



## FAIR POLITICAL PRACTICES COMMISSION

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May 8, 2009

Ronald W. Beals  
Chief Counsel  
Department of Transportation  
1120 N Street  
Sacramento, CA 95814

Re: Your Request for Advice  
**Our File No. A-09-115**

Dear Mr. Beals:

This letter is in response to your request for advice on behalf of Will Kempton, Director of the California Department of Transportation, regarding the "revolving door" provisions of the Political Reform Act (the "Act").<sup>1</sup>

### QUESTION

Would it violate Section 87407 or Regulation 18747, or any other provision of the Act, if Mr. Kempton signs the certification required under Section 1511 of the American Recovery and Reinvestment Act of 2009, when some of the funds dispensed under this certification will be paid to the Orange County Transportation Authority ("OCTA"), which has extended an employment offer to Mr. Kempton?

### CONCLUSION

A state officer or employee who is negotiating or has arranged employment with another person is prohibited from making, participating in making, or using his or her official position to influence a governmental decision affecting the new employer. However, Regulation 18747(d)(3) expressly states that Section 87407 does not apply if the prospective employer is a state, local, or federal governmental agency. Because OCTA is a local government agency under Section 82041, Section 87407 does not apply. But if Mr. Kempton does leave his present state employment to accept this new position, the Act's post-governmental employment restrictions may restrict some of his activities in the new position, as described below.

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<sup>1</sup> Government Code sections 81000-91014. Commission regulations appear at title 2, sections 18109-18997, of the California Code of Regulations.

## FACTS

Mr. Kempton is the Director of the California Department of Transportation (“Caltrans”). The American Recovery and Reinvestment Act of 2009 provides, among other things, for distribution of federal funds to state and local transportation agencies for use on infrastructure projects. The Governor of a state, or the chief executive officer of the state’s transportation agency, must execute a “certification” before these funds become available for use. Governor Schwarzenegger has delegated the responsibility to execute these certifications to Mr. Kempton. All decisions regarding allocation of these federal funds were made by the Legislature or the California Transportation Commission, and the certification is essentially a ministerial act. Caltrans is currently receiving several certification requests a week. None of the pending requests have been submitted by OCTA, but Caltrans anticipates that OCTA may soon submit several such requests. Director Kempton is presently considering an offer from OCTA, a local government agency, for employment as its executive director.

## ANALYSIS

Section 87407 prohibits certain state and local officials from making, participating in making, or using their official positions to influence decisions affecting persons with whom they are negotiating employment, or with whom they have any arrangement concerning employment. In addition, public officials who leave state service are subject to restrictions that prohibit representation of the new employer in certain proceedings. Colloquially, these provisions are known as the “revolving door” prohibitions. We discuss each of these provisions in turn.

### 1. Negotiating Prospective Employment

A public official may negotiate and accept an offer of future employment before leaving his or her current state position. Section 87407 is designed to ensure that the official does not use his or her state position to make any decisions that unduly benefit the organization that is hiring the official. Section 87407 states:

“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.”

A public official is considered to be “negotiating” employment “when he or she interviews or discusses an offer of employment with an employer or his or her agent.” (Regulation 18747(c)(1).) The official has an “arrangement” concerning prospective employment when he or she accepts an offer of employment. (Regulation 18747(c)(2).)

However, Regulation 18747(d)(3) specifically states that the prohibitions of Section 87407 do not apply if “[t]he prospective employer is a state, local, or federal

governmental agency.” OCTA is a local governmental agency under Section 82014. Accordingly, the prohibition of Section 87407 does not apply to employment negotiations or arrangements with OCTA. (See, e.g. the *Chan* Advice Letter, No. I-09-063; the *Arroyo* Advice Letter, No. I-09-002; the *Harris* Advice Letter, No. I-07-115.)<sup>2</sup>

## 2. Post-Governmental Employment Provisions

Assuming that he leaves his present state employment, Mr. Kempton would be subject to a lifetime ban on participating in certain proceedings, and a one year restriction applicable to certain other proceedings. Because you have not described any specific circumstances that might give rise to one of these prohibitions, we offer you general guidance on these post-employment restrictions.

The *Permanent Ban* - The “permanent ban” prohibits 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 it is one in which the former state employee participated while employed by the state (see 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 Mr. Kempton participated while he served as a state administrative official. “‘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 the *Donovan* Advice Letter, No. I-03-119.) New contracts with the employee’s former

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<sup>2</sup> While Mr. Kempton is employed by Caltrans, his activities are governed by the Act’s conflict of interest rules. He could have a conflict of interest in any decision relating to Caltrans that would have a reasonably foreseeable effect on his personal finances, such as his salary or terms of employment with OCTA. Because your account of the facts does not suggest such an outcome, we simply remind you of the possibility. If he has already received a firm offer of employment, the prospective employer would ordinarily be a source of income to him, since “income” is defined to include “promised income” for purposes of the conflict rules. (Regulation 18703.3(a)(1).) However, when the prospective employer is a governmental agency, the Act’s “government salary” exception provides that such income does not give rise to a conflict of interest. (Section 82030(b)(2).)

agency in which the former employee did not participate are considered new proceedings. (*Leslie* Advice Letter, No. I-89-649.) A new contract is one based on new consideration and new terms, even if involving the same parties. (*Ferber* Advice Letter, No. I-99-104; *Anderson* Advice Letter, No. A-98-159.) Moreover, the drafting and award of a contract, license or approval is considered to be a proceeding separate from the monitoring and performance of the contract, license or approval. (*Anderson, supra*; *Blonien* Advice Letter, No. A-89-463.)

**One-Year Ban** - The “one-year ban” prohibits a state employee from making any formal or informal appearance or making any oral or written communication, for compensation, with his or her former agency for the purpose of influencing certain administrative or legislative actions or influencing certain proceedings. (See Section 87406; Regulation 18746.1.)

The one-year ban applies to any employee of a state administrative agency who holds a position that is designated or should be designated in the agency’s conflict of interest code. (Section 87406(d)(1); Regulation 18746.1(a)(2).) The ban applies for 12 months from the date the employee leaves state office or employment, which is defined as the date the employee permanently leaves state service or takes a leave of absence. (Regulation 18746.1(b)(1) and (2).)

While in effect, the one-year ban applies only when a former employee or official is being compensated for his or her appearances or communications before his or her former agency on behalf of any person as an agent, attorney, or representative of that person. (Regulation 18746.1(b)(3) and (4).)

In contrast to the permanent ban, which only applies to “judicial or quasi-judicial” proceedings, the one-year ban applies to “any appearance or communication 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.” (Regulation 18746.1(b)(5). 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.” (Regulation 18746.2.) An appearance or communication includes, but is not limited to, conversing by telephone or otherwise, corresponding in writing or by electronic transmission, attending a meeting, and delivering or sending any communication. (*Id.*)

Finally, appearances and communications are prohibited only if they are before a state agency that the public official worked for or represented, or 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. (Regulation 18746.1(b)(6).)

Nevertheless, 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.)

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

- “(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.”

We have also advised that a former agency official may, without violating the one-year ban, 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, 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 as long as the employee is not identified with the employer’s efforts to influence the agency. (*Perry* Advice Letter, No. A-94-004.)

In short, should Mr. Kempton accept the position with OCTA, it is important that he remain mindful of the application of the permanent ban to any proceedings in which he has participated, and the applicability of the one-year ban to appearances before, or communications with, Caltrans.

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

Sincerely,

Scott Hallabrin  
General Counsel



By: Lawrence T. Woodlock  
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