



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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September 14, 2020

Anthony C. Williams
Legislative Affairs Secretary
anthonywms68@gmail.com

Re: Your Request for Advice
Our File No. A-20-100

Dear Mr. Williams:

This letter responds to your request for advice regarding the post-employment provisions of the Political Reform Act (the “Act”).¹ Please note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

QUESTIONS

1. Are there additional requirements for influencing a prospective employer beyond that of recusing yourself from decisions involving the prospective employer and excluding yourself from directing the work of subordinates on recused matters and not participating when those matters are discussed?
2. Does the one-year prohibition under Section 87406(d) prevent you from lobbying the entire executive branch of the state government or is the prohibition limited to interactions with the Governor and the Governor’s immediate staff? If the prohibition is not limited to the Governor and the Governor’s immediate staff, is it confined to the Executive Branch Administration (the “Governor’s Administration” or “Administration”), excluding constitutionally elected office holders and statutorily independent agencies?
3. Do the post-employment restrictions of the Act prohibit you from lobbying the Governor and the Governor’s immediate staff, if the lobbying in question is performed on a volunteer basis? Similarly, may you discuss legislative or administrative matters with the Governor, the Governor’s immediate staff if you are not employed or retained by an interested client or have any other financial interest related to the matter?

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.

4. May your direct reports and other representatives of Amazon.com, Inc. (“Amazon”) attend meetings and lobby the Governor and the Governor’s immediate staff? If so, may you advise direct reports and other representatives of Amazon as to strategies that may be helpful in such an advocacy meeting, as long as you do not attend the meeting? Further, may you introduce direct reports and other representatives of Amazon to the Governor and the Governor’s immediate staff so long as the intent of the meeting is not to influence administrative or legislative action and no attempts at advocacy occur? Finally, may you draft advocacy proposals, on Amazon’s letterhead or sent via Amazon email, but without your signature and that do not identify yourself, that are directed to the Governor and the Governor’s immediate staff?
5. May you advocate a position on behalf of Amazon at a legislative hearing or informal meeting with legislative staff, if members of the Governor’s Administration are present and representing the Governor’s Administration? Finally, may the Governor, the Governor’s immediate staff or the Governor’s Administration contact you with the intent of influencing the position of Amazon on a legislative, regulatory or other issue?

CONCLUSIONS

1. Pursuant to Regulation 18329(b)(1)(5), we are unable to provide advice on past conduct. In addition, we are unable to provide advice on laws outside the purview of the Act. However, we have provided the general rule relating to influencing prospective employers for your understanding.
2. The one-year prohibition embodied in Section 87406(d) prevents you from lobbying the Governor’s office and any state administrative agency subject to the direction and control of the Governor for one year after leaving your position. However, the prohibition does not apply to lobbying constitutionally elected officeholders, such as the Attorney General, or statutorily independent agencies.
3. The revolving door provisions, including both the one-year ban and the permanent prohibition (Sections 87401 and 87402) of the Act, do not prohibit you from lobbying the Governor’s immediate staff, if the lobbying in question is performed on a volunteer basis. Similarly, you may discuss legislative or administrative matters with the Governor’s immediate staff, if you do not represent an interested client or have any other financial interest related to the matter.
4. Your direct reports and other representatives of Amazon may attend meetings and lobby the Governor’s immediate staff. You may advise them as to strategies that may be helpful in such an advocacy meeting, as long as you do not attend the meeting. You may introduce your direct reports and other representatives to the Governor’s immediate staff, but you may not elicit the Administration’s viewpoint on a particular matter if the intent of the meeting is to influence administrative or legislative action. Finally, you may draft advocacy proposals, including proposal on Amazon letterhead or an Amazon email, that are directed to the Governor’s immediate staff, so long as you are not identified in the written communication including the use of an email address providing your name or identity.

5. You may advocate a position on behalf of Amazon at a legislative hearing but whether informal meetings with legislative staff are for the purpose of influencing legislative or administrative action, if members of the Governor's Administration are present and representing the Governor's interests, is necessarily a factual determination. You may not discuss or negotiate a matter with the Governor's Administration if, during the course of a legislative proceeding or informal meeting, you are directed to do so under the supervision and control of the Legislature or legislative staff. You may not communicate with the Governor's immediate staff regarding Amazon's position on an issue, even if you do not initiate the contact, if the purpose of the communication is to influence legislative or administrative action.

FACTS AS PRESENTED BY REQUESTER

You are the Legislative Affairs Secretary to Governor Gavin Newsom. You intend to remain in this appointment until September 1, 2020, or shortly after the completion date of this advice request. After leaving office, you intend to begin work for Amazon as Director of Public Policy. In that capacity you will direct the work of registered lobbyists and, in the event you register as a lobbyist or make contacts with government officials, personally engage in communications with state and local government officials on legislative, regulatory and other policy decisions affecting Amazon.

To this end, you are seeking advice on your pre and post-government activities. You engaged in formal interviews with Amazon beginning on April 16, 2020. From April 16 until you leave office, you have recused yourself from matters affecting Amazon, consistent with guidance provided to you by the Governor's Office of Legal Affairs. In summary, the guidance provided that you not make, participate in making, or use your position to influence any decision in which Amazon is named or involved, or where it is reasonably foreseeable that there will be a material effect on Amazon, as provided in Section 87407 and related regulations. You excluded yourself from directing the work of subordinates on recused matters and necessarily have excused yourself and did not participate when those matters were discussed. You would like to confirm that these are the requirements under California law and that no other ban on influencing prospective employment applies in California, as you will still be working for the Governor until September 1, 2020, or soon thereafter. Additionally, you would like clarification on the post-employment restrictions under the Act.

ANALYSIS

Influencing Prospective Employers

Pursuant to Regulation 18329(b)(1)(5), we are unable to provide advice on past conduct. In addition, we are unable to provide advice outside of the purview of the Act. However, we provide the general rules on influencing a prospective employer for your understanding.

Section 87407 prohibits public officials from making, participating in making, or using their official position to influence governmental decisions that directly relate to persons with whom they are negotiating employment, or have any arrangement concerning employment. While a public official may negotiate and accept an offer of future employment before leaving his or her current

state position, 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.

A public official is considered to be “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).) The Commission has construed the scheduling, conduct, and follow-up to an interview as one continuous process falling under the definition of “negotiating” employment. (*Bonner Advice Letter*, No. 1-98-287.) However, the mere act of sending a resume or application to a specific entity has not been considered “negotiating.” Similarly, entertaining informal inquiries about future plans and receiving expressions of general interest in discussing potential employment opportunities at some point in the future are not considered “negotiating.” (*Bonner Advice Letter*, No. 1-98-287.) “A public official has an ‘arrangement’ concerning prospective employment when he or she accepts an employer’s offer of employment.” (Regulation 18747(c)(2).)

A decision “directly relates” to a prospective employer under either of the following circumstances:

- (1) The employer, either directly or by an agent, is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official’s agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person. For an interest in an employer, this includes any decision in which the employer, either directly or by an agent, has initiated the proceeding by filing an application, claim, appeal, or similar request; offers to sell a product or service; bids on, or enters, a contract, or is identified as a subcontractor; is the named or intended manufacturer or vendor of any products to be purchased with an aggregate cost of \$1,000 or more in any 12-month period; applies for a permit, license, grant, tax credit, exception, variance, or other entitlement; is the subject of any inspection, action, or proceeding under the regulatory authority of the agency; or is subject to an action taken that is directed at the entity. (Regulation 18702.1(a)(1).)
- (2) It is reasonably foreseeable that the employer will be financially materially affected by the decision, as defined in the Commission’s conflict-of interest regulations. (Regulations 18702.1 and 18702.3.) Officials should consult the conflict-of interest regulations to determine the dollar threshold of the financial effect on the prospective employer that will trigger the official’s disqualification from a decision. (Section 87407; Regulation 18747.)

One-Year Ban

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; Regulation 18746.1(a)(4).) 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. (Section 87406(d)(1); Regulation 18746.1(b)(3) and (4).)

In contrast to the permanent ban, which only applies to certain matters involving specific parties such as “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(a)(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(a).) 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. (Regulation 18746.2(a).)

However, during the first year after leaving the agency, a former agency employee may advise others about communications with the agency intended to influence agency action (e.g., reports and other submissions) as long as he or she is not identified in the communication. (*Cook* Advice Letter, No. A-95-321.) We have 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 an administrative action. (*Cook* Advice Letter, No. A-95-321; *Harrison* Advice Letter, No. A-92-289.) A former agency employee may also advise clients on the procedural requirements, plans, and policies of the former agency as long as the former employee is not identified with the clients’ efforts to influence the agency. (*Newton* Advice Letter, No. A-96-129.)

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)(C).)

Are you prohibited from lobbying the entire executive branch or is the prohibition limited to interactions with the Governor and the Governor’s immediate staff? If the prohibition is not limited to the Governor and the Governor’s immediate staff, is it confined to the Executive Branch Administration (hereinafter, “the Governor’s Administration” or “Administration”), excluding constitutionally elected office holders and statutorily independent agencies?

In making a determination as to which agency an employee works for or represents, the scope of his or her duties is an important factor. Pursuant to the express language of the statute, the “state administrative agency of a designated employee of the Governor’s office includes any state administrative agency subject to the direction and control of the Governor.” (Section 87406(d)(2).) Therefore, for ex-employees within the Governor’s office, the primary focus is on determining which agencies the Governor, not the employee, directs and controls.

Consistent with Section 87406(d)(2), for ex-employees of the Governor’s office, we have advised that the “entire executive branch” is subject to the direction and control of the Governor. (*Zaremborg* Advice Letter, No. A-92-038; *Sybert* Advice Letter, No. I-93-380.) However, also consistent with the concepts of control discussed in the *Gould* Advice Letter, No. A-96-077, we

would not view constitutionally elected officeholders or statutorily independent agencies to fall under the prohibitions of Section 87406(d)(2).

Accordingly, the one-year prohibition prevents you from lobbying the Governor's office and any state administrative agency subject to the direction and control of the Governor. However, the prohibition does not encompass constitutionally elected officeholders, such as the Attorney General, or statutorily independent agencies.

Do the post-employment restrictions of the Act prohibit you from lobbying the Governor and the Governor's immediate staff, if the lobbying in question is performed on a volunteer basis? May you discuss legislative or administrative matters with the Governor, the Governor's immediate staff if you are not employed or retained by an interested client or have any other financial interest related to the matter?

Under Section 87406(d)(1) in order for the one-year ban to apply representation must be for compensation in connection with representation of another person. (*Reames* Advice Letter, No. I-91-289; *Simonian* Advice Letter, No. I-94-001.) The term "person" as defined in Section 82047 includes any "individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, association, committee, and any other group of persons acting in concert." If you will not be compensated for your representation, the one-year ban would not apply.

However, we caution that compensation includes both income and promised income. (Section 82030.5.) Thus, even volunteer services may come within the purview of the one-year ban if there is any indication that your services will be ultimately compensated through future payments. To the extent that you provide volunteer services to any prospective client, who may provide compensation for your services at a later time, you may wish to seek additional advice.

May your direct reports and other representatives of Amazon attend meetings and lobby the Governor and the Governor's immediate staff? If so, may you advise direct reports and other representatives of Amazon as to strategies that may be helpful in such an advocacy meeting, as long as you do not attend the meeting? Further, may you introduce direct reports and other representatives of Amazon to the Governor and the Governor's immediate staff so long as the intent of the meeting is not to influence administrative or legislative action and no attempts at advocacy occur? Finally, may you draft advocacy proposals, on Amazon's letterhead or sent via Amazon email, but without your signature and that do not identify you, that are directed to the Governor and the Governor's immediate staff?

We have advised that restrictions on influencing administrative or legislative action do not apply to paid or unpaid assistance rendered to a third person who subsequently appears before or communicates with a former official's agency. Thus, the ban of Section 87406 did not restrict a former official from assisting or advising other attorneys in the official's law firm or clients themselves who might appear before or communicate with the official's former agency regarding a regulation or legislation under consideration. (*Ordos* Advice Letter, No. A-95-052.)

Communications with an agency that are not for the purpose of influencing administrative or legislative action are not restricted by Section 87406. For example, an ex-employee can attend informational meetings with the agency, or request information from the agency concerning

existing laws, regulations, or policies, so long as the employee does not attempt to influence administrative or legislative action. (See *Bagatelos* Advice Letter, No. I-91-202; and Regulation 18202(a)(1).)

The Commission has advised that a former agency official may 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, the ex-employee may use his or her expertise to advise clients on the procedural requirements, plans, or policies of the employee'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.) Certain other informal contacts may not be considered influencing.

For example, an ex-employee may request information concerning anything that is a matter of public record, such as existing laws, regulations, or policies. (*Tobias* Advice Letter, No. A-96-089; *Harrison* Advice Letter, No. A-92-289.) Further, an ex-employee may attend informational meetings or public forums if the attendance is not for the purpose of influencing agency actions. (*Craven* Advice Letter, No. A-93-057.) Social conversations are also not considered influencing if the conversation is not intended to influence administrative or legislative action. (*Tobias* Advice Letter, No. A-96-089.)

May you advocate a position on behalf of Amazon at a legislative hearing or informal meeting with legislative staff, if members of the Governor's Administration are present and representing the Governor's administration? May the Governor, the Governor's immediate staff or the Governor's Administration contact you with the intent of influencing the position of Amazon on a legislative, regulatory or other issue?

Whether a particular meeting or conversation is for the purpose of influencing legislative action will depend on the individual facts of the case. For instance, if an ex-employee attends a public meeting with numerous other attendees where there are several topics discussed, it may be possible to infer that mere attendance is not for the purpose of influencing the official's former agency's action. Testifying at a public legislative hearing before the legislature would generally be permissible so long as the ex-employee is not communicating directly to his or her former agency at that hearing. Conversely, where there is a small informal meeting to discuss a particular administrative or legislative action, it may be inferred that the ex-employee's mere presence at the meeting is intended to influence agency action. Therefore, whether the ex-employee may attend such a meeting depends greatly on the facts of that particular meeting and the ex-employee's intentions in attending the meeting.

It is important to note that Section 87406 specifically states that a former state official may not have *any* contact with any officer or employee of the official's former agency for any of the prohibited purposes. The prohibitions include any oral or written communication.

Therefore, regardless of who initiates the contact, you may not personally communicate with the Governor's office staff or other officials subject to the prohibition to influence legislative or administrative action or one of the enumerated proceedings if you are compensated to do so. (*Tobias* Advice Letter, No. A-96-089; *Cook* Advice Letter, No. A-95-321; *Craven* Advice Letter, No. A-93-057.) You may receive general information concerning anything that is a matter of public

record, but you may not act as a liaison for a specific request pending before the Governor's office and state administrative agencies under the direction and control of the Governor's office. (*Tobias* Advice Letter, No. A-96-089.) You may, however, use your expertise to advise your direct reports and other representatives so long as you are not identified with their efforts to influence the Governor's office or any agency under the direction and control of the Governor. (*Perry* Advice Letter, A-94-004.)

You may carry on a social conversation if the conversation is not intended to influence administrative or legislative action. (*Tobias* Advice Letter, No. A-96-089.) As discussed above, you may not participate in conversations or meetings if the conversations are for the purpose of influencing administrative or legislative action or an enumerated proceeding. (*Craven* Advice Letter, No. A-93-057.) Our conclusion would not change if you are not the one who initiates the conversation or meeting or if the Governor's office requests your participation.

As discussed earlier, whether a particular meeting or conversation is for the purpose of influencing legislative action will depend on the individual facts of the case. Whether the ex-employee may attend a meeting or make a contact depends greatly on the facts of that particular meeting and the ex-employee's intentions. Under the circumstances you have described in your questions, with the possible exception of introductions of your staff to others where no advocacy occurs and testifying at public legislative hearings, it appears you would be communicating and participating in meetings and other communications with your former agency for the purpose of influencing legislative or administrative action.

However, you are not restricted from assisting or advising others at Amazon who might appear before or communicate with your former agency regarding a regulation or legislation under consideration, so long as you are not identified in connection with any communication or appearance made by the person you are assisting or advising. (*Ordos* Advice Letter, No. A-95-052.) Moreover, this includes preparing a proposal on Amazon letterhead or an Amazon email to be sent to the Governor's immediate staff, so long as you are not identified in the communication including any email address from which the communication is sent. Finally, third parties who are not officers or employees of the Governor's office or a state administrative agency under the direction and control of the Governor are not included in the prohibition.

Permanent Ban on "Switching Sides"

The "permanent ban" prohibits a former state employee from "switching sides" and participating, for compensation, in certain proceeding involving the State of California and other specific parties, or assisting 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 applies to every "state administrative official," which is defined as "every member, officer, employee or consultant of a state administrative agency who as part of his or her official responsibilities engages in any judicial, quasi-judicial or other proceeding in other than a purely clerical, secretarial or ministerial capacity." (Section 87400(b).) However, the ban does not apply to members, officers, employees, or consultants of the Legislature, the courts, or any

agency in the judicial branch of government, unless they held other positions or offices subject to the ban. (Sections 87400-87402.)

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. (Regulation 18741.1(a)(2).) “‘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.)

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).)

You may not, for compensation, aid, advise, counsel, consult or assist in representing any other person with the intent to influence the outcome of a proceeding in which you participated. (Section 87402.) This means that you may not work on proceedings in which you may have participated in at the Governor’s office and may not assist or advise other persons on such matters. You are deemed to have “participated” in any proceeding which you supervised or which you handled during your employment. (*Brown* Advice Letter, No. A-91-033.)

You have not provided information related to any proceedings you participated in while employed with the Governor’s office. However, please note that after you permanently leave state service, you are prohibited from aiding, advising, counseling, consulting, or assisting in representing any other person, other than the State of California, in an appearance or communication with the intent to influence any judicial, quasi-judicial, or other proceeding in which you participated while you served as a state administrative official with the Governor’s office.

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

Sincerely,

Dave Bainbridge
General Counsel

Katelyn L. Greene

By: Katelyn L. Greene
Counsel, Legal Division

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