

September 17, 2014

Randy Woolley, PE, CSEP  
Woolley Consulting  
105 Via Presa  
San Clemente, CA 92672

Re: Your Request for Advice  
**Our File No. A-14-164**

Dear Mr. Woolley:

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 (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), and we do not offer advice based on past conduct. 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. Finally, we urge you to consult with your former agency’s counsel or the Attorney General’s Office on possible application of these other laws.

### QUESTION

What restrictions or limitations will be placed on your current employment activities as a result of your former employment with the California Department of Transportation (“Caltrans”)?

### CONCLUSION

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

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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.

## FACTS

On July 1, 2014, you retired from the Caltrans, where you were a contract manager (and designated employee) with the Division of Research, Innovation and System Information (“DRISI”). As part of your work from 2002 until 2009, you were a contributing author and reviewer/approver for the Systems Engineering Guidebook for Intelligent Transportation Systems. You also co-developed and taught a two-day class on that subject to Caltrans and other public agency employees. Subsequent to 2009, you were not involved in any Systems Engineering development or contract work while at Caltrans. You note that you were the only employee at Caltrans with the distinction of being a Certified Systems Engineering Professional (“CSEP”).

Soon after retiring, you started your own consulting business. Now, you would like to contract with Caltrans for two separate jobs. First, the Caltrans Headquarters Traffic Operations (“Traffic Operations”) would like you to provide Systems Engineering services. You would actually be a subcontractor to an existing Caltrans contractor who provides “on call” expertise in Systems Engineering, developing documents for those in Traffic Operations who are developing Intelligent Transportation and Traffic Management systems, both hardware and software. While at Caltrans, you never supervised or had involvement with this particular contract.

Second, the DRISI would like you to “fully document the existing research process,” which would result in the creation of a flow chart, a word document, and a full set of example documents. You state that although this has long been needed at Caltrans, to your knowledge there has never been any actions or planning to initiate this type of work until after your retirement.

## ANALYSIS

### **Post-Governmental Employment Provisions**

#### *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>2</sup> or any

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<sup>2</sup> “Legislative action” is defined at Section 82037 to mean “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.”

“‘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, which shall include any proceeding governed by Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2.” (Section 82002(a).)

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).) The ban applies for twelve months from the date the employee permanently leaves state office or employment. 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).)

As stated, the one-year ban applies 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 another person*. (Section 87406; Regulation 18746.1(b)(3) & (4).) Importantly, however, Regulation 18746.1(b)(4) provides that "[a]n appearance or communication made by a public official solely to represent his or her personal interests . . . is not prohibited or limited by this section (the 'revolving door' provisions)." For this purpose, "personal interests" include "[a] business entity wholly owned by the official or members of his or her immediate family" (Regulation 18702.4(b)(1)(B)) and "[a] business entity over which the official exercises sole direction and control, or over which the official and his or her spouse jointly exercise sole direction and control." (Regulation 18702.4(b)(1)(C).)

You state that you just started your own consulting business so you would presumably be representing your own interests, not the interests of another when dealing with Caltrans. Thus, you would neither be compensated nor appearing on behalf of another person when appearing before or communicating with Caltrans. Accordingly, when looking to the relevant statutory and regulatory language, it is plain that the one-year ban does not prohibit you from appearing before

or communicating with Caltrans (or any other state agencies) for the purpose of discussing or negotiating contracts involving your consulting business.

However, the subcontract is different. In that case, your contract would not be with Caltrans itself. Instead, it would be with an existing Caltrans contractor who provides “on call” expertise in Systems Engineering. You would, in essence, be working for and paid by this contractor. Although the subcontract would not be prohibited under the Act, the one-year ban would apply to prohibit you from appearing before or communicating with Caltrans in connection with business involving the subcontract. In other words, when your business contracts directly with Caltrans, the prohibitions of the one-year ban do not apply; but when your business does not have such a contract, the prohibitions of the one-year ban apply to prohibit you from communicating with or appear before Caltrans because you would be doing so on behalf of another person for compensation.

### *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 agency 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).)

An official is considered to have “participated” in a proceeding if the official took part “personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information as an officer or employee . . .” (Section 87400(d).) A former state official who held a management position in a state administrative agency is deemed to have participated in a proceeding if: (1) the proceeding was pending before the agency during his or her tenure, and (2) the proceeding was under his or her supervisory authority. (Section 87400(d); Regulation 18741.1(a)(4).)

The permanent ban applies throughout the duration of a proceeding in which the official participated. It does not, however, prohibit the official from representing a client in any new proceeding, even though the person may have been a party to a previous proceeding in which the official participated. (*Ferber* Advice Letter, No. I-99-104.)

As a former Caltrans designated employee, you are former a state employee subject to the permanent ban. Generally, as a contract manager in the DRISI, you are deemed to have previously participated in any proceedings, including the making of any contracts, pending during your tenure over which you had supervisory authority. In such cases, you are permanently disqualified from participating in the matter after leaving state service. According to the facts, you had no previous involvement whatsoever in either of the contracts that your company potentially will enter. As a result, the permanent ban does not prohibit you from entering into the above-described contracts involving Caltrans.

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

Sincerely,

Zackery P. Morazzini  
General Counsel

By: Jack Woodside  
Senior Counsel, Legal Division

JW:jgl