

**REPORT OF INVESTIGATION
INTO EVENTS ARISING FROM
GOVERNOR DAVID A. PATERSON'S
ACQUISITION OF 2009 WORLD
SERIES TICKETS**

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INTRODUCTION

This report arises from Governor David A. Paterson's attendance at the first game of the 2009 World Series at Yankee Stadium on the evening of Wednesday, October 28, 2009, together with the Governor's teenage son, his son's friend, a close aide (David W. Johnson), and Deputy Director of State Operations Mark Leinung. The Governor and those four individuals sat in ticketed seats during the game. As of the end of the game that evening, no attempt had been made to pay the New York Yankees for the tickets. All tickets aside from the Governor's were paid for in the days following the game after a press inquiry about how the Governor and his party obtained tickets.

On October 30, 2009, the New York State Commission on Public Integrity ("Commission") advised Governor Paterson that it had received information that the Governor may have violated certain provisions of the Public Officers Law by soliciting, accepting, and receiving five complimentary tickets to the World Series game. During a preliminary investigation, the Commission took testimony from certain witnesses, including the Governor, who testified before Commission staff on February 24, 2010.

On March 3, 2010, the Commission asked Attorney General Andrew M. Cuomo and Albany County District Attorney P. David Soares each to investigate whether the Governor had testified falsely before Commission staff, and whether the Governor or any other person had prepared one or more false documents. On the same day, the Commission released a notice pursuant to Executive Law Section 94(12)(b) finding reasonable cause to believe both that the Governor had violated provisions of the Public Officers Law through his acquisition of World Series tickets and that the Governor had testified falsely under oath before Commission staff.

On March 11, 2010, the Attorney General issued Executive Order Number 17, which, pursuant to Executive Law Section 62 and other applicable laws, appointed Judith S. Kaye, former Chief Judge of the New York Court of Appeals, as Independent Counsel to the Office of the Attorney General (“OAG”) to oversee the investigation. In accordance with the Executive Order, Judge Kaye (“Independent Counsel”) has directly supervised the OAG Public Integrity Bureau attorneys and staff who have conducted the investigation.¹ On March 23, 2010, Governor Paterson approved the Independent Counsel’s request for Executive Law Section 63(8) authority with respect to this matter, and all subpoenas calling for testimony or the production of documents in the OAG’s investigation were issued pursuant to Section 63(8). The OAG’s investigation having concluded, the Independent Counsel hereby issues this report pursuant to Section 63(8).

EXECUTIVE SUMMARY

The OAG reviewed materials from the Commission’s investigation, including all testimony transcripts and documentary evidence. The OAG took additional testimony from five of the thirteen witnesses who had testified to the Commission, and from eight additional witnesses. The OAG collected and reviewed voluminous additional electronic and documentary evidence including e-mail; notes; telephone, expense, calendar, travel, bank, and computer records; and other related business records of the New York Yankees, the New York State Division of State Police, and the Executive Chamber and its staff. Based on this review, the investigation reached the following conclusions.

¹ Judge Kaye was assisted by David Meister, an attorney of her choice from Skadden, Arps, Slate, Meagher & Flom LLP, the law firm with which she is affiliated. Judge Kaye and Mr. Meister provided their services to the State of New York pro bono. During their service, they did not have access to any confidential OAG information other than information about the matters referred to Judge Kaye under Executive Order Number 17, and were screened from all matters at their law firm that involved the OAG.

The Governor testified before Commission staff on February 24, 2010 regarding, among other things, acquisition of the five tickets to the game used by the Governor and his party. In particular, the Governor testified that, prior to the game, he intended that all tickets for the individuals in his party other than his own would be paid for. In addition, he testified that, while at home prior to the game, he personally wrote and signed an \$850 check to pay for the two tickets used by his son and his son's friend, leaving only the payee section blank; that he brought this partially completed check to the game to pay for the tickets; and that, at the game, he gave this check to Johnson, who told him after the game that he would forward the check to the Yankees the next day.

Evidence developed in the investigation indicates that, contrary to the Governor's testimony, he had not formed an intent prior to the game that the tickets other than his own would be paid for. Evidence indicates that his decision to pay for the tickets for his son and his son's friend was made following a press inquiry the day after the game.

In addition, evidence indicates that, contrary to the Governor's testimony, he did not partially prepare and bring a check for \$850 to the game to pay for tickets for his son and his son's friend. However, the question of whether the Governor gave intentionally false testimony on this issue is clouded by the fact that the Governor testified regarding his preparation of a check after the Commission marked a copy of the check submitted to the Yankees as an exhibit and entries on that check were read aloud to the visually impaired Governor during a break in the testimony.² He did not personally examine the check at the time; his attention was not directed to the fact that the check was not in his handwriting, which would have been obvious to the Governor had he examined the check. After the check was read aloud to him, the Governor

² The OAG reviewed an audio recording of the Governor's testimony that contains this off-the-record exchange.

testified that he “assume[d]” the check marked as an exhibit was the one that he had sent to the Yankees, and only after that did he testify regarding his preparation of such a check. This defect in the proceeding created potential confusion in the Governor’s testimony concerning his preparation of a check.

With respect to the Commission’s request that the OAG investigate any false testimony provided to Commission staff, the evidence indicates at a minimum the above-described portions of the Governor’s testimony before Commission staff were inaccurate and misleading. Albany County District Attorney Soares, who received a simultaneous referral from the Commission as noted above, is currently reviewing this matter. The evidence developed in the OAG’s investigation under the Independent Counsel warrants consideration of possible criminal charges by the District Attorney, who will make the ultimate decision regarding whether or not charges should be brought. Under New York law, the Albany County District Attorney has original and ultimate responsibility for prosecutorial decisions regarding crimes and offenses arising in Albany County.³ A multitude of factors may be considered by the District Attorney in his exercise of prosecutorial discretion regarding whether or not to pursue charges in this matter.

With respect to the Commission’s request that the OAG investigate any falsification of documents, the only documents about which there is any evidence of falsity are two apparently backdated checks and an apparently backdated cover letter that were submitted to the Yankees to pay for tickets. Regarding these documents, the Independent Counsel does not believe that the evidence warrants consideration of criminal charges. The evidence indicates that the checks and cover letter were prepared by Johnson, who declined to cooperate with the OAG’s inquiry, and

³ See N.Y. County Law § 700(1); People v. Soddano, 86 N.Y.2d 727, 728 (1995) (“District Attorneys, of course, retain the ultimate, nondelegable responsibility for prosecuting all crimes and offenses . . .”). Because the Governor’s testimony occurred in Albany County and relates to a Commission investigation conducted in Albany County, the Albany County District Attorney is the District Attorney with jurisdiction to review alleged perjury and related charges arising out of such testimony. See N.Y. Crim. Proc. Law § 20.40.

the investigation did not otherwise find evidence sufficient to warrant the consideration of criminal charges with respect to these documents.

The Independent Counsel expects that, in conducting his independent review, the District Attorney will consider this report, all of the evidence and potential defenses, and any other evidence he obtains. The OAG has provided investigative materials and information to the District Attorney to facilitate his review. The Independent Counsel has reserved for the District Attorney certain investigative decisions, in particular whether and how to seek the Governor's sworn testimony, so that the District Attorney has the opportunity to make these decisions in the context of the exercise of his prosecutorial discretion.

Finally, the OAG's investigation revealed unclear and problematic policies at the Executive Chamber related to ticket acquisition that warrant attention by the Executive Chamber, and this report ends with certain recommendations in these areas.

LEGAL AUTHORITY

The Commission's referral to the OAG requested and authorized the OAG to conduct its investigation pursuant to Executive Law Section 63(3).⁴ After obtaining the Governor's approval, the OAG also had the authority, if merited by the public interest, to conduct its investigation pursuant to Executive Law Section 63(8).⁵ After finding that the public interest did require investigation pursuant to Section 63(8), the OAG conducted its investigation of this

⁴ Executive Law Section 63(3) permits the Attorney General, upon request of the Governor or the head of any department, authority, division or agency of the State, to "investigate the alleged commission of any indictable offense or offenses in violation of the law . . . in relation to any matters connected with such department, and to prosecute the person or persons believed to have committed the same and any crime or offense arising out of such investigation . . . including but not limited to appearing before and presenting all such matters to a grand jury."

⁵ Executive Law Section 63(8) permits the Attorney General to, "[w]henever in his judgment the public interest requires it," "inquire into matters concerning the public peace, public safety and public justice," when directed or authorized to do so by the Governor.

matter pursuant to both Sections 63(3) and 63(8). Subpoenas calling for testimony under oath or production of documents were issued under Section 63(8).

Executive Law Section 63(8) empowers the OAG to “subpoena witnesses, compel their attendance, [and] examine them under oath,” and “require that any books, records, documents or papers relevant or material to the inquiry be turned over to [it] for inspection[.]” These investigative powers are bolstered by the law’s requirement that public officers and other persons cooperate with a 63(8) investigation, and by its provision criminalizing disclosure of investigative information.

In New York’s history, Executive Law Section 63(8) has, for example, been used to investigate the operation of private proprietary adult homes, see Friedman v. Hi-Li Manor Home for Adults, 42 N.Y.2d 408 (1977); the nursing home industry, see Sigety v. Hynes, 38 N.Y.2d 260 (1975); the relationship between misconduct by public officials and enforcement of the law by local officials, see Greenspon v. Stichman, 12 N.Y.2d 1079 (1963); the relationship between organized crime and government in New York State, see In re Di Brizzi, 303 N.Y. 206 (1951); and corruption, ethical issues, conflicts of interest, and political favoritism in state government, see N.Y. Republican State Comm. v. N.Y.S. Comm’n on Gov’t Integrity, 138 Misc. 2d 790 (Sup. Ct., N.Y. County), aff’d, 140 A.D.2d 1014 (1st Dep’t 1988).

Section 63(8)’s direction to the Attorney General to investigate matters of “public peace, public safety and public justice” is to be given its “usual and ordinary,” rather than a “narrow and technical,” meaning. Di Brizzi, 303 N.Y. at 214. The typical and appropriate focus of inquiries under Section 63(8) is on “matters affecting ‘the condition of the state’” which are “of importance to the Governor in the discharge of his duties under the Constitution.” Id. at 216 (quoting N.Y. Const. art. IV, § 3). Accordingly, such investigations carry the broad mandate to

“secure information to guide executive action.” Id.; see also Sigety, 38 N.Y.2d at 266 (approving a 63(8) investigation designed to “inform the Governor, who, so informed, can more adequately fulfill the obligations of his office”); Matter of Carey, 68 A.D.2d 220, 224 (4th Dep’t 1979) (finding that Section 63(8) “confers general investigative powers and provides a means whereby the Governor and the Attorney-General may acquire information to guide them in the performance of their executive duties”).

The acquisition of information to “guide executive action” was an investigative purpose called for by Section 63(8) and by the public interest, which that law is designed to protect. In accordance with that Section 63(8) mandate, this report examines policies and procedures of the Executive Chamber related to ticket acquisition that require the attention of the Executive Chamber.

FACTUAL FINDINGS

I. PROCEDURAL BACKGROUND AND COMMISSION PROCEEDINGS

The relevant background with respect to the Commission proceedings is as follows. Public Officers Law Sections 73 and 74 set forth minimum standards of conduct and certain ethical prohibitions, including those with respect to gifts, for state officers and employees. N.Y. Pub. Off. Law §§ 73-74. Pursuant to Executive Law Section 94, the Commission has jurisdiction over statewide elected officials and state officers and employees to enforce these laws. N.Y. Exec. Law. § 94. Under the Executive Law, the Commission is empowered to investigate possible violations of the Public Officers Law, including by administering oaths, subpoenaing witnesses, and requiring the production of relevant documents. N.Y. Exec. Law §§ 94(12)(a) and (16)(d). If the Commission decides to investigate a possible violation, the Commission:

shall notify the individual in writing, describe the possible or alleged violation of such laws and provide the person with a fifteen day period in which to submit a written response setting forth information relating to the activities cited as a possible or alleged violation of law. If the commission thereafter makes a determination that a further inquiry is justified, it shall give the individual an opportunity to be heard. The commission shall also inform the individual of its rules regarding conduct of adjudicatory proceedings and appeals and the due process procedural mechanisms available to such individual. . . . All of the foregoing proceedings shall be confidential.

N.Y. Exec. Law § 94(12)(a). The written notification of possible violations that the Commission provides in compliance with the above are commonly referred to as “fifteen-day letters.” If the Commission has reasonable cause to believe that a violation has occurred, it must also send a notice of reasonable cause to the alleged wrongdoer and others. N.Y. Exec. Law § 94(12)(b). Such notices are to be made available to the public. N.Y. Exec. Law § 94(17)(a)(3).

Upon the completion of any investigation, the Commission has the authority to conduct a hearing before an administrative hearing officer, consider the hearing officer’s recommendations, and then make a final decision regarding Public Officers Law violations and any associated penalties. 19 N.Y.C.R.R. § 941.1-941.19 (2010). Regulations promulgated by the Commission set forth rules regarding the conduct of such proceedings. Id.

With regard to the Governor’s attendance at the first game of the 2009 World Series, late in the day on October 30, 2009 (two days after the game), the Commission hand-delivered to the Governor’s Counsel’s office a fifteen-day letter advising the Governor pursuant to Executive Law Section 94(12) that it had received information that he may have violated certain provisions of the Public Officers Law by soliciting, accepting, and receiving five complimentary tickets to the game.

On November 13, 2009 (within the fifteen-day period), the Governor's Counsel Peter Kiernan responded on behalf of the Governor to the Commission's letter. In his response, Kiernan framed the issue raised by the Commission's letter as whether complimentary attendance by the Governor at the first game of the World Series was appropriate under the Public Officers Law. Kiernan's letter summarized the events leading to the Governor's attendance at the game, noted the economic impact of the World Series on the City and State of New York and cited a 2008 advisory opinion issued by the Commission, to support that this economic impact and other factors brought the Governor's attendance within the "widely-attended event" exception to the Public Officers Law's prohibition on public officials accepting complimentary attendance to events that are "primarily recreational in nature." Kiernan's letter also noted that, although two staff members and the Governor's son and a friend were expected to attend the game, "the Governor expected that the Yankees would be reimbursed for all tickets other than his," and that, although a letter was submitted to the Yankees stating that the Governor would attend the game in his official capacity "no other tickets ever were expected to be complimentary, and none were."

From November 2009 through February 2010, consistent with its investigative authority, Commission staff conducted an investigation into the Governor's acquisition of World Series tickets. Commission staff requested and received documents and information from the Executive Chamber and the Yankees, and took testimony from three Yankees employees and then Governor Paterson, who was examined under oath on February 24, 2010. The Governor's testimony is described below. The next Executive Chamber witnesses to testify before Commission staff were Peter Kauffmann, the Governor's Director of Communications, and

Matthew Nelson, the Governor's scheduler, both of whom provided testimony on March 2, 2010 in that order.

The next day, March 3, 2010, the Commission issued a notice pursuant to Executive Law Section 94(12)(b) ("Notice") finding reasonable cause, based on its preliminary investigation, to believe that the Governor had violated the gift ban and misuse of official position provisions of the Public Officers Law through his acquisition of World Series tickets. The Commission's Notice was issued before the transcripts of Kauffmann's and Nelson's testimony were available, before Commission staff had completed its investigation into the Governor's acquisition of World Series tickets, and in the midst of speculation that the Governor was about to resign in the wake of press reports of Executive Chamber and State Police involvement in events related to an alleged domestic incident involving David Johnson. (That Executive Chamber and State Police involvement was the subject of the Independent Counsel's July 28, 2010 Report.⁶)

On the same day that it issued its Notice, the Commission requested that both the OAG and Albany County District Attorney Soares investigate whether the Governor or any other person "committed one or more crimes as a result of his role in the preparation of one or more documents and by swearing falsely during an interview of him that Commission staff conducted on February 24, 2010." Letter from Michael G. Cherkasky, Chairman, New York State Commission on Public Integrity, to Andrew M. Cuomo, Attorney General of the State of New York (March 3, 2010).

Thereafter, the Commission continued its investigation into the Governor's acquisition of World Series tickets, including by taking testimony from four additional Executive Chamber

⁶ The Governor testified before Commission staff on the same day that he requested that the OAG investigate those events.

employees and two additional Yankees employees. David Johnson declined to cooperate with the Commission's investigation.

On or about July 22, 2010, the Commission furnished Governor Paterson with a Notice of Hearing. This notice scheduled a hearing for August 17, 2010 to assist the Commission in determining whether Governor Paterson violated Public Officers Law §§ 73(5) and 74(3)(d), (f) and (h), as alleged in the Commission's March 3, 2010 Notice of Reasonable Cause.

The hearing proceeded on August 17, 2010 before a Hearing Officer as provided in Commission regulations. Governor Paterson did not participate. At the hearing, Commission staff presented evidence, including witness testimony, that the staff argued proved that the Governor had violated the gift ban and misuse of official position provisions of the Public Officers Law by soliciting and accepting tickets to the first game of the World Series.⁷ Following the hearing, the Hearing Officer's findings of fact and recommendations will be reviewed by Commission members who will make the final determination about the Governor's alleged violations of the Public Officers Law and, if applicable, any appropriate penalty.⁸

⁷ Although transcripts of this hearing are not yet available, OAG staff attended this hearing along with other members of the public as observers. On those topics that are the subject of the OAG's investigation, testimony given by witnesses at this hearing was consistent with prior testimony by those witnesses to the Commission and the OAG.

⁸ The Commission's proceedings address whether the Governor violated the Public Officers Law through solicitation, acceptance or receipt of tickets to the World Series. The alleged violations pending before the Commission were not referred to the OAG and are, therefore, not addressed in this report. Thus, any final determination regarding these violations has no bearing on this report. To the extent that the matters addressed in this report separately implicate the Public Officers Law, the Commission has primary jurisdiction over Public Officers Law violations, and thus any such potential violations are not addressed in this report. See N.Y. Pub. Off. Law §§ 73(18), 74(4); N.Y. Exec. Law § 94(12)(a).

II. THE GOVERNOR'S ACQUISITION OF TICKETS TO GAME ONE OF THE 2009 WORLD SERIES

The OAG adduced the following facts regarding the Governor's acquisition of tickets to and attendance at the first game of the World Series, the response to press inquiries after the game, payment for the tickets, and Executive Chamber practices and policies on attendance at sporting events.

A. Early October 2009 Events

On or about October 7, 2009, Lonn Trost, Chief Operating Officer of the New York Yankees,⁹ telephoned the Executive Chamber to inquire whether Governor Paterson would attend the Yankees game the following day, an American League Division series ("ALDS") post-season game. During his testimony before Commission staff, Trost characterized his question to the Executive Chamber not as an invitation but as an "inquiry," which he made in order to ensure that the Yankees would be prepared with appropriate security if Governor Paterson chose to attend the game. At that time, according to e-mails among his staff, the Governor told his Executive Chamber scheduler, Matthew Nelson, that he would not attend any games during the ALDS, but that he would attend during the next series. In an e-mail, Nelson asked another Executive Chamber staffer to convey that information to Trost, although Trost testified before Commission staff that his inquiry was never answered.

B. The Days Leading Up to Game One of the World Series

On Monday, October 26, 2009, Nelson e-mailed Johnson to inquire whether the Governor was interested in or planning on attending the first game of the World Series on October 28, 2009. In his e-mailed response, Johnson replied, "I think that he should. I will

⁹ In 2009, the New York Yankees Partnership was a registered lobbyist in the State of New York, and specifically was registered to lobby the Executive Branch in connection with stadium financing and other matters.

reachout [sic] to Randy Levine. President of the Yankees.” Nelson replied to Johnson informing him that, several weeks prior, Trost had reached out before “the ALDS games to see if [the Governor] wanted to go, and [the Governor] told me at that time that he’d skip that Series but would definitely go to the next round. . . Let me know if you can reach Randy, and we can try Lonn.”¹⁰ Johnson replied to Nelson: “[J]ust work with Lonn since he extended the invitation. I would see if they are willing to give us 5 or 6 tickets.”

According to documentary evidence and the testimony of Trost and Nelson, thereafter – but likely still on October 26, 2009 – Nelson telephoned Trost, told him that Governor Paterson intended to go to the first game of the World Series, and requested “five or six tickets.” At 3:58 p.m. on October 26, 2009, Nelson e-mailed Johnson indicating that Trost “said it’s no problem” and that Nelson would “find out what the deal is with getting the tickets and let [Johnson] know.” A few minutes later, Johnson replied to Nelson’s e-mail adding Kiernan to the e-mail chain and stating that the Governor “is coming in a ceremonial capacity Yankees the only sports franchise that gives us problems. We may have to have Peter Kiernan send that a [sic] waiver form so it is not seen as a gift. Looping Peter in.”

At some point after Trost’s conversation with Nelson, Trost transferred the handling of the anticipated attendance to Brian Smith, the Yankees Vice President of Corporate/Community Affairs, according to the testimony of both Trost and Smith.

On the morning of October 27, 2009, Governor Paterson appeared as a guest host on CNBC’s “Squawk Box” news program from a studio in Englewood Cliffs, New Jersey. Randy Levine, President of the Yankees, also appeared on the program, but from a studio in New York City. According to the testimony of Levine and Marissa Shorenstein (the Governor’s Press

¹⁰ The “next” series after the ALDS was actually the American League Championship Series (“ALCS”), the precursor to the World Series. The investigation found no evidence that the Governor attended the ALCS, which ran from October 16 to October 25, 2009.

Secretary who attended the “Squawk Box” taping that morning), the Governor and Levine, who had been law school classmates, were not present in the same studio, and did not have an opportunity to speak to one another during the taping of the program, except on the air. They did not discuss the Governor’s possible attendance at the World Series.

Also, according to documentary evidence and Mark Leinung’s testimony, during the afternoon of October 27, 2009, Johnson told Leinung that the Governor wanted Leinung to accompany him to the game the next day. Leinung testified that, during their conversation, there was no discussion regarding payment for a ticket. According to Leinung, he rarely accompanied the Governor to events in the course of his work at the Executive Chamber but thought it likely that he was asked to join the Governor because he was knowledgeable about the Yankees.

According to the testimony of Smith and Smith’s assistant, on either Tuesday, October 27, 2009 or Wednesday, October 28, 2009 (the day of the game), Smith explained to Johnson (and also likely to one of Johnson’s assistants) the Yankees’ policy on providing tickets to public officials: before they will release tickets to a public official the Yankees require either payment or a letter from the public official’s counsel stating that the requested tickets need not be paid for. Although Smith was not certain whether it was he or his assistant who conveyed this policy to the Executive Chamber, Smith’s assistant recalled overhearing Smith explain it by phone to Johnson, and testified that she explained it to a woman who subsequently called to check on the status of the Governor’s tickets.¹¹ Further, Smith testified that at some point prior to the game, he understood both that no payment was going to be made for any of the tickets because the

¹¹ Smith’s assistant testified that she recalled overhearing part of Smith’s side of a telephone conversation in Smith’s office, during which Smith explained the policy of requiring a letter from counsel if no payment was to be made for tickets. According to Smith’s assistant, after he hung up Smith told her that he had been speaking with Johnson.

Governor would be attending in his official capacity, and that the Governor's counsel would provide a letter to that effect.

Smith and Irfan Kirimca, Senior Director of Ticket Operations at the Yankees, testified that the Yankees' practice when payment is required is to request payment by credit card, and to obtain credit card information by phone before printing or processing ticket orders. Smith noted that the Yankees do not permit ticket orders to be processed or tickets released for pick-up until they have received either payment information or, in the case of a public official attending on official business, a letter from the official's counsel stating that payment was not required for that reason. Kirimca testified that when Smith contacted him to obtain tickets for the Governor, Smith did not provide payment information, but instead informed Kirimca that the Governor was attending on official business and that therefore the tickets would not be paid for. According to Trost, Smith told Trost the same thing.

C. Preparations on the Day of the Game

A State Police Investigator serving on the Governor's security detail testified that on the morning of the game, he went to Yankee Stadium to familiarize himself with the area in preparation for driving the Governor there that evening. According to the Investigator, while he was at the stadium that morning, a Yankees security agent told him that the Governor's tickets were not yet available, but provided the section and row in which the Governor and his party would likely be seated. This Investigator e-mailed that information to other members of the Governor's security detail on the morning of the game.

Consistent with the Yankees' understanding that the Executive Chamber would be providing a letter rather than payment for the tickets, Johnson's assistant testified that, on the day of the game, Johnson instructed her to call Peter Kiernan to ask him to write a letter to the

Yankees because the Governor was going to attend the game. Johnson's assistant spoke with Kiernan, but was unable to provide him with much information about the letter. She suggested that Kiernan speak with Johnson to get further details, but did not know whether Johnson and Kiernan actually spoke. The work diary of Johnson's assistant contains notes dated October 28, 2009 relating to the letter, including the note "Governor coming is official business." Johnson's assistant did not recall whether she wrote these notes while speaking with Johnson or Kiernan about the letter.

Kiernan's assistant testified that on game day Kiernan gave her a handwritten letter to the Yankees, which she immediately typed. Computer metadata¹² and e-mail records show that Kiernan's assistant typed the letter at approximately 3:09 p.m. on October 28, and at 3:34 p.m. e-mailed it to Smith and Smith's assistant at the Yankees. The body of the letter, which was addressed to Smith, states: "This is to advise that Governor David Paterson will be attending the opening game of the World Series this evening at Yankee Stadium. The Governor will do so on official business. Please advise if further elaboration is desired. On behalf of the Governor, we appreciate your courtesy and cooperation." Although the letter specified only the Governor, Smith testified that he understood that the letter covered all five of the requested tickets.¹³

Smith testified that it was his practice, after receiving such a letter, to tell the Yankees ticket office about the letter so that the ticket office could process the ticket order and make tickets available for pick-up. Kirimca, the Senior Director of Ticket Operations, testified that

¹² Metadata refers to electronic information stored with or attached to electronic files that contains information about those files. Electronic documents are often embedded with metadata indicating, among other things, the time and date a document was created, the author or creator of the document, the means of creation, and where on a network the data was created or stored.

¹³ During the Commission's investigation, Kiernan informed the Commission that he would assert attorney-client privilege if called to testify. The Commission thereafter did not take Kiernan's testimony in its investigation. The Independent Counsel has reserved for the District Attorney the decision as to whether or not to seek Kiernan's testimony.

prior to the game, Smith informed him by phone that the Governor was requesting five tickets and stated that the tickets would be complimentary because Smith had received a letter from the Governor's counsel stating that the Governor was attending on official business. As a result of this conversation, Kirimca located five tickets to the game,¹⁴ logged the tickets in the Yankees' computer system as complimentary, and placed the five tickets in an envelope for pick-up by the Governor's party. Kirimca gave the envelope of tickets to another Yankees employee. The face value of each ticket was \$425.

According to his testimony, a New York City Police Department ("NYPD") detective associated with the Governor's security detail picked up an envelope containing five tickets for the Governor and his party from a table at Yankee Stadium late in the afternoon on the day of the game. He looked at the tickets to determine the location of the seats, but did not recall whether he noticed the face value at that time. He also did not recall having conversations with anyone about the cost of the tickets or payment for the tickets. He testified that when the Governor's party arrived at the game, he gave the tickets to either Johnson or a member of the Governor's security detail.

D. Governor Paterson Attends the World Series Game

At the game that evening, the five tickets were used to provide seats for Governor Paterson, his son and his son's friend, Johnson (who was the Governor's assigned travel person for that day), and Leinung. Also assigned to and present at the game, but not in seats (and thus without tickets) were an Executive Chamber press staffer and photographer, and members of the Governor's security detail.

¹⁴ These tickets appear to have been available because they had been returned to the Yankees by Major League Baseball, which is provided an allotment of World Series tickets.

Members of the security detail who testified did not recall the Governor or Johnson talking about payment for tickets, making any inquiries of the Yankees, or taking other action that appeared related to making payment for tickets during the game. Kirimca testified that he received no information during the game indicating that the Governor or any member of his party wanted to make or deliver payment for tickets. He also testified that a ticket window in the Yankee Stadium concourse was staffed during the first game of the World Series, and that he had no indication that the Governor or his staff had made use of this window during the game to inquire about or make payment for tickets.

E. The Press Inquiry About the Governor's Attendance and the Initial Response

Just before 10:00 a.m. the next morning (Thursday, October 29, 2009), New York Post reporter Fredric U. Dicker e-mailed Peter Kauffmann, Governor Paterson's Director of Communications. Around this time, Dicker and Kauffmann also spoke on the phone. Dicker inquired as to how many guests the Governor took to the World Series game the night before and whether he and his guests paid for their tickets.¹⁵ Kauffmann testified that, from the time of the initial inquiry through approximately 1:30 p.m. that day, he had a series of conversations regarding the inquiry with the Governor and Johnson, sometimes together, sometimes separately, which for the most part took place in person in the Executive Chamber New York City offices. The Governor's official schedule indicates that he was in that office from approximately 8:30 a.m. to 4:30 p.m., and that Johnson was the travel staffer assigned to accompany the Governor.

When testifying about his conversations with the Governor and Johnson regarding the acquisition of World Series tickets and how to respond to the press inquiry, Kauffmann recalled

¹⁵ The e-mail inquiry to Kauffmann asked: "How did the governor and his aides get the tickets and who, if anyone, paid for them?" Kauffmann communicated the inquiry to others in the Executive Chamber as concerning the Governor and his four guests.

specific statements made to him that morning by Johnson, but could not recall specific statements made to him by the Governor. With regard to Johnson, Kauffmann testified that Johnson was “fairly adamant” that the tickets did not have to be paid for. Kauffmann recalled Johnson explaining that the Governor’s appearance was official and that Kiernan had written a letter to that effect that covered everyone who attended the game with the Governor.¹⁶

Kauffmann testified to Commission staff that during the first conversations he had with the Governor regarding the inquiry, the Governor initially “seemed to think that the tickets had been paid for.” In addition, Kauffmann testified that the Governor told him that he had been “invited” to the game by Randy Levine, President of the Yankees.¹⁷ Also during his Commission testimony, Kauffmann ascribed to the Governor and Johnson collectively certain statements indicating that all ticketed attendees were there in their official capacity and did not have to pay. However, in response to a question during his OAG testimony as to whether his conversations with the Governor were consistent with the conversations he had with Johnson, Kauffmann responded, “[d]uring this period of time, there was a consistent belief that the tickets did not have to be paid for, but I can’t place any specific statements that were made on individual tickets with the Governor specifically.”¹⁸

¹⁶ As noted above, Kiernan’s letter to the Yankees did not explicitly mention anyone other than the Governor, stating only “Governor David Paterson will be attending the opening game of the World Series this evening at Yankee Stadium. The Governor will do so on official business.” There is no evidence indicating that Johnson saw this letter, and e-mail traffic indicates that Kauffmann was still asking to see a copy on Monday, November 2.

¹⁷ Dicker subsequently told Kauffmann that Levine disputed this, and, according to Kauffmann, the Governor later stated that Levine had not invited him, but may have said something more casual such as “come on down, you should come to a game or something.” In his testimony to the Commission, the Governor stated that Levine had not invited him to the game.

¹⁸ The fact that Kauffmann did have direct conversations with the Governor during the morning of October 29, 2009 in connection to the reporter’s inquiry is corroborated by the testimony before Commission staff of Larry Schwartz (Secretary to the Governor) and Marissa Shorenstein (Deputy Director of Communications and Press Secretary to the Governor). Both recalled Kauffmann saying on that day after the reporter made his inquiry that he was going to speak with the Governor, and Shorenstein recalled Kauffmann recounting to her what he learned after he initially spoke with the Governor. In addition, the Governor’s New York City assistant recalled Kauffmann coming to her

Regardless, Kauffmann was clear in his testimony before Commission staff and the OAG that as a result of his conversations with Johnson and the Governor that morning, he understood that no one had paid for the World Series tickets, and that neither the Governor nor Johnson believed that payment for any of the five tickets was required. The following October 29, 2009 e-mails sent by Kauffmann corroborate that this was his understanding:

- At noon, Kauffmann e-mailed Larry Schwartz (Secretary to the Governor), Peter Kiernan and other Executive Chamber staffers the following draft proposed response to the reporter: “The Governor was invited by the Yankees to attend the opening game of the World Series in his official capacity, to represent the State of New York at a ceremonial occasion attended by First Lady Michelle Obama.” Kauffmann also included as information to be provided to Dicker on background that “[h]e did not pay for the tickets” and the identities of the four individuals who were seated with the Governor. According to Kauffmann, this draft response was based on information that Kauffmann learned from the Governor and Johnson, although, again, he was not able to attribute any specific statements to the Governor.
- At 1:11 p.m., Kauffmann e-mailed Johnson a slightly revised version of the draft response, including the background statement “[h]e did not pay for the tickets,” asking Johnson to run it by the Governor.
- At 1:26 p.m., Kauffmann e-mailed Leinung:

Mark- I wanted to give you a heads up that Fred Dicker is asking who sat with the Gov last night and did everyone pay for their tickets. The answer is no, no one paid, everyone was a guest of the Yankees but I wanted to give you a heads up that this will be in the Post tomorrow. I am working with DJ and the Gov to formulate our official response but wanted to give you a heads up as you were at the game. Thanks –Peter¹⁹]

- At 1:33 p.m., Kauffmann e-mailed Dicker, “The Governor was invited by the Yankees to attend the opening game of the World Series in his official capacity, to represent the State of New York at a ceremonial occasion.” Kauffmann did not e-mail the background information that no one had paid, but testified that to the best of his recollection, he provided that information to Dicker by telephone.

desk stating that he needed to speak to the Governor because the reporter said “he heard [the Governor] was at the Yankees game,” and saw Kauffmann go into the Governor’s office to speak with him on that same day.

¹⁹ Kauffmann testified that the statement in this e-mail that no one paid and that everyone was a guest of the Yankees was based on what Kauffmann learned from the Governor and Johnson.

F. Payment for Leinung's Ticket

Shortly after Kauffmann sent his October 29, 1:33 p.m. e-mail to Dicker, Kauffmann asked Leinung by e-mail what the face value was on his ticket. Leinung replied two minutes later that he thought it was \$425. Kauffmann testified that to the best of his recollection this was the first time that he learned the face value of the tickets. At 2:08 p.m., Kauffmann e-mailed Leinung:

Mark-
I spoke with Peter Kiernan. I think you should be prepared to pay the face value of your ticket (I believe it may be \$431).^[20] Dicker is calling the Public Integrity Commission to check the guidelines. My advice, which Kiernan agrees with, is for you to pay for your ticket. [Johnson] is sending me the contact info at the Yankees to follow up with on this.
Thanks
-Peter

Leinung replied, "As I said, I'd be happy to pay my way." Kauffmann testified that, at some point thereafter that day, he told the Governor that Leinung was going to pay for his ticket.

G. Payment for Tickets for the Governor's Son and his Friend

At no point during the series of conversations on October 29 following Dicker's inquiry did the Governor or Johnson mention to Kauffmann that the Governor had previously written and brought to the game an \$850 check to pay for tickets for his son and his son's friend.

However, near the end of this series of conversations, after he was told that Leinung would pay for his ticket, the Governor told Kauffmann, in substance, that he would pay for the tickets used for his son and his son's friend. On this point, Kauffmann testified before

²⁰ The source of the "face value" information Kauffmann conveyed in this e-mail is not clear. The price of the tickets would have been \$431 each if the Yankees had applied a standard \$6.00 fee to the tickets. However, because the tickets that were provided to the Governor were tickets that had been returned to the Yankees by Major League Baseball, fees were not applied to those tickets, and so the price of each of the tickets in question, as reflected on the face of the tickets, was \$425.

Commission staff: “[i]n subsequent conversations with the Governor, he felt that he – it was appropriate for him to pay for his son and his son’s friend’s tickets . . . [and] that, in fact, he should pay for his son and his son’s friend’s ticket.” At another point in his Commission testimony, Kauffmann stated that the Governor said something along the lines of “I’ll go ahead and I’ll pay for my son and my son’s friend.” Kauffmann testified before the OAG:

At some point throughout one of these conversations [after Kauffmann informed the Governor that Leinung would be paying for his ticket], the Governor told me that he was paying for his son’s and his son’s friend’s ticket. . . .

It was a culmination of a series of conversations, and at some point towards the end of those discussions, the Governor told me he would be paying for his son and his son’s friend’s tickets.

In addition, according to Kauffmann’s testimony both before Commission staff and the OAG, at the end of the series of conversations that day regarding the tickets, after Kauffmann told the Governor that Leinung was paying, and after the Governor said he would pay for his son and his son’s friend, the Governor stated, for the first time, that he always intended to pay for those two tickets. As Kauffmann testified before the OAG, the Governor “specifically made a statement to me, ‘Peter, it was always my intention to pay for my son and my son’s friend. I was always going to pay for their tickets.’” Kauffmann testified that he told Dicker that the Governor would be paying for the tickets for his son and his son’s friend, but did not convey to him the Governor’s statement to Kauffmann that he always intended to pay for them.

While the Governor said that he would be paying for the tickets for his son and his son’s friend, the Governor maintained to Kauffmann that Johnson’s ticket need not be paid for.

Kauffmann’s testimony before Commission staff on this point was:

[The Governor] said that while he would attend in his official capacity with one staff member attending to assist him and that

that was consistent with his understanding, but that, in fact, he should pay for his son and his son's friend's ticket.

* * *

But my understanding at that point, it was after Mark Leinung had already sent in a check or however – had already determined he was going to pay, and then the Governor told me that he was going to pay for his son and his son's friend with the thought being that he was there in his official capacity, David Johnson was there as his assistant in an official capacity. The other tickets would be paid for, and that that was – this would meet the criteria laid out by counsel.

From 2:13 p.m. to 5:53 p.m. on October 29, telephone records show multiple calls from the New York City Executive Chamber office phone used by Johnson and his assistant to Brian Smith, Lonn Trost, and Irfan Kirimca at the Yankees. Smith, Trost, and Smith's assistant did not recall conversations with Executive Chamber staff on this day, but Kirimca recalled receiving a voicemail message from Johnson stating that the Governor wanted to pay for tickets, which Kirimca testified surprised him since he had understood previously that the Executive Chamber would not be paying for any tickets. According to Kirimca, when he called Johnson back later that day, Johnson stated that the Governor wanted to submit payment and Kirimca offered to take credit card information, but Johnson stated that the Governor wanted to pay by check. Although the Yankees do not typically accept payment for tickets by check, Kirimca told him to make the check payable to the Yankees and provided Johnson with mailing information. Kirimca also recalled telling Johnson during this conversation the price of the tickets that had been provided to the Governor.

The work diary of Johnson's assistant for October 29, 2009 contains the following notes that appear related to the above events:

Yankees ticket make check out to:
Irfan – [phone number]

...

[same phone number] reimburse 2 tickets

Irfan Kirimca, Snr Director Ticket
Yankee Stadium Operations
1 E. 161st St
Bronx, NY 10451 \$425 per tkt

Johnson's assistant testified that these notes represented information she received from Johnson. While she did not recall whether Johnson spoke to Kirimca or anyone from the Yankees on October 29, her diary appears to reflect information that Johnson obtained from Kirimca that day, consistent with Kirimca's testimony.

At 5:21 p.m. on October 29, 2009, Kauffmann e-mailed Leinung and wrote, "To wrap this up, I just told Fred Dicker (after verifying with the Gov) that you are paying for your ticket and always intended to pay for your ticket. [Johnson] will have the contact info for you to send a check for the face value, \$425." Leinung replied, "No problem. Will do[.]"

Also at 5:21 p.m. on October 29, Shorenstein e-mailed for review by Kauffmann and other staff suggested remarks for the Governor to make during a radio appearance the next day, including the suggestion: "If you are asked about whether [you] paid for your tickets, [you] should say that [you] were there in [your] capacity as Governor and as a guest of the team, but that [you] intend to pay for your son and his friend's ticket." Shorenstein testified that this proposed statement was true and was written after the Governor "decide[d] to pay for his son and his son's friend." Shorenstein believed that she likely received her information about the Governor's intentions from Kauffmann.

Also that afternoon, a cover letter was prepared for the Governor to send to the Yankees enclosing his check for the tickets. According to computer metadata, that document was created after 2 p.m. on October 29, 2009 by Johnson's assistant. She testified that she typed the letter based on language dictated to her by Johnson that she had noted in her work diary. E-mail traffic and metadata show that Johnson's assistant e-mailed the letter to the Governor's New York City assistant, who affixed the Governor's electronic signature to the letter and printed it on letterhead that evening after 6:00 p.m.

Johnson's assistant testified that, after e-mailing the draft letter to the Governor's New York City assistant, she received the original of the printed letter bearing the Governor's electronic signature, made a copy for her files, and gave the original to Johnson with an envelope. She did not see a check to be enclosed with the letter and did not know who, if anyone, actually mailed the letter. The letter that was mailed to the Yankees, which bore the date October 29, 2009, and was postmarked October 30, 2009, read: "Thank you for the invitation to attend the World Series 2009 Opening Game at Yankee Stadium. Please accept the enclosed check for the purchase of two tickets for my son [name] and his friend [name]. Looking forward to a successful win this season."

According to Kirimca, who received the letter, enclosed with it was a check for \$850 dated October 27, 2009 payable to "Irfan Kirimca."²¹ According to the Governor's Albany assistant, the text and signature on the check were written by Johnson. The OAG's comparison of the handwriting on the check with handwriting on other documents written by Johnson indicates that the handwriting on the entire check, including the signature, is Johnson's. The

²¹ As noted above, Kirimca testified that he had told Johnson on October 29 that any check submitted for ticket payment should be made payable to the New York Yankees.

Commission obtained a handwriting analysis of the check from a forensic document examiner, which concluded that the check was written and likely signed by Johnson.²²

H. Payment for Johnson's Ticket

Kauffmann testified that, some time after the Governor indicated that he would pay for the tickets for his son and his son's friend, Kauffmann was informed that Johnson would also pay for his ticket. While it is not clear precisely when Kauffmann learned this, evidence suggests that it was some time between the evening of Friday, October 30, 2009 and Monday, November 2, 2009.

At 6:39 p.m. on Friday, October 30, 2009, Kauffmann e-mailed members of the Governor's campaign staff that he was expecting a negative story in the New York Post regarding the Governor's attendance at the World Series, and that "[t]here may be a chronology of comments by me with at least 4 versions of whether or not we would pay or have to pay or are paying, etc." The anticipated story referenced by Kauffmann was published on the morning of Monday, November 2, 2009. That story set forth a chronology of changing statements made by Kauffmann with respect to the tickets, and indicated that Dicker learned from Kauffmann over the weekend that a fourth (and final) ticket was going to be paid for, suggesting that Kauffmann communicated to Dicker over the weekend that Johnson's ticket would be paid for. Also, on the morning of November 2, Kauffmann exchanged e-mails with a New York Times reporter regarding the tickets story. Around 10:00 a.m., Kauffmann informed that reporter that in addition to Leinung and the Governor paying for tickets, "Johnson paid for his own ticket."

Metadata shows that a cover letter from Johnson to the Yankees, which was ultimately sent to the Yankees enclosing Johnson's check for \$425 to pay for his ticket, was created on

²² Evidence adduced in the OAG's investigation demonstrated that Executive Chamber staff, including Johnson, on occasion wrote and signed the Governor's checks for him with his permission.

Monday, November 2, 2009, although both the cover letter and the check were dated October 30, 2009. Johnson's cover letter enclosing the check was postmarked November 7, 2009.²³

I. Executive Chamber Past Practices Regarding Attendance at Sporting Events

Evidence adduced in the OAG's investigation about Governor Paterson's attendance at other professional sporting events provides context for evaluating his testimony to Commission staff about the World Series game by revealing the lack of clear policies or practices at the Executive Chamber.

In April 2009, the Governor attended the opening day games at Citi Field and Yankee Stadium, each of which represented the first game played in a new stadium. In each instance, the Governor and his party did not pay for their tickets. After the World Series game and the press and Commission inquiries that followed it, the Governor and Johnson attended a New York Giants football game at Giants Stadium on December 6, 2009. Documents indicate that at Kauffmann's recommendation, the Governor paid for his party's tickets. In February 2010, Governor Paterson dropped the ceremonial "first puck" at the American Hockey League's ("AHL") first outdoor game, the Mirabito Outdoor Classic in Syracuse. The Governor, who did not stay for the game, appeared without a ticket, and other Executive Chamber staff who attended this game (other than security) purchased tickets for themselves and were reimbursed by the State in accordance with e-mailed instructions distributed by the Executive Chamber, discussed further below.

Governor Paterson testified before Commission staff that at some point between the April 2009 opening game at Yankee Stadium and the first game of the World Series, there was a

²³ Leinung's cover letter to the Yankees was dated November 2, 2009. Metadata shows that Leinung created and his assistant formatted the cover letter on November 2, the date that, according to Leinung, he received information from Johnson about where to send his payment. His letter, enclosing the check, was postmarked that same day.

change in the Executive Chamber's policy or protocol with regard to sports tickets. While he felt that a World Series ticket could have been provided free of charge to his son, he thought that it was "better politics" to pay for that ticket.

Evidence shows that Executive Chamber staff members at various levels were not aware of any policy in the Executive Chamber at the time of the World Series game regarding when and if Executive Chamber staff, including the Governor, had to pay for tickets to events they were attending in their official capacity. Nor did staff act in accordance with any set procedures regarding obtaining tickets for the Governor and his party to the World Series or the prior 2009 baseball games. The Executive Chamber was unable to produce to the OAG any policy or procedure manual elaborating upon such a policy, apart from materials that simply excerpted relevant portions of the Public Officers Law. Further, review of voluminous documents produced by the Executive Chamber revealed only a single internal e-mail message outlining a ticket policy, which was specific to the February 2010 attendance by the Governor at an AHL hockey game described above.

ANALYSIS, RECOMMENDATIONS, AND CONCLUSIONS

The Commission asked the OAG to investigate whether the Governor testified falsely before Commission staff, and whether the Governor or any other person prepared false documents. The OAG requested and obtained from the Governor authority under Executive Law Section 63(8) to review the public policies, practices, and procedures implicated in the matter, to guide improved action in the future. The Independent Counsel's analysis of the Governor's testimony, documents submitted to the Yankees, and policies and practices at the Executive Chamber is set forth below.

I. THE GOVERNOR'S TESTIMONY

The Governor was the first Executive Chamber witness called to testify in the Commission's investigation. He was examined under oath on February 24, 2010 by Commission staff at the Commission's Offices in Albany. The Governor was represented at his testimony by an Assistant Counsel from the Governor's Counsel's office in the Executive Chamber. A few minutes before the start of the Governor's testimony, the Assistant Counsel and Commission staff briefly discussed how the parties would handle the presentation of paper exhibits to the Governor during his testimony in light of the Governor's visual impairment, and determined that when paper exhibits were used, the Assistant Counsel would either read the exhibits to the Governor or give the Governor time to review them himself.²⁴ Immediately prior to his testimony, the Assistant Counsel described this proposed procedure to the Governor. During the testimony, the Assistant Counsel read paper exhibits aloud to the Governor; the Governor did not personally examine them. The Assistant Counsel's reading of documents marked as exhibits was "off the record," meaning it was not transcribed.²⁵

The Governor testified that it was his idea to attend the World Series – he was not invited by the Yankees. He testified that after appearing on a CNBC program at the same time as Yankees President Randy Levine, the Governor told Johnson to work with Kiernan to "make sure that the acquiring of the tickets was done correctly," and that he wanted to purchase tickets for his son and his son's friend to attend with him. Later, he asked Johnson if Deputy Director of State Operations Mark Leinung was available to attend the game as well since Leinung was knowledgeable about the Yankees. The Governor testified that he did not know how tickets

²⁴ Despite his visual impairment, the Governor is able to read documents at close range.

²⁵ The entire session was tape recorded, however, and the OAG has reviewed that recording.

were actually obtained for the game or who among those attending needed tickets, and that he did not have any conversations with Kiernan before the game about tickets.

The Governor testified that he believed that he did not have to pay for his ticket because he attended the game in his official capacity in that the game was significant to the people of the State of New York. The Governor further testified that it was his intent, prior to the game, that all tickets, aside from his own, would be paid for:

Q: And was it your intention that all other tickets would be paid for prior to the game?

A: Yes.

(Paterson Comm'n Tr. 3:18-20).

In connection with his statement that he intended, prior to the game, that all tickets other than his own be paid for, the Governor testified that, on the day after the game, he had sent the Yankees a check to pay for tickets for his son and his son's friend. Specifically, the Governor stated that he gave a check to his assistant to send to the Yankees.

Commission staff then marked as an exhibit a copy of the Governor's October 29, 2009 cover letter to the Yankees and the check that the Yankees received with that letter, and asked the Governor to review those documents.

The Assistant Counsel then read aloud to the Governor the text of the exhibits, including the text of the check. According to the audio recording of the proceeding, the Assistant Counsel described the exhibits off the record as follows:

Um, this is a letter to Irfan Kirimca who is the Senior Director of Ticket Operations at Yankee Stadium. The letter says "Dear Mr. Kirimca, Thank you for the invitation to attend the World Series 2009 opening game at Yankee Stadium. Please accept the enclosed check for the purchase of two tickets for my son Alex Paterson and his son – and his friend – Jeremy. Looking forward to a successful win this season." Um, and then the check is check number 911, dated October 27, 2009, for \$850, the

memo says payment for World Series 2009 Game One Alex and Jeremy. Um, it is endorsed and the endorsement is – doesn't appear to have a date, but it says received by registered mail on November 3, 2009. And it's postmarked – there it is – it's postmarked October 30, 2009, the letter.

Immediately thereafter, Commission staff proceeded to question the Governor concerning the check that was marked as an exhibit:

Q: And is this a copy of the check that you sent to the New York Yankees?

A: I would assume it is.

Q: And did you make this check out personally?

A: Yes.

Q: And how did you know to make it out to Mr. Kirimca?

A: That part of the check I left blank because I didn't know who it was going to.

Q: So when did you make out this check?

A: I made out the check whatever was the day of the first game of the World Series.

* * *

Q: So then why is this check dated October 27, 2009?

A: That may have been when I filled it out.

(Paterson Comm'n Tr. 5:9-19; 6:5-6).

Commission staff elicited further testimony from the Governor regarding the check at various times over the course of the approximately ninety-minute-long testimony as follows:

Q: So just so I'm clear, you filled out every other part of the check but the section that is "pay to the order of?"

A: That's my memory. I didn't know who to send the check to.

* * *

Q: And it's your testimony that you filled this out on the day of Game 1 of the World Series?

A: Right.

Q: Prior to going to the game?

A: Prior.

Q: And that's because it was your intention to pay for your son and your son's friend's ticket prior to the game?

A: I brought the check along in case we needed it to pay for it.

* * *

Q: Do you know whether this check was actually forwarded to the Yankees prior to attending Game 1?

A: It couldn't have been, because I had it during Game 1.

* * *

Q: Did you pay prior to [your son's friend's] attendance at Game 1?

A: Yes – well, I wrote the check before Game 1. I see that they didn't get it until November 3.

Q: So just so we're clear, you wrote the check out other than to whom it was going to be made to –

A: Right.

Q: – prior to attending Game 1 of the World Series?

A: Right.

Q: So you wrote out \$850 on the check?

A: Right.

Q: And how long did you walk around with that in your pocket?

A: I took it to the game and gave it to David Johnson.

Q: You gave it to Mr. Johnson at the game?

A: Right.

Q: Do you know how long he walked around with an unmade check for \$850 out?

A: He told me that – no, I actually don't know.

Q: So he didn't tell you anything?

A: Well, he told me he was going to try to – when we left the stadium, he said he was going to get it to them the next day.

Q: Do you know whether he got it to them the next day?

A: I don't know.

Q: Did you have any concerns with an unmade check for \$850 being carried around Yankee Stadium?

A: I didn't think anyone was going to steal it from me.

Q: It's your understanding that Mr. Johnson wrote out the name Irfan Kirimca on the check?

A: Right.

* * *

Q: Governor, you testified earlier that you had written out the check for your son and your son's friend's tickets for \$850?

A: Right.

Q: And that you left the "pay to the order" section blank?

A: Right.

Q: How did you know to make the check out for \$850?

A: Because I was told what the price of the tickets was.

Q: Who told you?

A: I really don't remember. I mean, I think I know, but I don't feel – I don't know.

Q: Was it Mr. Johnson?

A: It could have been, but I'm not sure now.

Q: When did he tell you?

A: I don't even know that he told me that.

* * *

Q: So how did it come about that you wrote a check for \$850?

A: I wrote the check at home and brought it to the game.

(Paterson Comm'n Tr. 6:19-22; 7:1-10; 7:23-8:1; 40:19-41:24; 42:3-19; 47:8-11).

The Governor also testified that he learned on the day after the game of an inquiry made to his office by New York Post reporter Fredric U. Dicker about the World Series game, and believed that his press office responded to the inquiry, but was not advised of the content of that response prior to it being sent to Dicker. Regarding payment for the tickets used by Johnson and Leinung, the Governor testified that he did not speak with Leinung about payment for his ticket, but learned at some point that Leinung paid for his ticket, and that, after publication of a November 2, 2009 newspaper article about the Governor's attendance at the game, he asked Johnson whether Johnson paid for his ticket, and Johnson told him that he had done so. The Governor also testified that he did not know if Johnson actually paid for his ticket.

Evidence adduced by the OAG's investigation indicates that the Governor's testimony that, prior to the game, he intended that all tickets besides his own would be paid for was inaccurate. Kauffmann's understanding from his initial series of conversations with the Governor and Johnson the morning after the game was that no one paid for the tickets and no one needed to pay. In subsequent conversations with Kauffmann, the Governor apparently decided

he would pay for the tickets for his son and his son's friend, but still maintained that Johnson's ticket need not be paid for, contrary to his testimony to the Commission he intended prior to the game that *all* tickets other than his own be paid for. The Governor's statement to Kauffmann at the end of that series of conversations, after Kauffmann told him that Leinung would pay, that he always intended to pay for his son and his son's friend, was inconsistent with the Governor's conduct and statements in response to Dicker's inquiry. Finally, aside from the Governor's testimony about his preparation of a check – discussed below – there is no evidence that any effort was made to pay for any tickets prior to the game.

In addition, evidence indicates that the Governor's testimony that, prior to the game, he wrote an \$850 check to pay for tickets for his son and his son's friend is also inaccurate. Although the OAG subpoenaed all relevant records, no check written personally by the Governor to the Yankees, partially prepared or otherwise, was produced to the OAG in the investigation. Neither the Governor nor Johnson mentioned to Kauffmann any check during their conversations following Dicker's inquiry. There is no evidence that the Governor knew the price of the tickets before the game. In fact, evidence indicates that no Executive Chamber staff had discussed with the Yankees paying for any tickets before October 29, and that Johnson called Kirimca on October 29, the day after the game, seeking information on the price of the tickets. Finally, based on the handwriting on the check, the check that was submitted to the Yankees was written by Johnson, and not the Governor.

The Independent Counsel notes, however, that the Governor testified regarding his preparation of a check only after the Commission marked the check submitted to the Yankees as an exhibit and entries on that check were read aloud to the visually impaired Governor during a break in the testimony. The Governor did not personally examine the check; his attention was

not directed to the fact that the check was not in his handwriting, which would have been obvious to the Governor had he examined the check. After this exchange, the Governor testified that he “assume[d]” the check marked as an exhibit was one that he sent to the Yankees, and only after that testified regarding his preparation of such a check. This defect in the proceeding created potential confusion in the Governor’s testimony concerning his preparation of a check.

As a general matter, to prove a charge of perjury – the applicable Penal Law – the evidence must establish that a witness has intentionally made a false statement that the witness did not believe to be true at the time. N.Y. Penal Law §§ 210.00(5), 210.15, 210.05.²⁶

It is an affirmative defense to perjury “that the defendant retracted [the] false statement in the course of the proceeding in which it was made before such false statement substantially affected the proceeding and before it became manifest that its falsity was or would be exposed.” N.Y. Penal Law § 210.25. The Governor had a window of opportunity to retract his testimony had he chosen to do so. Once the Commission issued its Notice of Reasonable Cause, which questioned the veracity of the Governor’s testimony approximately one week after he testified, the Governor’s opportunity to avail himself of the affirmative defense closed.

Thus, the evidence indicates at a minimum the above-described portions of the Governor’s testimony before Commission staff were inaccurate and misleading. Albany County District Attorney Soares, who received a simultaneous referral from the Commission as noted above, is currently reviewing this matter. The evidence developed in the OAG’s investigation under the Independent Counsel warrants consideration of possible criminal charges by the

²⁶ A person is guilty of perjury in the first degree, a Class D felony, when the person swears falsely and when the person’s false statement (a) consists of testimony, and (b) is material to the action, proceeding or matter in which it is made. N.Y. Penal Law § 210.15. A person is guilty of perjury in the third degree, an A misdemeanor, when the person swears falsely. N.Y. Penal Law § 210.05. For both crimes, to “swear falsely” means to “intentionally make[] a false statement which [the witness] does not believe to be true (a) while giving testimony.” N.Y. Penal Law § 210.00(5). (Perjury in the second degree regards false statements in a written instrument and is not relevant here).

District Attorney, who will make the ultimate decision regarding whether or not charges should be brought. Under New York law, the Albany County District Attorney has original and ultimate responsibility for prosecutorial decisions regarding crimes and offenses arising in Albany County. A multitude of factors may be considered by the District Attorney in his exercise of prosecutorial discretion regarding whether or not to pursue charges in this matter.

The Independent Counsel expects that, in conducting his independent review, the District Attorney will review this report, all of the evidence and potential defenses, and any other evidence he obtains. The OAG has provided investigative materials and information to the District Attorney to facilitate this review. The Independent Counsel has reserved for the District Attorney certain investigative decisions, in particular whether and how to seek the Governor's sworn testimony, so that the District Attorney has the opportunity to make these decisions in the context of the exercise of his prosecutorial discretion.

II. DOCUMENTS SUBMITTED TO THE YANKEES

With respect to the Commission's request that the OAG investigate any falsification of documents, the only documents about which there is evidence of possible falsity are two apparently backdated checks and an apparently backdated cover letter that were submitted to the Yankees to pay for tickets. Therefore, the Independent Counsel examined whether evidence was sufficient to warrant consideration of criminal charges related to falsification of documents based on either the Governor's check for \$850 dated October 27, or Johnson's check for \$425 and cover letter, both dated October 30.

A person is guilty of falsifying business records in the first degree, a class E felony, when, with intent to defraud, the person makes or causes a false entry in the business records of an enterprise, and his intent to defraud includes an intent to conceal the commission of another

crime. See N.Y. Penal Law § 175.10. When such a false entry is made with an intent to defraud, but without the intent to conceal the commission of another crime, a person is guilty of falsifying business records in the second degree, a class A misdemeanor. See N.Y. Penal Law § 175.05.

A. The Governor’s Check to the Yankees

Evidence, including analysis by a handwriting expert engaged by the Commission, indicates that Johnson wrote the Governor’s check for \$850 submitted to the Yankees.

Evidence indicates that it is unlikely that the Governor’s check was written on October 27, the date that appears on the check. On October 27, the Yankees had not yet confirmed whether they would even be providing the Governor with tickets to the game. The Governor and his Executive Chamber staff were likely unaware of the precise price of the Governor’s tickets on the 27th, and Johnson called Kirimca only on October 29 for information on the price and where to direct payment. In light of this evidence, it appears that the Governor’s check dated October 27 was actually written on October 29.

Backdating a check can constitute making a false entry in the business records of an enterprise. An “enterprise” is “any entity of one or more persons, corporate or otherwise, public or private, engaged in business, commercial, professional, industrial, eleemosynary, social, political or governmental activity.” N.Y. Penal Law § 175.00(1). A “business record” is “any writing or article . . . kept or maintained by an enterprise for the purpose of evidencing or reflecting its condition or activity.” N.Y. Penal Law § 175.00(2). A personal check is a record of an enterprise and inclusion on a check of a date other than the date on which a check is written can constitute making a false entry.

Evidence developed by the OAG with respect to this check, however, is insufficient to warrant consideration of criminal charges. The Executive Chamber assistant, who, at Johnson’s

direction prepared October 29 letter to the Yankees from the Governor which accompanied the October 27 check, had no knowledge of when, how, or by whom the check was prepared. No other witnesses who cooperated with the OAG knew or had reason to know the circumstances of the drafting of the Governor's check. Johnson declined to cooperate with the OAG's investigation. In addition, the check was submitted to the Yankees along with a properly dated cover letter and no effort was made to disguise the fact that the Governor's payment was actually submitted after the game.

Accordingly, although not binding on the District Attorney, the Independent Counsel finds that the evidence adduced by the OAG's investigation does not warrant consideration of a false business records charge with respect to the Governor's check to the Yankees.

B. Johnson's Check and Cover Letter to the Yankees

Johnson's check and cover letter to the Yankees were dated October 30. Evidence regarding Kauffmann's conversations with reporters, along with the metadata on Johnson's cover letter suggests that Johnson decided to pay for his World Series ticket between October 30 and November 2.

There is virtually no evidence regarding the circumstances of Johnson's preparation of his check. The assistants who worked with Johnson in the Executive Chamber had no information about his preparation of this check to the Yankees. Further, even if Johnson did backdate his check and letter, he did so from one date after the game (November 2) to another date after the game (October 30). Thus, any backdating would have been immaterial to whether Johnson paid or intended to pay before the game.

Accordingly, although not binding on the District Attorney, the Independent Counsel finds that the evidence adduced by the OAG's investigation does not warrant consideration of a false business records charge with respect to Johnson's check and cover letter to the Yankees.

III. POLICIES AND PRACTICES

The OAG's investigation revealed unclear and problematic policies at the Executive Chamber relating to ticket acquisition that warrant attention by the Executive Chamber. The Independent Counsel makes the following recommendations:

- The investigation revealed that responsibility in the Executive Chamber for requesting and obtaining tickets for the Governor and others to attend events was diffuse, allowing for multiple decision-makers and an ad hoc process for determining how tickets should be obtained and whether they would be paid for. Thus, the Executive Chamber should consider (i) centralizing responsibility for obtaining and accepting tickets to events the Governor is attending as part of his official duties, and (ii) institutionalizing an oversight role for Counsel's Office to determine the propriety of the Governor and his staff obtaining and accepting event tickets.
- Evidence shows a possible misunderstanding between the Executive Chamber and the Yankees as to whether initial contact between Yankees and Executive Chamber staff constituted an offer by the Yankees of complimentary tickets to post-season games, including to the first game of the World Series. The Executive Chamber should consider the adoption of policies and training to ensure that staff charged with fielding such inquiries have a sufficient understanding of the Public Officers Law relating to gifts to allow them to clarify

any such inquiries as needed, and refer matters implicating the Public Officers Law to Counsel's Office for review.

- There appears to have been a lack of clarity as to when the Governor or members of his staff were attending ticketed events in their official capacities, and when and whether this permitted them to attend for free. The Governor's Counsel should clarify and promulgate a clear definition of "official business" or "official capacity," including guidance on when, if ever, the Executive Chamber staff should request or accept event tickets without payment.