



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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May 19, 2023

Russ Nichols
2953 Boeing Rd
Cameron Park, CA 95682

Re: Your Request for Informal Assistance
Our File No. I-23-058

Dear Mr. Nichols:

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.

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

QUESTIONS

1. As a former California Department of Technology (“CDT”) Chief Deputy Director, under the one year ban, may you, through a consultant business, advise state entities on projects that involve CDT as a control agency, including those receiving CDT Technology Stabilization and Modernization program (“TSM program”) funding?

2. Under the permeant ban, are you prohibited from advising state entities on projects that received funding through the CDT’s TSM program, and advising state entities that have projects approved and monitored by CDT as a control agency or any project in which you served as a member of the project’s Steering Committee on behalf of CDT?

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).)

CONCLUSIONS

1. You are subject to the one-year ban and may not appear before or communicate with CDT as a consultant as detailed below for one year from the date of your permanent separation on October 14, 2022, and continuing until October 14, 2023. The one year ban does not apply to your appearances before state agencies that are not under CDT's direction and control, as discussed below. Note that you are not prohibited under the one-year ban from making appearances or communications before CDT as a part of services performed to administer, implement, or fulfill the requirements of an existing contract, so long as those services do not involve the issuance, amendment awarding or revocation of the contract during the one-year ban period and you are not otherwise prohibited under the permanent ban. (Regulation 18746.1(c).)

2. The Act's permanent ban prohibits you from participating in certain proceedings involving the State of California or assisting others in the proceedings, if you previously participated in the proceedings while employed by CDT. However, you have not identified any specific proceedings in which you may have previously participated. You should seek additional advice prior to offering any assistance to HiPer Solutions or any other persons regarding any specific proceeding in which you previously participated.³

FACTS AS PRESENTED BY REQUESTER

You served as the Chief Deputy Director of CDT and retired from this position in November 2022. In a follow up email, you stated that your last working day was October 14, 2022. While at CDT, you held a position designated in the agency's conflict of interest code as the Chief Deputy Director and oversaw all operations of CDT. All areas of CDT operations and services are managed by deputy directors or senior managers that report to you.

CDT's Oversight Role on Information Technology ("IT") Projects

CDT is a department within the Government Operations Agency. CDT is a "control agency" that provides oversight of the state's technology portfolio and provides technology services to state departments and agencies. In this role it is responsible for setting IT policy and approving/monitoring significant IT projects for the state. CDT oversees the state's technology portfolio by developing the state technology strategic plan and state technology policies. CDT then reviews and approves technology projects proposed by departments and agencies in light of the CDT plans and policies and other guiding statutes and policies. In some cases, CDT executes the procurements necessary to fulfill a project's requirements on behalf of the state department or agency that owns the project. Funding and staffing authority for projects are granted by Department of Finance, not CDT.

³We caution that your facts potentially implicate the prohibitions in Section 1090. Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Pursuant to Section 1090, leaving state employment may not avoid a Section 1090 violation when the person has been involved in the contract process. You may also wish to seek further advice concerning Section 1090 prior to participating in any decisions involving a contract in which you previously participated.

CDT's Role on Significant IT Projects

During the course of significant projects, CDT monitors the progression of the projects and in some efforts, is a participant in governance as a member of the project's "Executive Steering Committee." While the specific departments and agencies have full management control of the project, project status, budget, and challenges are reported to the project Steering Committee. Within the project Steering Committee, CDT acts as a participant providing guidance, but refrains from decision making. That role is retained by the departments or agencies conducting the project. Information for the project is ultimately reported to CDT to ensure the project remains within the CDT-approved constraints for the project. Should the project fail to remain within the constraints, CDT can use control-agency authority to stop, reassess, or allow the project to continue with new constraints.

In a telephone call, you explained that CDT is not tasked with determining whether a particular agency or department needs a particular technology, but rather, it is responsible for evaluating whether the proposed project approach and technology are capable of working as intended, evaluating potential risk to the state in procurement and project execution. If CDT determines that a particular technology will function as intended and that the project approach and staffing are appropriate, it recommends to the Department of Finance that the project is appropriate. Once approved, CDT provides oversight of project milestones, determining whether implementation of a project is on track, and, if not, why. CDT can stop a project if it is not meeting these goals but does not manage the project.

CDT's TSM Program

By way of the TSM program, CDT may also provide funding to other departments, essentially in the form of a grant. Departments propose an IT project and CDT determines if the project merits a state investment of funds. The state Department of Corrections and Rehabilitation, Department of Industrial Relations, and Environmental Protection Agency, as well as several other entities, were allocated funding during your tenure. Once awarded, CDT monitored project progression, but took no active role in managing the project or operating the business of the receiving department.

In a follow up email, you explained that the Legislature approves the TSM program fund as a component of CDT's budget. This fund is managed separately from CDT's other budget items. State organizations can propose projects to CDT for use of the TSM program funding. These organizations could be departments, boards, commissions, etc. In all cases but one, the organizations that received funding during your tenure were from agencies other than the Government Operations Agency. To your knowledge, no department or organization within the Government Operations Agency has received funding since your departure.

Future Consultant Employment

You plan to accept an offer of employment from a company called HiPer Solutions. They have several contracts with the state, including a contract with CDT and one with a department that received funds from the CDT's TSM program fund. In your new employment capacity, you would act as a mentor or coach to the project staff with other state agencies, advising the project staff how

best to meet the requirements established during CDT's initial review. In some cases, you might simply monitor fulfillment of the requirements for the department executives, such as a chief deputy director or director. You anticipate that you may be asked to participate in conference calls with CDT on behalf of an agency in your capacity as a consultant.

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. 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 their 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 ban applies for twelve months from the date the employee permanently leaves state office or employment. Regulation 18746.4(b) provides that the date on which an officer of a state administrative agency permanently leaves office or employment is the date on which the officer is no longer authorized to perform the duties of the office or employment, and stops performing those duties, despite the officer continuing to receive compensation for accrued leave credits thereafter.

Application to Your Post-Employment, Appearances & Communications before CDT

The one-year ban applies to any designated employee of a state administrative agency. (Section 87406(d)(1); Regulation 18746.1(a)(4).) As the former Chief Deputy Director of the CDT, a position designated in the CDT's Conflict of Interest Code, you are subject to the one-year ban. You stopped performing the duties of the CDT's Chief Deputy Director on October 14, 2022. Therefore, you permanently left state service on that date, and you are subject to the one-year ban until October 14, 2023.

During this time, you are prohibited from appearing before or communicating with CDT as a paid consultant 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. Appearances and communications are prohibited if they are before CDT or before a state agency "which budget, personnel, and other operations are subject to the direction and control of CDT." (Regulation 18746.1(b)(6).)

A threshold issue is whether the one-year ban will extend to agencies under CDT's technological oversight. You state that CDT has oversight of the technology needs for state agencies. It is responsible for evaluating whether the proposed project approach and technology are capable of working as intended, and recommends appropriate projects to the Department of

Finance. Once approved, CDT provides oversight of project milestones, but does not manage the project. For significant projects, CDT participates in a “project steering committee” where CDT acts to provide guidance to the state department or agency but is not in a decisionmaking role. CDT also provides funding to other departments, in the form of a grant through its TSM program. In these instances, once the funds are awarded, CDT monitors project progression, but takes no active role in managing the project or operating the business of the receiving department. The fact that an agency is providing technical assistance, legal advice, or is subject to oversight by another agency pursuant to state law, is not a factor in determining whether an agency is subject to the direction and control of another. (Regulation 18746.1(b)(6)(C)(ii)). Therefore, based on these facts, the agencies with whom you would be working are not subject to CDT’s direction and control merely because CDT provides technical assistance or oversight to those agencies, and you would not be prohibited under the one-year ban from making appearances or communicating with these agencies.

Additionally, you will not be prohibited under the one-year ban from performing work as an independent contractor on matters involving CDT that do not require you to appear before or communicate with CDT. 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 their former 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.) 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.)

Telephone Calls with CDT on Behalf of a 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.*) You state that you may be asked to participate in conference calls with CDT on behalf of an agency in your capacity as a consultant. Under the one-year ban, you are generally prohibited from doing so until October 14, 2023.

Certain contacts do not rise to an “appearance for the purpose of influencing.” For example, an ex-employee may request information from their former agency 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, *supra.*) Also, you will not be prohibited from communications with CDT that are made as part of “services performed to administer, implement, or fulfill the requirements of an existing permit, license, grant, contract, or sale agreement... provided the services do not involve the issuance, amendment, awarding, or revocation of any of these actions or proceedings” during this time period. (Regulation 18746.1(c).) Note that the above exception is only applicable to the extent that the permanent ban does not prohibit your participation in the proceeding. (*Id.*)

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.) The permanent ban also prohibits a former state employee from aiding, advising, counseling, consulting, or assisting in representing any other person (except the State of California) in any proceeding in which the former official would be prohibited from appearing under Section 87401. (Section 87402.)

For purposes of the permanent ban, “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).) 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 the official 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).)

Relevant to your role as Chief Deputy Director, Regulation 18741.1(a)(4) further defines that a supervisor is “deemed to have participated” in any proceeding that was pending before the official’s agency and that was under the supervisor’s supervisory authority. For purposes of this regulation, a proceeding is under a supervisor’s “supervisory authority” if any of the following applies to the supervisor:

- (A) The supervisor’s duties include the primary responsibility within the agency for directing the operation or function of the program where the proceeding is initiated or conducted. However, this provision does not apply to a supervisor who is only responsible for the general oversight of the administrative actions or functions of a program in which the responsibilities concerning the specific or final review of the proceeding are expressly delegated to other persons in the agency.
- (B) The supervisor directly supervises the person performing the investigation, review, or other action involved in the proceeding including, but not limited to, assigning the matter for which the required conduct is taken.
- (C) The supervisor reviews, discusses, or authorizes any action in the proceeding.
- (D) The supervisor has contact with any of the participants in the proceeding regarding the subject of the proceeding.

Notably, 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. (See, e.g., the *Rist* Advice Letter, No. A-04-187 and the *Goldberg* Advice Letter, No. I-05-225.)

Further, the application, drafting, and awarding of a contract, license, or approval is considered a proceeding separate from the monitoring and performance of the contract, license, or approval. (See *Starovoytov* Advice Letter, No. A-14-149, citing *Anderson* Advice Letter No. A-98-159, and *Blonien* Advice Letter, No. A-89-463.) The “performance” or “implementation” proceeding is narrowly construed and limited to the execution of the existing terms of an existing contract. (*Lujan* Advice Letter, No. A-14-009.) Where an employee has participated in the implementation proceeding, the employee may not switch sides and work for compensation for an outside employer on the same implementation proceeding. (*Culp* Advice Letter, No. I-14-051.)

The permanent ban is applicable to you as a former Chief Deputy Director. To the extent that you “participated” in proceedings while employed with CDT, you would be subject to the permanent ban. You have indicated that, during your tenure, projects received funding through CDT’s TSM program, projects were approved and monitored by CDT as a control agency, and that you served as a member of a Steering Committee for a certain number of projects approved and monitored by CDT. You state that HiPer Solutions has several contracts with the state, including a contract with CDT and one with a department that received funds from the CDT’s TSM program fund. As such, to that extent you have participated in those proceedings, you may not represent or even advise third parties in these proceedings after your separation from government service.

Nonetheless, we do not have any information about specific proceedings at CDT, your participation in any specific proceeding at CDT, or your specific post-separation consultant work to make a determination regarding your current involvement in any specific proceeding at this time. Generally, we can only advise that the permanent ban may apply to certain proceedings you previously participated in, and, to the extent it does apply, you will be prohibited from representing HiPer Solutions in the proceeding as well as aiding or assisting them in any way. You may wish to seek further assistance regarding the permanent ban prior to offering any assistance to HiPer Solutions or any other persons relating to a specific proceeding in which you previously participated.

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

Sincerely,

Dave Bainbridge
General Counsel

Zachary W. Norton

By: Zachary Norton
Senior Counsel, Legal Division

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