

June 28, 2012

Jonathan Tapping  
5720 Thames Way  
Carmichael, CA 95608

Re: Your Request for Informal Assistance  
**Our File No. I-12-082**

Dear Mr. Tapping:

This letter responds to your request for advice regarding the revolving door provisions of the Political Reform Act (the “Act”).<sup>1</sup> This letter should not be construed as assistance on any conduct that may have already taken place. (See Regulation 18329(b)(8)(A) and (c)(4)(A).) In addition, this letter is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Because your question is general in nature, we are treating your request as one for informal assistance.<sup>2</sup>

Please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other laws that may apply including but not limited to Government Code Section 1090 or the post-governmental employment restrictions of Public Contract Code Section 10411.

### QUESTION

What restrictions would the Act’s revolving door provisions have on your proposed employment if you leave your position as a Principal Transportation Engineer with the California Department of Transportation (“Caltrans”) and accept a position as Chief Technical Officer (“CTO”) with a private company, Golden Link Concessionaire (“GLC”), working on a contract between GLC and Caltrans relating to the Presidio Parkway Public-Private Partnership (the “Presidio Parkway Project”)?

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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 provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

## CONCLUSION

1. While you indicate that you have not participated in the Presidio Parkway Project as a state employee, we caution that, as explained below, Section 87407 may apply if you take part in a decision as an employee of Caltrans that directly relates to GLC after negotiating or making an arrangement regarding prospective employment with GLC.

2. The permanent ban is a lifetime ban that also applies to former state employees. Under this ban, you are permanently prohibited from participating in a judicial or quasi-judicial proceeding involving the State of California, or assisting others in the proceeding for compensation if you previously participated in the proceeding as a state officer or employee. However, because you have not previously participated in any proceeding involving the GLC or its contract with Caltrans regarding the Presidio Parkway Project as a state employee, the permanent ban does not apply to that project. However, you should be aware of any other projects that you worked on at Caltrans that may subject you to the permanent ban.

3. Additionally, the one-year ban prohibits you, for compensation, from making an appearance or communication before Caltrans in representation of another person for one year after you leave the agency, if the communication or appearance is for the purpose of influencing 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.” Based upon the facts you have provided, the one-year ban prohibits you from attending the weekly meetings involving Caltrans to the extent that you engage in discussions: (i) of the amendment of the terms of the Presidio Parkway Project contract or (ii) that are likely to result in more than a de minimis change in the services or goods provided by GLC as originally contemplated by Caltrans under the contract. Nonetheless, you are not prohibited from giving advice to GLC “behind the scenes” and may advise GLC or GLC employees so long as you are not identified as the source of any information conveyed to Caltrans.

## FACTS

You are currently working as a Principal Transportation Engineer with Caltrans on the San-Francisco Oakland Bay Bridge Project. During your 28 years with Caltrans, you have also served as the San Francisco-Oakland Bay Bridge Project Risk Management Coordinator, the Toll Bridge Program Construction Coordinator, the Chief of the Office of Risk Management, and the Division of Construction Innovative Contracting Specialist. In these positions, you have managed the development, implementation, and maintenance of a systematic and comprehensive approach of planning for, identifying, analyzing, responding to, and monitoring project risks on the Bay Bridge project; promoted and counseled the Toll Bridge Program regarding construction and design program policy; managed the development, implementation, and maintenance of statewide policy and procedure with respect to construction risk management; and assessed and coordinated the potential delivery of various methods of innovative contracting and project

delivery mechanisms. You are currently a designated official under Caltrans' Conflict of Interest Code and have filed a Form 700 yearly since 1998.

You are considering leaving California state service and accepting the CTO position with GLC on the Presidio Parkway Project. GLC is newly established and jointly owned by Meridiam Infrastructure ("Meridiam") and HOCHTIEF PPP Solutions North America Inc. ("HOCHTIEF"). GLC is a special purpose company formed strictly to carry out and administer the contract for the Presidio Parkway Project. GLC will not pursue any new work or bid for further contracts with Caltrans.

The general duties of the CTO include directing and carrying out all the technical and operational activities of GLC in close coordination with GLC's Chief Executive Officer (the "CEO"). The CTO performs services to administer, implement and fulfill the requirements under the existing Presidio Parkway Project. The CTO also monitors contractual compliance between GLC and its design-build and operations and maintenance contractors.

During your first year of potential employment as CTO, you do not plan to attend technical dispute review board meetings, hearing activities involving Caltrans, or negotiate contract change orders, disputes, and claims involving Caltrans. However, you may provide oral or written advice with respect to such matters to the CEO and GLC and are aware that these activities could result in amendments or modifications to the Presidio Parkway Project contract.

As CTO you would also like to attend weekly meetings with Caltrans regarding project status, schedule issues, and performance monitoring. Besides Caltrans, these meetings will include senior members of GLC and GLC's contractors. During these meetings you would like to represent GLC, along with the CEO, and report to Caltrans on technical matters pertinent to carrying out the contract, such as construction quality and performance issues. As CTO, your attendance at weekly meetings is intended to facilitate communications between the various parties with a goal of resolving any project issues.

## **ANALYSIS**

Under the Act, public officials who leave state service are subject to two types of post-governmental employment provisions known as the permanent and one-year bans. (See Sections 87401, 87402 and 87406; Regulations 18741.1 and 18746.1) In addition, Section 87407 prohibits certain state and local officials from making, participating in making, or using their official position to influence decisions affecting persons with whom they are negotiating employment or have any arrangement concerning employment. (See Regulation 18747.) Colloquially, these provisions are known as the "revolving door" prohibitions.

## 1. Negotiating Prospective Employment

The Act and regulations contemplate that a public official may negotiate and accept an offer of future employment before leaving his or her current state position.<sup>3</sup> However, the Act is designed to ensure that an official does not use his or her state government position to make any decisions that unduly benefit the firm that is hiring the official. Section 87407, the ban against influencing prospective employment, states:

“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.”

“A public official is ‘negotiating’ employment when he or she interviews or discusses an offer of employment with [a potential] employer or his or her agent.” (Regulation 18747(c)(1).) The Commission has construed the scheduling, conduct, and follow-up to an interview as one continuous process falling under the definition of “negotiating” employment. (*Bonner* Advice Letter, No. I-98-287.) However, the mere act of sending a resume or application to a specific entity has not been considered “negotiating.” Similarly, entertaining informal inquiries about your future plans and receiving expressions of general interest in discussing potential employment opportunities at some point in the future is not considered “negotiating.” (*Ibid.*)

“A public official has an ‘arrangement’ concerning prospective employment when he or she accepts an employer’s offer of employment.” (Regulation 18747(c)(2).)

Your question to the Commission is premised on the possibility of accepting a position as the CTO of GLC. However, if you have “negotiated” prospective employment or have made an “arrangement” regarding prospective employment with GLC as discussed above, you are prohibited pursuant to Section 87407 from making, participating in the making, or using your official position with Caltrans to influence any governmental decisions “directly relating” to GLC. A decision “directly relates” to a prospective employer when:

1. The prospective employer initiates a proceeding in which the decision will be made by filing an application, claim, appeal or similar request;
2. The prospective employer is a named party in, or is the subject of,<sup>4</sup> a proceeding in which the decision will be made; or

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<sup>3</sup> The term “public official” is defined in Section 82048 as “every member, officer, employee or consultant of a state or local government agency.” As an employee of Caltrans, you are a public official under the Act.

<sup>4</sup> A person is the subject of the proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the prospective employer. (See Regulation 18704.1(a)(2).)

3. It is reasonably foreseeable that the governmental decision will have a material financial effect on the prospective employer.<sup>5</sup> (See Regulations 18704.1 and 18705.1; Regulation 18747.)

While you have indicated that you did not participate in the Presidio Parkway Project, we caution that Section 87407 may apply if you take part in a decision as an employee of Caltrans that directly relates to GLC after negotiating or making an arrangement regarding prospective employment. If you need additional advice regarding prospective employer provisions you should seek additional advice providing the details of the particular proceeding.

## **2. Post-Governmental Employment Provisions**

### *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. (Sections 87401 and 87402; Regulation 18741.1.) The permanent ban applies when an official has permanently left or takes a leave of absence from any particular office or employment. (Regulation 18741.1(a)(1).)<sup>6</sup>

The permanent ban is a lifetime ban and applies to any formal or informal appearance or any oral or written communication -- or aiding, advising, counseling, consulting, or assisting in representing any other person, other than the State of California, in an appearance or communication -- made with the intent to influence 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).) 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

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<sup>5</sup> The financial effect of a decision on a prospective employer is material if the effect meets the materiality thresholds established under Regulation 18705.1(c) for a business entity, Regulation 18705.3(b)(2) for a nonprofit organization, or Regulation 18705.3(b)(3) for an individual. (Regulation 18747(b)(2).)

<sup>6</sup> For purposes of the permanent ban, “[t]he date on which an official permanently leaves office or employment or takes a leave of absence is the date on which the official is no longer authorized to perform the duties of the office or employment, and the official stops performing those duties, even if the official continues to receive compensation for accrued leave credits.” (Regulation 18746.4(a)(1).)

different subject matter, or different factual issues from those considered in previous proceedings.” (*Rist* Advice Letter, No. A-04-187; also see *Donovan* Advice Letter, No. I-03-119.) 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.)

Upon leaving your position with Caltrans, you are subject to the permanent ban. However, the permanent ban only applies to proceeding in which you previously participated, and you have indicated that you did not participate in the Presidio Parkway Project. Therefore, because you have not previously participated in any proceeding involving the GLC or its contract with Caltrans regarding the Presidio Parkway Project as a state employee, the permanent ban does not apply to that project. However, you should be aware of any other projects that you worked on at Caltrans that may subject you to the permanent ban. If you need further assistance determining whether any of your actions as a Caltrans employee would be considered previous participation in a proceeding involving either GLC or its contract with Caltrans regarding the Presidio Park Project, or any other matter, you should seek additional advice providing the details of the particular proceeding.

### *One-Year Ban*

The “one-year ban” prohibits a former state employee from making, for compensation, any formal or informal appearance, or making any oral or written communication, before his or her former agency for the purpose of influencing any administrative or legislative actions 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. (See Section 87406; Regulation 18746.1.)

The one-year ban applies to any employee of a state administrative agency who held 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)(4).)<sup>7</sup> The ban applies for twelve months from the date the employee permanently leaves state office or employment.<sup>8</sup> While in effect, the one-year ban applies only when a former employee or official is being compensated for his or her

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<sup>7</sup> 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 have a reasonably foreseeable material effect on any financial interest. (Section 87302.)

<sup>8</sup> For purposes of the one-year ban, the date on which an official permanently leaves office or employment is the date on which the official is no longer authorized to perform the duties of that office or employment, and stops performing those duties. A person shall not be deemed to have left office permanently because he or she is on a leave of absence or serves as an intermittent employee. However, a person shall be deemed to have left office permanently if the person merely receives compensation for accrued leave credits. (Regulation 18746.4(b).)

appearances or communications on behalf of any person as an agent, attorney, or representative of that person. (Regulation 18746.1(b)(3) and (4).)

In contrast to the permanent ban, which only applies to “judicial or quasi-judicial” proceedings, the one-year ban applies to “any appearance or communication made for the purpose of influencing administrative or legislative action<sup>9</sup> 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.” (Regulation 18746.1(b)(5).) An appearance or 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.” (Regulation 18746.2.)

Finally, appearances and communications are prohibited only if they are (1) before a state agency that the public official worked for or represented; (2) before a state agency “which budget, personnel, and other operations” are subject to the control of a state agency the public official worked for or represented; or (3) before any state agency subject to the direction and control of the Governor, if the official was a designated employee of the Governor’s office during the twelve months before leaving state office or employment. (Regulation 18746.1(b)(6).)

You are a designated employee under Caltrans’ Conflict of Interest Code. Should you leave Caltrans, your post-employment activities are restricted under the one-year ban for 12 months from the date you permanently leave. As specifically relating to your request, you are prohibited from making an appearance or communication before Caltrans, in representation of GLC for the purpose of influencing GLC’s contract with Caltrans.

As discussed above, the one-year ban applies to appearance or communication before your former agency. An appearance or communication includes, but is not limited to, conversing by telephone or in person, corresponding in writing or by electronic transmission, attending a meeting, and delivering or sending any communication “for the purpose of influencing administrative or legislative action, or any discretionary action to influence 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.” (Regulations 18746.1(b)(5)(C))

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<sup>9</sup> For purposes of Section 87406, the Act defines “administrative action” and “legislative action” as the following:

“Administrative action’ means the 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 . . .” (Section 82002(a).)

“Legislative action’ means 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 82037.)

and 18746.2(a)). The prohibition on making appearances or having written or oral communications with your former agency, its officers and employees is broadly construed. We have advised that a former state official makes a formal or informal appearance where the former official is identified in connection with a communication. (*Thomas* Advice Letter, No. A-05-106; *Harrison* Advice Letter, No. A-92-289.) We have advised that identification of a former official in materials submitted to a former agency is sufficient to constitute an appearance or communication. (*Roberts* Advice Letter, No. A-02-190.). On the other hand, advising a person, for compensation, on the procedural requirements, plans, or policies of Caltrans would not be a prohibited “appearance” or “communication” under Section 87406 so long as you are not identified in connection with your new employer’s efforts to influence the Department. (*Harrison*, *supra*; *Perry* Advice Letter, No. A-94-004.)

Based upon the facts you have provided, you anticipate providing oral and written advice to the CEO and GLC that may lead to the amendment or modification of the Presidio Parkway Project contract. In providing advice to the CEO and GLC, the one-year ban does not restrict you from assisting GLC from behind the scenes. However, we caution that should your advice be conveyed to Caltrans in an effort to influence GLC’s contract with Caltrans, you may not be identified in any manner as the source of the information.

Additionally, you indicate that you anticipate attending weekly meetings between Caltrans, GLC, and GLC’s contractors and that your attendance at these meetings is intended to “facilitate communication” between the parties in order to resolve issues regarding the Presidio Parkway Project contract. While the one-year ban does not strictly prohibit your attendance at these meetings, the ban does apply if your attendance is for the purpose of influencing the amendment or revocation of GLC’s existent contract with Caltrans or the awarding or issuance of a new contract. *In this regard, your participation and attendance is prohibited if discussions during any specific meeting turn to the amendment of the terms of the Presidio Parkway Project contract or if the discussions are likely to result in more than a de minimis change in the services or goods provided under the contract.*

The one-year ban does not prohibit your participation or attendance at weekly meetings if your attendance is limited to “services performed to administer, implement or fulfill” the existing requirements under the contract. (Regulation 18746.1(c).) For example, while you are not prohibited from seeking Caltrans’ clarification of existing contract terms during a weekly meeting, you are strictly prohibited from discussing proposed amendments of the terms of the contract. Please note this prohibition extends to discussions not labeled as amendment discussions but are likely to result in more than a de minimis change in the services or goods provided by GLC as originally contemplated by Caltrans under the Presidio Parkway Project contract.

At this time, the question of whether your services during any specific meeting are meant to influence the amendment or revocation of GLC’s contract with Caltrans, and are therefore prohibited, is a factual determination that can only be made after consideration of the nature of the specific discussion. Should you need additional assistance determining whether you are

prohibited from any particular discussion during a weekly meeting, you should seek additional advice providing a full description of the anticipated discussion.

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

Sincerely,

Zackery P. Morazzini  
General Counsel

By: Keisha O. White  
Legal Intern, Legal Division

KOW:jgl

## LEGAL DIVISION ASSIGNMENT SHEET

<b>Tracking Number:</b>	12146
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ITEM DESCRIPTION			
Advice Letter No.	12-082	Requestor	Tapping, Jonathan
Regulation Project No.			
Other (describe)			

<b>Received By FPPC On:</b>	05/15/12	<b>Due Date:</b>	06/14/12
<b>Assigned To:</b>	Keisha	<b>Date To Assignee:</b>	05/15/12

REVIEWERS	Date To Review	1st Approval & Date (Including Regulation Notices)	Date To Review	Final Approval & Date (Incl. Regulation Adoption Memos)
<b>Proofed</b>				
<b>Senior</b>		WJL		
<b>TAD Chief (SEI, Campaign, Conflict of Interest Code letters)</b>				
<b>Assistant GC</b>				
<b>General Counsel</b>	6-27-12	ZPM		
<b>Executive Director (discretion of GC)</b>				
<b>Chair (discretion of GC)</b>				