



## FAIR POLITICAL PRACTICES COMMISSION

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June 3, 2008

Mahendra Mehta  
Department of General Services  
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1102 Q Street, Suite 5100  
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Re: Your Request for Advice  
**Our File No. I-08-080**

Dear Mr. Mehta:

This letter is in response to your request for information regarding the post-governmental employment provisions of the Political Reform Act (the "Act").<sup>1</sup> Please note that our advice is based solely on the Act. We therefore offer no opinion on the application, if any, of other post-government employment laws such as Public Contract Code Section 10411. We suggest you seek appropriate legal advice to determine if this or any other provisions outside the Act apply. Also, because your request is of a general nature, we are providing informal assistance rather than formal advice. Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3), copy enclosed.)

### QUESTION

How will the Act's post-employment provisions apply to you should you accept employment with or become a consultant to (i) a contractor who builds school buildings; (ii) school districts and their architects on specific building projects; (iii) Autodesk, a maker of software for doing plan reviews in electronic medium; or (iv) utilities that help school districts generate electricity with solar panels?

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<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

## CONCLUSION

As a retired designated employee of the Department of General Services, Division of the State Architect, your future employment will be governed by the permanent and one-year bans. Under the permanent ban, you may not represent, for compensation, any entities before the Department of General Services, or any officer or employee thereof, in any judicial, quasi-judicial or other proceeding in which you participated as an employee of the Department of General Services. The one-year ban would prohibit you from representing the contractor, school districts, their architect, Autodesk, utilities or other private entities before the Department of General Services for a period of one year after the date you leave state employment, if the appearance or communication is for the purpose of influencing administrative, legislative or other specified actions.

## FACTS

You work for the Department of General Services ("DGS") as a Manager, Structural Engineer, in the Division of the State Architect (the "Division"). Within DGS, the Division is responsible for approving plans and certifying construction of public school buildings and essential service buildings throughout the state. You have worked at DGS since August 1992. Between August 1992 and July 2006, you served as regional manager of the Division's San Diego regional office. Your staff reviewed plans and certified construction of school buildings in San Diego, Riverside, San Bernardino, Orange and Imperial Counties. From July 2006 to the present you have worked at the Division's headquarters in Sacramento and managed the following programs: establishing satellite offices at Riverside and Bakersfield; developing E-Plan Review capabilities of Division staff; write a report on the Division's responsibility for mechanical, electrical, plumbing and energy reviews; and supervise the Division's energy and sustainability plan review team.

You intend to retire from state service this year and are considering four prospects for future work either as an employee or consultant. You are considering (i) an offer of employment by a contractor who builds school buildings; (ii) providing project specific consultation to school districts and their architects; (iii) providing consulting services to Autodesk, a maker of software for doing plan reviews in electronic medium; and (iv) providing consulting services to utilities that help school districts generate electricity with solar panels. You state that the work you would perform for the contractor would consist of designing school buildings.

## ANALYSIS

The Act contains three post-governmental restrictions on individuals leaving public service:

**Restrictions on Negotiating Prospective Employment:** This rule places restrictions on a public official who is negotiating or has any arrangement concerning prospective employment. (See Section 87407, Regulation 18747).

**Permanent Ban:** This rule prohibits a former state administrative official from advising or representing any person, other than the State of California, for compensation in any judicial, quasi-judicial or other proceeding in which the official participated while in state service. (See Sections 87401-87402, Regulation 18741.1); and

**One Year Ban:** This rule prohibits a former public official from appearing for compensation before his or her former agency, or officer or employee thereof, for the purpose of influencing any administrative, legislative or other specified action. (See Section 87406, Regulations 18746.1 and 18746.2.)

### **Prospective Employment**

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 have any arrangement concerning employment. (Section 87407; Regulation 18747.)

Section 87407 provides: "No public official, shall make, participate in making, or use his or her official position to influence, any governmental decision directly relating to any person with whom he or she is negotiating, or has any arrangement concerning, prospective employment."

Under subdivision (c) of Regulation 18747, a person is a prospective employer of a public official if the official, either personally or through an agent, is negotiating or has an arrangement concerning prospective employment with that person. Regulation 18747(c) further defines "negotiating" and an "arrangement concerning prospective employment" as follows:

"(1) A public official is 'negotiating' employment when he or she interviews or discusses an offer of employment with an employer or his or her agent.

"(2) A public official has an 'arrangement' concerning prospective employment when he or she accepts an employer's offer of employment.

"(3) A public official is not 'negotiating' or does not have an

'arrangement' concerning prospective employment if he or she rejects or is rejected for employment."

Under subdivision (b) of the regulation, a governmental decision will directly relate to a prospective employer if the public official knows or has reason to know that the prospective employer is "directly involved" in the decision, or it is reasonably foreseeable that the financial effect of a decision on a prospective employer is material.

Please be mindful of the above rules for the duration of your employment by DGS to avoid any violations of this provision of the Act.

### **The Permanent Ban on "Switching Sides"**

The permanent ban on "switching sides" 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 proceeding after leaving state service. 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.)

Section 87400 (b) defines state administrative official as: "every member, officer, employee of a state administrative agency who as part of his or her official responsibilities engages in any judicial, quasi-judicial or other proceedings in other than a

purely clerical, secretarial or ministerial capacity.” The DGS is a state administrative agency under section 87400(a). Accordingly, if as part of your responsibilities while employed at the DGS you have engaged in any judicial, quasi-judicial, or other proceedings, you are considered a state administrative official, and the provisions of Sections 87401 and 87402 will apply to you.

#### Proceedings

Section 87400(c) defines “judicial, quasi-judicial, or other proceeding” 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, 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.”

#### *A. Regional Manager Position*

Your duties as a regional manager included approval of plans and certifying construction of school building projects. The definition of “judicial, quasi-judicial, or other proceeding” includes a “determination” involving a “specific party or parties” in a state administrative action. Before a school district can build a school, it must obtain Division approval of the project’s building plans. Such approval constitutes a determination made by the Division involving a specific party, the school district. At the end of construction, the school district must obtain a final certificate of construction from the Division certifying that the project has been built to meet the state’s building code. The determination to issue a certificate of construction also constitutes a determination involving a specific party. Accordingly, you are permanently prohibited from influencing any such determinations in which you participated while in state service.<sup>2</sup>

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<sup>2</sup> 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.) We have found generally that proceedings to draft a plan or agreement are different from proceedings involving implementation of the same plan or agreement. For instance, the Commission considers the application, drafting and awarding of a contract, license or approval to be a proceeding separate from the monitoring and performance or implementation of the contract, license or approval. (*Doyle* Advice Letter, No. A-05-104; *Billeci* Advice Letter, No. I-00-234; regulation 18741.1.) Hence, certifying construction of a building project may be considered a “new proceeding” separate from the “proceeding” involving approval of the plans for that project.

### *B. Headquarters Position*

Your duties at headquarters consist of establishing offices, developing staff capabilities, writing a report and supervising a plan review team. None of these activities appear to involve participation in a "judicial, quasi-judicial, or other proceeding." Hence, any future employment that may be related to these activities is not prohibited by the permanent ban.

### Participation/Supervision

An official is considered to have "participated" in a proceeding if the official took 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 . . ." (Section 87400(d).) A former state official who held a management position in a state administrative agency is deemed to have participated in a proceeding if: (1) the proceeding was pending before the agency during his or her tenure, and (2) the proceeding was under his or her supervisory authority. (Section 87400(d); Regulation 18741.1(a)(4).) For purposes of Regulation 18741.1, a proceeding is under a supervisor's "supervisory authority" if the supervisor:

"(A) Has duties that include primary responsibility within the agency for directing the operation or function of the program where the proceeding is initiated or conducted; or

"(B) Has direct supervision of the person performing the investigation, review, or other action involved in the proceeding including, but not limited to, assigning the matter for which the required conduct is taken; or

"(C) Reviews, discusses, or authorizes any action in the proceeding; or

"(D) Has any contact with any of the participants in the proceeding regarding the subject of the proceeding."

"Supervisory authority' does not include a supervisor, at a higher level within the agency's chain-of-command than the supervisor identified in subsection (a)(4)(A) above, with responsibility for the general oversight of the administrative actions or functions of a program where the responsibilities concerning the specific or final review of the proceeding are expressly delegated to other persons in the agency's structure (i.e. supervisors under subsection (a)(4)(A) above) unless the higher level supervising official

has actual involvement in the proceeding as set forth in subsections (a)(4) (C) or (D) of this regulation.”

You indicate that while employed as the regional manager of the Division’s San Diego regional office, you had a supervisory position directly responsible for the activities of approving plans and certifying construction of public school buildings. The fact that you had supervisory authority over these activities means that you “participated” in any projects that went through the approval or certification process while you held that position. Accordingly, you may not represent any other person (other than the State of California) before the DGS, or any officer or employee thereof, by making an appearance or communication with the intent to influence the DGS proceeding or determination regarding such projects.<sup>3</sup> (Section 87401.) You also may not aid, advise, counsel, consult or assist in representing any other person (other than the State of California) in any proceeding or determination by the DGS regarding such projects. (Section 87402.)

### **The One-Year Ban — “Revolving Door”**

Section 87406 of the Act prohibits specified officials from acting as an agent or attorney or otherwise representing, for compensation, “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 one year after the official left the agency’s 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.” (Section 87406(d), see also Regulation 18746.1.) For the purposes of this provision, an appearance before a state administrative agency does not include an appearance in a court of law or before an administrative law judge. (Section 87406(d)(1), see also Regulation 18746.1.)

Regulation 18746.1(b) outlines when the prohibitions of the one-year ban will apply. Under this regulation, an official covered by the one-year ban is prohibited from making an appearance or communication if all of the following apply:

“(1) The official has left his or her state office or employment, which means he or she has either permanently left state service or is on a leave of absence.

“(2) The appearance or communication is made within 12 months after leaving state office or employment.

“(3) The public official is compensated, or promised compensation, for the appearance or communication.

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<sup>3</sup> However, this would not be the result if the proceeding or determination in which you were to represent another person is considered a “new proceeding” as discussed in Footnote 2.

However, a payment made for necessary travel, meals, and accommodations received directly in connection with voluntary services is not prohibited or limited by this section.

“(4) The appearance or communication is made on behalf of any person as an agent, attorney, or representative of that person. An appearance or communication made by a public official solely to represent his or her personal interests, as defined in 2 Cal. Code Regs. Section 18702.4, subdivision (b)(1), is not prohibited or limited by this section.

“(5) The appearance or communication is made for the purpose of influencing, as defined in 2 Cal. Code Regs. Section 18746.2, any legislative or administrative action, or any 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.

“(A) Services performed to administer, implement, or fulfill the requirements of an existing permit, license, grant, contract, or sale agreement may be excluded from the prohibitions of this regulation, provided the services do not involve the issuance, amendment, awarding, or revocation of any of these actions or proceedings. However, the prohibitions of Government Code Sections 87401 and 87402 [the permanent ban on “switching sides”] may apply.

“(6) The appearance or communication is made before any officer or employee of any of the following:

“(A) Any state administrative agency that the public official worked for or represented during the 12 months before leaving state office or employment...

“(B) Any state administrative agency which budget, personnel, and other operations are subject to the direction and control of any agency described in subdivision (b)(6)(A). . .”

Regulation 18746.2(a) further provides:

“(a) 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.”

The one-year ban applies to those employees who held a position that was designated in the agency’s conflict-of-interest code or should have been designated in the agency’s conflict of interest code. (Section 87406(d)(1); Regulation 18746.1(a)(2); *West* Advice Letter, No. I-02-077; *Unterreiner* Advice Letter, No. I-98-299.) As a regional manager, you were or should have been designated in the DGS conflict-of-interest code. You are, therefore, subject to the one-year ban from the date you leave your position.

The prohibition on making appearances or having written or oral communications with your former agency, its officers and employees is broadly construed. We have advised that a former state official makes a formal or informal appearance where the former official is identified in connection with a communication. (*Thomas* Advice Letter, No. A-05-106; *Harrison* Advice Letter, No. A-92-289.) We have advised that identification of a former official in materials submitted to a former agency is sufficient to constitute an appearance or communication. (*Roberts* Advice Letter, No. A-02-190.) Accordingly, you may not be identified within any communications with the DGS, its officers or its employees.

Certain communications are not restricted under the one-year ban. The one-year ban does not prevent you from requesting information generally available to the public. (Regulation 18746.2(b)(3).) Nor does it prohibit you from attending informational meetings by DGS regarding existing laws, regulations, or policies, as long as you do not attempt to influence the agency’s legislative or administrative action. (Section 87406(d)(1).) Social conversations with employees of the DGS that are not intended to influence administrative or legislative action are not prohibited by the ban. (*Tobias* Advice Letter, No. A-96-089.) Whether a particular meeting or conversation is for the purpose of influencing administrative or legislative action (as defined by Regulation 18746.2) depends on the facts of each case. Also, advising an employer on the procedural requirements, plans, or policies of the DGS would not be a prohibited “appearance” or “communication” under section 87406 so long as you are not identified in connection with your new employer’s efforts to influence the DGS. (*Harrison*, *supra*; *Perry* Advice Letter, No. A-94-004.) Finally, the one-year ban would not prohibit you from providing services that involve appearing before or communicating with other state administrative agencies, unless the agency is subject to the budgetary authority of the DGS. (Regulation 18746.1(b)(6)(B).)

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

Sincerely,

Scott Hallabrin  
General Counsel

A handwritten signature in cursive script that reads "Valentina Joyce".

By: Valentina Joyce  
Counsel, Legal Division

VJ:jgl  
Enclosure