

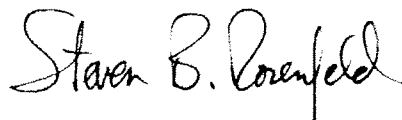
Conclusion

As set forth above, the Board has determined that (1) Elected Officials for whom the NYPD has determined that security in the form of a car and security personnel is required may make any lawful use of the official vehicle and personnel prescribed by the NYPD for personal purposes that are not otherwise a conflict of interest, including pursuit of outside business and political activities, without any reimbursement to the City, provided the Elected Official is in the vehicle for all such use; and (2) Elected Officials for whom protection has not been mandated by the NYPD, but whose duties require them to be constantly available to respond to the needs of constituents and to public emergencies, may use their allotted City vehicles and/or drivers for any lawful personal purpose within the five boroughs, so long as the use does not separately constitute a conflict of interest, including pursuit of outside business or political activity, and so

¹⁴ The Board recognizes that there is a distinction between its treatment of the use of official vehicles and its treatment of the use of other City resources. The Board has consistently interpreted Sections 2604(b)(2) and (3) of Chapter 68 to prohibit *any* use of City office supplies or equipment and technology resources for the pursuit of outside business interests (see, e.g., COIB v. Schlein, COIB Case No. 2006-350 (2008) (former Chair of the City Civil Service Commission fined \$15,000 for use of City personnel, computer, telephone, photocopy machine, and facsimile machine for private law practice)) or for political activities (see, e.g., COIB v. Cantwell, COIB Case No. 2005-690 (2007) (former Vice President of the School Construction Authority fined \$1,500 for, among other things, using a City photocopier and printer to print materials for his political campaign)). Likewise, under the City's AUP, the use of such City technology resources as office computers, telephones, copiers, fax machines, and the like is not permitted for the pursuit of outside business interests or for political purposes *even with reimbursement*. See AUP at 2-3. Nevertheless, Category 2 Elected Officials may use City cars and drivers within the City limits, even for outside business or political purposes, without reimbursement, because the rationale underlying the Board's conclusion regarding personal use of City cars - to ensure the prompt availability of the public official - simply does not apply to any business or political use of City resources listed above such as computers, phones, and fax machines.

long as the Elected Official is in the vehicle, without reimbursement to the City, and may use the vehicle outside the five boroughs within a range permitting timely return to the City, with reimbursement to the City, unless they can clearly demonstrate that any particular use outside the City's limits was for official business, in which case reimbursement to the City is not required. The Board wishes to emphasize that this Opinion applies only to Elected Officials who are allotted City cars. Moreover, the Board cannot anticipate all possible scenarios involving non-City use of City cars and drivers – either by Elected Officials or by appointed public servants who are not subject to this Opinion. Any public servant, elected or appointed, who has a question regarding a particular vehicle use should request advice from the Board. What the Board has sought to do in this Opinion is to promulgate certain bright line rules for certain Elected Officials. To the extent that a particular situation does not fit clearly within those guidelines, public servants are urged to contact the Board for guidance.

The Board does not opine on whether the use of City vehicles permitted herein will result in imputation of income for tax purposes or will have implications for relevant election or campaign finance laws. It is incumbent on Elected Officials to ascertain and comply with any such applicable laws.



Steven B. Rosenfeld
Chair

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Andrew Irving

Dated: March 12, 2009

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