



FAIR POLITICAL PRACTICES COMMISSION

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August 19, 2011

Sara Wan
22350 Carbon Mesa Rd.
Malibu, CA 90265

Re: Your Request for Informal Assistance
Our File Nos. I-11-136 and I-11-149

Dear Ms. Wan:

This letter is in response to your request for assistance regarding the “revolving door” provisions of the Political Reform Act (the “Act”).¹ Because you are requesting general information on the operation of the law, and did not offer detailed information on your planned employment activities, we are providing you with informal assistance.² While our response to your original request for assistance was in its final review process, we received a second request for assistance asking essentially the same questions. Please consider this letter as a response to both requests for assistance.

This letter is based solely on provisions of the Act. We can offer no opinion on the application, if any, of such provisions as Government Code Section 1090, or post-government employment laws such as Public Contract Code Section 10411. You may wish to consult your former agency’s counsel or the Attorney General’s office on possible application of these provisions.

QUESTIONS

1. May you communicate with staff of the California Coastal Commission on behalf of the City of Del Mar, and attend a meeting with representatives of the City and Coastal Commission staff?

¹The 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 regulations may be found in Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² 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).

2. While representing an unnamed third party, may you meet on "Coastal Commission issues" with staff and/or members of other agencies, such as the State Lands Commission, the Natural Resources Agency or the Department of Fish and Game?
3. Does the Act's "lifetime ban" prevent you from assisting a third party seeking enforcement by the Coastal Commission of conditions in a permit on which you voted as a member of the Coastal Commission?

CONCLUSIONS

1. You may engage in such communications, for compensation, to the extent that the discussions mentioned in this question are directed towards the opening or prosecution of an enforcement action by the Coastal Commission, and do not involve a proceeding in which you participated while employed by the Coastal Commission.
2. Yes. The prohibitions of the one-year ban apply only to communications, concerning possible administrative or legislative action, with employees of the Coastal Commission, or related agencies as described in Regulation 18746.1(b).
3. No. You are not barred from assisting a third party in an enforcement action based on non-performance of permit conditions, because a performance-related action is a proceeding separate and distinct from the proceeding in which the permit was originally granted.

FACTS

You were a member of the California Coastal Commission until May 20, 2011. As you explained in your initial request for advice, and further during the course of several telephonic and email communications, since you left the Coastal Commission you have been asked by the City of Del Mar to advise them, for compensation, on an enforcement action that has or may at some future date be initiated and come before the Coastal Commission. Your plan is to attend a meeting between representatives of the City and Coastal Commission staff, regarding certain alleged violations by a party other than the City. Your appearance would be before Coastal Commission staff, not the Coastal Commissioners themselves. You state that the violations in question "were not dealt with by the Commission" during your tenure on the Commission, and that you had nothing to do with any decisions to proceed or not to proceed with related enforcement actions, nor with decisions on the scope of any such actions.

As to the third question, you indicate that the permit holder/applicant has failed to comply with conditions attached to the permit, and that the request for a Coastal Commission enforcement action had not been begun at the time you left the Coastal Commission.

ANALYSIS

Public officials are subject to three types of post-governmental employment restrictions under the Act. A one-year “revolving door” restriction bars certain state employees from communicating, for compensation, with their former agencies for the purpose of influencing certain administrative or legislative actions. (Section 87406, Regulation 18746.1.)

A permanent (“lifetime”) ban prohibits a former state employee from “switching sides” to participate, for compensation, in a proceeding involving the State of California if the proceeding is one in which the former state employee participated while employed by the state. (Sections 87401-87402, Regulation 18741.1.)

Finally, there is a restriction on influencing prospective employment that prohibits a public employee from participating in, or using his or her official position to influence, a governmental decision directly relating to any person with whom he or she is negotiating, or has an arrangement concerning, prospective employment. (Section 87407, Regulation 18747.) Your account of the facts does not indicate that you require advice in this area.

The One-Year “Revolving Door” Restriction: Questions One and Two.

A. General Application of 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 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. 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 Workers’ Compensation Appeals Board”

Regulation 18746.2(a) further provides:

“(a) For purposes of Government Code Section 87406, 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.”

As a member of the Coastal Commission you were required to file a Form 700 “Statement of Economic Interests” under Section 87200, that you were an “officer” or “designated employee” under the Coastal Commission’s conflict of interest code, and therefore that your post-governmental employment activities are limited by the Act’s one-year ban. (*Ordos* Advice Letter, No. A-95-052.)

Regulation 18746.1(b) outlines the circumstances when the prohibitions of the one-year ban will apply. Under this regulation, a former 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. 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 . . .

“(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) . . .

“(C) Any state administrative agency subject to the direction and control of the Governor, if the official was a designated employee of the Governor’s office during the 12 months before leaving state office or employment.”

B. Communications Covered by the One-Year Ban.

Communications restricted by the one-year ban include any formal or informal appearance or oral or written communication made to influence legislative or administrative action or any action on a proceeding. (Section 87406(d)(1).) These communications include, but are not limited to, conversing directly or by telephone, corresponding by writing or e-mail, attending a meeting, and delivering or sending any communication. (Regulation 18746.2(a).)

A communication is considered to be for the purpose of influencing legislative or administrative action “if it is made for the principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding.”³ (Regulation 18746.2(a).)

Certain communications are *not* restricted under the one-year ban. A communication is not subject to the one-year ban when the 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.” (Regulation 18746.2(b)(1)-(4).)

Thus, the one-year ban does not prevent a former state official from seeking information generally available to the public about agency business from a former state employer or other state agencies. Nor would it bar attending informational meetings regarding existing laws, regulations, or policies, so long as the former official does not attempt to influence legislative or administrative actions by his or her former agency. Social conversations with employees of the former agency that are not aimed at influencing its administrative or legislative actions are not prohibited by the ban. (*Tobias Advice Letter, No. A-96-089.*) (Section 87406(d)(1).)

Whether a particular meeting or conversation is for the purpose of influencing administrative or legislative action or a specific proceeding (as defined by Regulation 18746.2)

³ “Legislative action” is defined at Section 82037 to mean “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 official capacity. “Legislative action” also means the action of the Governor in approving or vetoing any bill.” Section 82002(a) provides that “‘Administrative action’ means the proposal, drafting, development, consideration, amendment, enactment, or defeat by any state agency of any rule, regulation, or other action in any ratemaking proceeding or any quasi-legislative proceeding, which shall include any proceeding governed by Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2.

depends on the facts of each case. For instance, if an ex-employee attends a large public meeting with many other persons, where there are many topics on the agenda, it may be reasonable to infer that the ex-employee's 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, or other specific 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)), it may more readily be inferred that the former employee's presence at the meeting is intended to influence agency action. (*Ramirez* Advice Letter, No. A-99-300.)⁴

Similarly, as noted above, Regulation 18746.1(b)(5)(A) provides that performing services to administer, implement, or fulfill the requirements of an existing permit, license, grant, contract, or sale agreement are not considered appearances or communications prohibited under Section 87406, so long as you do not influence other administrative or legislative action, or the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.

It is important to note that Section 87406(d)(1) applies only to communications relating to administrative or legislative actions, and not to judicial or quasi-judicial agency actions. The statute expressly excludes "an appearance in a court of law, before an administrative law judge, or before the Workers' Compensation Appeals Board . . ." In the *Harris* Advice Letter, No. A-10-183a (copy enclosed) we advised that an agency enforcement proceeding (which is a *quasi-judicial*, rather than an administrative or legislative action) begins "as soon as the client reasonably concludes that the agency has commenced an investigation" which could result in the opening of an enforcement proceeding against the client which, unless settled, would ultimately be heard and decided by an administrative law judge.

It appears from your account of the facts that your first question involves discussions between the City and Coastal Commission staff regarding whether to open or to continue an investigation that has or may lead to an enforcement action by the Coastal Commission. Assuming that the enforcement action will not concern a specific permitting or other proceeding in which you participated while serving on the Coastal Commission, the one-year ban would not prohibit you from advising the City on questions relating to a specific Coastal Commission investigation/enforcement proceeding, since such a matter is not "administrative or legislative action" under Section 87406(d)(1).

Your second question, however, does not seem to concern enforcement-related matters, since it mentions only meetings with a variety of state agencies on "coastal commission issues," in which you would represent a "third party," or an attorney for a "third party." It appears from our communications that you do not understand the meaning of the term "third party." This term is found in a very thorough and accurate summary of the Act's "revolving door" provisions presumably given to you on your departure from the Coastal Commission. On page 4 of this Memorandum, in a section describing conduct not prohibited by the one-year ban, we find:

⁴ Further information is provided in the enclosed fact sheet prepared by the Commission to address common questions associated with post-employment restrictions.

“Advice given to a third party about the Coastal Commission.” The author of this memorandum would, of course, be the best source of clarification on this point, but we believe that the intended meaning of this term is “any person who is not currently a member or employee of the Coastal Commission.”

The prohibitions of the one-year ban apply to communications with the Coastal Commission or its employees – and with agencies described in Regulation 18746.1(b) – when they are communications you are compensated by “any other person” to make, as described in Section 87406(d)(1), which concern possible administrative or legislative action. The Act’s expression “any other person,” for present purposes, has the same meaning as the term “third party,” discussed in the preceding paragraph.

For twelve months after the effective date of your separation from the Coastal Commission, you may not make such a communication 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. The one-year ban does not affect your communications with state agencies that are *not* described in Section 87406(d)(1) or Regulation 184765.1.

To summarize, our answers to question one and two differ because question one appears to refer to communications involving a current or prospective enforcement action, which is not by definition an “administrative or legislative action,” while question two appears to refer to communications that do involve an “administrative or legislative action,” which are the kinds of communications that are subject to the one-year ban.

The Permanent Ban on “Switching Sides:” Question Three

This *permanent* ban prohibits a former state employee from “switching sides” and participating, for compensation, in a 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. (See Sections 87401-87402; Regulation 18741.1.)

The permanent ban is a lifetime ban applicable to any judicial, quasi-judicial, or other proceeding in which you participated while employed 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).)

An official has “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).)

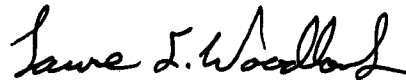
The permanent ban does not apply to a "new" proceeding even in cases where the new proceeding is related to or grows out of a prior proceeding in which the official had participated. A "new" proceeding *not* subject to the permanent ban typically involves different parties, subject matter, or circumstances that differ from those involved in previous proceedings. (*Rist* Advice Letter, No. A-04-187; also see *Donovan* Advice Letter, No. I-03-119.) New contracts let by the employee's former 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 it involves the same parties. (*Ferber* Advice Letter, No. I-99-104; *Anderson* Advice Letter, No. A-98-159.) In addition, the application, drafting, and the award of a contract, license, or approval is considered a proceeding separate from the monitoring and performance of the contract, license, or approval. (*Anderson, supra*; *Blonien* Advice Letter, No. A-89-463.)

Section 87402 prohibits former officials from being paid to "aid, advise, counsel, consult or assist in representing" any other person in any proceeding in which the official would be prohibited from appearing under Section 87401. Thus the permanent ban extends not only to appearances before a former agency, but to "switching sides" generally. In short, it prohibits any form of paid "behind the scenes" consultation or assistance.

As we understand your account of the facts, you voted in a proceeding in which the Coastal Commission granted a certain permit, which included certain conditions which the applicant has allegedly not honored. Under these facts, an action seeking enforcement of the permit conditions would be a proceeding separate and distinct from the proceeding in which the permit was granted, and you are not barred by the Act from assisting any person including a "third party" or an attorney for a third party who seeks to compel performance by the permit holder.

Sincerely,

Zackery P. Morazzini
General Counsel



By: Lawrence T. Woodlock
Senior Counsel, Legal Division

LTW:jgl

Enclosures