

RAVI MEHTA  
CHAIRMAN



## FAIR POLITICAL PRACTICES COMMISSION

July 24, 1997

James Strock  
400 Spear Street, Suite 107  
San Francisco, California 94105

**Re: Your Request for Advice  
Our File No. A-97-340**

Dear Mr. Strock:

This letter is a response to your request for advice regarding the provisions of the Political Reform Act (the "Act").<sup>1</sup>

### QUESTIONS

Pursuant to the post-government employment restrictions of the Political Reform Act, may you take the following actions:

1. Contact the California Environmental Protection Agency including its constituent boards and departments. (As part of this answer, would you kindly include an explanation of the differential limitations, if any, which may exist with respect to requests for public information, as opposed to advocacy for a regulatory policy or decision? Also, as an example, is there any limitation on your attendance at group briefings on public issues where there is no advocacy role for members of the audience?)
2. Contact members or staff of the Legislature to discuss environmental legislation, programs, policies or other matters in which you had involvement or oversight as Secretary for the Environmental Protection Agency. Are you limited in any way from testifying on such matters at legislative hearings, for example? Are there distinctions between testimony at hearings or other venues for legislative discussions?
3. Contact the Governor's Office to discuss environmental legislation, programs, or other matters in which you had involvement or oversight as Secretary for the Environmental Protection Agency. Are there limitations of any kind on issues other than those relating to your prior role as

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

Secretary for the Environmental Protection Agency?

4. Contact other state cabinet agencies, boards, departments or other entities to discuss environmental legislation, programs, or other matters in which you had involvement or oversight as the Secretary for Environmental Protection Agency. Are there any limitations on discussions with them on issues other than those with which you dealt as Secretary for the Environmental Protection Agency?

5. In the case of individuals before whom you are barred from advocating policy positions on behalf of paying clients, are there any limitations on other contacts, such as social contacts? Are there any limitations with respect to issues other than those for which a client would be paying for advocacy?

6. Are there any other foreseeable or recurring questions that the preceding suggest would be appropriate to add?

### CONCLUSIONS

1. There is a permanent prohibition on influencing any judicial or other proceeding in which you participated while in state service. Also, for one year after leaving state service you may not, for compensation, act as representative or agent for any person before the California Environmental Protection Agency, its subordinate agencies, or any officer or employee thereof, for the purpose of influencing administrative or legislative 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. An ex-employee may attend informational meetings of the agency, or request information from the agency concerning existing laws, regulations, or policies, unless the appearance or communication is made for the purpose of influencing administrative or legislative action.

2. You would not be restricted from lobbying the Legislature.

3 - 5. See the answer to question #1 and the discussion in the Analysis provided below.

6. Please see the discussion in the Analysis provided below.

### FACTS

You recently resigned from the position as Secretary for the Environmental Protection Agency for the State of California. The incumbent in that position serves in the Governor's Cabinet. As the head of the California Environmental Protection Agency (Cal/EPA), the Secretary's areas of responsibility include the state Air Resources Board, the state Water Quality Control Board, the Regional Water Quality Control Boards, the Department of Toxic Substances Control, the Department of Pesticide Regulation, the Office of Environmental Health Hazard Assessment, and the Integrated Waste Management Board.

You have now established a private consulting practice to assist domestic and international for-profit, non-profit, and government entities in meeting environmental requirements, implementing programmatic approaches to environmental compliance and protection, and identifying appropriate technologies for remediation and pollution prevention.

### ANALYSIS

Your letter concerns post-employment issues, colloquially known as the “revolving door” prohibition and the permanent ban on “switching sides.” The Act places certain restrictions on individuals who have recently left state service and who wish to use the expertise and relationships they developed at their former agency for compensation by third persons.

#### A. The permanent ban on “switching sides.”

Public officials who leave state service are subject to two types of post-employment restrictions under the Act. The first is a permanent prohibition on influencing any judicial or other proceeding in which the official participated while in state service. (Sections 87401 and 87402.) In other words, a public official may never “switch sides” in a proceeding<sup>2</sup> after leaving state service. Since you do not mention a specific factual circumstance where these sections may apply, I urge you to take note of Sections 87400-87405 in their entirety. I will discuss certain aspects of those sections here.

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

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<sup>2</sup> “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 115000) of Division 3 of Title 2 of the Government Code.” (Section 87400(c).)

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.) We have also advised that Sections 87401 and 87402 are not limited with respect to development of legislation. (*Witherspoon, supra; Byrne* Advice Letter, No. A-95-337.)

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, a "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 do not restrict an ex-employee's ability to participate in *new* proceedings. (*Leslie* Advice Letter, No. I-89-649.)

Under Sections 87400-87402, the prohibition applies if participation is for compensation. Where the State of California is a party, the prohibition does not apply. Therefore, the prohibition does not apply if the former official is acting on behalf of another state agency or the State of California. We have advised that the provisions of Sections 87401 and 87402 do not prevent a former state administrative official who has left his or her state employment from contracting with other state agencies. (*Webb* Advice Letter, No. A-93-382; *McWhirk* Advice Letter, No. A-89-392; *Walsh* Advice Letter, No. A-90-281.) However, we have applied the prohibition to include representation of a county by a former state official. (*Evans* Advice Letter, *supra; Berrigan* Advice Letter, No. A-86-045.)

**B. One-Year Ban**

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

"[F]or 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<sup>3</sup> administrative or legislative action,<sup>4</sup> 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. For purposes of this paragraph, an appearance before a state administrative agency does not include an appearance in a court of law, before an administrative law judge, or before the Worker's Compensation Appeals Board. The prohibition of this paragraph shall only apply to designated employees employed by a state administrative agency on or after January 7, 1991.

In determining which is an official's state administrative agency<sup>5</sup> within meaning of Section 87406, we have applied a pyramid concept. In the *Monagan* Advice Letter, No. A-93-473, the facts were that a statute established three distinct Occupational Safety and Health agencies under the Department of Industrial Relations, each with different duties. We advised that the prohibition was limited to one of those agencies, the former board that employed the official.

Thus, generally, a designated employee's state administrative agency means the agency

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<sup>3</sup> "Influencing legislative or administrative action" includes influencing by any means, including but not limited to the provision or use of information, statistics, 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.

<sup>4</sup> 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.

<sup>5</sup> For purposes of Section 87406, we have advised that "state administrative agency" means every state office, department, division, bureau, board and commission, but does not include the Legislature, the court or any agency in the judicial branch of government. (Section 87400; *Michelotti* Advice Letter, No. I-93-102.)

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.) Also, 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.)

We have advised that Section 87406 does not prohibit every former member of the executive branch from appearing before or communicating with the entire executive branch. For example, in the *Gould* Advice Letter, *supra*, we advised that a former director of the Department of Finance, a distinct state administrative agency, may lobby administrative agencies in the executive branch which he did not work for during the course of his government service. In the course of his employment, we concluded that he participated in the budget process as an advisor to the Governor and the Legislature, but he did not work for or represent those agencies within the meaning of Section 87406(d)(1). 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.

Consequently, Section 87406(d)(1) is applicable to you and for one year after you leave your position as the Secretary for the Environmental Protection Agency for the State of California, you may not, for compensation, act as representative or agent for any person before the California Environmental Protection Agency or any of its subordinate agencies<sup>6</sup> for the purpose of influencing administrative or legislative 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.)

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

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<sup>6</sup> These agencies would include the state Air Resources Board, the state Water Quality Control Board, the Regional Water Quality Control Boards, the Department of Toxic Substances Control, the Department of Pesticide Regulation, the Office of Environmental Health Hazard Assessment, and the Integrated Waste Management Board according to the facts provided. The Commission is not the finder of fact in providing advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

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>7</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.*)

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.*) Social conversations are also not considered influencing if the conversation is not intended to influence administrative or legislative action. (*Tobias* Advice Letter, *supra.*)

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 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 agency's action. Conversely, where there is a small 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.

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

Sincerely,

Steven G. Churchwell  
General Counsel



By: Marte Castaños  
Staff Counsel, Legal Division

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<sup>7</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.)