

May 28 2014

Saeid A. Asgari, P.E.  
14252 Culver Drive, A-296  
Irvine, CA 92604

Re: Your Request for Informal Assistance  
**Our File No. I-14-087**

Dear Mr. Asgari:

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(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 provides advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) We offer no opinion on the application of laws other than the Political Reform Act, such as the post-employment provisions of Public Contract Code Section 10411.<sup>2</sup> Because your questions are general in nature, we are treating your request as one for informal assistance.<sup>3</sup>

### QUESTION

In anticipation of your retirement from the Department of Transportation, what restrictions do the Act's revolving door provisions impose on your (1) ability to explore future employment and engage in discussions with consulting firms regarding future employment while concurrently employed by the state and (2) future employment after leaving state employment?

---

<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> While the Commission may provide assistance regarding Government Code Section 1090, this section applies only if you participated in making the contract as a state official including any preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. (See *Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237). If you have previously participated in making a contract and anticipate future employment with the same contractor, you may wish to seek additional advice regarding Section 1090 providing a description of your participating in the making of the contract and your anticipated duties on behalf of the contractor.

<sup>3</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

As a current state employee, you are prohibited from making, participating in making, or using your official position to influence any governmental decisions “directly relating” to a prospective employer if you have “negotiated” prospective employment or have made an “arrangement” regarding prospective employment. After leaving state employment, your future employment activities are restricted by the one-year and permanent bans as discussed below.

## FACTS

You are a licensed professional engineer. In 1989, you joined the California Department of Transportation (“CalTrans”) in District 11 (San Diego) Engineering Services, Consultant Contract Services Branch. In 1992, you were promoted to a Senior Transportation Engineer Position in District 12 (Orange County) and became the Supervision Transportation Engineer, Office Chief of Construction in 2005. In your current position, you provide leadership to a dedicated team of 17 Senior Resident Engineers, Supervisors, and manage 160 employees. Additionally, you have directly supervised or managed every major construction project in Orange County during this time.

In anticipation of your retirement from CalTrans, you seek general guidance regarding the Act’s post-employment restrictions placed upon your future employment under the Act. Additionally, you have asked about restriction in exploring future employment and engaging in potential discussions with consulting firms regarding future employment prior to your retirement.

## ANALYSIS

Under the Act, public officials who leave state service are subject to two types of post-governmental employment provisions known as the one-year and permanent 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 a perspective employer. (See Regulation 18747.) These provisions are known as the “revolving door” prohibitions.

### *Section 87407*

A public official may negotiate and accept an offer of future employment before leaving his or her current position. However, Section 87407 is designed to ensure that the official does not use his or her position to make any decisions that unduly benefit the entity that is hiring the official. 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).)

If you have “negotiated” prospective employment or have made an “arrangement” regarding prospective employment, you are prohibited under Section 87407 from making, participating in making, or using your official position to influence any governmental decisions “directly relating” to the prospective employer.<sup>4</sup> A governmental decision “directly relates” to a prospective employer if the public official knows or has reason to know that the employer, or the employer’s agent, has either (1) initiated the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or (2) is a named party in, or subject of, the proceeding. (Regulations 18704.1(a) and 18747(b)(1).) A governmental decision also “directly relates” to a prospective employer if the public official knows or has reason to know that it is reasonably foreseeable that the financial effect of the decision on a prospective employer is material. 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).)

If you need additional assistance in determining whether you may take part in any specific decision that may affect a prospective employer, it is advisable that you seek further advice providing all relevant facts relating to the decision.

### *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 action<sup>5</sup> or any discretionary act involving the issuance, amendment, awarding, or revocation of a permit,

---

<sup>4</sup> Section 87407 does not apply if “[t]he prospective employer is a state, local, or federal governmental agency.” (See Regulation 18747(d)(3).)

<sup>5</sup> For purposes of Section 87406, the Act defines “administrative action” and “legislative action” as:

“‘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.)

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).)<sup>6</sup> The ban applies for twelve months from the date the employee permanently leaves state office or employment.<sup>7</sup> 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 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).)

While you have not indicated whether your position is specifically designated in CalTrans conflict-of-interest code, as a Supervising Transportation Engineer, your position is or should be designated in the code, and your post-employment actions are restricted under the one-year ban for 12 months from the date you permanently leave CalTrans. 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 other business or organization in administrative proceedings before

---

<sup>6</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>7</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).)

CalTrans, such as general decisions regarding any CalTrans project, and in any proceedings involving the issuance, amendment, awarding, or revocation of a contract with CalTrans.

*Permanent Ban*

The “permanent ban” prohibits a former state employee from “switching sides” and participating, for compensation, in any proceeding involving specific parties before any court or state administrative agency, or assisting others in the proceeding, if the former employee participated in the proceeding 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>8</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).)

Based upon the information you provided, you directly supervised and managed every major construction project within Orange County. Under Regulation 18741.1(a)(4), 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 “supervisory authority” if the supervisor:

“(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

---

<sup>8</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).)

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

As a Supervising Transportation Engineer, you are a former state employee subject to the permanent ban. However, you have not identified any specific proceedings involving specific parties in which you previously participated as an employee of CalTrans. Accordingly, we can only offer general assistance regarding the permanent ban. If you need additional advice regarding the permanent ban it may apply to any specific proceeding in which you previously participated as an employee of CalTrans, you should seek additional advice providing the details of the particular proceeding.

Generally, as the supervisor and manager of construction projects within Orange County, any proceedings regarding the projects were under your supervisory authority, and you have therefore previously participated in the proceedings for purposes of the Act’s permanent ban. Accordingly, you are permanently prohibited from making an appearance or communication, and from aiding, advising, counseling, consulting, or assisting any person in making an appearance or communication, for compensation, in a proceeding before any state administrative agency for the purpose of influencing: (i) the amendment or revocation of an existing contract; (ii) the issuance or awarding of a substantially similar contract; or (iii) agency decisions that, although still within a 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. (See *del Valle* Advice Letter, No. A-12-086.)

Nonetheless, [t]he 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.)

Based upon the facts you have provided, construction projects that are initiated after you leave CalTrans are new proceedings to which the permanent ban does not apply, although the one-year ban may still apply.

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