

February 20, 2013

John K. Guhl
P O Box 268
Pollock Pines, CA 95726

Via U.S. mail and
e-mail snowfirejohn@msn.com

Re: Your Request for Advice
Our File No. A-13-007

Dear Mr. Guhl:

This letter responds to your request for advice regarding the post-governmental employment provisions of the Political Reform Act (the “Act”).¹ Please note that our advice is based solely on the Act. We therefore offer no opinion on the application, if any, of other post-government employment laws.

QUESTION

Do the Act’s post-governmental-employment restrictions prohibit you from working as a consultant for a company that has an engineering contract with the California Department of Transportation (“CalTrans”) to do similar work that you performed as a designated employee of the Office of the State Fire Marshal?

CONCLUSION

The permanent ban applies to certain aspects of the performance phase of projects on which you worked while a state employee, but would not prohibit you from working on other projects. The one-year ban applies in limited circumstances involving communications with your former agency.

FACTS

You are a former Supervising Deputy State Fire Marshal for the Fire and Life Safety Division in the Office of the State Fire Marshal (“OSFM”) from which you retired on

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.

December 31, 2012. You were a designated employee up to the point of your retirement. As a Supervising Deputy State Fire Marshal, you supervised the day-to-day activities of five Deputy State Fire Marshals in fifteen Northern California counties. The activities included: annual inspections, construction inspections, special events, fire investigations, training, etc. You also conducted field inspections.

The projects in which you were involved ranged from small remodeling projects to multi-building complexes and roadway tunnels. You also assisted the OSFM Plan Review and Code Analysis Division in reviewing complete fire alarm systems, smoke control, and fire suppression systems. Specifically, you oversaw the Caldecott Tunnel project and the Devil's Slide Tunnel project. You supervised the deputy who was assigned to conduct the construction inspections and testing of the fire protection systems of both projects. You provided guidance and assistance to the onsite deputy as needed and would intervene to resolve code deficiency issues in plans and ongoing construction. At the request of CalTrans project managers, you attended several construction and plan review meetings to provide project updates, code requirements, safety systems information, and to review emergency operations plans.

After you retired, you were offered a position with a private company, S&C Engineers, to work as a consultant on the Caldecott Tunnel Project and the Devil's Slide Tunnel Project. S&C Engineers contracts with CalTrans to provide construction engineering and inspection services. As a consultant, you would review the construction contract plans for fire protection systems and proposed changes to the fire protection plans. You would also review Construction Contractor submittals related to fire protection systems and perform inspections of those systems as they are installed. You stated that other private companies have also contacted you to work as a consultant.

ANALYSIS

Post-Governmental Employment Restrictions

Before addressing the applicable provisions of the Act, we point out that the Act does not prohibit former state employees from being employed by anyone. Instead, as described below, the Act places restrictions on certain types of activities for which former state employees may be compensated. There are, however, limitations on the type of activities you may be able to do for the contractor in relation to your former state employer.

There are two types of post-employment restrictions on former state employees under the Act—the “permanent” and “one-year” bans. 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 future employment or with whom they have any arrangement concerning future employment. (*See* Regulation 18747.) Colloquially, these provisions are known as the “revolving door” prohibitions.

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 the employee has permanently left or takes a leave of absence from any particular state office or employment. (Regulation 18741.1(a)(1).)

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 the official participated while working for the state. (Sections 87402 and 87403.) “‘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).)

Under the facts presented, it appears the only possible issue under the Act’s “permanent ban” is whether your work with the contractor on both tunnel projects constitutes participation in a “proceeding” and, if so, what restrictions would apply to the work. You were not involved in the contract formation between the contractor and Cal Trans for either project as a state employee. And your involvement in your private capacity would be limited to working with the contractor after the contract is in place.²

An employee of a state agency who works on monitoring the performance phase of a contract gleans a substantial amount of information and insight into the agency’s viewpoints and strategies in dealing with the outside contractor. Disclosure of this insight or information could, in some cases, be detrimental to the agency and beneficial to the contractor, not only in actions and negotiations involving the possible amendment of the existing contract, but also in the decision to award a similar new contract or even in decisions by the agency concerning performance by the contractor within the terms of the existing contract. (*Joe and Nancy del Valle* Advice Letter, No. A-12-086.)

² We have advised that the application, drafting, and awarding of a contract is considered to be a proceeding separate from the monitoring, performance or implementation of the contract (hereafter “performance phase”). (*Blonien* Advice Letter, No. A-89-463; *Kernan* Advice Letter, No. I-12-017.) Here, however, you were involved in the performance phase of the contract as a state employee. The performance phase of the contract is also considered to be a “proceeding” for purposes of the permanent ban. (See *Joe and Nancy del Valle, supra*.)

Consequently, while the permanent ban does not prohibit a state employee who worked on the performance phase of an agency contract from leaving the agency to work on the same phase of the contract for a private contractor, the employee's work for the private contractor is restricted, as follows: The former employee cannot, as part of his work for the contractor or any other non-state entity, aid, advise, counsel, consult with or in any way assist the contractor or communicate with his or her former state agency's staff or representatives for the purpose of influencing: (i) the amendment or revocation of the existing contract; (ii) the issuance or awarding of a substantially similar contract; or (iii) agency decisions that, although still within the contract's terms, are likely to result in more than a *de minimis* change in the level of services or goods provided by the contractor from that originally contemplated by the agency. (*Id.*)

The 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 actions³ 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 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).)⁴ The ban applies for twelve months from the date the employee permanently leaves state office or employment. The one-year ban applies only when a former employee or official is being compensated for his or her appearances or communications before his or her former agency 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 or influencing any action or

³ 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.)

⁴ 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.)

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.) An appearance or communication includes conversing by telephone or in person, corresponding in writing or by electronic transmission, attending a meeting, and delivering or sending any communication. (*Id.*)

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).)

The position you occupied before leaving OSFM is designated in the conflict-of-interest code; consequently, the provisions of the one-year ban described above will apply to you for the one year after leaving OSFM. These provisions do not, however, prevent you from working for a contractor on an existing contract with OSFM. Under these provisions you are only prohibited, during the one-year period, from engaging in any of the conduct listed above, specifically, communicating with OSFM staff or representatives for the purpose of attempting to influence OSFM on the issuance, amendment, awarding, or revocation of the existing contract or a new contract, or on the purchase of goods or property.

Under your facts, you will be consulting with a private company that has a contract with CalTrans. While the ban would not apply to CalTrans, as that is not your former agency, it would apply to communications with OSFM (as described above).

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: Heather M. Rowan
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HMR:jgl