



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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October 03, 2023

Mitch Weiss
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Re: Your Request for Informal Assistance
Our File No. I-23-142

Dear Mr. Weiss:

This letter responds to your request for advice regarding the revolving door provisions of the Political Reform Act (the “Act”).¹ Please note that we are only providing advice under the Act. We express no opinion on the application, if any, of other post government employment laws such as the Public Contract Code. Also, note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice. Because your question is general in nature, we are treating your inquiry as a request for informal assistance.²

QUESTION

As a part-time employee for a lobbyist, may you meet with staff from the California Department of Transportation (“Caltrans”), California State Transportation Agency (“CalSTA”), or local agencies (e.g., cities, counties, and regional transportation planning agencies) to discuss transportation programs, transportation projects, or transportation funding issues, including projects that will or might request an allocation of funds from the California Transportation Commission (“CTC”)?

CONCLUSION

The Act contains two post-governmental employment restrictions that may apply to the facts presented: the one-year and permanent bans. As a part-time employee with a registered state lobbyist, the one-year ban does not prohibit you from meeting with staff from Caltrans, CalSTA, or local agencies (e.g., cities, counties, and regional transportation planning agencies) to discuss transportation programs, transportation projects, or transportation funding issues, including projects that will or might request an allocation of funds from the CTC because the one-year ban applies only to communications and appearance before your former governmental employer the CTC and

¹ 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 18104 through 18998 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.

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).)

agencies “which budget, personnel, and other operations” are subject to the control of the CTC. However, you may be prohibited from assisting your employer in any proceeding you previously participated in under the permanent ban discussed below.

FACTS AS PRESENTED BY REQUESTER

You are the former Executive Director of the CTC, having left service and ceased performing official duties on March 23, 2023. You would like to consider part-time employment with a registered state lobbyist. Your duties and responsibilities would include meeting with officials from Caltrans, CalSTA, and local agencies (including councils of government, regional transportation planning agencies, cities, counties, and transit providers) to discuss transportation programs, transportation projects, and transportation funding issues.

You state that the CTC is an independent state agency under Section 14534.1 with responsibilities that include, but are not limited to, the following:

- Programming and allocating state and federal transportation funds appropriated by the legislature to specified transportation programs. This includes allocations to specific projects and lump sum amounts allocated to Caltrans for suballocation to local agencies. (Streets and Highways Code section 75(b).)
- Advising and assisting the Secretary of Transportation and the Legislature in formulating and evaluating state transportation policies and plans. (Section 14520.).)
- Approving right-of-way matters related to the state highway system. (e.g., Streets and Highways Code section 75(a).)

You state that the CTC exercises no direction or control over the hiring, firing, or any other personnel matters of these agencies. Nor does the CTC exercise direction or control of other operations at these agencies.

CTC and CalSTA

Regarding budgets, the CTC does not exercise direction and control over CalSTA’s budget. It is the opposite, as CTC budget proposals require CalSTA approval before being submitted to the Department of Finance. There is one program in CalSTA’s budget, the Transit and Intercity Rail Capital Program, for which the projects require CTC allocation. CalSTA approves a multiyear program (list) of projects for funding in this program. Applicants to this program are public agencies that operate or have planning responsibilities for existing or planned regularly scheduled public transportation services. Presumably, the appropriation level requested in the Governor’s Budget is based in part on the CalSTA program of projects; however, the CTC does not have an approval role in the projects or the appropriation level. The statute does state that the CTC “shall allocate funding to applicants under the program of projects approved by the Transportation Agency.” (Public Resources Code section 75220.) Because the statute requires the allocations, the CTC is afforded no policy discretion in making these allocations.

CTC and Caltrans

While the Caltrans budget being subject to the direction and control of the CTC might be more nuanced, you have provided that Caltrans' budget is not under the CTC's direction and control. Like other state agencies, Caltrans' budget is set (appropriated) by the Legislature and subject to approval by the Governor.

The statute prohibits the CTC from forming "a committee for the purpose of considering budgetary and related fiscal matters" under Section 14507. The statute specifically requires that the CTC allocate funds for transportation projects consistent with the provisions of the current and prior Budget Acts that apply to the appropriated funds to be allocated under Section 14533. Therefore, the Legislature and Governor enacting the budget directs and controls Caltrans' budget. In theory, there is a relationship between some appropriations requested by Caltrans in the Governor's Budget and multi-year lists (programs) of projects adopted typically biennially by the CTC; however, requested appropriations and budget change proposals by Caltrans are submitted to CalSTA and the Department of Finance, not the CTC. Therefore, the CTC does not have a direct approval role in those levels. Further, the requested appropriation levels are impacted by considerations outside the purview of the CTC, such as declining or increasing revenues, new union contracts, or political concerns.

In the past, the Legislature has appropriated funds for programs not proposed in the Governor's Budget, and the Governor has vetoed funding for programs that the Legislature appropriated.

The CTC allocates funds to individual projects in some programs. These may be funds appropriated to Caltrans as state operations, local assistance, or capital outlay. Projects implemented by local agencies require an allocation of local assistance funds. Some programs require that Caltrans receive an allocation of state operations funds before Caltrans can begin work on a particular phase of a project. However, even without a project allocation of state operations funds, Caltrans is required by state personnel rules to pay its staff.

The CTC does allocate capital outlay funds to Caltrans for individual projects. As noted above, the Legislature and the Governor direct and control the appropriations from which these allocations are made. On a project-specific level, the amount of funding requested is determined initially by a project study report, over which the CTC has no approval role, and later by an engineer's estimate, over which the CTC has no approval role.

CTC and Local Agencies

The CTC allocates some local assistance funds to local agencies to fund specified transportation projects; however, the CTC does not exercise direction and control over the budget of those agencies. Without a CTC allocation, a local agency may be unable to utilize certain state or federal funds on a project. Still, the agency may make budgetary changes to use other funds for the project.

The CTC also oversees the Senate Bill 1 Local Streets and Road Program. All California cities and counties can receive apportioned funding through this program. To be eligible to receive

this funding (apportioned by the State Controller), cities and counties must submit a list of proposed projects to the CTC each year. The CTC then adopts a list of eligible cities and counties to receive funding, which is sent to the State Controller to begin the apportionment process. Although all cities and counties receive this funding, it cannot be said that the budget of every city and county in California is subject to the direction and control of the CTC.

ANALYSIS

Public officials who leave state service are subject to two types of post-governmental employment provisions under the Act: the one-year ban and the permanent ban. These provisions are commonly referred to as the “revolving door” prohibitions.

One-Year Ban

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

The one-year ban applies to any employee of a state administrative agency who holds a position 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 twelve months after the employee permanently leaves state office or employment. While in effect, the one-year ban applies only when a former employee or official is being compensated for their appearances or communications before their 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 some issues involving specific parties, such as “judicial or quasi-judicial” proceedings, the one-year ban applies to “any appearance or communication made to influence administrative or legislative action or influence 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.) Appearance or communication includes but is not limited to conversing by telephone or in person, corresponding in writing or by electronic transmission, attending a meeting, and delivering or sending any communication. (Regulation 18746.2.)

Appearances and communications are prohibited only if they are: (1) before a state agency that the public official worked for or represented; (2) before a state agency “which budget, personnel, and other operations” are subject to the control of a state agency the public official worked for or represented; or (3) before any state agency subject to the direction and control of the Governor if the official was a designated employee of the Governor’s office during the twelve months before leaving state office or employment. (Regulation 18746.1(b)(6).)

In determining an official's former state agency employer, we have previously advised that, while other agencies may be under the umbrella of the agency of a former agency official, if the agencies have their own budgets allocated by the Legislature or are independently operated by independent managers (executive director and appointed chairman and commissioners), these other agencies would not be considered the official's former state administrative employer. (*Brown Advice Letter, No. A-08-062.*)

Based on the facts provided, the CTC does not have control over the budget, personnel, or operations of Caltrans, CalSTA, or local government agencies based on the facts provided. While the CTC allocates funds for specific projects, the allocation of funds for these particular projects does not alone establish control of the budgets for Caltrans, CalSTA, or local governmental agencies. While other agencies may be under the umbrella of the agency of a former agency official, if the agencies have their own budgets allocated by the Legislature or are independently operated by independent managers (executive director and appointed chairman and commissioners), these other agencies would not be considered the official's former state administrative employer. (*Brown Advice Letter, No. A-08-062.*) Additionally, the CTC has no control of the personnel or other operational responsibilities of Caltrans, CalSTA, or the local agencies mentioned herein. Under Regulation 18746.1(b)(6), these agencies are not considered your former state administrative employer for purposes of the one-year ban. Therefore, you are not prohibited from meeting with staff at these agencies to discuss transportation programs, transportation projects, or transportation funding issues, including projects that will or might request an allocation of funds from the CTC.³

Permanent Ban

The "permanent ban" prohibits a former state employee from "switching sides" and participating, for compensation, in certain proceedings involving the State of California and other specific parties or assisting in the proceeding if the proceeding is one in which the former state employee participated while employed by the state. (Sections 87401 and 87402; Regulation 18741.1.) The permanent ban applies when an official has permanently left or taken a leave of absence from any particular office or employment. (Regulation 18741.1(a)(1).)

The permanent ban applies to every "state administrative official," which is defined 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." (Section 87400(b).)

The permanent ban is a lifetime ban and applies to any formal or informal appearance or any oral or written communication - or aiding, advising, counseling, consulting, or assisting in representing any other person, other than the State of California, in an appearance or communication - made with the intent to influence any judicial, quasi-judicial, or other proceeding in which you participated while you served as a state administrative official. "'Judicial, quasi-judicial or other proceeding' means any proceeding, application, request for a ruling or other

³ Note that although meeting with staff at these agencies is not prohibited, you are, however, prohibited for one year from appearing or communicating with the CTC to influence any administrative or legislative actions 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. If you are required to communicate with or make any appearance before the CTC or its officers or employees, you may want to seek further guidance beforehand.

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 the official 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).) Further, a former supervisor has “participated” in any “pending” proceeding before the official’s former agency and under the former supervisor’s authority. A proceeding is under a supervisor’s “supervisory authority” if the supervisor:

- 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.
- Has direct supervision of the person performing the investigation, review, or other action involved in the proceeding;
- Reviews, discusses, or authorizes any action in the proceeding; or
- Has any contact with any of the participants in the proceeding regarding the subject of the proceeding. (Section 87400(d); Regulation 18741.1(a)(4).)

However, proceedings are not under an official’s “supervisory authority” merely because the supervisor is responsible for the general oversight of the administrative actions or functions of a program, where the responsibilities concerning the specific or final review of the proceedings are expressly delegated to other persons in the agency’s structure and the supervisor is not involved in the actual proceedings. (Regulation 18741.1(a)(4); see also *In re Lucas* (2000) 14 FPPC Ops. 15.)

The permanent ban is not an issue if you will not participate in decisions in which you participated while at the CTC. However, since you have yet to present a specific decision or proceeding you are considering participating in, we cannot determine whether the permanent ban applies. To the extent that you may participate in a project in your new role that you participated in while at the CTC, the permanent ban may be implicated. In that case, we advise that you seek additional assistance describing your involvement in the project.

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

Sincerely,

Dave Bainbridge
General Counsel



By: Katelyn L. Baeta-Orick
Counsel, Legal Division

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