

February 6, 2015

Steve Toyama
7205 Danberg Way
Elk Grove, CA 95757

Re: Your Request for Advice
Our File No. A-15-020

Dear Toyama:

This letter responds to your request for advice regarding the “revolving door” provisions of the Political Reform Act (the “Act”).¹ Please note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Government Code Section 1090.

FACTS

You retired from State employment on June 30, 2014 after 37 years of service. You retired with the classification of Data Processing manager IV and your responsibilities at the Department of Motor Vehicles (DMV) were managing IT teams as well as running a large IT project. Your position was designated in the DMV Conflict of Interest code.

You plan to return to DMV as a retired annuitant at the classification of System Software Specialist III providing technical guidance and support for the department. You are also planning on starting your own consulting business (an LLC) as an independent contractor providing consulting services to DMV organizations in WA, NV, OR and AZ.

ANALYSIS

Revolving Door, Generally: 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 and 87100 prohibits officials from

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.

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.

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 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).) 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, 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. (*Ibid.*)

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).)

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.”

Without violating the one-year ban, a former agency official may also draft proposals on a client’s behalf to be submitted to the official’s former agency so long as the former official is not identified in connection with the client’s efforts to influence the agency. (*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.)

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).)

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).)

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).) 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).) However, proceedings are not under an official's "supervisory authority" merely because the supervisor is responsible for the general oversight of the administrative actions or functions of a program, where the responsibilities concerning the specific or final review of the proceedings are expressly delegated to other persons in the agency's structure and the supervisor is not involved in the actual proceedings. (Regulation 18741.1(a)(4); see also *In re Lucas* (2000) 14 FPPC Ops. 15.)

Furthermore, "[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.)

QUESTIONS AND CONCLUSIONS

(1) Do the provisions of the Act prohibit you from working for DMV of other states?

You are generally not prohibited from working with the DMV of other states. However, note that if your work with another state's DMV involves a prohibited appearance before the California DMV or "switching sides" (as discussed above), the conduct would be prohibited.

(2) May you work on non-DMV projects/contracts in California?

You are generally not prohibited from working on projects and contracts with other California agencies, other than your former employer, so long as your work does not involve a prohibited appearance before the California DMV or "switching sides" (as discussed above).

(3) May you contract with California DMV?

The permanent ban on "switching sides" will prohibit you from appearing and communicating to represent any other person for compensation, before any state administrative agency in any judicial, quasi-judicial or other proceeding if you previously participated in the proceeding in your state capacity. The prohibition would also prohibit aiding, advising, counseling, consulting, or assisting in representing any other person.

The one-year ban will prohibit you from representing any other person by appearing before or communicating with, for compensation, your former agency in an attempt to influence agency decisions that involve the making of general rules (such as regulations or legislation), or to influence certain proceedings involving a permit, license, contract, or transaction involving the sale or purchase of property or goods.

However, Regulation 18746.1(b)(4) provides that an “appearance or communication made by a public official solely to represent his or her personal interest, as defined in Regulation 18702.4(b)(1), is not prohibited or limited.” Regulation 18702.4(b)(1) provides that a public official is not attempting to use his or her official position to influence a governmental decision of an agency if the official “appears in the same manner as any other member of the general public before an agency in the course of its prescribed governmental function solely to represent himself or herself on a matter which is related to his or her personal interests.” The definition of “personal interests” includes a business entity wholly owned by the official or members of the official’s immediate family. (Regulation 18702.4(b)(1)(B).) When you appear before the California DMV to bid on a contract on behalf of a business that you own, you will be representing your personal business interest. Therefore, the one-year ban does not prohibit you or your company from bidding on contracts offered by your former employer.

(4) When would you be eligible to work as an independent contractor on California DMV projects/contracts? Is it one year after your retirement date of June 30, 2014 or one year after the termination of your status as a retired annuitant?

The one-year ban applies when an official permanently leaves any particular office or employment subject to the ban. An official has permanently left an office or employment on the date on which the official is no longer authorized to perform the duties of the office or employment and stops performing those duties, even if the official is still receiving compensation for accrued leave credits. (Regulation 18146.4(b).)

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

Sincerely,

John W. Wallace
Assistant General Counsel

JWW:jgl