

December 19, 2013

Russ Guarna, Deputy Director
California Technology Department
Statewide Technology Procurement Division
3011 Daggett Drive
Granite Bay, CA 95746

Re: Your Request for Informal Assistance
Our File No. I-13-154

Dear Mr. Guarna:

This letter responds to your request for advice regarding the revolving door provisions of the Political Reform Act (the “Act”).¹ This letter should not be construed as assistance on any conduct that may have already taken place. (See Regulation 18329(b)(8)(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.²

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 such as the post-employment provisions of Public Contract Code Section 10411.

QUESTION

Upon your retirement from state service, what restrictions do the Act’s revolving door prohibitions place on your activities as a consultant for associations interested in governmental procurement policy and practices, such as your participation in forums regarding procurement policy and practices at which your former agency employer will also participate?

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

As a private consultant, the Act's one-year ban prohibits you from appearing before or communicating with your former state agency employer for compensation and for the purpose of influencing administrative or legislative action or 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. More specifically, any forum involving the procurement of information technology by a state agency or other services under the purview of your former agency employer at which the agency participates is an administrative action before the agency and you may not participate in the forum for 12 months after leaving state service.

Additionally, the Act's permanent ban prohibits you from participating in any proceeding involving the State of California or assisting others in the proceeding if the proceeding is one in which you participated as a state employee, while Section 87407 prohibits you from taking part in any governmental decision with a reasonably foreseeable material financial effect on a prospective employer prior to your retirement.

FACTS

After almost 30 years of state services, you plan to retire from state service at the end of December to pursue opportunities as a consultant with the private sector. Currently, you are the Deputy Director of the Department of Technology, Statewide Technology Procurement Division.

As the Deputy Director, you oversee the acquisition of large system integrated projects on behalf of other state departments. In this position, you oversee the activities of 34 staff managers and procurement specialists whom assist state departments in the procurement process and provide recommendations to you and your managers for your review/approval of those procurements. Additionally, the Department of Technology participates in meetings with vendors on a variety of issues regarding procurements, negotiations, and disputes. The department also provides assistance to the vendor community and state departments in forums to help them understand procurement policy and procedures.

Upon your retirement, you plan to seek consulting opportunities with various "associations" with a focus on procurement policy and the improvement of procurement practices pertaining to state and local government contracting including working in support of proposed legislative changes. While you do not anticipate representing individual vendors before the Department of Technology, you are seeking assistance regarding the revolving door provisions and any limitations these provisions impose on your participation at forums, at which the Department of Technology may participate.

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. 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.

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 action³ 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.⁵ While in effect, 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

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.)

⁵ 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).)

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.” (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 if they are (1) before a state agency that the public official worked for or represented or (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. (Regulation 18746.1(b)(6).)

As the Deputy Director, your position is or should be designated in the Department of Technology’s conflict-of-interest code, and your post-employment actions as a paid consultant are restricted under the one-year ban for 12 months from the date you permanently leave the department. As addressed above, the one-year ban applies to any administrative or legislative action and 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. Accordingly, the one-year ban prohibits you from representing any client for compensation regarding procurement policy and practices before the Department of Technology.

More specifically, you have asked about participating in forums regarding procurement policy and practices at which the Department of Technology might participate. In this regard, a forum that involves the procurement of technology by state agencies, or other services under the purview of the department, at which the department participates is an administrative action before the department, and you may not participate in the forum for 12 months following the date you leave state service. However, a forum regarding procurement policy or practices not under the Department of Technology’s purview, such as a forum related to procurement by a local agency, would not be an action before the department. Accordingly, you may participate in a forum regarding policy and practices not under the department’s purview so long as you do not use the occasion to attempt to influence any decision that may ultimately come before the department through your contacts with department staff also in attendance.

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).)⁶

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 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.)

As the former Deputy Director for the Department of Technology, you are a former state employee subject to the permanent ban. Accordingly, you are prohibited from making an appearance or communication, or from assisting any other person in making an appearance or communication, before any state administrative agency, for compensation, in a quasi-judicial proceeding if you previously participated in the proceeding as a state official.

Under Regulation 18741.1, “A supervisor is deemed to have participated in any proceeding that was ‘pending before’ . . . the official’s agency and that was under his or her supervisory authority.” A proceeding is under a supervisor’s “authority” if the supervisor:

⁶ 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).)

“(A) Has duties that include primary responsibility within the agency for directing the operation or function of the program where the proceeding is initiated or conducted; or

“(B) Has direct supervision of the person performing the investigation, review, or other action involved in the proceeding including, but not limited to, assigning the matter for which the required conduct is taken; or

“(C) Reviews, discusses, or authorizes any action in the proceeding; or

“(D) Has any contact with any of the participants in the proceeding regarding the subject of the proceeding.”

While you have not provided information regarding any specific proceeding before the Department of Technology, we can generally state that you are prohibited from appearing before any state administrative agency, or assisting any vendor with an appearance before a state administrative agency, for compensation, if (1) it is for the purpose of influencing any proceeding involving a contract with the state and (2) the contract was subject to review by the Department of Technology prior to your retirement date. If you need further assistance regarding the permanent ban, you should seek additional advice describing a specific proceeding before the department and your prior participation in the proceeding.

Section 87407

In addition to the post employment restrictions, Section 87407 prohibits public officials from making, participating in making, or using their position to influence certain decisions affecting a potential employer if the official is negotiating or has an arrangement regarding prospective employment. While an official may negotiate and accept an offer of future employment while employed by a governmental agency, Section 87407 prohibits an official from using his or her governmental position to make decisions that unduly benefit the person hiring the official. More specifically, Section 87407 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 an employer or his or her agent. (Regulation 18747(c)(1).) A public official has an “arrangement” concerning prospective employment when he or she accepts an offer of employment. (Regulation 18747(c)(2).)

While you have not indentified a prospective employer, we caution that Section 87407 may apply should you negotiate employment or make an arrangement concerning prospective employment prior to your retirement from state service.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: Brian G. Lau
Counsel, Legal Division

BGL:jgl