

MEMORANDUM OF LAW

DATE: March 28, 1994

TO: JACK McGRORY, City Manager; and DAN McALLISTER,  
Special Projects Director, Office of the Mayor

FROM: City Attorney

SUBJECT: Reportability of Air Transportation

We have been informed that the Mayor and City Manager flew by commercial airliner on October 26, 1993 to Chicago, Illinois to assist in the City of San Diego's bid for the 1998 Super Bowl to the National Football League Owners' Committee. The trip was a reimbursable expense and appropriate two-way commercial airline tickets were purchased by the City for both. After concluding the presentation on behalf of the City, both officials accepted re-turn air transportation in the private aircraft of the owner of the San Diego Chargers who, while present for the owners' meeting, was returning to San Diego in the normal course of events. We are asked whether the receipt of the return flight is a reportable event. We advise that this transportation need not be reported if the factors discussed infra show that it was a neutral act of friendship or that the recipient of the gift was the City of San Diego.

The Political Reform Act (California Government Code section 81000 et seq.) imposes disclosure and disqualification requirements on public officials who are the recipients of gifts. California Government Code sections 87103, 87207 and 87302(b). While Section 82028 of the Act broadly defines the term "gift," the Fair Political Practices Commission, which is charged with the Act's implementation, has recognized that certain types of benefits are not gifts notwithstanding the expansive statutory definition. The Commission has specifically spoken on the receipt of air transportation.

The providing of free air transportation in a private plane may in certain circumstances be of a similar character. Many persons own or lease small aircraft purely for

recreational purposes and they welcome the opportunity to take a friend on a flight. It is also not uncommon for a person who is utilizing the services of a private plane, whether for personal or business purposes, to offer a ride to someone who is coincidentally headed for the same destination. Public officials engaged in official business may be offered air transportation under these circumstances, and we think it would be mischaracterization of both the intent and effect of the event to label it a gift if nothing more than a gesture of friendship or neighborliness is involved.

In re Stone, 3 FPPC Ops. 52, 53 (1977) emphasis added  
The Commission cautioned that there is no "mechanical formula" to assess whether such offers are nonreportable acts of friendship or a gift. Rather, the Commission looked at three factors: 1) would the donor be expected to deduct the expense as a business expense, 2) does the donor have business pending before the officials who receive the service, and 3) is the service normally the subject of an economic transaction.

Construing these three (3) factors, the Commission concluded that private aircraft transportation received by the City Attorney of San Jose from a friend to facilitate city business was not a "gift" because each of the three factors could be answered in the negative. (No probable tax deduction, no business before the city attorney, and no lobbying on city issues.)

In the instant case, we do not have the certainty of similar negative answers. While the owner's gesture was one of helpfulness, there is an ongoing business relationship between the Charger organization and the City, hence the appearance, not necessarily the reality, of business discussions are present. Moreover, the corporate nature of the aircraft makes it more likely than not that a business tax deduction would be available. As cautioned, there are no mechanical formulas to divide friendship from the appearance of advantage. Inasmuch as the above three (3) factors cannot be answered in the negative, we believe the cautious approach is to treat the transportation as a gift.

Even if it is established the receipt of transportation

is a gift, there is no individual reporting requirement if the recipient of the gift was the City.

Even though we believe that the service to the councilman is a gift rather than a noneconomic gesture of friendship or neighborliness, it is still possible that the gift need not be re-reported if it is made solely to the city. When a city official receives free air transportation from private sources for use in performing his official duties, both the city and the official have received something of value. The city receives something of value because it saves the cost of the airline ticket it would have had to purchase for the official had he not received free transportation. The official may also be able to work more efficiently if private transportation shortens his trip, another possible benefit to the city.

In re Stone, 3 FPPC Ops. at 56

The FPPC recognized in Stone that "no immutable guidelines can be cast" to establish to whom the gift is made. Rather, the Commission looked at four (4) criteria:

1. The donor intended the gift to the city and not the individual;
2. The city exercised substantial control over the gift;
3. The donor did not limit the gift to a specified official; and
4. The making of the gift is formalized by some public record.

We believe the instant facts closely parallel these factors. The City of San Diego was the direct beneficiary of this gift. The public officials present had each purchased round-trip tickets and the purpose of their trip was solely to support the City's interest in the Super Bowl bid. The unused return tickets were returned and the Auditor's Office confirms that both the Mayor and Manager reflected this return on their travel statements and appropriate credits were received by the City. Second, the donor's gift was not specifically limited to a specified individual but rather benefitted all city representatives present.

The obvious critical factor in the above criteria is the donor's intent and some memorialization of same. To satisfy the Stone criteria, we believe the donor's intent can be satisfied by a letter to the City and accepted by the City Council confirming that the donation of transportation was to the City of San Diego and not specified for any particular individual. If such a letter of intent is obtained and accepted by Council action, the recipients would not be subject to any reporting obligation because the donor's intent, required by Stone, will be clear. Absent such an indication of intent, the recipients must declare the equivalent value of the return flight as a reportable gift.

We are not unmindful of the pending FPPC efforts to codify the Stone opinion in the form of proposed Regulation 18944.2. Nothing in the staff's proposed regulation vitiates the validity of Stone. In fact the supporting staff report confirms that the purpose of the regulation is to "codify the concepts of In re Stone . . . ." Moreover the codification is not scheduled until April 1994 and hence would have no retroactive effect on the transportation at hand. Discussion of Proposed Regulation 18944.2, FPPC Staff Memorandum, February 18, 1994.

#### CONCLUSION

The reportability of free air transportation is dependent on an analysis of the factors articulated by the Fair Political Practices Commission in their opinion In re Stone, 3 FPPC Ops. 52 (1977). Where the donation amounts to a gift, the reportability depends on whether the recipient was the public entity or the public official. In the instant case, we believe there are sufficient facts to show that the recipient of the air transportation was the City of San Diego. Since this determination is heavily dependent on the donor's intent, this intent should be confirmed in a letter to the City and accepted by the Council.

JOHN W. WITT, City Attorney

By

Ted Bromfield

Chief Deputy City Attorney

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