



ALAN WILSON
ATTORNEY GENERAL

December 23, 2013

The Honorable Brad Hutto
Senator, District No. 40
Post Office Box 1084
Orangeburg, South Carolina 29116

Dear Senator Hutto:

You seek an opinion regarding the following questions:

1. May state assets or personnel be used by the Governor for campaign purposes or activities, whether or not the purpose or activity occurred in-state or out of state. If so, under what circumstances and under whose authority may this occur?
2. Whether the Executive Director of the State Ethics Commission alone has the authority to make decisions on the merits of accusations of violations of the state ethics law?
3. It is my understanding there was a written communication from a staff member of the Ethics Commission to the Governor's campaign or to the Governor concerning an ethical violation or an alleged ethical violation. Subsequent to sending the letter the Commission reversed its position on the matter as stated in the letter. My further understanding is that the communication was destroyed by the Ethics Commission. As a public document, did the Ethics Commission have the authority to destroy that public record?

The answers to these questions, particularly your question 1, are, by law, delegated to the State Ethics Commission for resolution. This Office has consistently recognized the Commission's exclusive jurisdiction regarding any resolution of questions involving interpretation and administrative enforcement of the State Ethics Act. For example, in *S.C. Op. Atty. Gen.*, October 29, 1984 (1984 WL 250000), we noted that "it is clear that [the] Commission

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is the body authorized to interpret the provisions of the State Ethics Act. This Office, therefore, is not authorized to comment on the applicability of the Ethics Act to the facts stated in your letter." And, in *Op. S.C. Atty. Gen.*, September 29, 2010 (2010 WL 3896162), we stated that "[t]he South Carolina State Ethics Commission has primary jurisdiction over the state's ethics laws...." Again, in *Op. S.C. Atty. Gen.*, January 6, 1998 (1998 WL 62947), we commented that "[s]tate law does not authorize this Office to issue an opinion upon *any matter* which is within the jurisdiction of the State Ethics Commission."

Moreover, the ultimate answer to your questions depend upon the facts involved. As we have consistently recognized, "[t]his office cannot in an opinion determine how a particular set of facts might apply to the law in a particular instance. Only a court of competent jurisdiction can make such a determination." *Op. S.C. Atty. Gen.*, April 19, 2013 (2013 WL 1803939). *See also, Op. S.C. Atty. Gen.*, March 11, 2011 (2011 WL 1444718) ["... we can obviously not predict with any certainty how a court will rule if presented with particular facts."]; *Op. S.C. Atty. Gen.*, June 19, 2012 (2012 WL 2464919) ["... such a determination would necessarily require factual findings and an opinion of this office cannot make such findings."]; *Op. S.C. Atty. Gen.*, June 6, 2011 (2011 WL 2648721) quoting *Op. S.C. Atty. Gen.*, April 29, 2005 (2005 WL 1024601) that "this office cannot in an opinion resolve the factual questions necessarily surrounding the legality or illegality of a particular video game machine." Accordingly, for the foregoing reasons, we are unable to provide you a definitive opinion regarding the issues you have raised.

However, by way of comment, we provide the following law in the hope that it may be helpful to you.

It is well recognized in South Carolina that public funds may only be used for public purposes, and not private purposes. As stated in an opinion, dated February 3, 2005 (2005 WL 469070):

[t]his office has repeatedly recognized that public funds must be used for public and not private purposes. See, e.g. Opinion of the Attorney General dated October 8, 2003 citing decisions of the South Carolina Supreme Court in *Elliott v. McNair*, 250 S.C. 75, 156 S.E.2d 421 (1967); *Haesloop v. Charleston*, 123 S.C. 272, 115 S.E.2d 596 (1923). In an opinion dated August 29, 2003, we advised that "[T]he Due Process Clause of the Constitution (federal and state) requires that public funds must be expended for a public purpose." ... While each case must be decided on its own merits, the notion of what constitutes a public purpose has been described by our Supreme Court in *Anderson v. Baehr*, 265 S.C. 153, 217 S.E. 43 (1975) as follows:

(a)s a general rule a public purpose has for its objective the promotion of the public health safety, morals, general welfare, security, prosperity and contentment for all the inhabitants or residents, or at least a substantial part thereof Legislation (i.e. relative to the expenditure of funds) does not have to benefit all of the people in order to serve a public purpose.

Authorities generally conclude that expenditure of public funds for partisan political purposes constitutes a private, rather than a public purpose. As was stated in *People v. Ohrenstain*, 531 N.Y.S.2d 942, 958 (1988), “[t]here is ... a clear line of precedent that partisan political activity is a private function, not a public purpose for which state funds may be constitutionally expended.” In an opinion, dated August 7, 1963 (1963 WL 11390), former Attorney General McLeod concluded that public funds may not be expended for campaign expenses of office holders. ...” General McLeod cited in support the Supreme Court decision of *Paslay v. Brooks*, 198 S.C. 345, 17 S.E.2d 865 (1941) wherein it was held that the expenses of counsel in an election contest could not be paid by a school district from the school funds. As the Court stated in *Paslay*,

[t]here is no authority in this State, statutory or otherwise, which empowers school trustees to issue warrants covering fees of counsel for candidates engaged in a legal contest for the office of school trustee. It is not the duty for the public to pay for such services; such is not a school district purpose, and the taxpayers of a school district cannot legally be called upon to meet the expenses of such contests growing out of school district elections.

17 S.E.2d at 868. See also, *Op. S.C. Atty. Gen.*, June 24, 2002 (2002 WL 1925749) [health service district may not use public funds to make political contributions].

The Governor, however, is treated separately by statute. Section 1-11-270 provides for the terms and conditions upon which the Governor is provided an automobile. Pursuant to Subsection (A) thereof, “[o]nly the Governor, statewide elected officials and agency heads are provided a state-owned vehicle based on their position.” Subsection (C) further states:

[a]ll persons except the Governor and statewide elected officials, permanently assigned with automobiles shall log all trips on a log form approved by the board, specifying beginning and ending mileage *and job functions performed*.

(emphasis added). It should be noted that this statute does not specify that the Governor use such vehicle only for official business. Nor is there an express prohibition or comment contained therein regarding who may be a passenger in such vehicle. The Legislature could have expressly prohibited members of the Governor's campaign staff from being passengers in the vehicle of the Governor. Section 56-3-1710 further states that the Governor's automobile is "supplied for the Governor's *personal use*." (emphasis added). By contrast, Proviso 157.23 of the 2013-2014 Appropriations Act specifies that the state plane must be "used only for official business."

In addition, Proviso 117.76 of the 2013-2014 Appropriations Act provides for the security detail for the Governor. Such Proviso states:

The State Law Enforcement Division, the Department of Public Safety, and the Department of Natural Resources shall provide a security detail to the Governor in a manner agreed to by the State Law Enforcement Division, the Department of Public Safety and the Department of Natural Resources to offset the cost of the security detail for the Governor shall be made in an amount agreed to by the State Law Enforcement Division, the Department of Public Safety, the Department of Natural Resources, and the Office of the Governor from funds appropriated to the Office of the Governor for this purpose. Law enforcement officers assigned to security detail for the Governor shall only perform services related to security and shall not provide any unrelated service during the assignment.

As can be seen, this Proviso, like the statute authorizing the Governor's automobile, does not specify that the Governor's activities must relate only to official business when the security detail is used. While the Proviso does say that the Governor's detail may "only perform services related to security," such provision could easily be read simply to ban use of the detail for matters unrelated to security, such as running errands, etc.

Indeed, a decision of the Oklahoma Supreme Court, *Ethics Comm. v. Keating*, 958 P.2d 1250 (Okla. 1998) concluded that use of the Governor's automobile and security detail, even to attend political fundraisers, was for a public purpose. There, based upon statutory provisions authorizing the Governor to be furnished with an automobile and a security detail, the Oklahoma Supreme Court found that "the language of the statute and the discernible intent of the Legislature indicate no limitation on the Governor's use of the DPS – provided transportation to attend partisan political events." 958 P.2d at 1257. In the Court's view, "... the Governor does not stop being the Governor at 5:00 P.M. He is Governor twenty-four hours a day, and must respond to the duties of his office whenever they arise." *Id.* at 1258.

Our Supreme Court affords great deference to the Legislature's determination that a particular matter promotes a public purpose. *See, Nichols v. S.C. Research Authority*, 290 S.C. 415, 425-26, 351 S.E.2d 155, 161 (1986) ["(i)t is uniformly held by courts throughout the land that the determination of public purpose is one for the legislative branch The question of whether an Act is for a public purpose is primarily one for the Legislature."]. While only a court may determine whether the Governor's use of the state-provided automobile and security detail for campaign-related events constitutes a public purpose, there is authority in other jurisdictions concluding in the affirmative. As noted above, only a court could resolve this issue with certainty.

The State Ethics Act is also relevant to your inquiry. We discussed above that interpretation and administrative enforcement of the Ethics Act is expressly delegated solely to the Ethics Commission and that we cannot opine or "second guess" the Commission's application of the Act. We note that Section 8-13-765(A) provides that "[n]o person may use government personnel, equipment, materials or an office building in an election campaign. The provisions of this subsection do not apply to a public official's use of an official residence." Section 8-13-1346(A) further provides that "[a] person may not use or authorize the use of public funds, property, or time to influence the outcome of an election."

How the Ethics Commission might apply the foregoing provisions of the Ethics Act to the Governor in a given factual situation is beyond the scope of an opinion of this Office for the reasons set forth above. For example, we do not know how the Ethics Commission would read the above-referenced provisions relating to the Governor in light of the cited provisions of the Ethics Act. This Office is not authorized to "second guess" the Commission's application of the Ethics Act to a given set of facts. Accordingly, we must defer to the Ethics Commission in any administrative resolution to your question 1.

With respect to your second question – whether "the Executive Director of the State Ethics Commission alone has the authority to make decisions on the merits of accusations of violations of the state ethics laws" – reference is made to § 8-13-320 of the Code, which provides for the duties and powers of the Ethics Commission. Subsection (a) provides that *the Ethics Commission is authorized to initiate or receive complaints and make investigations concerning public officials or public employees, except those concerning members or staff of the General Assembly*. *See, Rainey v. Haley*, 404 S.C. 320, 324, 745 S.E.2d 81, 83 (2013) ["the State Ethics Commission is generally responsible for the handling of ethical violations by most public officials"]. Again, we do not have access to any given set of facts, and we must presume the Ethics Commission and the Executive Director have followed the law. *See, Howell v. Littlefield*,

211 S.C. 462, 468, 46 S.E.2d 47, 49 (1947) [the presumption is always in favor of the correct performance of his duty by an officer].

As to your third question – whether the Ethics Commission possesses the authority to “destroy” a public record – reference is made to the Public Records Act of South Carolina. *See*, § 30-1-10 *et seq.* We have consistently advised that the Public Records Act prohibits the destruction of public records. As we have stated in prior opinions, “the public policy of this State is to preserve, rather than destroy public records.” *Ops. S.C. Atty. Gen.*, August 25, 1997 (1997 WL 569109) and May 21, 2007 (2007 WL 1651338). The Act defines a “public record,” § 30-4-20(C). Our opinion, dated February 16, 2011 (2011 WL 782321) (attached herein), discusses the Public Records Act at length.

However, we have no information whatsoever that the Ethics Commission has “destroyed” a public record. Such would require specific facts which are certainly not presented here.

Conclusion

For two specific reasons, we cannot provide a definitive answer to your questions. First, as we have stated on numerous occasions, “[s]tate law does not authorize this Office to issue an opinion upon any matter which is within the jurisdiction of the State Ethics Commission.” Moreover, as we have consistently emphasized, “[t]his office cannot in an opinion determine how a particular set of facts might apply to the law in a particular instance.”

However, in an effort to be of some assistance to you, we have set forth the generally applicable law in this area. As we discuss herein, public funds may only be used for public purposes, not private purposes. In prior opinions, we have applied this principle to partisan activities where there is no statute providing otherwise, thereby suggesting public purpose as determined by the General Assembly.

However, there are specific statutes relating to the automobile and security detail to be provided to the Governor. These statutes, in contrast to the provision relative to the state plane, do not limit the Governor’s use of such assets to official use. At least one decision in another jurisdiction has concluded that pursuant to similar statutes the Governor’s use of such assets to attend a partisan political fundraiser does not violate the provision prohibiting use of public funds for a private purpose. We cannot predict with any certainty how a South Carolina court might rule in similar circumstances.

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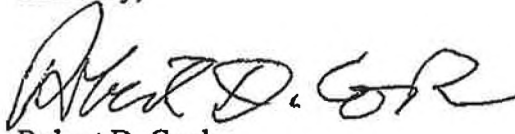
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Also, applicable to this situation are the provisions of the State Ethics Act particularly §§ 8-13-765 and 8-13-1346, which bar use of public funds and resources for use in an election campaign or to influence the outcome of an election. Administrative application of these provisions to a given situation involving the Governor is exclusively within the province of the Ethics Commission and we cannot comment thereupon.

Ultimately, this is a matter for consideration by the General Assembly. Certainly, if the Legislature wishes, it may make further amendments to the law.¹

Sincerely,

A handwritten signature in black ink, appearing to read "Robert D. Cook", written over a horizontal line.

Robert D. Cook
Solicitor General

Enclosure
RDC/an

¹ We note that legislation has been pre-filed which would prohibit a public official from providing transportation in a state owned vehicle, including a state owned aircraft, to any member of the public official's campaign staff, anyone performing fundraising activities for the benefit of the public official's campaign or a member of a committee.