



NEW YORK STATE SENATOR

Catharine Young

Attorney General Report of Investigation into the Alleged Misuse of New York State Aircraft

CATHARINE YOUNG July 27, 2007

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ALLEGED MISUSE OF NEW YORK STATE AIRCRAFT AND
THE RESOURCES OF THE NEW YORK STATE POLICE
STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

July 23, 2007

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INTRODUCTION DRAFT

During the week of July 2, 2007, the Office of the Attorney General for the State of New York Andrew M. Cuomo (the "OAG") commenced an investigation into Senate Majority Leader Joseph L. Bruno's use of New York State Police aircraft ("state aircraft"). On July 5, 2007, Senator Bruno asked the OAG to investigate "the Governor's alleged misuse of State resources in connection with State Police surveillance of Senator Bruno's activities."¹ This entailed a review of the Division of New York State Police's ("State Police") collection, creation, and production of documents regarding Senator Bruno's travel during 2007. The State Inspector General Kristine Hamman commenced a separate investigation into the surveillance allegations, while the Albany District Attorney P. David Soares also commenced a separate investigation into Senator Bruno's use of state aircraft. The OAG investigated both matters independently.

Part I of this Report describes the results of the OAG's investigation concerning the use of the State Police in relation to Senator Bruno's travel records. As set forth in Part I, the OAG found no evidence that the State Police conducted actual surveillance of Senator Bruno. As explained below, however, the investigation has raised serious issues about the State Police's handling of documents and information concerning Senator Bruno's travel, at the direction of the Governor's liaison to the State Police ("Governor's liaison").

Part II of this Report describes the results of the OAG's investigation concerning Senator Bruno's use of state aircraft. With respect to that issue, the investigation has shown that Senator Bruno's use of state aircraft was in accordance with existing

¹ Letter from Michael A. Avella, Esq., Counsel to the Majority, to Attorney General Andrew Cuomo, dated July 5, 2007.

regulations and procedures. Nevertheless, the OAG recommends that these policies and procedures be changed to ensure more specificity.

2 FOIL is a critically important law providing access to the press and the public. Its hallmarks are accountability and disclosure. Informal disclosures that go beyond the strict requirements of FOIL (such as accepting oral requests for information) help remove barriers between the press and public information, and are to be encouraged where appropriate. Impediments to access under FOIL should be removed where possible because they frustrate the democratic process.

During the investigation, the OAG interviewed dozens of witnesses and collected numerous travel records, e-mails, and other documents from multiple sources, including the State Police and the Governor's Office. Key interviews were conducted under oath. This Report sets forth the findings of the investigation and the factual basis for those findings.

FINDINGS

- The Governor's Office planned to obtain information concerning Senator Bruno's use of state aircraft for the purpose of giving this information to the media. Under the pretext of responding to a Freedom of Information Law ("FOIL") request, the Governor's liaison caused the Acting Superintendent of the State Police to (1) create documents detailing where the State Police had driven Senator Bruno, and (2) report details of Senator Bruno's requests for ground transportation, upcoming schedules, and changes to those schedules. This conduct deviated from State Police standard operating procedures and past practices, and was not required by FOIL.
- FOIL is a hallmark of good government, promoting accountability and transparency.² The integrity of the FOIL process must be protected. Relevant FOIL policies should be evaluated to consider whether FOIL requests directed to the Governor's Office should be referred to the relevant entity within the

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Executive Department. If such a change were made, the other entities within the Executive Department and elsewhere would handle their own FOIL requests in accordance with their own established rules and policies.

- The Governor's Office should set the standard for diligence in avoiding political interference with State Police business. The Superintendent of the State Police must conduct the business of the State Police in a wholly apolitical manner and must avoid even the appearance of partisan

activities within the State Police. A new ethics policy should be promulgated establishing protocols between the Governor's Office and the State Police to this effect.

- The Acting Superintendent of the State Police, the Governor's liaison, and the Governor's Communications Director should be evaluated in light of the findings contained in this Report and appropriate disciplinary action should be considered.
- Senator Bruno's use of state aircraft was in accordance with state regulations and practices. The OAG investigated every use of state aircraft by Senator Bruno for calendar year 2007 and found that some "legislative business" occurred during each trip. On some trips, Senator Bruno's legislative business occupied only a small part of the business day.
- The current state aircraft policy is overly permissive and porous and allows for an abuse of taxpayer funds. The policy should be changed to provide stricter, clearer guidance concerning when state aircraft may be used in connection with official state business, and under what circumstances, if any, official use of state aircraft may be combined with political or personal use.

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PART ONE

USE OF THE STATE POLICE TO COLLECT, CREATE, AND

PRODUCE TO THE GOVERNOR'S LIAISON DOCUMENTS

AND INFORMATION REGARDING SENATOR BRUNO'S TRAVEL

This Part sets forth the results of the investigation concerning allegations that the Governor's Office used the State Police to conduct surveillance of Senator Bruno during 2007. We find that no surveillance occurred, but that serious issues have been raised about the use of the State Police to collect, create, and produce to the Governor's Office documents and information regarding Senator Bruno's travel.

I. BACKGROUND AND OVERVIEW

The Governor's Office controls the use of state aircraft. The primary, but not sole, users of state aircraft in recent years have been the Governor, Lieutenant Governor, and Senator Bruno. After Eliot Spitzer became Governor in January 2007, the Governor's Office changed

the procedure for the use of state aircraft to require that the applicant "certify" the truth and accuracy of the information contained in the request to use state aircraft, including the stated purpose of the trip. A knowingly false certification may be a criminal offense. See, e.g., Penal Law §§175.30.

Beginning in approximately May 2007, persons in the Governor's Office planned to provide information to the media demonstrating that Senator Bruno had been using state aircraft for political purposes, contrary to his certification that he was on official state business. In furtherance of that plan, in mid-May 2007, Preston Felton, Acting Superintendent of the State Police (the "Superintendent") and William F. Howard, Assistant Deputy Secretary for Homeland Security under Michael Balboni, New York State Deputy Secretary for Public Safety, had a series of conversations about Senator

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Bruno's travel and his use of state resources. At some point, Howard, who was the Governor's liaison to the State Police, apparently told Felton that the Governor's Office had received a FOIL request for records concerning Senator Bruno's travel. At the request of Howard, the Superintendent began informing Howard about Senator Bruno's planned and actual movements in New York City for trips certified to be for "legislative business." This included the Superintendent notifying Howard of Senator Bruno's upcoming schedule "on the ground" in New York City and each change to the upcoming schedule as it was made.

On May 31, 2007, the Superintendent collected flight records from the Aviation Unit of the State Police concerning both Senator Bruno and the Governor, and forwarded these records to Howard. Also, during the first week of June 2007, the Superintendent directed others in the State Police to debrief the State Police investigators who had been assigned to drive Senator Bruno in New York City regarding the locations to which they had driven him. The Superintendent further directed that documents be created to reflect this information in a form that purported to be official State Police records. The Superintendent forwarded these purported records to Howard. Although Senator Bruno took ten trips on state aircraft during

2007, Howard asked the Superintendent to provide ground transportation information for only three of those trips, each of which occurred on days when well-publicized political fundraisers were held.

The various documents and information collected by the Superintendent at the request of Howard were all highly pertinent to whether Senator Bruno's use of state aircraft was in fact in connection with legislative business in New York City, as Senator Bruno had certified.

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3 Specifically, the Governor's Office produced the following records, all for January through May 2007, unless otherwise indicated: (1) monthly State Police aviation reports for the Governor, Lieutenant Governor, and Senator Bruno; (2) six flight request forms for helicopter use by the Governor (four unsigned and two signed by the Chief of Staff); (3) preflight confirmation and aircraft manifests showing travel by the Governor, Lieutenant Governor, and Senator Bruno; (4) a typed list of dates on which the Lieutenant Governor had used state aircraft; (5) schedules for the Governor and Lieutenant Governor for a variety of days; (6) nine flight request forms all signed by Senator Bruno; (7) two documents entitled "Transportation Assignment for Senator Joseph Bruno" for May 3-4, 2007, and May 24, 2007; and (8) Senator Bruno's itinerary for May 17-18, 2007.

On June 28 and 29, 2007, the Governor's Office produced to the Albany Times Union (the "Times Union") a range of aviation and ground transportation records concerning the Governor, Lieutenant Governor, and Senator Bruno for the period of January through May 2007.³ These records included documents detailing where Senator Bruno was scheduled to be driven or was actually driven for only three of the ten trips, coinciding with the dates of the fundraisers.

On July 1, 2007, a story appeared in the Times Union reporting that "three times this year, Senate Majority Leader Joseph L. Bruno used taxpayer-funded state aircraft to fly to political fundraisers in Manhattan while certifying he was on official state business, according to documents obtained by the Times Union." Odatto, "State Flies Bruno to

Fundraiser," Albany Times Union (July 1, 2007) (the "July 1 article"). The newspaper reported that it had obtained the documents under FOIL. FOIL requires government agencies to provide access to their records on request, with certain exceptions. After the article ran, the Governor's Office represented to the media that it had done nothing more than produce documents under a FOIL request from the Times Union. As detailed below, however, this account is not consistent with the facts found during the investigation.

Part One of the Report is organized as follows. First, we address the position of the Governor's Office that it produced the relevant documents to the Times Union in response to a FOIL request. We conclude that the Governor's Office was acting pursuant

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to a plan, which preceded any FOIL request, to show that Senator Bruno had misused state aircraft. We further conclude that Howard told the Superintendent there was a FOIL request before any such request existed, in order to obtain and produce documents and information about Senator Bruno.

Second, even assuming that the Superintendent and Howard were acting in response to a FOIL request, their conduct deviated substantially from the requirements of FOIL and from standard State Police operating procedures in the following ways:

- The Superintendent directed the creation of records to show where State Police investigators had driven Senator Bruno while he was in New York City, even for a trip for which Senator Bruno had already provided a schedule. These records were not ordinarily created or maintained by the State Police. The Superintendent provided these records to Howard with the understanding that they would be produced under a FOIL request.
- The Superintendent began reporting to Howard information about Senator Bruno's upcoming schedule and changes to the schedule on an ongoing basis as the Superintendent received that information.
- The creation of records outside the ordinary course of business and the events in question carries the risk of creating inaccurate or misleading records, which occurred here.
- Howard requested and the Superintendent produced selective information regarding Senator Bruno.

- The Superintendent and Howard produced sensitive scheduling information of the kind not typically produced and did so without conducting a security review.
- The Superintendent personally handled and oversaw the document creation and production. This was contrary to more than twenty years of State Police practice and procedure and was something that the Superintendent himself had never done before.

These points are explained fully herein.

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II. THE REPRESENTATION BY THE GOVERNOR'S OFFICE THAT IT WAS ACTING PURSUANT TO A FOIL REQUEST IS NOT SUPPORTED BY THE FACTS

The investigation disclosed that persons in the Governor's Office carried out a plan to obtain and disseminate information about Senator Bruno's use of state aircraft before any FOIL request was made.

A. The Governor's Office Had a Plan to Generate Press Coverage of Senator Bruno's Use of State Aircraft

Beginning in May 2007, persons in the Governor's Office planned to generate press coverage of Senator Bruno's use of state aircraft to attend fundraisers and other political events, rather than for official state business as he had certified. On May 23, 2007, Darren Dopp, the Governor's Communications Director, wrote an e-mail to Richard Baum, Secretary to the Governor, relaying that Howard said the "records exist going way back. Itineraries showing where the individual was taken and who was in the car. [Howard] has the last two trips in his possession. Also, I think there is a new and different way to proceed re media. Will explain tomorrow."

On June 3, 2007, Dopp wrote an e-mail to Baum remarking upon a story in the Times Union about a federal grand jury investigation into Senator Bruno's investment in thoroughbred horses. Odat, "Probe Centers on Thoroughbreds," Albany Times Union (June 3, 2007). Dopp then wrote: "Think a travel story would fit nicely in the mix." Later that morning, Howard wrote an e-mail to Baum stating: "The impending travel stuff implies more problems – particularly in the tax area I think. I think timing right for that move."

These e-mails show that persons in the Governor's Office did not merely produce records under a FOIL request, but were instead engaged in planning and producing media coverage concerning Senator Bruno's travel on state aircraft before any FOIL request was made.

B. The FOIL Requests

The July 1 article in the Times Union stated that the newspaper had obtained documents regarding Senator Bruno's travel pursuant to a FOIL request. Over the following days, Dopp stated that the Governor's Office had done nothing more than produce records under a FOIL request from the Times Union. Hakim & Confessore, "The Feuding by Bruno and Spitzer Turns Bitter," N.Y. Times (July 6, 2007); Benjamin, "It Has Never Been this Bad," N.Y. Daily News (July 6, 2007).

In response to a request from the OAG for all FOIL requests concerning Senator Bruno, the Governor's Office produced two e-mail FOIL requests from the Times Union, both directed to Dopp. The first request, dated June 27, 2007, called for the following:

records identifying the use of the state aircraft by Gov. Eliot Spitzer, Lt. Gov. David Paterson, Comptroller Thomas DiNapoli, Senate Majority Leader Joseph Bruno, Assembly Speaker Sheldon Silver, Assembly Minority Leader James Tedisco and Senate Minority Leader Malcolm Smith. I seek the material for calendar year 2007.

Please include any materials that explain the purpose of the trips, itineraries, manifests and the schedules for Gov. Spitzer and Lt. Gov. Paterson for the days in which they used the state aircraft for any purpose.

The FOIL request made on June 27, 2007, however, could not, as a practical matter, require the collection, creation, and production to the Governor's Office of records in May and early June 2007.

This FOIL request cannot explain the creation of records and production of scheduling information for Senator Bruno, not only because of the timing of the request, but also because the request does not call for the production of Senator Bruno's schedules or

scheduling information. The FOIL request expressly called for schedules of the Governor and Lieutenant Governor, but not those of Senator Bruno. Specifically, the FOIL request stated: "Please include any materials that explain the purpose of the trips, itineraries, manifests and the schedules for Gov. Spitzer and Lt. Gov. Paterson for the days in which they used the state aircraft for any purpose."

The Governor's Office produced documents reflecting Senator Bruno's actual movements on the ground in New York City (which were not called for), but did not produce documents showing the actual movements of the Governor and Lieutenant Governor. Instead, the Governor's Office produced preexisting schedules for the Governor and Lieutenant Governor; these schedules do not purport to show all stops, public and private.

The second FOIL request from the Times Union is dated July 10, 2007. The timing of this request is odd, however, given that it was sent nine days after the July 1 article appeared, and shortly after the OAG and other agencies had confirmed the various investigations into this matter. In this July 10, 2007, e-mail, the Times Union reporter, James Odatto, repeated his earlier FOIL request of June 27, 2007, but added a new clause in the second paragraph seeking schedules of "anyone else on the list for which you have such materials," a request which would include the documents concerning Senator Bruno which had already been produced, and not previously requested.

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III. EVEN ASSUMING THAT THE SUPERINTENDENT AND HOWARD WERE ACTING IN RESPONSE TO A FOIL REQUEST, THEIR CONDUCT WAS NOT REQUIRED UNDER FOIL AND DEVIATED FROM STATE POLICE OPERATING PROCEDURES

Howard planned to produce a press account about Senator Bruno, but told the Superintendent that he needed certain documents in order to respond to a FOIL request. Thus, the concept of a FOIL request became the basis for the Superintendent's actions, according to Superintendent Felton's testimony. However, even assuming that the

Superintendent and Howard were acting pursuant to a FOIL request, their conduct was not called for by FOIL and fell well outside the boundaries of State Police operating practices and procedures as well as beyond FOIL laws and regulations. We address the particular issues below.

A. The State Police Created Ground Transportation Records Concerning Senator Bruno, Which Was Not Legally Required Under FOIL

The State Police created documents to provide to the Governor's Office for the purpose of producing them pursuant to the FOIL request. This, however, was not required under FOIL. FOIL, which is codified as Sections 87-89 of the Public Officers Law, requires a government entity to provide access to its records on request, with certain exceptions. Public Officers Law §87(2). A "record" is information kept in any physical form, such as a document or computer tape or disc. Public Officers Law §86(4). The law expressly provides that it does not require a government entity to create or reconstruct records that are not in its possession when the request is received. Public Officers Law §89(3).

This principle has been repeatedly reaffirmed in opinions of the State Committee on Open Government, see, e.g., Advisory Opinion # 9953 (March 13, 1997), available at

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4 McMahan served as Superintendent from April 1994 to August 2003. McMahan served for thirty-seven years with the State Police.

<http://www.dos.state.ny.us/coog/ftext/f9953.htm>; and in judicial opinions, see, e.g., *Matter of Gabriels v. Curiale*, as Superintendent of Insurance, 628 N.Y.S. 2d 882 (3d Dept 1995). Similarly, an agency is not required by FOIL to honor an ongoing or prospective request for records that may be created in the future. See Advisory Opinion # 13290 (April 3, 2002), available at <http://www.dos.state.ny.us/coog/ftext/13290.htm>.

Robert J. Freeman, Executive Director of the State Committee on Open Government, confirmed in an interview on July 13, 2007, that an agency is not required by FOIL to gather information or create or reconstruct a report in response to a request for information; if an

agency chooses to do so, it is acting voluntarily and not pursuant to FOIL. Captain Laurie Wagner, the Records Access Officer in charge of the Central Records Section of the State Police, similarly testified that FOIL does not require the creation of documents. In her ten years of experience, apart from a document summarizing voluminous records, she has never created or directed anyone to create records in response to a FOIL request. Moreover, Captain Wagner stated that she would need to consult with State Police counsel in order to determine whether creation of records would be permitted.

The Superintendent's creation of records to be produced under a FOIL request appears to be unusual for the State Police. In an interview, former Superintendent James W. McMahon stated that he knew that the State Police were "not required to create" records under FOIL. Referring to published reports that the State Police had created or recreated the schedules of a public official, McMahon stated that he had "never seen anything like this."⁴ McMahon emphasized that if a FOIL request seeks records

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⁵ Bennett served as Superintendent from September 2003 to February 26, 2007. Bennett is currently the Public Safety Commissioner for the City of Schenectady, New York.

⁶ As detailed below, Senior Investigator Anthony Williams mistakenly identified the wrong investigator who served as the driver on May 17-18, 2007, and therefore collected incorrect information about that trip.

regarding a public official, counsel for the State Police should immediately be consulted and remain involved until the end of the process.

Former Superintendent Wayne E. Bennett stated in an interview that in more than thirty-eight years of service with the State Police, he had "never heard of such a thing" as creating records in response to a FOIL request.⁵ Bennett stated that the agency should be producing records already maintained by the agency rather than creating new records. In fact, Bennett stated that State Police counsel would advise the records access officer not to create records. As Freeman's remarks indicate, when the State Police created documents about Senator

Bruno's travel, they were acting outside FOIL. In this regard, Felton testified that Howard asked him for the travel itineraries for three trips that the Senator had taken in May 2007, for which the State Police had provided ground transportation. When Felton told Howard that the itineraries did not exist, Howard asked, "Well, do you know what he did that day?" Felton said he would find out. Felton then had Major Michael Kopy at the New York City Troop location interview investigators who had driven Senator Bruno on the days in question.⁶ Kopy typed up the information in the form of a "Transportation Assignment" for each trip, and provided these documents to Felton, who forwarded them to Howard. Felton said Kopy had volunteered to type up the information since itineraries did not exist, and Felton agreed. For his part, Kopy testified that he did not know about any FOIL request; he was simply trying to ensure that Felton, his boss, got the information he was requesting. Felton testified that he told Howard these were

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⁷ The State Police had already requested that Senator Bruno's office send the Senator's itinerary for the May 17-18, 2007, trip.

⁸ This is plainly wrong. The investigators were asked for details about their driving assignments concerning Senator Bruno on June 6, 2007. Yet the Governor's Office did not produce documents to Odatto until June 28-29, 2007. Hence, the request for scheduling information could not have come from Odatto.

"synopses." However, Felton could not explain why the State Police created a document concerning Senator Bruno's May 17-18, 2007, trip given that the State Police already possessed an itinerary from Senator Bruno's office for this trip.

For his part, Howard testified that he asked for the scheduling information at Dopp's request. According to Howard, Dopp noticed that the State Police had produced a copy of an itinerary originating from Senator Bruno's office,⁷ and asked if Howard could obtain itineraries for the other trips. Howard stated that he believed that James Odatto from the Times Union had requested the additional itineraries after reviewing documents he had

received under the FOIL request.⁸ Felton denied that he knew of any follow-up questions from journalists. Howard stated that he did not at first realize that Felton was having schedules created for the purpose of sending to Howard, but that for certain later schedules he knew this was occurring. Felton flatly refuted Howard's denial, saying he made it clear to Howard that all of the schedules, except one which originated from Senator Bruno's office, had been created by the State Police in response to Howard's request for the information.

B. The Superintendent Reported Information about Senator Bruno's Upcoming Schedule and Changes to the Schedule as They Occurred

The investigation disclosed that the Superintendent and Howard had an ongoing dialogue about Senator Bruno's use of state aircraft, before, during, and after the trips in question, over a period of months. According to the Superintendent, he received at least three separate requests from Howard for documents and information regarding Senator

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⁹ The Superintendent said that Howard first asked him for the aviation records, then for a schedule for one trip, and then for information about trips for which no schedule existed (leading to the creation of records).

Bruno.⁹ In addition, the Superintendent kept Howard informed on an ongoing basis of Senator Bruno's pending ground transportation requests, his upcoming schedule in New York City, and changes to that schedule as they occurred. This resulted in a continuous flow of information from the Superintendent to Howard regarding Senator Bruno's travel.

For example, with respect to Senator Bruno's May 24, 2007, and June 27, 2007, trips, the State Police kept track of changes in the Senator's schedule and conveyed them to Howard. The State Police also created a contemporaneous schedule for the June 27, 2007, trip, which Felton supplied to Howard. In his testimony, Felton could not explain why he produced information about trips that had not yet occurred, except to say that Howard asked him for the information. For his part, Howard flatly denied ever knowing any information about trips that had not yet happened. Felton acknowledged that Howard had not directed him to

create any synopses, but emphasized that Howard had asked for the information.

Similarly, on May 21, 2007, Felton sent the following e-mail to Howard: "Just received another request for ground transportation from that same individual we had last week in New York City, do you want us to provide it and do you want me to do the same on documentation we previously talked about for this trip?" (Emphasis added). Felton recalled that in connection with this e-mail, he asked Howard, "You guys still want us to continue providing a driver for Bruno?" He further testified as follows:

Q: Why did you ask Mr. Howard whether or not the State Police should provide the ground transportation to Senator Bruno?

A: As I said before, they were FOILing the documents, so I wanted to know whether we should continue to provide

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that transportation.

Q: What was it about the FOIL request that made you think that, perhaps, the State Police might not be continuing to provide transportation?

A: It wasn't a question of if we were gonna continue to provide it, it was whether the Chamber wanted us to continue to provide it.

When asked why he did not use Senator Bruno's name in the May 21, 2007, e-mail quoted above, Felton said that e-mails are not one hundred percent secure. He testified as follows:

Q: Why didn't you name Senator Bruno in this e-mail?

You say "from that same individual," why didn't you name him?

A: Because the Senator is a, the ranking majority leader in the Senate, it would be the same if I was dealing with an issue involving the Attorney General, I would not put his, generally, put his name in there, I would say the A G or something. As you know, e-mail is not one hundred percent secure. The last thing I would want is an e-mail out

there floating around the internet saying Joe Bruno flew to New York City on a specific day.

Q: Yet that information was gonna be provided through a FOIL request?

A: Not the e-mail.

Q: Not the e-mail, but the fact that he flew on a certain date, and had drivers on a certain day?

A: I can't control what's on the flight manifest, that's what goes on, but --

[Colloquy omitted.]

A: No, your question is clear, what I'm telling you is, we are very careful about what we put in e-mails about, you know, government officials.

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A review of other e-mails close in time to the May 21, 2007 e-mail shows that Felton did sometimes use Senator Bruno's name in certain other e-mails, including an internal State Police e-mail on June 29, 2007, two days before the Times Union article appeared, asking for a report on any prior threats against Senator Bruno and whether or not a threat assessment had ever been provided, with the instruction that the information be provided directly to Howard.

When asked to explain his reference to documentation in the May 21, 2007, e-mail, Felton testified as follows:

Q: The second part of the e-mail, "Do you want me to do the same on documentation we previously talked about for this trip?" What is that in reference to?

A: The itinerary.

Q: And, "Do you want me to do the same?" means what?

A: Send it to you.

Q: Why were you asking if you should produce documents on this prospective trip?

A: Because there was a FOIL request.

Q: And did you believe that FOIL request had not yet been answered?

A: I don't know if it had been answered or not, I knew they were working on it.

In response to the May 21, 2007, e-mail, Howard sent a reply e-mail asking Felton to call with the details of Senator Bruno's itinerary. Felton replied that he did not have the details yet, just the request. The next day, outside the chain of command, Felton wrote an e-mail directly to State Police Senior Investigator Anthony Williams in New

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10 When asked why the Superintendent contacted him directly rather than going through Major Kopy, Senior Investigator Williams stated: "Probably because we have a personal relationship. He used to be the major down here in Troop NYC. And prior to that, I worked for him when he was captain on the executive service detail."

York City, with whom he has a personal friendship,¹⁰ asking for the latest itinerary regarding "J.B. for the trip they called about yesterday." Williams provided the details of the itinerary for the upcoming trip of May 24, 2007, by e-mail, which Felton forwarded to Howard by e-mail, noting that he did not have a hard copy itinerary, just the e-mail information. When asked why he was providing the information to Howard if there was not yet an itinerary, Felton stated:

A: Because he's FOILing, they're working on a FOIL request on travel for the Governor and for Joe Bruno, and I'm trying to live with the spirit of the FOIL request. I don't want them coming back to me and saying, I hid records.

(Emphasis added).

Major Kopy testified that in June 2007, he suggested to the senior investigator that the investigators begin keeping track of Senator Bruno's schedules and changes to his schedules after Felton started requesting them and asking the investigators to report on the Senator's planned and actual movements. Senator Bruno's office did not typically supply a schedule to the State Police. Instead, as all of the investigators testified, typically Senator Bruno's

secretary would supply details about the schedule by telephone or e-mail. Major Kopy testified as follows:

A: After the Superintendent called down and said, "Hey, can you reconstruct this, can we get to that point?"

Q: Okay, what happened?

A: Then I told Anthony, "Hey listen, you know what, so we can answer these things in the future, let's just try and keep a mental note, keep a file of some of these things, so

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if we get an itinerary, that we're not stuck." What I imagined was five or six months from now trying to reconstruct something that happened in May.

Q: But that was your own decision?

A: That was my decision, and that was to, what I would term, make my life easier, okay.

Q: It was a practical decision?

A: It was a practical decision and it was for nothing more than to say, okay, now I'm trying to piece stuff from a month ago, what will happen a year from now if we have to piece this together, so I figured, hey, let's just keep an idea, when we can, of these itineraries, and save them –

It appears that Major Kopy's suggestion was followed by keeping high levels of command informed about pending requests, schedules, and changes in schedule for Senator Bruno's travel, all of which the Superintendent then conveyed to Howard.

C. Creating Documents In Response to a FOIL Request Is Problematic

Creating documents in response to a FOIL request is problematic because it risks creating inaccurate documents or causing deception in other ways. On this point, Felton claimed that he was overseeing the recreation of schedules for Senator Bruno. This is incorrect on at least two scores. First, the State Police never had schedules for any trip by Senator Bruno in 2007, with one exception for the May 17-18, 2007, trip, when they requested a schedule from

Senator Bruno's staff. They could not "recreate" documents they never had. Second, the Superintendent was actually overseeing the creation of documents that never existed before -- "Transportation Assignments" -- and then facilitating their production to the media as official agency records, which they were not. The records were produced without identifying that they were created weeks after the events they described, thereby creating the misleading impression that the transportation

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assignment records were made contemporaneously and in the regular course of business, which they were not. At a minimum, to be accurate to the intent of the FOIL laws, such documents should have been identified as "synopses" of other information so as to fully inform the reporter and the public.

As former Superintendent Bennett stated in an interview, it raises questions to create or "recreate records." One of the dangers of creating documents is the risk that the created documents are inaccurate or misleading. In fact, one of the documents created by the State Police at the direction of the Superintendent is wholly inaccurate. Senior Investigator Anthony Williams mistakenly identified the wrong investigator as the driver for Senator Bruno on May 17, 2007. The "Transportation Assignment" document created for this trip lists Rommel Cartright as the driver and purports to record ground movements in New York City for Senator Bruno on that day. The movements recorded, however, are entirely inconsistent with the Senator's actual schedule that day (which reflects a different investigator as the assigned driver), which the OAG reviewed and confirmed through interviews. The movements recorded on the "Transportation Assignment" document are more consistent with the Senator's schedule for April 5, 2007, when Cartright was actually assigned to drive Senator Bruno. Notably, although this document was created, albeit inaccurately, prior to the June 27, 2007, FOIL request, it does not appear in the packet of FOIL documents that the Governor's Office says was produced to the Times Union, and therefore was apparently not produced to the Times Union. FOIL contains no exemption for withholding production of

responsive documents on the basis that they contain inaccurate information.

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11 FOIL contains an exemption for information that if disclosed would (pre-2003) or could (2003 forward) endanger the life or safety of any person. Public Officers Law 87(2)(f).

D. The Superintendent and Howard Produced Itineraries of Public Officials Without a Security Review

The State Police produced and, in some instances, created documents regarding Senator Bruno's movements, with the understanding that these would be produced to the public or the media, without considering any potential security concerns. The past policy of the State Police was to limit FOIL requests for full schedules to protect the security of public officials. The current policy appears to still limit disclosure of the Governor and Lieutenant Governor's full travel itinerary so as to protect their security and privacy. Captain Wagner, the Records Access Officer for the State Police, testified that security issues are always a concern in the release of documents, and it was her practice to identify and withhold information that could endanger the life or safety of any person, because such information is exempted from production.¹¹

Senator Bruno's full itinerary, however, was released. Felton testified that he produced whatever he was asked to produce without considering security issues. To the contrary, Howard testified that he assumed that the State Police had assessed any security issues in producing the documents. Felton acknowledged that he was aware that prior to the current administration, the policy of the State Police had been to make a security assessment before producing itineraries of public officials. Yet, after first acknowledging the sensitivity of travel schedules, Felton stated that he had done nothing to determine the policy of the new administration.

In this regard, Felton testified that sometimes schedules of a public official are shredded after the day in question because "you have a host of different stuff on there that you wouldn't want out, freely out in the public." When asked whether schedules of a

12 We do not reiterate or identify those details here so as to avoid adding to those security concerns.

public official are typically not produced or are redacted for security reasons, the Superintendent stated that the current administration has "a different outlook on security" than the prior administration. The Superintendent testified that he was more concerned from a security perspective about the release of schedules beforehand than afterwards, but that even afterwards there could be security concerns. However, the Superintendent did not ask Howard the current policy of the Governor's Office regarding producing schedules of public officials.

A review of the schedules and scheduling information produced for Senator Bruno discloses that they did in fact contain sensitive information of the kind that the Superintendent specifically identified in his testimony as implicating security concerns.¹² Moreover, the Superintendent did produce to the Governor's Office scheduling and scheduling information for Senator Bruno in advance of certain trips -- when, according to the Superintendent, security concerns are heightened -- which the Superintendent said was for production under a FOIL request. Yet he had no idea at what point -- before or after the trip -- this information would be disclosed to the public.

For his part, Howard at first denied that there were security issues associated with the production of itineraries of public officials but ultimately testified as follows:

Q. If I'm a journalist and I come to you today and I give you a FOIL request for the Governor's complete 24-hour itinerary for the last six months, where he's driven by any member of the State Police, times, dates, location, purpose of trip; is that producible?

A. I doubt that would be producible because of the nature of the detail, but --

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13 Constantine served as Superintendent from 1987 to 1994, when he was appointed to be Commissioner of the Drug Enforcement Administration, a position he held for five years. Constantine served for thirty-two years with the State Police.

A. I do think there are security issues there. There is a dentist's office that may be mentioned that you don't want somebody staking out. You could probably redact certain information, but there is probably all sorts of information on that schedule, but if the comparison is between the documents that were produced relating to Senator Bruno and the governor's public schedule, the Senator's schedule produced in those documents does not even meet the detail of the schedule that Governor Spitzer is releasing right now.

Howard stated that he "hoped" someone had reviewed the Governor's schedule for security concerns but did not know if anyone had done so. He acknowledged that Senator Bruno was similarly entitled to a security review of his schedule prior to production under a FOIL request.

Thus, the head of the State Police and the Governor's liaison, who is also a high-ranking official of the Homeland Security department, did not adhere to the State policy of protecting the security of state officials. The concern for security is an exemption to production of records under FOIL. Public Officers Law §87(2)(f). In interviews, three former Superintendents of the State Police stated that a security assessment ought to be made before disclosing itineraries of public officials, even after the day of the events reflected in a given itinerary. As former Superintendent Thomas A. Constantine stated, even the disclosure of the methods and means of providing security (such as the number of assigned officers)

can undermine the security of a public official.¹³

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14 The seven named officials are "Gov. Eliot Spitzer, Lt. Gov. David Paterson, Comptroller Thomas DiNapoli, Senate Majority Leader Joseph Bruno, Assembly Speaker Sheldon Silver, Assembly Minority Leader James Tedisco and Senate Minority Leader Malcolm Smith." According to the State Police, Malcolm Smith used state aircraft on one occasion during 2007, yet no records were produced for him.

15 Although the Governor's Office possessed travel itineraries for the Governor and Lieutenant Governor, a search of State Police records should also have been made to satisfy the FOIL request. Felton testified that he did not see the FOIL request and that he produced whatever Howard asked him to produce. Howard testified that he also did not see the FOIL request and that he asked Felton for whatever Dopp asked him to obtain. According to Felton, Howard initially requested only aviation records, solely concerning Senator Bruno and the Governor. After that, said Felton, everything Howard asked for concerned only Senator Bruno, and therefore that is what he produced. Our review of records that have been submitted to us pursuant to this investigation suggests that the State Police and the Governor's Office had relevant documents in their custody that they did not produce. This included monthly aviation reports and a scheduling log book.

E. The State Police Produced

Selective Information on Senator Bruno

The Superintendent produced selective information concerning Senator Bruno, at Howard's request. The June 27, 2007, FOIL request asked for travel records regarding seven public officials,¹⁴ yet the State Police only produced records regarding Senator Bruno, the Governor, and the Lieutenant Governor. Moreover, the June 27, 2007, FOIL request did not ask for Senator Bruno's schedules, yet the Superintendent produced one from Senator Bruno's office, as well as documents detailing Senator Bruno's actual movements in New York City for two other trips. Having decided to produce schedule-related information, they did so

selectively for the trips on which fundraisers were held. Howard did not request and the Superintendent did not produce documents reflecting the actual movements of the Governor or Lieutenant Governor, and thus they treated Senator Bruno differently.¹⁵ Because the State Police did not route the FOIL request through ordinary channels within the State Police, and because, after initially asking for aviation

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¹⁶ Although the Governor's Office did produce some records concerning the Lieutenant Governor's use of state aircraft, they did not produce travel request forms, and did not ask the State Police to search for any records concerning the Lieutenant Governor during the time that Senator Bruno's records were being compiled.

¹⁷ This is plainly untrue in view of the e-mails between Howard and Baum discussed earlier in this Report.

records regarding the Governor and Senator Bruno, Howard solely asked about Senator Bruno's travel, the State Police produced documents only about Senator Bruno.¹⁶

F. The Superintendent Personally Handled the Production of Documents Contrary to State Police Practice and Procedure

Superintendent Felton testified that he personally handled the State Police's production of documents to the Governor's Office pursuant to a FOIL request. It should be noted that the State Police never received the FOIL request. Instead, the Superintendent stated that he was responding to Howard's "orders" in a purported response to a FOIL request received by the Governor's Office. The personal handling by the Superintendent bypassed the chain of command which would normally handle FOIL matters, including the Public Information Officer, the Records Access Officer, and Counsel's Office. For his part, Howard testified that he did not discuss the FOIL request or Bruno's travel documents with anyone else in the Governor's Office apart from Darren Dopp,¹⁷ and does not know with whom, if anyone, Dopp discussed this subject within the Governor's Office.

Captain Wagner, the Records Access Officer in charge of the Central Records Section of the

State Police, testified that in her ten years of service the State Police has received approximately 10,000 FOIL requests. Captain Wagner stated that the policy of the State Police is to accept written FOIL requests, route them to the Central Records Section, and process them to see if responsive documents exist. Captain Wagner testified

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18 Kreppein directed Dispatcher Nancy Pennick to collect the information and fax it to the Superintendent's office. Kreppein provided to the OAG four sets of faxes that he identified as the information sent to the Superintendent in response to the request. One fax has a cover page that says "Bruno April" and contains aviation records reflecting Senator Bruno's travel. The next has a cover page with "Governor April" and contains aviation records relating to the Governor's air travel. These faxes were followed by two subsequent faxes the same day containing May records for Senator Bruno and the Governor. All faxes appear to have been sent on the afternoon of May 31, 2007. This is consistent with the fax lines on the set of copies that the Governor's Office provided to us, and that appear on aviation records on the Times-Union website. Kreppein was not aware of any other requests for information during this time period, nor was Major Kenneth Rogers, to whom he reports.

that she was not involved in overseeing or handling the FOIL request concerning Senator Bruno and had no information about it.

Captain Robert Kreppein of the Aviation Unit of the State Police testified that, on May 31, 2007, he received a call from the Superintendent requesting executive flight information for Senator Bruno and the Governor April 2007. Shortly afterwards, the Superintendent called back to request the same kind of information for May 2007. Kreppein asked the Superintendent, "What are we doing?" The Superintendent replied, according to Kreppein, that he "wasn't able to discuss that with me. Just to get the documents and to send them over to his office, which we did." Kreppein had never before had a request from a superintendent for this type of information.¹⁸

The Superintendent's personal handling of the matter appears to have been unprecedented

in State Police history. During an interview, former Superintendent McMahon stated that he had never personally handled a FOIL request during his term as Superintendent. McMahon stated that he might be informed about a high-profile or sensitive FOIL request but would not personally handle the request because, among other things, the Superintendent has a range of far more important responsibilities involving public safety, security, and other high-level matters. McMahon stated that all FOIL requests should be routed through the records access officer.

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19 There is some support for this proposition. Lieutenant Glenn Miner testified that he received a oral request for flight manifest records from the N.Y. Post in March 2007. Miner sent an e-mail about this request to Paul Larrabee in the Governor's press office, explaining that Miner did not want an honor an oral request. Larrabee told Miner to provide the records to the Governor's Office for ultimate production to the

Former Superintendent Constantine stated that in his experience FOIL requests should be directed to the attention of the records access officer. If the FOIL request was sensitive, it should be brought to the attention of the Superintendent, but that did not mean the Superintendent would personally handle the request. Constantine stated that he had never personally handled a FOIL request.

Former Superintendent Bennett, who served as Superintendent until February 2007, stated that FOIL requests should be handled by the records access officer sometimes with the assistance of a lawyer in the State Police whose responsibilities include FOIL issues. Bennett stated that he had never handled a FOIL request himself. Although he might be made aware of a FOIL request if it was a very sensitive one, he still would not handle the request himself. Thus, the three immediately past Superintendents of the State Police, who collectively represent over twenty years of service in that position appointed by two Governors, all stated that they had never personally handled a FOIL request and could not imagine ever doing so. The former Superintendents found the concept of a Superintendent personally

overseeing compliance with a FOIL request to be highly unusual and indeed unprecedented in their years of service.

Felton's explanation is that under the prior administration, the FOIL request was required to be directed to the specific agency (such as the State Police) that held the records, but suggested that the new administration had liberalized its FOIL and media practices.¹⁹ However, Felton acknowledged that this was the first time he had ever

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N.Y. Post. It is not clear whether Larrabee obtained a written FOIL request from the N.Y. Post before disclosing the records.

personally handled a FOIL request, collected State Police documents for a FOIL request to the Governor's Office, or received a request from Howard to produce documents in connection with a FOIL request. Felton testified that he was not a FOIL expert. In response to many of the OAG's questions about FOIL, Felton responded that he was simply not familiar with the requirements of the statute or the FOIL policies and practices of the State Police because he had never personally handled a FOIL request before.

When asked why he handled the FOIL himself if he was unfamiliar with law and policy on the matter, Felton said he viewed Howard's requests as direct orders to produce the requested documents and information about Senator Bruno to satisfy a pending FOIL request and as such was responding to orders rather than a FOIL request.

Felton did know that the State Police has an official records access officer, Captain Wagner, responsible for overseeing FOIL compliance, and a person in the counsel's office (a Deputy Counsel) whose responsibilities include FOIL compliance. Yet he failed to confer with them about the creation and production of ground transportation information. Felton did ask the General Counsel for the State Police whether he should produce the aviation records, but did not ask counsel about more complex and sensitive issues regarding the creation and production of ground transportation schedules. The fact that Felton asked counsel about the aviation records undermines his claim that he had no choice but to comply with a direct

order. The inconsistency in his approach undermines the Superintendent's position that he did not view his actions as part of a response to a FOIL request. If the Superintendent was simply complying with Howard's orders to produce records, he would not have asked

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State Police counsel whether aircraft records should be produced under FOIL. Moreover, Felton acknowledged that Howard did not give him a direct order to create documents, but Felton did so anyway.

For his part, Howard also testified that he had no direct experience with FOIL before personally handling the FOIL request about Senator Bruno. Howard acknowledged that FOIL was a very specialized area typically handled through counsel and the records access officer for the Governor's Office. Howard testified that he did not read or receive a copy of the FOIL request. Howard stated his belief that the FOIL request was to the State Police but was being handled by the Governor's Office.

G. Differing Accounts of Responsibility for Production of State Police Documents

Notably, Howard and Felton gave differing accounts of their respective roles in the production of the documents at issue. For his part, Howard denied instructing Felton how to respond to the FOIL request. Instead, Howard claimed that Dopp notified Howard about the FOIL request and suggested that Howard notify Felton as a courtesy. Howard testified that it appeared that the State Police were already aware of the request, because they provided him with documents without any guidance from Howard. Howard denied specifically asking for aviation records about the Governor and Senator Bruno (which Felton said Howard did ask him for). Moreover, Howard emphasized that he was not in a position to give direction to Felton about the FOIL request because he had never read it and did not, for example, know what time period it covered. Howard testified that he inferred that someone else from the Governor's Office must have been coordinating with his or her counterpart in the State Police regarding record production.

20 Miner testified that he had no knowledge of relevant events until June 28 or 29, 2007, when Odatto called and said he was writing a story and needed information about costs relating to the use of helicopters. Miner said that his subsequent statements to the media about the underlying events were based on his discussions with the Superintendent. Felton gave a contradictory account of his discussions with Howard. In particular, Felton stated that Howard was the only person in the Governor's Office with whom he spoke about the FOIL request, and that Felton was the only person at the State Police coordinating or overseeing production of records to the Governor's Office. Moreover, it appears that General Counsel for the State Police did not coordinate with counsel in the Governor's Office, and the public information officer for the State Police, Lieutenant Glenn Miner, testified that he, too, was not coordinating with Darren Dopp, his counterpart, and in fact had no involvement whatsoever in the FOIL request.²⁰

Howard did acknowledge that subsequently, at Dopp's request, he asked Felton to produce certain schedules and scheduling information about Senator Bruno's travel, and that this ultimately made him more "directly" involved than he had been initially.

IV. FACTORS BEARING ON THE CONDUCT OF THE GOVERNOR'S LIAISON AND THE SUPERINTENDENT

A. Howard Knew He Was Dealing with a Politically Sensitive Matter

Howard knew that he was dealing with a politically sensitive matter. In fact, Howard testified that he specifically chose not to discuss the matter with his direct supervisor, Michael Balboni, because Balboni was a former Republican senator and Howard did not want to "put him in an uncomfortable position." If this were simply a FOIL request, there would be no reason for Howard to have any concern about notifying his supervisor. Furthermore, the fact that the matter was politically sensitive made it a significant enough matter that Howard should have notified a supervisor, whether Balboni or someone else.

B. The Superintendent Was Vulnerable to Pressure

It is possible that the Superintendent felt pressured by the Governor's liaison. Felton is an Acting Superintendent and has not yet been nominated by the Governor or confirmed by the state Senate. There is some evidence to suggest that he may have felt vulnerable to pressure from Howard., , The Superintendent expressed his dilemma as follows:

A: I run the State -- I run the State Police, he is the Assistant Deputy Secretary that has oversight of our agency. I deal with him all day on a multitude of different issues.

Q: Right.

A: You know, we talk on the phone all day, into the night. I have to keep him briefed on stuff that's going on in the agency. This guy is my superior. Can he fire me? No. But can he walk down the hall and tell somebody, "Preston isn't doing his job"? Yes. Do I have explaining to do when that happens? Clearly, I do.

A: The New York State Police is a semi-military organization. We follow a chain of command.

Q: Right.

A: There is no way of getting around that.

Q: But is he in that chain?

A: He's at the top of that chain in the Executive Chamber above me.

Q: He is, alright.

A: So I answer to him.

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In an interview, former Superintendent Constantine emphasized the importance of safeguarding the integrity of the State Police by remaining vigilant to potentially improper influence. Constantine stated that if he was informed that the State Police had received a

request for information about a public official, he would immediately have consulted counsel for the State Police and ensured that counsel stayed involved every step of the way. Felton failed to recognize these imperatives.

V. OTHER REPORTED JUSTIFICATIONS FOR THE STATE POLICE'S CONDUCT ARE INCONSISTENT WITH THE EVIDENCE

A. There Was No April 2007 Change in Record Retention or Creation Policies of the State Police

In media reports after the July 1 article reporting on Senator Bruno's travel requests, various explanations have been offered for the State Police's document collection, retention, and production practices concerning Senator Bruno. In a news article dated July 6, 2007, Dopp was quoted as saying some of the State Police's conduct could be explained by the fact that the State Police changed its record retention policy in April 2007. Specifically, the article reported as follows:

Until recently State Police discarded Bruno's schedules after they were done with them, but in April they started retaining the logs. The change in practice came shortly after interim Superintendent Preston Felton, who had been appointed by Spitzer in late February, called the Governor's Office to make sure providing the travel to Bruno was okay, Dopp said. We had called and said, "Follow your standard procedure," explained Dopp. Itineraries, he said, had always been done, but after April they started retaining them.

"Bruno: I'm Watched," Albany Times Union (July 6, 2007).

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However, Felton testified that none of the events recounted in the quoted paragraph occurred. Apart from the fact that itineraries had not "always been done," Felton testified as follows:

Q: Alright, was there a change in policy or procedure in

approximately April of this year with respect to either document creation or document retention for State Police being assigned to drive Senator Bruno to your knowledge?

A: Not to my knowledge, no.

Q: [Reading article to the witness.]

To your knowledge, in April, did the State Police begin retaining logs that they had previously discarded?

A: Not to the best of my knowledge.

Q: And did you call anyone in the Governor's Office after you were made Acting Superintendent to ask any questions about providing travel to Senator Bruno?

A: I don't believe I called anybody, I had one e-mail message, I believe it was June, in reference to if they wanted us to continue providing transportation to him.

Q: Okay. So when you became Acting Superintendent, you did not speak to anybody in the Governor's Office about, is this something we're supposed to be doing, providing travel or drivers to Senator Bruno, you did not have that conversation?

A: No.

Q: And in fact, you would not need to have that conversation because in your prior capacity as Deputy Superintendent, you were already aware that that occurred, is that right?

A: Yep.

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21 A few days later, a New York Times story attributed the complaint not to Michael Long but to his daughter, Eileen Long-Chelales, a former official in the administration of Governor George Pataki and a former head of the federal General Services Administration. Confessore & Hakim, "Three Say Bruno and Troopers Were a Concern in Pataki Years," N.Y. Times (July 10, 2007). The article was based on three anonymous sources described as a current and a

former senior State Police official and a "person close to both the Spitzer and Pataki administrations." The article reported that Long-Chelales had complained that Senator Bruno had appeared at an event with an escort of troopers, and that as a result of the complaint, the State Police clarified its policy to ensure that it provided a travel escort and not a personal escort. The article reported that Long-Chelales denied making any such complaint.

Moreover, during the investigation, four investigators, one senior investigator, and a major all testified that there was no change in document creation or retention practices in April 2007.

B. Any Complaints by Michael Long or Eileen Long-Chelales Are Immaterial to this Investigation

In another news article, Dopp was quoted as saying that the State Police started keeping logs of Senator Bruno's travel after Michael R. Long, chairman of the Conservative Party, complained late last year about Senator Bruno bringing a police escort to a fundraising event. Dicker, "Governor's Trooper Snoop Job on Bruno," N.Y. Post (July 5, 2007). The article quoted Dopp as follows: "Long thought it was highly inappropriate, and it probably was. Recalling that incident, the [State Police] made some changes . . . and, yes, [started] keeping basic records, i.e. logs." Long issued a statement in which he denied making any such complaint. Id. Two days later, Dopp then denied having suggested to the New York Post that the State Police began to keep new records or did anything other than follow standard operating procedure. "Statement by Darren Dopp, Governor's Director of Communications, Regarding the New York Post Article on State Police Security Coverage of Majority Leader Bruno," (July 5, 2007); Hakim & Confessore, "The Feuding by Bruno and Spitzer Turns Bitter," N.Y. Times (July 6, 2007).²¹

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²² For his part, Howard testified that he believed that Michael Long made a complaint about Senator Bruno's use of a police escort into an event in early or mid-2006, and that Eileen

Long-Chelales made a similar complaint in 2005.

Superintendent Felton dismissed the substance of the article. He testified that he knew of "no complaint by Michael Long about [Senator] Bruno's use of the State Police." The Superintendent said he had been made aware of a remark by Michael Long's daughter, Eileen Long-Chelales, and Brad Race, former Chief of Staff for Governor Pataki, regarding a claim that investigators from the State Police were not only driving Senator Bruno, but escorting him into events in a manner that made it appear he had a security detail, which he did not. In response, Superintendent Felton called Major Kopy's predecessor in New York City to ensure that drivers provided transportation only, and not security.

Thus, even if Long-Chelales raised an issue about Senator Bruno's use of the State Police, it concerned whether the State Police accompanied Senator Bruno into an event, and not whether they drove him there.²² More importantly, any such remark by Long-Chelales did not lead to any changes in record creation or retention by the State Police. Therefore, any complaints by Michael Long or Long-Chelales are immaterial to the record creation and retention issues in this investigation.

VI. CONTINUED CONFUSION ABOUT SENATOR BRUNO'S USE OF STATE POLICE GROUND TRANSPORTATION

Some news articles after July 1, 2007, made reference to Senator Bruno's need for ground transportation in New York City on the basis of personal security. See, e.g., Hakim, "State Financed Trips Weren't Improper, Bruno says" N.Y. Times (July 3, 2007) (citing references by Senator Bruno's spokesperson to death threats against the Senator,

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and a response by the Governor's staff referring to the fact that no security assessment for Senator Bruno had been done).

Howard testified that he was opposed to the use of the State Police to provide ground transportation to Senator Bruno or any other dignitary absent a security need, and that he communicated this to the State Police. Howard testified that he was aware that the State

Police provided ground transportation to Senator Bruno in connection with his travel on state aircraft. He then testified as follows:

Q. Are you suggesting in any way there is anything wrong with the State Police providing state drivers to Senator Bruno under those circumstances from your perspective?

A. I am a firm believer that the State Police is a valued resource to the state and I think that the use of the state police should be based on law enforcement criteria. I can't tell you whether or not there was threat assessment or anything else that resulted in Senator Bruno being able to make use of state police resources. I think they are law enforcement resources that should be used for law enforcement purposes.

Q. But there can be a public purpose to a flight that is not connected to security?

A. Yes.

Q. So, if the Senator satisfied the criteria of a public purpose and it was not security based and took the flight, you still think an additional standard or layer of scrutiny ought to be applied to the use of the state police driver?

A. Personally I do.

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Howard testified that he told the State Police about his view but that he was not successful in getting the State Police to adopt it, despite Howard's supervisory role over the State Police. Howard said that he thought for a period of time that the State Police had stopped

providing ground transportation to Senator Bruno, and then learned in early 2007 that they were still providing it. Howard claims that he told Felton that he ought to stop this practice. When pressed as to how the State Police could continue to provide such a service over the objection of their supervisor, Howard stated that he ultimately deferred to Felton on this point.

During the investigation, the OAG could find no other evidence that Howard sought to stop the State Police from providing ground transportation to Senator Bruno. Felton testified to the contrary, as follows:

Q: Why did -- Why does Senator Bruno get State Police escort, protection, etc., but not Speaker Silver, just because he asks?

A: Probably, that would be my answer.

MR. GLENN VALLE (State Police Counsel): You can ask, we'll give it to you too.

A: That would be, that would be, that would be my answer, is he asks for it, and we provide it.

Q: Was Senator Bruno entitled to police protection to your knowledge?

A: I would have to ask you in what context that question is being asked?

Q: Well, from time to time he would ask for drivers to be assigned in New York City, do you know why he was entitled to have drivers assigned to him in New York City?

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A: He is a high ranking state official, majority leader of the Senate.

Q: So today, is he entitled to, if he came to the City, entitled to a detail?

A: It's not a detail, it's a driver. If he called me right now and said, "Do I, can I get transportation in the City," I

would probably approve that.

Q: Assuming it was in connection with state business?

A: Yep.

It is significant that Howard testified that he opposed State Police as he gave contradictory testimony on the same point. Howard testified as follows:

Q. And again, before July 2, 2007, did you ever learn that Senator Bruno had made a request for ground transportation from the state police that was then pending?

A. No.

Q. Anything you learned about his trips was after the fact?

A. In twelve or thirteen years of doing this business never heard about a request in advance of any request coming in. It was always after the fact that I would have learned about it.

Q. To include this calendar year?

A. Yes.

But in fact Howard did know about several trips in advance, as the e-mails discussed earlier in this report reflect. In the May 21, 2007, e-mail, Felton directly asked Howard whether he ought to provide ground transportation services for an upcoming trip, and Howard's response was simply to ask for the itinerary, and not to prevent this practice.

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Howard also testified that he may have informed former Superintendent Bennett to stop providing police transport for Senator Bruno. Howard testified that Bennett complied for a period of time but then the trips resumed with the proviso that the request be routed to State Police in Albany rather than in New York City. Howard's testimony was wavering on this point, and Bennett had no recollection of any such conversations. In this regard, Howard appears, at best, to be confusing the instruction to the State Police to confine their services

to transportation and not personal escort. According to Felton, that instruction went from Felton to Major Kopy's predecessor. Bennett, like Felton, had no recollection of receiving any instruction from Howard not to provide ground transportation to Senator Bruno.

On balance, though, it appears that Howard was personally opposed to the State Police providing ground transportation services to Senator Bruno, and that Howard was offended by what he viewed as Senator Bruno's abuse of the use of state resources. Howard could have stopped the provision of ground transportation, especially when Felton sent a May 21, 2007, e-mail asking whether he ought to approve such a request from Senator Bruno. Felton was clearly seeking direction from Howard. Instead, Howard allowed the trip to proceed, collecting records and information all the while, until he had a mass of information he thought would lead to an explosive story in the

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23 When asked for his reaction if it should turn out that there was no pending FOIL request at the time that Howard was asking Felton to produce documents, Felton testified:

A: One, I'd be shocked, two I'd be very, very pissed off. But, again, you know, he's the Executive Chamber and that's an explanation he has to give for the people in this office. One, two, three, you know [counting the number of OAG lawyers in the room].

A: Yeah, let me just say, if he doesn't have a FOIL request, I would assume he has an explanation for the three people in this office who are lawyers.

media. Ironically, in so doing, Howard himself abused the resources of the State Police, and tarnished the reputation of the agency which he testified he holds so dear.²³

As former Superintendent McMahon stated during his interview, the State Police must "stay

out of politics." Former Superintendent Constantine put it best when he said, "it is critically important that the State Police be seen as apolitical due to their enormous power to arrest and investigate." Although a superintendent serves at the pleasure of the Governor, the superintendent must strive to stay out of politics completely, whatever the cost. Here, the Superintendent permitted the Governor's liaison to lead him and the State Police squarely into the middle of politics, precisely where they do not belong. Although we find that the conduct at issue here is not unlawful, it is serious enough to warrant a policy and personnel review by the Governor.

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PART TWO

SENATOR BRUNO'S USE OF STATE AIRCRAFT

This Part addresses Senator Joseph L. Bruno's use of New York state aircraft for travel from Albany to New York City during 2007. During the investigation, the OAG evaluated ten such trips. We determined that these trips were permissible under the existing policy for the use of state aircraft by non-State Police executive staff. As discussed below, the OAG recommends strengthening the existing state aircraft policy to reduce the potential for inappropriate use.

I. STATE AIRCRAFT POLICY

In order to assess Senator Bruno's use of state aircraft, it was first necessary for the OAG to determine the relevant policy and procedures governing the use of state aircraft.

The New York State Police Aviation Unit Manual lists fourteen authorized uses of state aircraft, including law enforcement operations, disasters, searches for criminal or noncriminal suspects, aerial firefighting operations, and, as relevant here "official transportation of personnel when approved." Investigation showed that the Governor's Office controls the approval process for the use of state aircraft for executive travel. In response to our request for copies of relevant policies and procedures, the Governor's Office

produced a copy of a document entitled "Aviation Procedures: Use of the Executive Aircraft" (the "Memorandum"). The Memorandum states that it was written in 1994 and revised in 1999. The Memorandum further states that it is "an informal and confidential guide designed to assist the Secretary to the Governor's Office in the approval process for use of the Executive Aircraft."

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24 Based on discussions with the Governor's Office, it appears that the Governor's Office has not yet decided whether to adopt this policy. However, the Governor's Office produced the Memorandum to the Times Union with the various travel records produced in connection with the June 27, 2007, FOIL request.

The Memorandum provides in relevant part: "The Executive Aircraft is to be utilized only if the requesting official's trip is related to state business or such usage facilitates the execution of official duties. In those limited instances where the executive aircraft is utilized for other than state business, income will be imputed to the respective official based on application of the IRS valuation rules by the State Police Aviation."

The Memorandum does not define use "related to state business." Because even a trip with multiple purposes, one of which is for state business, can be said to be "related to state business," the Memorandum appears to permit mixed usage of state aircraft. Thus, where at least one purpose of the trip is for state business, use of state aircraft is permitted. In practice, such mixed usage of state aircraft has been traditionally allowed.

The Governor's Office informed the OAG that it had inherited the policy reflected in the Memorandum and had not adopted it as such.²⁴ During his testimony, William Howard, Assistant Deputy Secretary for Homeland Security, and the Governor's liaison to the State Police, whose aircraft is at issue, described the standard for assessing the use of state aircraft as follows, "I think it's a little bit like the Supreme Court with pornography. You would look at the schedule and you would make a determination of whether or not this looked to be a political event or whether this was a governmental event." Thus, this administration and

prior administrations, which have and have had the authority to set guidelines for the use of state aircraft, has yet to articulate or communicate to users of state aircraft what their parameters are. In fact, the OAG

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25 Except in extreme instances, it would be difficult to attempt to impose criminal responsibility under the Penal Law based on the mixed use of state aircraft given the vagueness of the relevant policy and the lack of any definition of what constitutes "official business." Depending on the facts, it might implicate violations of the Public Officers Law, but in the absence of clear standards, this might be difficult to establish as well, with respect to mixed use. See Public Officers Law §74(3)(h).

requested any written policies or guidelines and has not received anything more specific than what is described herein.²⁵

The Governor's Office also produced a copy of a blank Flight Request Information form. According to the Governor's Office, this form "was created by the Executive Chamber in early 2007 (using a model [they] inherited) to process and approve state aircraft requests."

The Governor's Office did not produce any guidelines governing use of this form.

As has been widely reported, in 1995, the then-Executive Director of the New York State Ethics Commission issued an opinion that was re-confirmed in 2001, stating "that as long as the trip included a bona fide public purpose, the ethics laws did not require reimbursement for those portions of the trip that were political in nature." Statement on Gubernatorial Travel, Department of State, May 21, 2001. The Commission further stated: "At the time of the request, this was a long-standing policy. It continues to be the Commission's position on the subject." This opinion by its terms expressly permits mixed use of state aircraft.

The OAG is not aware of any written or oral policy inconsistent with the state's "long-standing" policy that permits the use of state aircraft for personal or political events as long as the trip includes an official business purpose.

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II. FACTUAL INVESTIGATION CONCERNING USE OF STATE AIRCRAFT

Given the laxity of the existing standard concerning the use of state aircraft, which permits personal or political business to be mixed with official state business on the same trip, evaluating Senator Bruno's use of state aircraft was a relatively straightforward endeavor. It was only necessary to determine whether at least one event during each trip in question was for the purpose of official state business.

A. Collection of Documents

The first phase of the factual investigation focused on three trips in May 2007, as these had been the focus of the media coverage that precipitated calls for this investigation. In this regard, the OAG requested and obtained all relevant documentation for the three trips in question (May 3-4, 17-18 and 24, 2007) from the New York State Police, the Division of the Executive Department that administers aircraft use, the Governor's Office, and Senator Bruno's office. Responsive documents included Senator Bruno's written requests for the use of state aircraft, written approvals of such requests, and the State Police Aviation Unit's records of the Senator's trips, including the aircraft manifests.

After evaluating the trips occurring in May 2007, and concluding, as set forth below, that the trips included at least some official state business, the OAG conducted a second phase of factual inquiry to assess Senator Bruno's use of the state aircraft on other dates going back to January 2007. In connection with this inquiry, we requested the same kinds of documentation regarding Senator Bruno's use of state aircraft during all of 2007.

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26 All but the January 18, 2007, trip included round-trip travel.

Review of these documents disclosed that all of Senator Bruno's requests for state aircraft were approved by the Governor's Office for the following dates that Senator Bruno actually used the state aircraft: January 11, 2007; January 18-19, 2007; February 8, 2007; March 1, 2007; April 5, 2007; April 20, 2007; May 3-4, 2007; May 17-18, 2007; May 24, 2007; and June 27, 2007. The documents further reflect that Senator Bruno requested state aircraft travel, which the

Governor's Office approved, for March 15, 2007 and June 8, 2007, but that Senator Bruno did not actually make those trips on state aircraft. It was therefore not necessary to analyze the latter two dates. In sum, the State Police Aviation Unit records reflect that Senator Bruno used state aircraft on ten trips during 2007.²⁶

In addition, the OAG obtained from Senator Bruno's office his itineraries (the "itineraries") for the above-referenced dates on which Senator Bruno used state aircraft. Senator Bruno's scheduler testified that each of the itineraries was prepared in advance of the flights, and that they listed the meetings or events that were scheduled for the dates of the trips.

B. Compliance with Procedural Requirements

Investigation disclosed that for each of Senator Bruno's ten trips using state aircraft, he first filled out the form from the Governor's Office entitled "Flight Request Information." Senator Bruno did the same for the two trips he ultimately did not make on state aircraft. The form calls for the person requesting state aircraft to indicate the date and time of the flight, the departure and arrival cities, the names of the passengers traveling, and the purpose of the flight request. In the section relating to purpose, the applicant is required to "indicate the official state business reflected on [his] schedule

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²⁷ According to the Governor's Office, in January 2007, Governor Spitzer amended the travel request form it inherited, revising it to include a required certification. A false certification on such a document could subject the requestor to criminal liability. See, e.g., Penal Law §175.30.

during the hours between landing and departing from the arrival city, and advise the Chief of Staff of any changes."

Immediately below the information provided, the requestor is required to certify that the information contained on the form is true and accurate by signing a certification to that effect.²⁷ The certification provides: "I hereby certify that the statements above and in the attachment are true and accurate." This language is followed by a line requiring the public

official's signature. Under the signature is a line that states "Approved by the Chief of Staff to the Governor." The Chief of Staff is required to check next to the line that states "Yes" or "No." On each of Senator Bruno's ten Flight Request Information forms for the trips that he actually took, all the information required was provided. In addition, for each trip, Senator Bruno stated that the purpose of the trip was "legislative business" or some other official state business. Senator Bruno certified the accuracy of the information by signing each form. The Governor's Chief of Staff, Marlene Turner, approved each request on the form itself. Thus, the procedural requirements for the use of state aircraft were met for each of Senator Bruno's ten trips during 2007.

C. Official State Business During the Trips

The OAG next sought to determine whether the ten trips made by Senator Bruno on state aircraft during 2007 did, in fact, include "legislative business" or "official state business" as Senator Bruno had certified on the form. As a point of departure, we reviewed the State Police Aviation unit records and the Senator's itineraries to determine the nature of Senator Bruno's events during those days.

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28 To the extent that the staff did not identify other meetings as having a legislative purpose, the OAG accepted this as a representation that the meeting or event served a political or personal purpose.

Over a period of several days, the OAG interviewed Senator Bruno's counsel and members of his staff. For each of the ten trips, Senator Bruno's staff identified meetings which they represented as relating to legislative business, and they provided the identities of persons present at the meeting, the meeting's duration and venue, and the nature of the discussion. The staff members identified twenty-three meetings on the itineraries which they represented related to legislative business, at least two of which occurred on each trip using state aircraft.²⁸

The OAG conducted a series of interviews with third parties to determine whether Senator

Bruno in fact conducted legislative business or official state business on each of the ten trips. In particular, the OAG interviewed non-Senate participants in the meetings and other witnesses to determine whether the meetings related to legislative business. The OAG interviewed a total of sixteen individuals, two of whom had participated in several meetings on different dates.

The OAG asked the witnesses about the meetings in question, including the identities of the participants. The OAG also asked the witnesses to describe the parameters of the meetings with Senator Bruno, including the location and duration of the meetings. In several instances, the interviewees consulted diaries or other notes to confirm their own recollections, which we view as a point of corroboration. The OAG asked the witnesses who had set up the meetings and when the meetings had been scheduled, as well as the nature of discussion during the meetings.

Each of the third party witnesses (none of whom work as Senate staffers or employees) corroborated the information provided to the OAG by Senator Bruno's staff.

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Each described the meetings as having been scheduled in advance, and noted that specific legislation or legislative policy was discussed. Each corroborated who was at the meeting and its approximate duration.

We found that Senator Bruno conducted some legislative business on each trip for which he used state aircraft. However, on several occasions, the legislative business constituted a minor portion of the day's schedule.

For example, State Police aviation records reflect that state aircraft was used to transport Senator Bruno and staff from Albany to New York City on April 5, 2007 at about 11:00 a.m., and from New York City back to Albany at about 5:00 p.m. the same date. The itinerary for that date reflects a lunch at 12:30 p.m., followed by meetings at 2:30 p.m., 3:30 p.m., and 4:30 p.m.

The investigation revealed that the 3:30 p.m. and 4:30 p.m. meetings related to legislative or

official state business. However, the 3:30 p.m. meeting, which lasted between thirty and forty minutes, included some discussion of political business. The 4:30 p.m. meeting lasted approximately ten minutes. Thus, less than one hour of the day's schedule related to legislative business.

State Police aviation records reflect that state aircraft was used to transport Senator Bruno and staff from Albany to New York City on May 3, 2007 at about 1:00 p.m., and from New York City back to Albany the following day, May 4, 2007. The itineraries for those dates reflect meetings at 2:30 p.m., 3:00 p.m., 4:00 p.m., 4:30 p.m. and 5:00 p.m., followed by the New York State Senate Republican Campaign Committee "Spring Reception" at 5:30 p.m. The itinerary for the following date, May 4, 2007, reflects a 9:00 a.m. meeting.

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The investigation disclosed that the May 3, 2007 meetings at 2:30 p.m. and 4:30 p.m. related to legislative or official state business. On May 4, 2007, the 9:00 a.m. meeting related to legislative business and lasted approximately 1 and ½ hours.

State Police aviation records reflect that state aircraft were used to transport Senator Bruno and staff from Albany to New York City on May 17, 2007 at about 11:00 a.m., and from New York City back to Albany the following day, May 18, 2007, at about 9:00 a.m. The itinerary for May 17, 2007 reflects a lunch at 12:30 p.m., followed by meetings at 2:30 p.m., 3:30 p.m., and 5:00 p.m. The schedule reflects the "Annual New York Republican State Committee Dinner" at 6:00 p.m. that evening. The itinerary does not reflect any scheduled meetings in New York City on the following day, May 18, 2007.

The investigation disclosed that the May 17, 2007 meetings at 12:30 p.m. and 5:00 p.m. related to legislative or official state business. No meetings were held on the following date, when the Senator and his staff used state aircraft to return to Albany. Thus, legislative business was conducted, but the balance of the days' schedules was not dedicated to official state business.

Notwithstanding the limited nature of the legislative business conducted on some of the

trips, there is no legal basis to conclude that Senator Bruno's use of the state aircraft violated any state policy. It is plain, however, that in some instances the state's permissive policy allowed the use of state aircraft in a manner that did not adequately protect taxpayer resources.

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D. Conclusion

As a result of the investigation, under the permissive state aircraft policy in effect, the OAG has determined that Senator Bruno conducted at least one legislative business meeting on each of the ten trips using state aircraft. Therefore, after reviewing all the facts and circumstances of Senator Bruno's ten trips during 2007 and the policy of New York with respect to use of state aircraft, we find that Senator Bruno used state aircraft for trips during which he conducted both legislative business as well as political or personal business. We further find that such mixed usage is permissible under existing New York State policy.

III. THE STATE SHOULD ENACT A MORE RIGOROUS POLICY CONCERNING USE OF STATE AIRCRAFT

Given the permissive nature of New York's existing state aircraft policy, the OAG reviewed the statutes and policies of other states and the federal government to determine whether a better policy has been developed elsewhere. We surveyed numerous states and determined the following:

1. Several other states, and the federal government, permit the mixed use of government aircraft.
2. Some states apply more rigorous guidelines and procedures for use of state aircraft, and reasonably specific schedules to calculate reimbursement for portions of the trip.
3. At least one other state requires certification by state personnel as to the state business usage of the aircraft.
4. Many states still rely on unwritten or informal policies.

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5. Whether a state allows or bans mixed usage, it appears in some cases to be a difficult task to define "official business." However, a few states have gone to great lengths to define what constitutes "official business."

New York, like many other jurisdictions, has a policy permitting mixed use of state aircraft, but lacks a clearly defined set of rules for implementing this policy. The OAG recommends that New York reevaluate the current aircraft policy, and consider the options for new policies set forth below.

A. Bright Line Rule

One option is a "bright line" rule permitting use of state aircraft only when the purpose of the trip is exclusively governmental. This policy would be easier to understand and enforce than the current mixed-use model.

For example, in South Dakota, in November 2006, the state enacted an outright ban on the use of state-owned or leased aircraft for any purpose other than state business. S.D. Codified Laws §5-25-1 (2007). Similarly, section 2205.036 of the Texas Government Code provides that only persons whose transportation "furthers official state business" may use state aircraft. The Code further states that usage may not be provided to a passenger who, at the origin or destination of the trip:

- (1) will make or has made a speech not related to official state business;
- (2) will attend or has attended an event sponsored by a political party;
- (3) will perform a service or has performed a service for which the passenger is to receive an honorarium, unless the passenger reimburses the board for the cost of transportation;
- (4) will attend or has attended an event at which money is raised for private or political purposes;

or

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- (5) will attend or has attended an event at which an audience was charged an admission fee to see or hear the passenger.

Tex. Gov. Code Ann. §2205.036.

B. Commercially Reasonable Policy

Another option is a "commercially reasonable" policy, which would permit the use of state aircraft only when a trip is calculated to be more cost-effective than a commercial carrier, or when use of a commercial carrier is unreasonable or unavailable. If this policy were to be adopted, the state should publish rate schedules and costs, as it currently does for state-owned automobiles.

C. Mixed-Use with Reimbursement

A third option would be to continue to permit mixed use but require reimbursement for the portion of the trip not involving state business. If this approach were to be pursued, it would be prudent to promulgate guidelines as to what proportion of a trip must be devoted to official business, and at what rate the state should be reimbursed.

For example, in Kentucky, a public official or employee must make a reasonable calculation in accordance with a rate schedule established pursuant to administrative regulations, and reimburse the state. Ky. Rev. Stat. Ann. §36.415 (West 2007). Similarly, in Florida, the relevant statute provides as follows: "A person traveling on state aircraft for purposes other than official state business shall pay for any trip not exclusively for state business by paying a prorated share of all fixed and variable expenses related to the ownership, operation, and use of such aircraft." Fla. Stat. §287.17 (2007).

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Likewise, the United States government allows a public official or employee to use state aircraft for both official purposes and personal or political activities. "Use of Government-Owned and -Operated Aircraft," 41 C.F.R. Ch. 101-37.404. The federal regulation permits non-emergency use of government aircraft "when no commercial airline or aircraft service is reasonably available." Advance authorization is required, and if any part of the trip is non-official, the public official or employee must reimburse the federal government. See "Improving the Management and Use of Government Aircraft," Office of Management and Budget Circular No. A-126 (Revised) (May 22, 1992).

Whether New York continues to apply its current policy or adopts a new one, the state should provide a definition of "official state business." In the absence of such a definition, any policy will continue to be subject to misinterpretation and abuse. In sum, as long as New York decides to make state aircraft available for use by public officials, the taxpayers of the State of New York deserve a set of guidelines that define and appropriately govern such use.