



FAIR POLITICAL PRACTICES COMMISSION

P.O. Box 807 • 428 J Street • Sacramento, CA 95812-0807

(916) 322-5660 • Fax (916) 322-0886

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Todd J. Eberle
Assistant Director, Legal Counsel
Department of Information Technology
801 K Street, Suite 2100
Sacramento, California 95814

**Re: Your Request for Advice
Our File No. A-98-318**

Dear Mr. Eberle:

This letter is in response to your request for advice on behalf of John Thomas Flynn, Director of the Department of Information Technology ("DOIT"), regarding the provisions of the Political Reform Act (the "Act").¹

QUESTIONS

1. What restrictions will be placed on Mr. Flynn's ability to appear before the DOIT?
2. May Mr. Flynn appear before the Legislature and administrative agencies in the executive branch that he did not represent?

CONCLUSIONS

Pursuant to Section 87406, for one year after Mr. Flynn leaves the DOIT he may not appear, for compensation, before the DOIT 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 Sections 87401 and 87402, Mr. Flynn may not represent another person in a judicial, quasi-judicial, or other proceeding in which he participated. Therefore, Mr. Flynn may lobby the Legislature and administrative agencies in the executive branch that he did not

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

represent so long as the matter does not involve a judicial, quasi-judicial, or other proceeding in which he participated. See Analysis below.

FACTS

John Thomas Flynn is the Director of the DOIT. DOIT is an independent department within the executive branch created pursuant to Government Code Section 11700 et seq., with the purpose of providing leadership, guidance and oversight of information technology in state government. The DOIT is charged with the establishment of policies and procedures, as well as development of statewide strategic plans for the effective application of information technology. The department regularly reviews and approves technical plans of information technology projects submitted by state agencies and departments, but the DOIT has no direct operational control over those agencies and departments. Mr. Flynn is considering employment in the private sector and is seeking guidance regarding the “post-employment” prohibitions under the Act.

ANALYSIS

I. Introduction

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.²

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, quasi-judicial, or other proceeding in which the administrative official participated while in state service. (Sections 87401 and 87402; Regulation 18741.1.) In other words, a public official may never “switch sides” in a proceeding³ after leaving state service. Since you do not mention a specific factual circumstance where these sections may apply, we urge you to take note of

² In addition, the Act includes a “pre-post employment” restriction on influencing prospective employment while still a state official. (See Section 87407; Regulation 18747.)

³ “‘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.” (Section 87400(c).)

Sections 87400-87405 and Regulation 18741.1 in their entirety. We 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 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.)

Mr. Flynn is a state administrative official. (Section 87400(b).) 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 Mr. Flynn participated while at the DOIT. 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 do not limit an official’s ability to develop legislative proposals. (*Witherspoon* Advice Letter, No. A-94-371; *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.”

Mr. Flynn is considered to have “participated” in a proceeding if he 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 Mr. Flynn actually participated while at the DOIT, as well as any proceeding, which he supervised, that was pending before the DOIT. (See Regulation 18741.1(a)(4).)

Under Section 87400(c) set forth above, a “proceeding” includes any particular matter involving a specific party or parties in a state administrative agency. A proceeding that is regulatory or general in nature is 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. Commission staff has held that you cannot escape the prohibitions of Section 87406 (the one-year ban discussed below) by charging your client for some activities, but not others. (*Weil* Advice Letter, No. A-97-247.) The same general rule applies in the context of Sections 87400-87402.

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, the prohibition includes representation of a county by a former state official. (*Evans* Advice Letter, No. I-86-117; *Berrigan* Advice Letter, No. A-86-045.)

In summation, Sections 87401 and 87402 do not prevent Mr. Flynn from lobbying the Legislature, the DOIT, or any other administrative agency *unless* the matter involves a judicial, quasi-judicial, or other proceeding in which Mr. Flynn participated. However, please see below regarding the provisions of Section 87406.

B. The 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 influencing⁴ administrative or legislative action,⁵ 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 agency⁶ 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."

Subdivision (d)(2) of the same section provides:

"For purposes of [the above paragraph], a state administrative agency of a designated employee of the Governor's office includes any state administrative agency subject to the direction and control of the Governor."

Mr. Flynn was a designated employee. Therefore, Section 87406 is applicable to him. (Regulation 18746.1(a)(2).) However, you have not provided a specific factual scenario where this section may apply. Therefore, we will provide you with general advice regarding Section 87406 and Regulation 18746.1, which was recently adopted and interprets Section 87406.

⁴ "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.

⁵ 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.

⁶ 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.)

Generally, a designated employee's state administrative agency means the agency for which he or she worked, and any other state administrative agency whose budget, personnel, or other operations are subject to the direction and control of the state administrative agency for which he or she worked. However, whether an agency is provided technical assistance or legal advice, or is subject to oversight by another agency pursuant to state law, are not factors to be considered in determining whether an agency is subject to the direction and control of another. (Section 87406(d)(1); Regulation 18746.1(b)(6).)

In the *Gould* Advice Letter, No. A-96-077, 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). Similarly, you are not restricted under Section 87406(d)(1) and Regulation 18746.1 from lobbying the Legislature, the Governor, or other state agencies since you did not work for or represent the Legislature and the DOIT is not subject to the direction and control of the Governor as contemplated in Section 87406(d)(2). (*Eberle* Advice Letter, No. A-98-165.) Also, generally, a designated employee is not restricted by Section 87406 from lobbying the Legislature or Governor regarding legislation. (*Witherspoon* Advice Letter, *supra*; *Craven* Advice Letter, No. A-93-057.)

Therefore, for one year, Mr. Flynn may not, for compensation,⁷ act as representative or agent for any person *before the DOIT 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. (Section 87406.)

For purposes of Section 87406(d), a formal or informal appearance or oral or written 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. An appearance or communication includes, but is not limited to, conversing by telephone or in person, corresponding with in writing or by electronic transmission, attending a meeting, and delivering or sending any communication. (Regulation 18746.2.)

There are regulatory exemptions to what is an appearance for the purpose of influencing. Regulation 18746.2(b) states that an appearance or communication is not prohibited by Section 87406(d) when an individual:

⁷ Again, Commission staff has held that you cannot escape the prohibitions of Section 87406 by charging your client for some activities, but not others. (*Weil* Advice Letter, *supra*.)

- “(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.”

In addition, 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 as long as the former official was not identified in connection with the appearance or communication. (*Ordos* Advice Letter, No. A-95-052.)

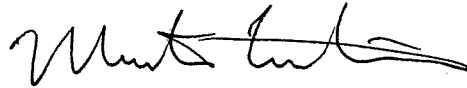
The Commission has also advised that a former agency official may draft proposals on a client's behalf to be submitted to the agency as long as the former employee is not identified in connection with the client's efforts to influence administrative action. (*Cook* Advice Letter, No. A-95-321; *Harrison* Advice Letter, No. A-92-289.) 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 as long as the employee is not identified with the employer's efforts to influence the agency. (*Perry* Advice Letter, No. A-94-004.)

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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