

August 28, 2014

Anna Starovoytov
1542 Arch Street
Berkeley CA 94708

Re: Your Request for Advice
Our File No. A-14-149

Dear Ms. Starovoytov:

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 (Regulation 18329(c)(4)(A)), and 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.

QUESTION

What restrictions or limitations will be placed on your employment activities should you choose to leave your current employment with the San Francisco Bay Regional Water Quality Control Board (“SF Regional Board”) and accept an offer of employment with the Sonoma Resource Conservation District (“Sonoma RCD”)?

CONCLUSION

The restrictions that exist based on your position with the SF Regional Board include the permanent ban on switching sides and the one-year ban, both of which are explained in detail below.

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.

FACTS

You are currently employed as a staff-level Environmental Scientist at the SF Regional Board, a state agency. In that position, you have been responsible for developing a general waste discharge requirements permit for vineyards within the Napa River and Sonoma Creek watersheds. In addition, you have worked with a consultant to prepare an Environmental Impact Report to evaluate potential environmental impacts of this particular permit.

With respect to the actual permit, it would regulate the discharge of sediment from vineyard properties in the Napa River and Sonoma Creek watersheds, and it would require vineyard owners to develop farm plans and implement management actions to reduce erosion and heavy storm flow off their properties. The proposed permit and the draft EIR will likely be ready for consideration by the SF Regional Board in February or March of 2015.

In addition, you volunteered to oversee a grant that was awarded to the Sonoma RCD² prior to your employment with the SF Regional Board. In doing so, you reviewed quarterly invoices, corresponded with the project manager from the Sonoma RCD on their progress, and attended one meeting for the technical action committee which was formed to assist with developing a grower assistance program called LandSmart. This program would help vineyard owners to develop plans to comply with the general waste discharge requirements under the proposed permit. At a certain point, you managed the grant with direct supervision from a manager in your office. All decisions and invoice approvals were made in consultation with this manager.

Recently, the Sonoma RCD was awarded a second grant to aid, in part, the further development of the LandSmart program. Although you were designated as the anticipated grant manager once it obtained the necessary approval, you had no involvement in the selection or awarding process for the grant. You have not yet begun any management tasks with respect to the second grant.

You recently received a job offer from the Sonoma RCD to serve as Project Manager, primarily responsible for continuing the development of the LandSmart program, including the farm plan materials and workshops geared towards meeting the requirements of the general waste discharge requirements under the proposed permit. You would also assist in managing the newly awarded grant and helping with its implementation concerning the LandSmart program. In addition, you would be responsible for soliciting and engaging vineyard owners to use LandSmart in the future in order to comply with the requirements of the proposed permit if the SF Regional Board approves it at some point next year. Finally, you state that as Project Manager, you may be called to represent the Sonoma RCD at meetings and on committees, some of which may include stakeholder meetings/general staff meetings/CEQA public hearings held

² Although your letter states that the Sonoma RCD is a non-governmental agency, it is our understanding that RCD's are special districts considered to be local government entities. (See e.g., <http://www.carcd.org>.) Therefore, we proceed with our advice under the assumption that the Sonoma RCD is a local government entity.

by the SF Regional Board, all related to the proposed general waste discharge requirements for vineyards.

ANALYSIS

Public 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. In addition, Section 87407 prohibits officials from making, participating in making, or using their position to influence decisions affecting persons with whom they are negotiating employment, or have any arrangement concerning employment.

1. Negotiating Prospective Employment

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

This notwithstanding, Regulation 18747(d)(3) specifically states that the prohibitions of Section 87407 do not apply if “[t]he prospective employer is a state, local, or federal governmental agency.” Therefore, because the Sonoma RCD is a local government agency, the provisions in Section 87407 are not applicable to your situation.

2. Post-Governmental Employment Provisions

One-Year Ban

The one-year ban prohibits a former state employee from appearing before or communicating with, for compensation, 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 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).)³ The ban applies for 12 months from the date

³ 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.)

the employee leaves state office or employment, which is defined as the date the employee permanently leaves his or her state agency or takes a leave of absence. (Regulation 18746.1(b)(1) and (2).)

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, 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. (*Id.*)

Finally, appearances and communications are prohibited only if they are before a state agency that the public official worked for or represented or 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).)

However, not all communications are prohibited by the one-year ban. Appearances or communications before a former state agency employer, made as part of “services performed to administer, implement, or fulfill the requirements of an existing permit, license, grant, contract, or sale agreement may be excluded from the [one-year] prohibitions ... provided the services do not involve the issuance, amendment, awarding, or revocation of any of these actions or proceedings.” (Regulation 18746.1(b)(5)(A); *Quiring* Advice Letter, No. A-03-272; *Hanan* Advice Letter, No. I-00-209.)

Additionally, Regulation 18746.2(b)(1)-(4) provides that appearances or communications are not restricted under the one-year ban if an individual:

- “(1) Participates as a panelist or formal speaker at a conference or similar public event for educational purposes or to disseminate research and the subject matter does not pertain to a specific action or proceeding;
- “(2) Attends a general informational meeting, seminar, or similar event;
- “(3) Requests information concerning any matter of public record; or
- “(4) Communicates with the press.”

We have also advised that a former agency official may, without violating the one-year ban, draft proposals on a client's behalf to be submitted to the agency so long as the former employee is not identified in connection with the client's efforts to influence administrative action. (*Cook* Advice Letter, No. A-95-321; *Harrison* Advice Letter, No. A-92-289.) Similarly, a former agency official may use his or her expertise to advise clients on the procedural requirements, plans, or policies of the official's former agency so long as the employee is not identified with the employer's efforts to influence the agency. (*Perry* Advice Letter, No. A-94-004.)

You have not specified whether you are a designated employee of the SF Regional Board, but it appears that you should be given your participation in government decisions that have financial impacts. Thus, should you accept employment with the Sonoma RCD, appearances and communications before the SF Regional Board, or any other state agency “which budget, personnel, and other operations are subject to the control” of the SF Regional Board, on behalf of the Sonoma RCD are prohibited for a one-year period if made for the purpose of influencing administrative or legislative action,⁴ 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.

You have asked whether the one-year ban would prohibit you from working on either the existing or the new grant awarded to the Sonoma RCD by the SF Regional Board. As stated above, services performed to administer, implement, or fulfill the requirements of an existing permit, license, *grant*, contract, or sale agreement may be excluded from the prohibitions of this regulation, provided the services do not involve the issuance, amendment, awarding, or revocation of any of these actions or proceedings. However, the prohibitions of Sections 87401 and 87402 may apply. As outlined above, the one-year ban prohibits you from appearing before or communicating with the SF Regional Board 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. Thus, while an appearance or communication before the SF Regional Board to influence the awarding, amendment or revocation of a grant is prohibited, the one-year ban does not prohibit you from managing the grants already awarded.

Your work on the general waste discharge requirements permit appears to fall within the purview of administrative action, and the one-year ban would thus prohibit you from making an appearance before or communication to the SF Regional Board if it is made for the “principal

⁴ For purposes of Section 87406, the Act defines “administrative action” and “legislative action” as follows: “‘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. (Section 82037.)

purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing” the permitting program. However, you may still attend general informational meetings or seminars at the SF Regional Board concerning the permit and/or request information concerning any matter of public record from it. And, as stated above, you may draft proposals on a client's behalf, without identifying yourself, to be submitted to the SF Regional Board and you may use your expertise to advise clients (and Sonoma RCD) on the procedural requirements, plans, or policies of the permitting program so long as you are not identified with their efforts to influence the SF Regional Board.

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 in which the official did not participate while with the state agency 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; see also *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.)

With these general principles as a backdrop, to apply the permanent ban to your situation, you need to determine if any of the actions in which you may engage on behalf of your new

employer involve a *proceeding* in which you *participated* while employed at the SF Regional Board. (Regulation 18741.1(a)(4).)

Clearly, your duties at the SF Regional Board with respect to overseeing the first grant awarded to Sonoma RCD are within the scope of activities described above. The administration of the state grant is a proceeding, analogous in some ways to the oversight of a contract, involving a specific party - the recipient of the grant. In your capacity as an official with the SF Regional Board, you oversaw the grant's administration through viewing and approving quarterly invoices, corresponding with the project manager from Sonoma RCD on their progress and attending meetings. These proceedings are quasi-judicial proceedings in which you participated.⁵

Thus, once you leave state service you may not, for compensation, represent any person or entity (other than the State of California) before the SF Regional Board regarding the first grant to the Sonoma RCD. In fact, this permanent ban applies not only to representation made by you before the SF Regional Board, but also before "any court or state administrative agency or any officer or employee thereof . . ." (Section 87401.)

However, the permanent ban does not restrict your ability to participate in a new proceeding. For example, we advised a former supervisor with the Department of Health Services that she could assist a client in reviewing a new RFP issued by the department involving a project on which she had previously worked. (*Pratt* Advice Letter, No. A-95-386.) The new RFP, which was issued after she left the department, involved a new contract and was, therefore, a separate proceeding for purposes of Sections 87401 and 87402. Accordingly, if new grants develop from the projects in which you participated as an employee for the SF Regional Board, the permanent ban would not prohibit you from assisting the Sonoma RCD by influencing decisions concerning that grant. The one-year ban, however, may restrict that activity for one year.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: Jack Woodside
Counsel, Legal Division

JW:jgl

⁵ The same is not true with the second grant awarded to Sonoma RCD because although you were designated as the anticipated grant manager, you had no involvement in the selection or awarding process, and have not yet begun any management tasks with respect to that grant.