

RAVI MEHTA
CHAIRMAN



FAIR POLITICAL PRACTICES COMMISSION

October 18, 1995

Mr. Michael F. Byrne
Director
Department of Conservation
801 K Street
Sacramento, CA 95814-3528

Re: Your request for Advice
Our File No. A-95-337

Dear Mr. Byrne:

You have requested advice about the "revolving door" restrictions of the Political Reform Act (the "Act")¹ that apply to your activities in the governmental relations firm you plan to open after you leave the Department of Conservation.

QUESTIONS

1. How will the Act's revolving door provisions affect your activities in your governmental relations firm? Which state agencies may you represent clients before and which state agencies may you not?
2. May you work for a client who has contracted with the Department of Conservation during your tenure, if your work has nothing to do with the contract and the Department of Conservation?
3. How will the Act's revolving door provisions affect your lobbying activities?

CONCLUSIONS

1. For one year you may not represent any other person for compensation before the Department of Conservation. This prohibition would preclude you from making any formal or informal appearance, or any oral or written communication, if the

¹ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations, Sections 18000-18995. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

appearance or communication is for the purpose of influencing the Department's administrative or legislative action or action involving contracts.

The one-year ban on influencing your former agency's administrative or legislative action or action involving contracts only applies to the "state administrative agency" for which you worked, the Department of Conservation. This ban does not prohibit you from advocating administrative or legislative action or action involving a contract before other state agencies, the Governor, or the Legislature.

In addition, you are permanently prohibited from representing another person or aiding, advising, counseling, consulting or assisting in representing another person before any court or state administrative agency (or officer or employee thereof) in any judicial or other proceeding in which you participated as a state administrative official.

The permanent ban prohibits your involvement in any proceeding, or specific matter between two parties, in which you participated while Director of the Department of Conservation. You are prohibited from participating in such proceedings at the Department of Conservation or any other state agency.

2. The Act's revolving door provisions would not prohibit you from entering into a consulting agreement with a client who contracted with the Department of Conservation while you were Director. Under the agreement, you would be attempting to acquire new work for the client, but would not be contacting the Department of Conservation as the client's representative nor conducting business related to a specific proceeding or matter (including the GeoSAR project) on which you worked as Director of the Department.

3. In general, the Act's revolving door restrictions do not prohibit you from lobbying the Legislature or the Governor.

FACTS

You have been Director of the Department of Conservation since 1991. You are resigning your position effective October 15, 1995. Upon your resignation, you will be opening a governmental relations firm, Michael Byrne and Associates ("MB&A"), located in Sacramento. You plan to register as a lobbyist with the State of California.

MB&A will represent the interests of private businesses, institutions, associations, governmental entities and individuals before the state and federal government. Among the services MB&A will provide are issues management and advocacy, permit approvals, sales of products and services to government entities, and public affairs spokesperson.

As Director of the Department of Conservation, you administered the beverage container recycling program as well as concerns related to natural resources conservation, mining, and waste diversion. You also conducted interagency relations with the Trade and Commerce Agency, the Office of Planning and Research, the Office of Emergency Services, the Seismic Safety Commission, and the Departments of Water Resources, Fish and Game, Parks and Recreation, Forestry, and Caltrans.

While you were Director of the Department of Conservation, you also participated in a project known as GeoSAR, which involved mapping seismic hazards in California. The GeoSAR project used military radar for civilian purposes, and was funded in part by the federal government. The entities working on GeoSAR included the Department of Conservation, Jet Propulsion Laboratories, and Calgis Incorporated ("Calgis"). Calgis is a California corporation located in Fresno, which produces maps.

You are interested in signing a consulting agreement with Calgis pursuant to which you would attempt to acquire new work for Calgis from government agencies. The contract states that you would not contact the California Department of Conservation as a Calgis representative, or conduct any GeoSAR project-related business on behalf of Calgis.

ANALYSIS

An official who has left state service is subject to two types of restrictions under the Act. The first is a one-year prohibition on making any appearance before his or her former agency for the purpose of influencing administrative or legislative action or any action involving contracts. The second is a permanent prohibition on influencing any judicial or other proceeding in which the official participated while in state service.

One-Year Ban

Section 87406(d)(1) of the Act provides that no officer or designated employee of a state administrative agency:

" ... for a period of one year after leaving office or employment, shall, for compensation, act as agent or attorney for, or otherwise represent, any other person, by making any formal or informal appearance, or by making any oral or written communication, before any state administrative agency, or officer or employee thereof, for which he or she worked or represented during the 12 months before leaving office or employment, if the appearance or communication is 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."

Pursuant to Section 87406, for one year after you leave the Department of Conservation, you may not, for compensation, act as representative or agent for any person before the Department for the purpose of influencing² administrative³ or legislative⁴ action or 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. (Section 87406.)

For example, under Section 87406, you would be prohibited from making any communication or appearance to influence the Department of Conservation's action on any existing or new contracts, including contracts related to the GeoSAR project. Any communications such as telephone calls or meetings with Department of Conservation staff that are intended to influence administrative or legislative action or action on a contract are prohibited under Section 87406.

However, communications with the Department which are not for the purpose of influencing administrative or legislative action are not restricted by Section 87406. For example, you could attend informational meetings with the Department of Conservation, or request information from the Department concerning existing laws, regulations, or policies, as long as you do not attempt to influence administrative or legislative action. (See Bagatelos Advice Letter, No. I-91-202; and Regulation 18202(a)(i).)

² "Influencing legislative or administrative action" includes influencing by any means, including but not limited to the provision or use of information, statistics, studies or analyses. (Section 82032.)

³ "Administrative action" is defined in Section 82002 as the proposal, drafting, development, consideration, amendment, enactment or defeat by any state agency of any rule, regulation or other action in any rate-making proceeding or any quasi-legislative proceeding.

⁴ Section 82037 defines "legislative action" as 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 or her official capacity. "Legislative action" also means the action of the Governor in approving or vetoing any bill.

Permanent Prohibition

The Act also contains a permanent prohibition on former state officials' involvement in certain proceedings in which they participated while working for the state. Sections 87401 and 87402 provide:

No former state administrative official, after the termination of his or her employment or term of office, shall for compensation act as agent or attorney for, or otherwise represent, any other person (other than the State of California) before any court or state administrative agency or any officer or employee thereof by making any formal or informal appearance, or by making any oral or written communication with the intent to influence, in connection with any judicial, quasi-judicial or other proceeding if both of the following apply:

(a) The State of California is a party or has a direct and substantial interest.

(b) The proceeding is one in which the former state administrative official participated.

Section 87401.

No former state administrative official, after the termination of his or her employment or term of office shall for compensation aid, advise, counsel, consult or assist in representing any other person (except the State of California) in any proceeding in which the official would be prohibited from appearing under Section 87401.

Section 87402.

The Department of Conservation is a "state administrative agency," and as Director of the Department of Conservation, you would be considered a state administrative official. (Section 87400(a) and (b).)

However, this restriction is limited to judicial, quasi-judicial or other proceedings in which you participated. Section 87400 provides:

(c) "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, including but not limited to any proceeding governed by Chapter 5 (commencing with Section 11500) of Division 3 of Title 2 of the Government Code.

(d) "Participated" means to have taken 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, but excluding approval, disapproval or rendering of legal advisory opinions to departmental or agency staff which do not involve a specific party or parties.

(Emphasis added.)

As Director of the Department of Conservation, you are deemed to have "participated" in any proceeding which you supervised or which was handled by the Department of Conservation staff during your tenure. (Brown Advice Letter, No. A-91-033.)

Under Section 87400(c) set forth above, a "proceeding" includes any particular matter involving a specific party or parties in a state administrative agency. For example, any contractual arrangements between the Department of Conservation, Jet Propulsion Laboratories, and Calgis related to the GeoSAR project would constitute a proceeding in which you participated at the Department. You would be permanently prohibited from representing Calgis, or assisting in representing them, before any state administrative agency regarding GeoSAR project contracts.

Consulting Agreement

Section 87406 does not prohibit you from entering into a consulting agreement with Calgis and seeking to acquire new work for the client, as long as you do not attempt to influence the Department of Conservation's administrative or legislative action, or action involving contracts.

In addition, the permanent bar discussed above would not prohibit you from entering into a consulting agreement with Calgis since the agreement is unrelated to GeoSAR project contracts. Thus, you would not be working on the same proceeding in which you participated at the Department of Conservation.

Registration as a Lobbyist

With respect to your registering as a lobbyist, in general, the Act's revolving door restrictions would not prohibit you from lobbying the Legislature or Governor.

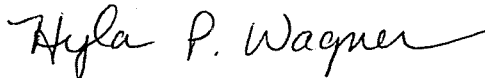
As far as influencing administrative or legislative action, the one-year ban of Section 87406 only prohibits you from appearing before or communicating with the state agency for which you worked. Thus, lobbying the Legislature or Governor regarding legislation, is not restricted by Section 87406. (See Witherspoon Advice Letter, No. A-94-371.)

The permanent ban of Sections 87401 and 87402 applies only to judicial, quasi-judicial or other proceedings before any court or state administrative agency in which you participated while at the Department of Conservation. Section 87400(a), however, expressly defines "state administrative agency" to exclude the Legislature. In addition, developing legislative proposals would not be "judicial or quasi-judicial" proceedings. (Witherspoon Advice Letter, supra.)

If you have any further questions regarding this matter, please feel free to contact me at (916) 322-5660.

Sincerely,

Steven G. Churchwell
General Counsel



By: Hyla P. Wagner
Counsel, Legal Division