

February 15, 2012

Fritz Kraus  
9824 Taverner Rd.  
Wilton, CA 95693

Re: Your Request for Informal Assistance  
**Our File No. I-11-201**

Dear Mr. Krauss:

This letter is in response to your request for advice on provisions of the Political Reform Act (the “Act”).<sup>1</sup> Because the subject of your inquiry does not concern a specific non-governmental employment plan or decision, we treat your request as one for informal assistance.<sup>2</sup> This letter is based solely on the facts presented; the Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Nothing in this letter should be construed to evaluate any conduct that has already taken place. Please bear in mind also that our advice is limited to obligations arising under the Act, as explained further below; we do not decide the application, if any, of other bodies of law that may be pertinent to your circumstances.

### QUESTIONS

You have asked a series of questions relating to a variety of potential private-sector employment opportunities that you might accept either while remaining in state service, or upon your retirement.

### CONCLUSIONS

We offer general guidance on the Act’s post-governmental employment and conflict-of-interest provisions. Some of your questions cannot be answered by reference to provisions of the

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<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

<sup>2</sup> Informal assistance does not supply immunity conferred by formal written advice. (Regulation 18329(c)(3).)

Act. Thus, for example, questions on whether and to what extent your normal work schedule may be altered to permit an absence during normal duty hours to teach a seminar depends upon the terms and conditions of your particular state employment, which can best be answered by an appropriate official at the Military Department. Similarly, the Military Department should maintain a list of activities incompatible with your current employment obligations; you should consult an appropriate official at the Department to determine if any of the employment opportunities you are considering are incompatible with your present duties at the agency. There are also provisions of the Government Code (such as Government Code Section 1090), the Public Contracts Code, and common law conflict-of-interest rules that may limit or restrict your involvement in certain kinds of employment arrangements. Because the Commission may only provide assistance on provisions within the Act, we cannot advise you on restrictions contained in these other bodies of law. You should consult your agency's general counsel or the Attorney General's office to ensure that your plans are consistent with restrictions outside the purview of the Act.

## FACTS

You are currently employed by the State of California in the Military Department as a strategic planner, whose duties involve development of the Departmental Strategic Plan. The Adjutant General identifies key "result areas" and policy for the Military Department, and your job is to coordinate planning by all subordinate entities within the Military Department to provide a single, coherent plan to implement the goals identified by the Adjutant General. Your position is not listed in the Department's Conflict-of-Interest Code.<sup>3</sup>

You have been contacted regarding your availability to perform compensated services under contract with a private employer wishing to retain you to assist in the implementation of the Civil Support Task List in the Defense Readiness Reporting System (the "CTSL"). The Office of the Secretary of Defense and the National Guard Bureau are now negotiating a contract with this non-governmental vendor, which would be paid from federal funds to implement the CTSL, which you had a major role in designing. You have not taken part on either side of contract negotiations with the contractor, which has contacted you regarding your interest in assisting its implementation of the CTSL. You have not as yet responded to that inquiry other than to say that you must ensure that any decision you make must comply with any and all laws governing such employment.

You have two other possible employment opportunities, and rather than submit multiple requests, you describe these other employment possibilities for consideration here.

The California Emergency Management Agency (a state agency) is preparing a Request for Proposals for a consulting contract to assist the state in developing what you describe as "the California Emergency Functions." This contract would be funded by federal Homeland Security

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<sup>3</sup> As discussed below, from the nature of your job duties it appears that the Department's Conflict-of-Interest Code should be amended to designate your position. One of the Commission's Political Reform Consultants will contact your agency to discuss further this apparent need for amendment.

Grant funds awarded to the state to fund the project, which is closely related to the work you did in developing the CSTL. Responsible state and federal agencies have defined a number of “Emergency Functions” and you presently represent the Military Department on the Department of General Services working group for the state’s Emergency Function 7. State and federal Emergency Functions are not exactly the same, but your working group has made significant progress in coordinating state and federal roles in Emergency Function 7. The intent of the pending contract is to bring the other Emergency Functions to parity with the progress made on Emergency Function 7, largely as a result of your involvement in that working group. You have had no role in developing or negotiating this proposed contract.

In addition, you have recently been contacted regarding employment as an adjunct professor at an educational institution, teaching subjects that relate to your Doctorate, as well as technical classes such as Homeland Security and Strategic Planning. This employment would be part-time and primarily evenings and non-duty weekends, although it is possible that you might be required to teach classes during normal duty hours (such as a 2 or 3 hour class once a week for a semester). You assume that anything requiring absence during a normal duty day would require both advance approval and meticulous documentation, but you are uncertain on the details of your obligations to your state employer.

You have not received or discussed any specific job offer, but you seek guidance on your responsibilities as a state employee to ensure that any decisions or actions you may take on these outside employment opportunities will comply with your obligations to the state. More specifically, you seek advice relative to each of these opportunities under the following circumstances:

1. The offer of employment is made for limited, part-time consultation for a contractor’s implementation team, with all interactions and work accomplished after hours or while on leave from work. In such a case, you would (for example) respond to questions after work from home, using your personal email account.
2. You might accept an offer of full-time employment, if you conclude it is in the best interest of all parties for you to retire and accept a private-sector job. You ask what limitations and restrictions would apply in that case, and if there would be prohibitions on accepting some form of employment while on “terminal leave?”

## ANALYSIS

### **The Act’s Restrictions On Private-Sector Employment**

The Act does not impose a *per se* ban on non-governmental employment by a current state employee. But the Act does impose some restrictions on governmental decisionmaking by current state employees when a governmental decision concerns the employee’s non-governmental employer. Section 87407 prohibits state and local public officials from making, participating in making, or using an official position to influence governmental decisions

affecting persons with whom they are negotiating private-sector employment, or have any arrangement concerning such employment. (Section 87407; Regulation 18747.)<sup>4</sup>

The Act also contains two restrictions applicable to private-sector employment by persons who have already left state service. A one-year “revolving door” provision bars certain former state employees from communicating, for compensation, with their former agencies for the purpose of influencing certain administrative or legislative actions. (Section 87406; Regulation 18746.1.)

A permanent (“lifetime”) ban prohibits a former state employee from “switching sides” to participate, for compensation, in a proceeding involving the State of California if the proceeding is one in which the former state employee participated while employed by the state. (Sections 87401-87402; Regulation 18741.1.)

Finally, the Act bars public officials from making, participating in making, or using an official position to influence governmental decisions that have a reasonably foreseeable, material financial effect on the official’s economic interest in a non-governmental employer. We begin by discussing the rule governing a *current* state employee who is considering concurrent private-sector employment in the future.

### **Section 87407: Duties While Negotiating Prospective Employment**

Section 87407 provides:

“No public official, shall make, participate in making, or use his or her official position to influence, any governmental decision directly relating to any person with whom he or she is negotiating, or has any arrangement concerning, prospective employment.”

Under subdivision (c) of Regulation 18747, a person is a prospective employer of a public official if the official, either personally or through an agent, is negotiating or has an arrangement concerning prospective employment with that person. Regulation 18747(c) further defines “negotiating” and an “arrangement concerning prospective employment” as follows:

“(1) A public official is ‘negotiating’ employment when he or she interviews or discusses an offer of employment with an employer or his or her agent.

“(2) A public official has an ‘arrangement’ concerning prospective employment when he or she accepts an employer’s offer of employment.

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<sup>4</sup> The term “public official” is defined at Section 82048 to include “every member, officer, employee or consultant of a state or local government agency.” Thus, for purposes of the Act, you are a “public official.”

“(3) A public official is not “negotiating” or does not have an “arrangement” concerning prospective employment if he or she rejects or is rejected for employment.”

You state you have been contacted about potential non-governmental employment, but have not participated in developing or negotiating any proposed contracts between these prospective employers and your agency. So long as you avoid any role in “making,” “participating in making,” or “using your official position to influence a governmental decision,” you will not be in violation of Section 87407. These terms are broadly defined at Regulations 18702.1 through 18702.4 (copies enclosed). If you have particular questions regarding the scope of these definitions, or their potential application to specific actions you may be contemplating, you may call our toll-free advice line at 1-866-ASK-FPPC for a consultation over the telephone, during normal business hours Monday through Thursday.

We next review the two restrictions on private-sector employment that are imposed on former state employees *after* separation from state employment.

#### **Section 87406: The One-Year “Revolving Door” Ban.**

The one-year ban applies to any employee of a state administrative agency who holds a position that is designated *or should be* designated in the agency’s conflict-of-interest code. (Section 87406(d) (1); Regulation 18746.1 (a) (2).) A governmental employee *should be* designated in his or her agency’s conflict-of-interest code if the employee makes or participates in making governmental decisions that could have a reasonably foreseeable material effect on any financial interest. (Section 87302.)

Your account of the facts indicates that your position is one that *should have been* designated in the Department’s Conflict-of-Interest Code. You note that your position as Strategic Planner required you to formulate policies and procedures to coordinate planning by all of the Department’s subordinate entities (military and civilian) to facilitate a single, coherent approach to the emergency response goals identified by the Adjutant General. One factor that caused you to seek guidance on your duties under the Act is potential employment opportunities with contractors, whose interest in retaining your expertise is understandable because the vendors anticipate contracts involving the CTSL which you, as a state employee, had a major role in designing. We conclude that the one-year ban applies to you.

#### General Application of the One-Year Ban.

Section 87406(d)(1) of the Act provides, in pertinent part, that no designated employee of a state administrative agency, or an officer, employee or consultant of a state administrative agency:

“[F]or a period of one year after leaving office or employment, shall, for compensation, act as agent or attorney for, or otherwise represent, any

other person, by making any formal or informal appearance, or by making any oral or written communication, before any state administrative agency, or officer or employee thereof, for which he or she worked or represented during the 12 months before leaving office or employment, if the appearance or communication is made for the purpose of influencing administrative or legislative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. For purposes of this paragraph, an appearance before a state administrative agency does not include an appearance in a court of law, before an administrative law judge, or before the Workers' Compensation Appeals Board . . . .”

Regulation 18746.2(a) further provides:

“(a) For purposes of Government Code Section 87406, a formal or informal appearance or oral or written communication is for the purpose of influencing if it is made for the principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding. An appearance or communication includes, but is not limited to, conversing by telephone or in person, corresponding with in writing or by electronic transmission, attending a meeting, and delivering or sending any communication.”

You have explained that you were not required under the Military Department's Conflict-of-Interest Code to file a Form 700 "Statement of Economic Interests," but you were of course an "employee" of the Military Department, and it appears from your account of your duties and accomplishments at the Military Department that your position required a great deal of professional judgment and expertise, leading us to believe that your position should have been designated under the Department's Code. We conclude that your post-governmental employment activities would be limited as specified by Section 87406.

#### Communications Covered by the One-Year Ban.

Regulation 18746.1(b) outlines the circumstances when the prohibitions of Section 87406 will apply. Under this regulation, a former official covered by the one-year ban is prohibited from making an appearance or communication if all of the following apply:

- “(1) The official has left his or her state office or employment, which means he or she has either permanently left state service or is on a leave of absence.
- “(2) The appearance or communication is made within 12 months after leaving state office or employment.
- “(3) The public official is compensated, or promised compensation, for the appearance or communication. However, a payment made for necessary travel,

meals, and accommodations received directly in connection with voluntary services is not prohibited or limited by this section.

“(4) The appearance or communication is made on behalf of any person as an agent, attorney, or representative of that person. An appearance or communication made by a public official solely to represent his or her personal interests, as defined in 2 Cal. Code Regs., Section 18702.4, subdivision (b)(1), is not prohibited or limited by this section.

“(5) The appearance or communication is made for the purpose of influencing, as defined in 2 Cal. Code Regs. Section 18746.2, any legislative or administrative action, or any discretionary act involving the issuance, amendment, awarding, or revocation of a permit, license, grant or contract, or the sale or purchase of goods or property.

“(A) Services performed to administer, implement, or fulfill the requirements of an existing permit, license, grant, contract, or sale agreement may be excluded from the prohibitions of this regulation, provided the services do not involve the issuance, amendment, awarding, or revocation of any of these actions or proceedings . . .

“(6) The appearance or communication is made before any officer or employee of any of the following:

“(A) Any state administrative agency that the public official worked for or represented during the 12 months before leaving state office or employment . . .

“(B) Any state administrative agency which budget, personnel, and other operations are subject to the direction and control of any agency described in subdivision (b)(6)(A) . . .

“(C) Any state administrative agency subject to the direction and control of the Governor, if the official was a designated employee of the Governor’s office during the 12 months before leaving state office or employment.”

Communications restricted by the one-year ban include any formal or informal appearance or oral or written communication made to influence legislative or administrative action or any action on a proceeding. (Section 87406(d)(1).) These communications include, but are not limited to, conversing directly or by telephone, corresponding by writing or e-mail, attending a meeting, and delivering or sending any communication. (Regulation 18746.2(a).)

A communication is considered to be for the purpose of influencing legislative or administrative action “if it is made for the principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding.”<sup>5</sup> (Regulation 18746.2(a).)

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<sup>5</sup> “Legislative action” is defined at Section 82037 to mean “the drafting, introduction, consideration, modification, enactment or defeat of any bill, resolution, amendment, report, nomination or other matter by the Legislature or by either house or any committee, subcommittee, joint or select committee thereof, or by a member or employee of the Legislature acting in his official capacity. “Legislative action” also means the action of the Governor in approving or vetoing any bill.” Section 82002(a) provides that “‘Administrative action’ means the

Certain communications are *not* restricted under the one-year ban. A communication is not subject to the one-year ban when the former official:

“(1) Participates as a panelist or formal speaker at a conference or similar public event for educational purposes or to disseminate research and the subject matter does not pertain to a specific action or proceeding;

“(2) Attends a general informational meeting, seminar, or similar event;

“(3) Requests information concerning any matter of public record; or

“(4) Communicates with the press.” (Regulation 18746.2(b)(1)-(4).)

Thus, the one-year ban does not prevent a former official from seeking information generally available to the public about agency business from a former state employer or other state agencies. Nor would it bar attending informational meetings regarding existing laws, regulations, or policies, so long as the former official does not attempt to influence legislative or administrative actions by his or her former agency. Social conversations with employees of the former agency that are not aimed at influencing its administrative or legislative actions are not prohibited by the ban. (*Tobias* Advice Letter, No. A-96-089.) (Section 87406(d)(1).)

Whether a particular meeting or conversation is for the purpose of influencing administrative or legislative action or a specific proceeding (as defined by Regulation 18746.2) depends on the facts of each case. For instance, if an ex-employee attends a large public meeting with many other persons, where there are many topics on the agenda, it may be reasonable to infer that the ex-employee’s attendance is not for the purpose of influencing the agency’s action. Conversely, where there is a small meeting to discuss a particular administrative or legislative action, or other specific action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property (Section 87406(d)), it may more readily be inferred that the former employee’s presence at the meeting is intended to influence agency action. (*Ramirez* Advice Letter, No. A-99-300.)<sup>6</sup>

Similarly, Regulation 18746.1(b)(5)(A) provides that performing services to administer, implement, or fulfill the requirements of an existing permit, license, grant, contract, or sale agreement are not considered appearances or communications prohibited under Section 87406, so long as you do not influence other administrative or legislative action, or the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.

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proposal, drafting, development, consideration, amendment, enactment, or defeat by any state agency of any rule, regulation, or other action in any ratemaking proceeding or any quasi-legislative proceeding, which shall include any proceeding governed by Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2.

<sup>6</sup> Further information is provided in the enclosed fact sheet prepared by the Commission to address common questions associated with post-employment restrictions.

To summarize, for twelve months after the effective date of your separation from the Military Department,<sup>7</sup> you may not make such a communication for the purpose of influencing administrative or legislative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. The one-year ban does not affect your communications with state agencies that are *not* described in Section 87406(d)(1) or in Regulation 184765.1.

### **The Permanent Ban on “Switching Sides.”**

This *lifetime* ban prohibits a former state employee from “switching sides” and participating, for compensation, in a specific proceeding involving the State of California, or assisting others in the proceeding, if the proceeding is one in which the former state employee participated while employed by the state. (See Sections 87401-87402; Regulation 18741.1.)

The permanent ban is a lifetime ban applicable to any judicial, quasi-judicial, or other proceeding in which you participated while employed as a state administrative official. “Judicial, quasi-judicial or other proceeding” means any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency . . .” (Section 87400(c).)

An official has “participated” in such a proceeding if he or she took part in the proceeding “personally, and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation, or use of confidential information . . .” (Section 87400(d).)

Importantly, the permanent ban does not apply to a “new” proceeding even in cases where the new proceeding is related to or grows out of a prior proceeding in which the official had participated. A “new” proceeding *not* subject to the permanent ban typically involves different parties, subject matter, or circumstances that differ from those involved in previous proceedings. (*Rist* Advice Letter, No. A-04-187; also see *Donovan* Advice Letter, No. I-03-119.)

New contracts let<sup>7</sup> by the employee’s former agency, in which the former employee did not participate, are considered new proceedings. (*Leslie* Advice Letter, No. I-89-649.) A “new” contract is one based on new consideration and new terms, even if it involves the same parties. (*Ferber* Advice Letter, No. I-99-104; *Anderson* Advice Letter, No. A-98-159.) In addition, the application, drafting, and the award of a contract, license, or approval is considered a proceeding separate from the monitoring and performance of the contract, license, or approval. (*Anderson, supra*; *Blonien* Advice Letter, No. A-89-463.)

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<sup>7</sup> The “effective date of separation” is the date on which your employment by the State of California has ended. You have *not* reached the effective date of separation during any period of “terminal leave” to exhaust unused vacation time, leave, sick days or similar time-credits.

Section 87402 prohibits former officials from being paid to “aid, advise, counsel, consult or assist in representing” any other person in any proceeding in which the official would be prohibited from appearing under Section 87401. Thus the permanent ban extends not only to appearances before a former agency, but to “switching sides” generally. In short, it prohibits any form of paid “behind the scenes” consultation or assistance.

As we understand your account of the facts, it does not appear that the permanent ban on switching sides will bar you from accepting the employment you describe, which involve either “new” contracts in which you had no involvement or (in the case of employment to teach in an educational institution) no agency contract or other proceeding is involved.

### **The Act’s Conflict-of-Interest Provisions.**

The Act’s conflict-of-interest rules apply to involvement in agency decisionmaking during the course of state employment. We include the Commission pamphlet “Can I Vote” to explain in more detail how and when the Act’s conflict-of-interest rules might apply to you. We treat this area for the sake of completeness, although your account of the facts does not suggest that these rules would prove a barrier to the employment opportunities you have described to us.

The Act’s conflict-of-interest laws bar a public official from making, participating in making, or using his or her official position in any way to influence a governmental decision in which the official knows, or has reason to know, that he or she has a “financial interest.” (Section 87100.) Section 87103 provides that a public official has a “financial interest” in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the official’s economic interests.

Private-sector employment does not constitute a *per se* conflict of interest under the Act. A conflict of interest as defined by the Act can only arise when a public official is involved in a governmental decision that would have a reasonably foreseeable, material financial effect on one or more of an official’s economic interests. Concurrent private sector employment simply provides an official with an additional economic interest that could give rise to conflicts of interest in particular governmental decisions.<sup>8</sup>

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<sup>8</sup> A *former* governmental employee does not have governmental decisionmaking authority that could give rise to a conflict of interest at that term is used in the Act.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini  
General Counsel

By: Lawrence T. Woodlock  
Senior Counsel, Legal Division

LTW:jgl

Enclosures