

RAVI MEHTA  
CHAIRMAN



## FAIR POLITICAL PRACTICES COMMISSION

July 21, 1997

K. Patrick Wheeler  
Environmental Engineer  
169 Lakeshore Court  
Richmond, California 94804

**Re: Your Request for Advice  
Our File No. I-97-291**

Dear Mr. Wheeler:

This letter is a response to your request for advice regarding the provisions of the Political Reform Act (the "Act").<sup>1</sup> Because you have provided us with very little detail regarding your former employment with the State Water Resources Control Board, Division of Clean Water Programs, Underground Storage Tank Cleanup Fund ("SWRCB"), the nature of the fund allocation procedures engaged in by SWRCB and your present consulting services, we do not have sufficient facts to render formal advice. Consequently, we are treating your request as one for informal advice, as required under Regulation 18329 (copy enclosed.) Please bear in mind that nothing in this letter should be construed as evaluation of any conduct which may already have taken place. Further, this letter is based on the facts as they have been presented to us. The Commission does not act as the finder of fact in providing advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

### QUESTIONS

1. You are a former employee of the SWRCB and presently have your own private consulting firm which advises people with respect to applying to the Underground Storage Tank Cleanup Fund (the "Fund") for reimbursement of cleanup costs. Given your past affiliation with SWRCB, are you barred under the applicable provisions of the Government Code from representing people (for compensation) in front of the SWRCB or from communicating with the SWRCB on any matter?

2. If you are barred from representing persons in front of the SWRCB or from communicating with the SWRCB, does that bar apply to an employee of your present consulting company? Additionally, does the analysis change if the employee is a spouse, friend or sibling?

---

<sup>1</sup> Government Code sections 81000 - 91014. Commission regulations appear at title 2, sections 18109 - 18995, of the California Code of Regulations.

company? Additionally, does the analysis change if the employee is a spouse, friend or sibling?

### CONCLUSIONS

1. Under section 87406(d)(1), you are barred from representing clients for compensation before the SWRCB (including the Fund) for a period of one year from the date you left employment with the state. Under the prohibitions of sections 87401 and 87402, you are banned **permanently** from representing or appearing for any person (for compensation) before any court or state administrative agency with the intent to influence, in connection with any judicial or quasi-judicial proceeding, if the State of California is a party or has a direct and substantial interest and the proceeding is one in which you participated while with the state.

2. Employees of your consulting business, including a spouse, friend or sibling, are not generally implicated by the ban of section 87406(d)(1). The permanent ban of section 87402 does implicate employees of your consulting business **unless** you are completely “walled off” from any participation or involvement in the particular proceeding.

### FACTS

The following recitation of facts is set forth in your letter. As stated previously, the Commission relies on facts presented by the person requesting advice; we make no attempt to gather independent facts or correct any factual statement provided.

You were employed formerly by the SWRCB. Subsequent to your employment with the SWRCB and the State of California, you have started a private consulting firm that advises people who are faced with environmental contamination cleanup and wish to apply to the Fund for reimbursement of their cleanup costs.

The Fund is a reimbursement program only and is not charged with enforcement or regulatory duties. The duties of the Fund’s staff are simply to ensure that funds gathered are expended for appropriate activities. The staff does not have the regulatory authority to direct action; the staff can only advise people on the potential eligibility of costs for reimbursement from the program.

The responsible parties engaged in remedial actions are under the direction of some local regulatory agency (e.g., regional board, county health agency or regional water district). These agencies are parties in the sense that they are directing the cleanup and they have a substantial interest in attempting to ensure that the waters of the State of California are protected. These responsible parties engage the services of contractors or environmental consultants to carry out the remediation. The costs incurred by this activity are then submitted to the Fund for review and possible reimbursement.

The monies expended from the Fund are not from the General Fund but are special fees raised during the delivery of petroleum products to underground storage tanks and are specified

as a non-tax. These fees cannot be used for any purpose other than to reimburse responsible parties for eligible costs and each party may be allotted up to one million dollars in reimbursement costs.

The Fund is a public agency. Its files are subject to the freedom of information act. Proceedings before the Fund are subject to regulations that solicit and allow public comment.

During your tenure with the SWRCB you were involved in a great many proceedings, both internal and external.

### **APPLICABLE LAW**

The Act's post-governmental employment restrictions limit the types of contacts a former employee may have with his or her agency. Two limitations exist: a one year ban involving appearances in front of and communications with a former employee's former agency and a permanent ban involving participation in judicial and quasi-judicial proceedings in which the former employee participated while at his or her former agency. These two bans are discussed generally below.

#### **1. One Year "Revolving Door" 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 a designated employee leaves his or her agency, the employee may not, for compensation, act as representative or agent for any person before his or her agency for the purpose of influencing (1) administrative or legislative action or (2) 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.)

##### **a. Influencing Administrative or Legislative Action.**

"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.) “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.

In determining whether other proceedings are quasi-legislative, the Commission has considered relevant whether the action taken involved “an orientation towards a future event,” or “rules and regulations which establish standards for future conduct” to which a private party must conform in the future. (*In re Leonard* (1976) 2 FPPC Ops. 54; *Erickson* Advice Letter, No. A-90-537.) However, as a threshold matter, matters that are quasi-judicial are not quasi-legislative. (See, *In re Evans* (1978) 4 FPPC Ops. 84.) Thus, for example, adjudicatory proceedings such as licensing or permit proceedings are not considered administrative action. (*Epstein* Advice Letter, No. A-90-306.)

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 a bill.

A designated employee’s state administrative agency means the agency for which he or she worked, or any board or commission under the agency’s control. (*Grimm* Advice Letter, No. I-96-114; *Gould* Advice Letter No. A-96-077.) Thus, generally, a designated employee is not restricted by section 87406 from lobbying the Legislature or Governor regarding legislation. (*Witherspoon* Advice Letter, No. A-94-371; *Craven* Advice Letter, No. A-93-057.) In addition, a former employee is not prohibited from influencing administrative action of agencies not under the control of his or her agency. (*Monagan* Advice Letter, No. A-93-473.)

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.)<sup>2</sup> 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, *supra*.)

In addition, 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

---

<sup>2</sup> The inclusion of the ex-employee’s name on the employer’s normal letterhead will not constitute an appearance before or communication to the employee’s former agency. (*Perry* Advice Letter, No. A-94-004.)

attempt to influence administrative or legislative action. (See *Bagatelos* Advice Letter, No. I-91-202.)

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, *supra*.) 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, *supra*.)

**b. 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 apparent intent of section 87406 generally is to remedy the problem of recent agency “insiders” using the advantages of that recent “insider” status on behalf of their clients. In keeping with this remedial purpose, the Commission staff interprets section 87406 broadly. (*Marcus* Advice Letter, No. A-96-334.)

**2. Permanent Ban on “Switching Sides.”**

Sections 87401 and 87402 provide an additional restriction on the post-governmental employment activity of former public officials that may apply even where section 87406 does not, or where the one year prohibition in section 87406 has run. They 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 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 a former employee participated while at his or her former agency. Section 87400(a) expressly defines "state administrative agency" to exclude the Legislature. (*Sanford* Advice Letter, No. A-85-182.)

Section 87400(c) defines "judicial, quasi-judicial or other proceeding" to include:

“[A]ny 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.” (Emphasis added.)

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).) This covers any proceeding in which any employee has actually participated while at his or her former agency, as well as any proceeding which he or she supervised. (*Brown* Advice Letter, No. A-91-033.)

Under section 87400(c) set forth above, "proceeding" includes any particular matter involving a specific party or parties in a state administrative agency. Proceedings that are regulatory or general in nature are not a "proceeding" for purposes of section 87401 since there is no specific party involved. (*Chalfant* Advice Letter, No. A-92-509.) Sections 87401 and 87402 prohibit participation in the **same** proceeding in which an official participated as a state employee, but does not restrict his or her ability to participate in **new** proceedings. (*Leslie* Advice Letter, No. I-89-649.)

## ANALYSIS

Section 87401 restricts the activities of state administrative officials; section 87406 restricts the activities of designated employees and members of state administrative agencies, as well as officers, employees or consultants of state administrative agencies who have decisionmaking authority. Under section 87400(b), a state administrative official is defined as:

“[E]very 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.”

A judicial, quasi-judicial or other proceeding is defined under Section 87400(c) as:

“[A]ny 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 82019 defines the term, “designated employee.” In brief, a designated employee is one who is exempt from the state civil service system, is elective, is designated in a conflict of interest code or is involved as a state employee at other than a clerical or ministerial level in the functions of negotiating or signing any contract awarded through competitive bidding, in making decisions in conjunction with the competitive bidding process, or in negotiating, signing, or making decisions on contracts executed pursuant to Section 10122 of the Public Contracts Code.

In your letter, you have not stated whether you are a state administrative official for purposes of analysis under section 87401 or are one of the enumerated persons specified in section 87406. Furthermore, you have not provided facts sufficient to deduce this information. Accordingly, a material fact necessary to a complete analysis of your request is not available to us. For purposes of providing you with some direction, we will assume, however, that you are both a state administrative official and a person covered by section 87406. As stated earlier, because your former employment status is an assumed fact, this advice will be informal.

### 1. The One Year Ban.

You also do not give many details regarding the consulting services you will be providing to your clients. To the extent that you intend to represent clients before the SWRCB, for compensation, and intend to engage in any activity which comprises “influencing legislative or administrative action” (see discussion, *supra*, pgs. 4-5), you may **not** do so for a period of one year from the date you left the employ of the SWRCB.<sup>3</sup>

You do state that you intend to advise clients regarding applying to the Fund for reimbursement of their cleanup costs. Again, you have not described the procedures involved in applying to the Fund for reimbursement of costs or the deliberative process engaged in, if any, by the Fund in granting reimbursement. However, it facially appears that an application to the Fund for reimbursement would constitute an “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” as that phrase is used in section 87406(d)(1). Further, as mentioned above, the apparent purpose behind this section is to prevent recent agency “insiders” from exploiting

---

<sup>3</sup> Throughout your letter you make the distinction between the SWRCB and the Fund and imply that you worked exclusively for the Fund. Yet, you do not provide any details describing how these two entities are different or independent. Absent further facts, we must conclude that the Fund is, at least, an adjunct of the SWRCB and under the SWRCB’s control. As such, the prohibitions of sections 87401 and 87406 apply equally to SWRCB and the Fund. (*Grimm* Advice Letter, No. I-96-114; *Gould* Advice Letter, No. A-96-077.)

information gained through agency employment for their personal benefit. You acknowledge that your former experience with the Fund would be a hallmark of your consulting agency in your letter to Ms. Dana Differding (a copy of which was provided to us): “[a]fter leaving the Fund, I hope that I can deliver what I truly consider to be good advice based upon extensive experience and knowledge of both the funding and regulatory processes.” We conclude, therefore, that the consulting services you have described - should you be compensated for them - are both explicitly and implicitly covered by section 87406(d)(1). Consequently, you may not represent clients for compensation before the SWRCB (including the Fund, see footnote 3, *supra*), for a period of one year.

Under the *Davidian* Advice Letter, No. A-97-076a (as amended by the Commission on July 3, 1997, copy enclosed) actions by employees of your consulting business will **not** generally subject you to the ban of section 87406(d)(1). The specific parameters governing prohibited activities for you acting individually and in concert with your employees, are discussed on pages 9 and 10 of the *Davidian* Letter. As expressed in the *Davidian* Letter, the purpose behind the restriction of section 87406(d)(1) is to prevent influence of the state agency in the form of **the individual** who was the state employee. Accordingly, an employee of your business who also happens to be your spouse, friend or sibling is not banned under section 87406(d)(1). However, you must ensure that the combined efforts of you and your employees do not result in a violation of section 87406.

## **2. The Permanent Ban.**

Under the prohibitions of sections 87401 and 87402, you would be banned permanently from representing or appearing for any person (for compensation) before any court or state administrative agency with the intent to influence, in connection with any judicial or quasi-judicial proceeding, if the State of California is a party or has a direct and substantial interest and the proceeding is one in which you participated. The determinations as to whether the state is a party or has a direct and substantial interest and your involvement in a proceeding are both inquiries which are fact specific. Because we do not have enough facts to analyze these inquiries, we cannot determine whether the permanent ban of sections 87401 and 87402 would apply to you. We do not concur, however, with your blanket statement that the “non-regulatory” nature of the Fund exempts it (or the state through it) as a party or prevents the state from having a direct and substantial interest in a proceeding.

Please note that section 87402 prohibits any former state administrative official from **aiding, advising, counseling, consulting or assisting in the representation of any person** in any proceeding in which the official would be banned under section 87401. Because this same language is not found in section 87406(d)(1), we conclude that it was the Legislature’s intent to have a broader application of sections 87401 and 87402 and, thereby, to restrict employees and associates of a former official from participating in a proceeding in which the former official was involved personally and substantially unless the former official is **completely** “walled off” from any participation or involvement in the proceeding (i.e., no aiding, advising, counseling, consulting or assisting is engaged in by the former official).

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

Sincerely,

Steven G. Churchwell  
General Counsel

A handwritten signature in cursive script that reads "Lisa L. Ditora".

By: Lisa L. Ditora  
Staff Counsel, Legal Division

SGC:LLD:jlw