

March 5, 2012

Neal Fishman
127 Kimberly Way
Petaluma, CA 94952

Re: Your Request for Advice
Our File No. I-12-027

Dear Mr. Fishman:

This letter responds to your request for advice regarding the post-governmental employment provisions of the Political Reform Act (the "Act").¹

This letter is based on the facts presented in your request. The Commission does not act as a finder of fact when issuing advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Our advice is applicable only to the extent that the facts provided to us are correct and all material facts have been provided.

Additionally, our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other post-governmental employment laws such as Public Contract Code Section 10411.

Because your question is general in nature and does not refer to any specific appearance before or communication with your former state administrative agency, we are treating your request as one for informal assistance.²

QUESTION

May you work with a private consulting firm that wishes to make a proposal regarding a program establishing a Dungeness Crab Task Force and developing rules and regulations for a trap limit program when you worked on a similar project while in state service and drafted legislation that reestablished the project?

¹ 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.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

CONCLUSION

The one-year ban has expired, and it will no longer restrict your appearances before or communications with your former agency. With regard to the permanent ban, under these facts, the drafting of legislation would not be considered a *judicial, quasi-judicial, or other proceeding* because it does not involve a 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.

Furthermore, because the task force that you worked on as a state employee dissolved due to a sunset provision, the reestablishment of a similar task force via new legislation would be a proceeding separate and distinct from the proceeding in which you previously participated. Therefore, you are not barred by the Act from assisting any person including a private consulting firm that wishes to bid on the project.

FACTS

You retired as Deputy Executive Officer (CEA II) from the State Coastal Conservancy (“Conservancy”) in November 2010. One of your duties was to oversee the work of the California Ocean Protection Council (“OPC”) and its staff. You also worked directly on a project to develop a Dungeness Crab Task Force consisting of crab fishermen, processors, nongovernmental organizations, and Department of Fish and Game staff. The work was the result of previous legislation.

You facilitated several meetings of the task force and wrote legislation establishing a trap limit program based on its work. The legislation did not pass and the task force dissolved due to a sunset provision.

In 2011, new legislation was introduced based on the previous drafts with some modifications. It reestablished the task force and established a trap limit program. You assisted in the drafting of this legislation on a volunteer basis for State Senator Noreen Evans. You did not receive compensation of any kind for this work.

The bill passed and became law on January 1, 2012. The legislation assumes that the OPC will hire a facilitator and other staff to assist in working with the Department of Fish and Game and the reestablished task force to develop rules and regulations for the trap limit program and to monitor its results.

The Conservancy has put out a Request for Proposal (“RFP”) for such services. You have been in touch with a private consulting firm that wishes to make a proposal to the Conservancy and have offered your assistance as a sub-contractor, pending your request with our agency.

You wish to know whether you may work on any aspect of this program, and if so, would you be limited in any significant ways (i.e. direct communications with the Conservancy or OPC or their staff members)?

ANALYSIS

Officials who leave state service are subject to two types of post-governmental employment provisions under the Act, colloquially known as the “revolving door” prohibitions. We discuss your question under each of these provisions.

- **One-Year Ban:** The “one-year ban” prohibits a state employee from appearing before or communicating with, for compensation, his or her former agency for the purpose of influencing certain administrative or legislative action or influencing certain proceedings. (See Section 87406; Regulation 18746.1.)

The one-year ban applies only to appearances or communications made within 12 months of leaving state office or employment and made before or with an agency the official worked for or represented (or an agency under the budgetary or appointive control of the agency the official worked for or represented) during the 12 months before leaving state office or employment. (Regulation 18746.1(b)(2) and (b)(6).)

Based on the facts you have provided, you left your position with the Conservancy 14 months ago in November 2010. Accordingly, the one-year ban has expired, and your appearances before or communications with the Conservancy are restricted only if they fall under the permanent ban as described below.

- **Permanent Ban:** The “permanent ban” prohibits a former state employee from “switching sides” and participating, for compensation, in any 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 and applies to any *judicial, quasi-judicial, or other proceeding* in which you participated while you served 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).) Additionally, an official is considered to have “participated” in 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).)

“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, a different subject matter, or different factual issues from those considered in previous proceedings.” (*Rist* Advice Letter, No. A-04-187.) New contracts with 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 that is 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 awarding of a contract, license, or approval is considered to be a proceeding separate from the monitoring and performance of the contract, license, or approval. (*Anderson, supra; Blonien* Advice Letter, No. A-89-463.)

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, you helped draft new legislation to reestablish a Dungeness Crab Task Force and establish a trap limit program – the type of program that you were in charge of overseeing as a deputy executive office with your former state agency.

Under these facts, the drafting of this legislation would not be considered a *judicial, quasi-judicial, or other proceeding* because it does not involve a 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.

Furthermore, because the task force that you worked on as a state employee dissolved due to a sunset provision, the reestablishment of a similar task force via new legislation to draft a new bill would result in a new “proceeding.” If you were not compensated for your post-retirement assistance in drafting the legislation that has now become law, you would also not be subject to the permanent ban because your services were not “for compensation.” Therefore, you are not barred by the Act assisting any person including a private consulting firm that wishes to bid on the RFP.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: Emelyn Rodriguez
Counsel, Legal Division

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