



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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March 27, 2023

Jessica Sicard
Jessicasicard@gmail.com

Re: Your Request for Informal Assistance
Our File No. I-23-016

Dear Ms. Sicard

This letter responds to your request for advice regarding the post-government employment provisions of the Political Reform Act (the “Act”).¹ Because your inquiry is general in nature, we are treating your request as one for informal assistance.²

Please note that we are only providing advice under the post-government employment provisions of the Act. We therefore offer no opinion on the application, if any, of other post government employment laws, such as Public Contract Code Section 10411.³

Please also note that Government Code Section 19990, which is not part of the Act, may be applicable to your situation. Generally, Government Code Section 19990 allows each state agency to develop a statement of incompatible activities, which includes specific enterprises or employment “clearly inconsistent, incompatible, in conflict with, or inimical to” the duties of the agency’s officials and employees. As we do not offer advice beyond the confines of the Act, we must refer you to your agency’s counsel and statement of incompatible activities to ensure that your activities do not violate conflict of interest laws outside the Act or are not otherwise incompatible with your responsibilities to the agency.

Also 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

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 18104 through 18998 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.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

³ Also, we express no opinion regarding your participation in any decision before the California Department of Social Services (“CDSS”), your current state employer. Should you become a paid consultant for the United States Geological Survey (“USGS”), you should seek further advice prior to taking part in any CDSS decision that may impact the USGS. Additionally, we must caution that should consult counsel for the CDSS regarding any restrictions the agency may impose on outside employment or incompatible activities, which are also matters outside of the Act.

not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

QUESTIONS

1. Does the one-year ban prohibit you from acting as a consultant for the United States Geological Survey (“USGS”), related to preparing a technical report on the use of datacasting for earthquake alerts and assisting in developing a strategy for its use, due to your past employment with the California Governor’s Office of Emergency Services (“Cal OES”), where Cal OES is a member of the USGS’ ShakeAlert Working Group, and the Technical User Working Group but the USGS leads the group and is the decisionmaking agency?

2. Are you prohibited from acting as a USGS consultant under the permanent ban due to your work on the subaward grant, California Earthquake Early Warning Program Grant?

CONCLUSIONS

1. As explained below, you would not be generally prohibited from merely consulting for USGS as a subject matter expert on datacasting technology. The one-year ban prohibits you, for twelve months from the date on which you have left Cal OES, July 15, 2022, from making paid appearances and communications before Cal OES 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. The one-year ban generally does not apply to a proceeding in which the former state employee’s state agency is not the governmental decision-maker in the proceeding. Therefore your appearance or communication as a consultant to USGS for purposes of its Technical Working Group is generally not prohibited by the one-year ban. However, as explained below, you may not attempt to influence your former state employer during the one year period in its decisions relating to its own administrative or legislative actions or decisions to issue, amend, or revoke a license, grant, contract or the sale or purchase of goods or property.

2. The permanent ban strictly prohibits you from participating or assisting others participating in a “proceeding,” as defined below, in which you previously participated on behalf of your former employer. The only proceeding identified relates to your work on the subaward grant, a process that has completed. Based on the facts you have provided; the permanent ban would not prohibit you from providing the consulting services to the USGS on this new proceeding.

FACTS AS PRESENTED BY REQUESTER

In the fiscal year 2018-2019, you were employed with the California Governor’s Office of Emergency Services (“Cal OES”) and you were in charge of a subaward grant (“California Earthquake Early Warning Program Grant”) that gave funds to America’s Public Television Stations to run a test pilot and see if using the television broadcast spectrum can transmit earthquake early warning signals in a timely manner. After this project finished, Cal OES was no longer involved with America’s Public Television Stations in an official capacity and did not continue exploring datacasting as a possibility for transmitting public alerts. You state that you did not perform any work on this project beyond the grant that completed in June 2019.

Your last day as a research and development analyst at Cal OES was on July 15, 2022, and this job did not require a form 700. You did not supervise any other employees in your position with Cal OES. Your first day as a contracts analyst at the California Department of Social Services (“CDSS”) was on July 18, 2022. You are still with CDSS in a position that files a Form 700.

USGS Consultant: ShakeAlert Earthquake Early Warning Project

Scientific partners (UC Berkeley, Caltech, USGS and California Geological Survey) that work with the Earthquake Early Warning Program at Cal OES wish to continue exploring datacasting as an option for disseminating earthquake early warning alerts, and they have asked you to teach them about this technology and also help develop resources to help visualize how television and radio frequencies can be used for timely earthquake alerts. Although there are other scientific partners, including Cal OES, you confirmed in a follow-up email that the USGS will be exercising decision making authority for this project.

The USGS considers you an expert in the field of datacasting and would like to engage you as a consultant on a short-term basis to advise on the USGS ShakeAlert Earthquake Early Warning Project, the first public alerting system in the United States to provide rapid mass notification when an earthquake is detected. The work being performed for this project will be for the use of the USGS ShakeAlert internal working groups. Cal OES is a member of USGS’ ShakeAlert Working Group, and the Technical User Working Group. However, these groups are led by the USGS, and the USGS, not Cal OES, exercises decision making authority. The USGS makes the decisions and intends to educate participants of the working groups about different avenues to send alerts since there is a lack of knowledge about datacasting, how it works, how it can be implemented, and its advantages and disadvantages. Accordingly, you would work to accomplish the following tasks:

- Datacasting Technical Report to USGS and its Technical User Working Group. You would provide a datacasting technical report to be used for the education and training of the USGS ShakeAlert Working Groups, specifically, the Technical User Working Group, in an effort to better understand how datacasting works, the feasibility of delivering the ShakeAlert Message in accordance with USGS performance standards, geofencing, bandwidth, concerns and challenges, regulations, credentials, etc.
- Assist USGS’s Technical User Working Group to Develop a Datacasting Strategic Plan
Assist the USGS Technical User Working Group in developing a strategic plan to identify potential uses of datacasting and the engagement of datacasting services as potential technical partners to deliver the ShakeAlert Message via datacasting and coordinate on ShakeAlert deliverables.

In a follow-up emails, you stated that you would be directly supervised by the USGS to provide information and resources on the topic of datacasting. These resources will be available to the scientific partners and would serve as an internal document, for the USGS and its scientific partners.

ANALYSIS

Public officials who leave state service are subject to two types of post-governmental employment provisions under the Act, the one-year ban and the permanent ban.⁴ These provisions are commonly referred to as the “revolving door” prohibitions.

The One-Year Ban

The “one-year ban” prohibits a former state employee from appearing before or communicating with his or her former state administrative agency or its officers or employees on behalf of any other person for compensation for the purpose of influencing any administrative or legislative action or any discretionary action involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. (Section 87406; Regulation 18746.1(b)(5)(C).) Unlike the permanent ban, this ban is not confined to particular proceedings.

The one-year ban applies to, among others, a designated employee of a state administrative agency, “an employee of a state administrative agency who should be designated in the agency’s conflict-of-interest code,” and “any officer, employee, or consultant of a state administrative agency who holds a position that entails the making, or participation in the making, of decisions that may foreseeably have a material effect on any financial interest.” (Section 87406(d)(1); Regulation 18746.1(a)(4).) This may be evidenced by the employee holding a position that is designated in the agency’s conflict-of-interest code or by the actual duties of the employee. (Section 87406(d)(1); Regulation 18746.1(a)(4).) An employee should be designated when that employee holds a position that entails making or participating in making decisions. The ban applies for twelve months from the date the employee permanently leaves state office or employment.

Based on the facts provided, as an analyst at Cal OES who worked on implementing the California Earthquake Early Warning Program Grant, you held a position that appears to have entailed the making, and participation in the making, of decisions that may foreseeably have a material effect on a financial interest. Therefore, you are potentially subject to the one-year ban. However, we do not make a determinative conclusion as it is unnecessary in light of our conclusion below. Assuming, however, that the one-year ban applies, you are prohibited from appearing before or communicating with your former state agency as a paid consultant for USGS for the purpose of influencing any administrative, legislative or discretionary action, to the extent that such action involves the issuance of a permit, license, grant, contract or sale of goods or property during the one year period from July 15, 2022 to July 15, 2023,.

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).)

⁴ Regulation 18746.1(b)(1), unless an exception exists, applies the one year ban in Section 87406 when a state official has permanently left “any particular office or employment,” meaning that the one-year ban applies to the official’s activities before their former state agency even if he or she has moved to employment with another state agency.

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, as relevant to these facts, 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).)

We point out, however, that not all communications are prohibited by the one-year ban. A communication is not subject to the one-year ban when the former official:

- (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.

(Regulation 18746.2(b)(1)-(4).)

Whether a particular meeting or conversation is for the purpose of influencing administrative or legislative action (as defined by Regulation 18746.2) depends on the facts of each case. For instance, if a former employee attends a public meeting with many other persons where there are many topics on the agenda, it may be reasonable to infer that the former employee’s attendance is not for the purpose of influencing the agency’s action. Conversely, where there is a small meeting to discuss a particular administrative or legislative action, or other specific 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 (Section 87406(d)), it may more readily be inferred that the former employee’s presence at the meeting is intended to influence agency action. (*Ramirez* Advice Letter, No. A-99-300.)

Additionally, a former agency official may draft proposals on a client’s behalf to be submitted to the agency. (*Cook* Advice Letter, No. A-95-321; *Harrison* Advice Letter, No. A-92-289); or may use his or her expertise to advise clients on the procedural requirements, plans, or policies of his or her former agency (*Perry* Advice Letter, No. A-94-004), so long as the former employee is not identified in the client’s efforts to influence the agency.

Based on the facts you have provided, the one-year ban would not prohibit you from providing consulting services to the USGS as described above, because USGS, not Cal OES, will be the agency making the decisions on this project. Generally, if a former state employee's state

agency is not the governmental agency making the decision in a particular proceeding, the former employee is not appearing before the former agency for purposes of the one-year ban. Therefore, merely attending a meeting with USGS in which your former state employer is participating as a stakeholder or technical group member generally would not be an appearance or communication subject to the one-year ban. (*Chan* Advice Letter No. I-09-063; appearance or communications in the capacity as a federal employee at a meeting in which the former state agency is requesting waivers, funding and other actions does not fall under the one-year ban where the state agency is not the decision-maker in the proceeding; *Wetter* Advice Letter No. I-21-038; appearance and communications with former state agency as a federal employee related to federal clean-up projects is not prohibited by the one-year ban where the state agency is neither the lead regulator or lead agency on the projects.)

We caution, however, that your participation as a consultant will be restricted because you may not use the meetings as opportunities to make appearances or communications otherwise prohibited. At no time, even during the course of the work, may you make an appearance or communication, while representing the USGS, to influence your former state employer in its decisions relating to its own administrative or legislative actions or in its decisions to issue, amend, award, or revoke a permit, license, grant, or contract, or the sale or purchase of goods or property.

As an example, you may participate in a meeting as a consultant to the USGS, in which your former state agency employer participates as a stakeholder or member of a technical working group, to the extent that the USGS is making determinations concerning the datacasting actions. Moreover, you may evaluate the proposed actions and seek clarification from your former state employer as necessary to answer any questions you may have pertaining to the datacasting actions. because this would not involve communicating directly with Cal OES on behalf of USGS to influence any Cal OES administrative, legislation or discretionary action, given that the USGS will exercise decision making authority as to datacasting project.

Permanent Ban

The permanent ban prohibits a former state employee from switching sides and participating for compensation in certain proceedings involving the State of California and other specific parties, if the former state employee participated in the proceeding(s) while employed by the state. (Sections 87401 and 87402; Regulation 18741.1.)

The permanent ban is a lifetime ban and applies to any formal or informal appearance or any oral or written communication made with the intent to influence a judicial, quasi-judicial, or other proceeding in which you participated while serving as a state administrative official. (Section 87401.) These types of proceedings include: 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).) Thus, the permanent ban covers proceedings that affect the rights or claims of specific parties. It does not apply to proceedings that involve the making of rules or policies of general applicability.

An official or employee has “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 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. 1-03-119.) 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. 1-99-104; *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.)

To the extent that you “participated” in proceedings while employed with Cal OES, you would be subject to the permanent ban. You have identified that you were involved in a subaward grant that was a part of the California Earthquake Early Warning Program Grant that gave funds to America’s Public Television Stations to run a test pilot on using the television broadcast spectrum, but that CAL OES was no longer interested in pursuing this after the grant ended in 2019. As this grant has ended, this proceeding has concluded, and the permanent ban would not apply to any new proceedings, even if this datacasting project grew out of your work on the subaward grant.

Therefore, based on the facts you have provided, the permanent ban would not prohibit you from providing consulting services to the USGS as this would not involve the proceeding in which you had participated in while employed by Cal OES

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

Sincerely,

Dave Bainbridge
General Counsel

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By: Zachary W. Norton
Senior Counsel, Legal Division

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