FAIR POLITICAL PRACTICES COMMISSION
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March 2, 2007

Dennis Green
5069 Auburn Avenue
San Bernardino, CA 92407

RE: Your Request for Informal Assistance
Our File No. I-07-006

Dear Mr. Green:

This letter is in response to your request for advice regarding the post governmental employment provisions of the Political Reform Act (the "Act").[1] Since you have not provided any facts related to a specific appearance before or communication with your previous government agency employer, we are treating your request as one for informal assistance.[2] This letter should not be construed as assistance on any conduct that may have already taken place. In addition, this letter is based on the facts presented. The Fair Political Practices Commission ("Commission") does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) FPPC Ops. 71.)

QUESTION

As a former employee of the California Department of Transportation ("Caltrans"), what limitations does the Act impose on you while working for Lim & Nascimento Engineering Corp. ("LAN") on projects involving Caltrans?

CONCLUSION

As a former state government employee, you are subject to the Act's post governmental employment restrictions as discussed below.

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[1] Government Code sections 81000-91014. Commission regulations appear at title 2, sections 18109-18997, of the California Code of Regulations.

[2] Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; regulation 18329(c), copy enclosed.)

FACTS

You retired from Caltrans as a Staff Service Manager I, Specialist in Construction. You were in this position from February 2005 until September 22, 2006. Your duties while employed with Caltrans included building support groups throughout District 8, which encompassed Riverside and San Bernardino counties. You facilitated public information meetings, established and chaired citizen advisory committees, attended press conferences, and responded to media and elected official's inquiries regarding on-going freeway construction projects. You also advised upper management, senior and resident engineers and the public affairs office regarding sensitive public issues. You responded to complaints regarding construction projects and developed and implemented mitigation strategies with communities for construction projects.

In February of 2006, you asked for assistance with setting up meetings and additional clerical and office support. You needed support staff for your office because you were in the field so often. To help with these needs you were given four task orders for consultant support in February of 2006. Two task orders were with Caltrop, one was with Parsons Engineering Group, and one was with Harris and Associates. You did not sit on the selection panels or have any involvement in the selection process for these task orders and were not the contract manager. You outlined the tasks each consultant would be performing for you as well as the skills needed to succeed. The consultants came on board between April and June of 2006 and worked with you for about six months until you retired on September 22, 2006. This was your only involvement with consultants throughout your 24-year career with Caltrans.

You began working for LAN as a Risk Manager for Program Project Management on October 2, 2006. LAN has a contract with Caltrans for Construction Management and Program Project Management support services, which includes risk management. These contracts were already in place while you were working for Caltrans, and you had no involvement with them while you were in construction at Caltrans.

During our telephone conversation you stated that you were not a designated employee under the Caltrans conflict of interest code during your employment as Staff Services Manager I, Specialist in Construction. However, you also indicated that while working with Caltrans you were responsible for making determinations related to community outreach and relations. You also indicated that your superiors would rely on such determinations when making their final decisions.

For example you described a situation in which Caltrans had marked a few trees to be cut down near the highway for safety reasons. Members of the local community, who were opposed to eliminating the trees, chained themselves to the trees to prevent Caltrans from cutting them down. To solve this problem you devised a plan to work with the local elementary school to have students plant trees along the highway as part of a "Caltrans Day" in exchange for allowing Caltrans to cut down the trees without opposition. Your superiors relied on your investigation, judgment, and decisionmaking ability when they gave approval for this plan.

When you retired, the four task orders that you were task manager for were rewritten to another task manager. You want to know if you are precluded from working for Caltrop, Parsons Engineering, and Harris Engineering on other task orders with Caltrans District 8.

ANALYSIS

Public officials who leave state service are subject to two types of post-governmental employment provisions under the Act,[3] colloquially known as the "revolving door" prohibitions.[4] We look to these provisions to answer your questions.

- **Permanent Ban:** The first restriction is the "permanent ban" prohibiting a former state employee from "switching sides" and participating, for compensation, in any specific proceeding involving the State of California or assisting others in the proceeding if the proceeding is one in which the former state employee participated while employed by the state (Sections 87401-87402, regulation 18741.1).

The permanent ban is a lifetime ban and applies to any judicial, quasi-judicial, or other proceeding in which you participated while you served as a state administrative official.[5] "'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).) Additionally, 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).)

"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." (*Rist* Advice Letter, No. A-04-187; see also *Donovan* Advice Letter, No. I-03-119.)

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[3] In addition, section 87407 prohibits certain state and local officials from making, participating in making, or using their official position to influence decisions affecting persons with whom they are negotiating employment, or has any arrangement concerning employment. (Section 87407; regulation 18747.)

[4] A comprehensive discussion of the elements of the two laws is set forth in the attached "Leaving Your State Job? Post-Employment Restrictions May Affect You." We have enclosed this document for your information. We do not repeat this information in the body of this letter.

[5] You were a state administrative official because your former position meets the definition under section 87400(b) for a state administrative official. Section 87400(b) defines state administrative official as "every 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."

You have not provided any information as to your participation in any proceeding while employed as a Staff Services Manager I, Specialist in Construction at Caltrans that may affect your ability to engage in any of the conduct listed herein. To apply the permanent ban to your situation, you need to determine if any of the actions in which you now wish to engage on behalf of your new employer involve a proceeding in which you participated while employed at Caltrans. (Regulation 18741.1(a)(4).)

- **One-Year Ban:** The second restriction is the "one-year ban" prohibiting a state employee from communicating, for compensation, with his or her former agency for the purpose of influencing certain administrative or legislative action or influencing certain proceedings. (Section 87406, regulation 18746.1.)

The one-year ban applies to employees who are designated in their former agency's conflict of interest code. However, the one-year ban also applies to employees who made or participated in the making of governmental decisions that had a reasonably foreseeable material effect on any financial interest. In other words, the one-year ban applies to former employees who *should have been designated* in their former employer's code. (Section 87406(d)(1); regulation 18746.1(a)(2).)

A state employee "makes a governmental decision" when acting within the scope of his or her authority, he or she: 1) votes on a matter; 2) appoints a person; 3) obligates his or her agency to any course of action; 4) enters into any contractual agreement on behalf of his or her agency; or 5) determines not to act, unless the determination is made due to a conflict of interest. (Regulation 18702.1.)

Additionally, a state employee "participates in making a governmental decision" when he or she negotiates (without significant substantive review) with a government entity or private person regarding a governmental decision, or when he or she advises or makes recommendations to the decisionmaker (either directly or without significant substantive review), by conducting research or an investigation or by presenting any report, analysis or opinion, which requires the exercise of independent judgment on the part of the employee and the outcome or purpose of which is to influence the decision. (Regulation 18702.2.)

We have advised that an employee participates in the making of a governmental decision, even if it is reviewed by several of his or her superiors, if any of the following apply: 1) the superiors rely on the data or analysis prepared by the employee without checking it independently; 2) the superiors rely on the professional judgment of the employee; or 3) the employee in some way actually influences the final decision. (*Lilyquist* Advice Letter, No. M-96-318 [Memorandum to the Attorney General].)

Nothing in your facts indicates that your position was properly not designated in the Caltrans conflict of interest code.[6] In fact, the current noticed edition of the proposed Caltrans

[6] We note that Caltrans is in the process of updating its conflict of interest code. Unless you can provide documentation from Caltrans that your position was properly not designated in its code, it appears that your position should have been designated while you were employed with Caltrans, and you should abide by the one-year ban.

conflict of interest code now lists all Staff Services Manager I positions in District 8, including your former position, as designated positions. From the facts that you have provided, it appears that although you may not have had final approval of your decisions, you had a significant role in advising your superiors on the decisions they made in connection with your job duties and actions. Based on these facts provided, it appears that your position as Staff Services Manager I, Specialist in Construction should have been designated in Caltrans' conflict of interest code, and that you are a public official subject to the one-year ban. Accordingly, the one-year ban will apply for 12 months from the date you left state employment. (Section 87406(d)(1); regulation 18746.1 (b)(2).)[7]

The one-year ban applies to appearances or communications, for which you are compensated made on behalf of any person as an agent, attorney, or representative. (Section 87406(d)(1); regulations 18746.1(b)(3) and (4).) From the facts provided, you are working as a Risk Manager for Program Project Management for LAN. Since you are a paid employee of LAN, you will be working for compensation and in representation of another person.

Appearances and communications are prohibited only if they are made for the "purpose of influencing" an, "administrative or legislative action" or "discretionary act 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(d)(1); regulation 18746.1(b)(5).) Regulation 18746.2 provides that 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.

Finally, appearances and communications are prohibited if they are before a state agency the public official worked for or represented, or before a state agency whose budget, personnel, and other operations are subject to the control of a state agency the public official worked for or represented. (Section 87406(d)(1); regulation 18746.1(b)(6).) Since you left a position with Caltrans, the one-year ban applies to any appearance or communications before Caltrans, including all Caltrans districts and employees.

We point out, however, that not all communications are prohibited by the one-year ban. Appearances or communications before a former state agency employer, made as part of "services performed to administer, implement, or fulfill the requirements of an existing permit, license, grant, contract, or sale agreement may be excluded from the [one-year] prohibitions . . . provided the services do not involve the issuance, amendment, awarding, or revocation of any of these actions or proceedings." (Regulation 18746.1(b)(5)(A); *Quiring* Advice Letter, No. A-03-272; *Hanan* Advice Letter, No. I-00-209.)

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[7] We have advised that the one-year ban commences when the employee is no longer under an employment agreement and is no longer receiving compensation, including compensation for "unused" vacation time. (*Weil* Advice Letter, No. A-97-247.)

Additionally, regulation 18746.2(b)(1)-(4) provides that appearances or communications are not restricted under the one-year ban, if an individual:

> "(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;
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> "(2) Attends a general informational meeting, seminar, or similar event;
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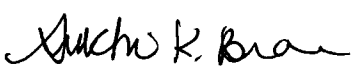
> "(3) Requests information concerning any matter of public record; or
>
> "(4) Communicates with the press."

Finally, 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.) 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.)

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

Sincerely,

Luisa Menchaca
General Counsel



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Enclosures