



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3050 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

May 22, 2024

Melissa Semcer
Chief Strategist & Principal Consultant
Climate, Wildfire and Energy Strategies, LLC

Re: Your Request for Informal Assistance
Our File No. I-24-007

Dear Ms. Semcer:

This letter responds to your request for advice regarding the post-governmental employment provisions of the Political Reform Act (the “Act”).¹ Because your question is general in nature and not limited to a specific proceeding, we are treating your request as one for informal assistance.²

Please note that we are only providing advice under the post-governmental employment provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Section 1090.

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.

QUESTION

Having left your former agency, the Office of Energy Infrastructure Safety (OEIS) in August 2023, to start a consulting business specializing in climate, wildfire, and energy strategies, may you engage in the following activities under the Act’s revolving door prohibitions:

1. May you assist a climate tech group by joining the group in meetings with OEIS or the California Public Utilities Commission (CPUC), as well as assisting the group with public comments?
2. May you assist a major investor-owned utility with its 2025 Wildfire Mitigation Plan Update despite having reviewed the 2023-2025 base year plans and assisting with creating guidelines for the 2025 Plan Updates while employed at OEIS?

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).)

3. May you assist a Public Utility Commission (PUC) from another state with developing and evaluating its Wildfire Mitigation Plans?

CONCLUSION

Under the one-year ban, you are prohibited from making an appearance or communication before OEIS, for compensation, on behalf of another person for one year from the date you left state service if that contact is made for the purpose of influencing an administrative or legislative 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. While you have not identified a specific proceeding before OEIS, for most proceedings, you may not generally make an appearance or communication before OEIS for one year as a consultant for a tech group including accompanying the tech group to meetings with OEIS.

You are not generally prohibited from attending meetings with CPUC in which OEIS is not in attendance, nor prohibited from assisting a tech group with drafting public comment so long as you are not designated or identified when the comment is submitted by the tech group. Further, the one-year ban does not prohibit you from assisting a PUC from another state with developing and evaluating a Wildfire Mitigation Plans, including requesting public information from OEIS, provided you are not communicating with OEIS for the purposes of influencing their actions.

Under the permanent ban, you are generally prohibited from “switching sides” and participating, for compensation, in any proceedings involving specific parties and the State of California or assisting others in the proceeding if the proceeding is one in which you participated while employed by the state. For purposes of assisting a tech group or a PUC from another state, you have not identified any proceeding specific to these parties in which you previously participated. Accordingly, we can only caution that the permanent ban may apply if you previously participated in a proceeding specifically involving the party.

Regarding assisting an investor-owned utility with a 2025 Wildlife Mitigation Plan Update, you have indicated that you have previously participated in reviewing Mitigation Plans in previous years including base year plans encompassing 2023-2025. Absent additional facts, it appears the 2025 Mitigation Plan Update would involve the same party, similar or the same subject matter, and similar or the same factual or legal issues as the 2023-2025 base year plan. Accordingly, to the extent that you previously participated in the review of an investor-owned utility’s 2023-2025 base year plan you are permanently prohibited from aiding, advising, counseling, consulting, or assisting the investor-owned utility in the 2025 Mitigation Plan Update.

FACTS AS PRESENTED BY REQUESTER

You were formerly appointed as Deputy Director at OEIS and formally left the office on August 4, 2023. You have since started a consulting business, Climate, Wildfire, and Energy Strategies, LLC, and are seeking advice on the post-governmental employment provisions of the Act in relation to work you would like to perform for your clients.

OEIS was originally a department of the California Public Utilities Commission (CPUC) prior to becoming its own office in July 2021. OEIS is tasked, among other activities, with reviewing California investor-owned utilities and Wildfire Mitigation Plans. In 2023, the utilities submitted their Wildfire Mitigation Plans for the 2023-2025 cycle (base plans), which you assisted in evaluating. In 2023, OEIS evaluated and approved or denied plans for 2023 and 2024. At the end of 2023, OEIS released draft guidelines that have not yet been adopted for utilities to submit updates to their 2023-2025 base year plans for the year 2025 (to be submitted in 2024). Plans are now a year ahead such that OEIS is reviewing plans for the forthcoming year. Following OEIS approval of a plan, it is sent to the CPUC for ratification.

As deputy director you were involved in the evaluations for the 2023-2025 base year plan evaluations. You were not involved at all in the evaluation of the 2025 Updates (to be submitted in 2024), however you were involved with developing the high-level framework for the 2025 Update Guidelines, although you left prior to finalization of the guidelines.

Currently, as a consultant you perform or seek to perform the following work:

1. You advise a clean climate tech group that helps climate tech startups navigate and develop regulatory policies. As part of that work, the startups may request meetings with the CPUC and OEIS, which they would like you to attend. They may also draft comments, for which you would provide input but would not be a signatory.

2. You have been asked to work with a major investor-owned utility in California to provide input on its 2025 Wildfire Mitigation Plan Update, as well as input on its team structure/framework for developing plans. You would not be a signatory on the Plan, communicate with or appear before OEIS or CPUC.

3. A Public Utility Commission (PUC) in another state has requested your assistance developing processes and evaluating their own Wildfire Mitigation Plan. The out of state plan is entirely separate from OEIS submitted plans and is not subject to OEIS review or approval. However, the PUC may wish to reach out to OEIS or CPUC for questions of general guidance on developing these policies.

ANALYSIS

Under the Act, public officials who leave state service are subject to two types of post-governmental employment provisions known as the one-year ban and the permanent ban. In addition, 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 have any arrangement concerning employment. (See Regulation 18747.) Colloquially, these provisions are known as the “revolving door” prohibitions.

One-Year Ban

The one-year ban prohibits a former state employee from making, for compensation³, any formal or informal appearance, or making any oral or written communication, before the employee's former agency for the purpose of influencing any administrative or legislative 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. (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).) A "state administrative agency" is "every state office, department, division, bureau, board, and commission, but does not include the Legislature, the courts or any agency in the judicial branch of government." (Section 87400.) The ban applies for 12 months from the date the employee permanently leaves state office or employment.

In contrast to the permanent ban, which only applies to certain "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 conversing by telephone or in person, corresponding in writing or by electronic transmission, attending a meeting, and delivering or sending any communication. (*Id.*) An appearance or communication is not for the purpose of influencing administrative or legislative action when 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; (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.)

Appearances and communications are prohibited if they are (1) before a state agency that the public official worked for or represented or (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. (Regulation 18746.1(b)(6).) We have advised that a former agency official may, without violating the one-year ban, draft proposals on a client's behalf to be submitted to their former agency so long as the former employee is not identified in connection with the client's efforts to influence an administrative action. (*Nichols* Advice Letter, No. I-23-058; *Cook* Advice Letter, No. A-95-321; *Harrison* Advice Letter, No. A-92-289.)

³ Compensation includes actual compensation and promised compensation, including but not limited to the promise of future employment. Compensation does not include payments made for necessary travel, meals and accommodations received directly in connection with otherwise volunteer services. (Regulation 18746.1; *Crooke* Advice Letter, No. I-12-146.)

You left office in August 2023 and are now a compensated consultant. As a consultant, you are generally subject to the one-year ban until August 2024.

1. Clean Climate Tech Group

Under the one-year ban, prohibited appearances or communications include accompanying a client to a meeting for compensation as an appearance or communication includes attending any meeting with OEIS under Regulation 18746.2(a). Moreover, attending an OEIS meeting on behalf of the tech group is generally an appearance or communication for the purpose of influencing OEIS's actions, made for compensation as a consultant, and would therefore fall within the one-year ban to the extent that the proceeding is an administrative or legislative action or involves the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. Please note that while most appearances and communications will be prohibited, there are some appearances or communications that are not made for the purpose of influencing the agency's decisions and therefore not prohibited. For instance, attendance at a general informational meeting, seminar, or similar event or requests for information concerning any matter of public record are not prohibited. (See Regulation 18746.2(b).)

Additionally, you have asked whether you may assist the group with drafting comments to submit to OEIS. Under the one-year ban, you are not prohibited from assisting the group so long as you do not make an appearance or communication to the OEIS. Provided you are not the signatory and not identified in the comment in any way, you personally would not be appearing before or communicating with your former agency and therefore would not be prohibited by the one-year ban in offering assistance to the group on the draft of the comment.

You noted in your request that previously OEIS has been under the CPUC umbrella, however it has not been since 2021. At the time you left office, neither OEIS nor the CPUC was under the authority of the other. Therefore, while you are prohibited from participating in OEIS meetings, you are not prohibited from attending meetings with CPUC provided no OEIS official was in attendance.⁴

2. Investor-Owned Utility

In light of the conclusion below that you are prohibited from aiding, advising, counseling, consulting, or assisting the investor-owned utility with its 2025 Mitigation Plan Update under the permanent ban, an analysis of any appearance or communication before the OEIS on behalf of an investor-owned utility under the one-year ban is unnecessary at this time.

3. Other State's PUC

You have indicated that you may be asked to assist a PUC in a different state with developing processes and evaluating their own Wildfire Mitigation Plans. These plans would be out of state plans entirely separate from plans submitted to OES. The plans would not be subject to OEIS approval or review, although you indicate that it is possible the PUC in the different state may want to reach out to OEIS for general information and guidance in developing their plans. As a

⁴ If a scenario arises in the future where there is a joint proceeding of CPUC and OEIS, please seek additional advice and provide more detailed facts so that we may advise as to the extent you may participate.

consultant for the PUC in another state, you are representing the PUC for compensation and potentially subject to the one-year ban. However, the one-year ban applies only if you make an appearance or communication before the OEIS. You are not prohibited from providing the PUC with assistance under the one-year ban that does not involve you making an appearance or communication before OEIS. Additionally, to the extent that you are asked to communicate with OEIS merely to request information concerning a matter of public record, you would not be prohibited under the one-year ban from making the request on behalf of your client. (See Regulation 18746.2(b).)

Permanent Ban

The permanent ban prohibits a former state employee from “switching sides” and participating, for compensation, in certain proceedings involving a specific party or parties and 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 and 87402; Regulation 18741.1.) The permanent ban applies when an official has permanently left or takes a leave of absence from any office or employment. (Regulation 18741.1(a)(1).)

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 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 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).) 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 the official’s tenure, and (2) the proceeding was under the official’s supervisory authority. (Section 87400(d); regulation 18741.1(a)(4).)

“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.) New contracts with 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 that is 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 awarding of a contract, license, or approval is a proceeding separate from the monitoring and performance of the contract, license, or approval. (*Anderson*, supra; *Blonien* Advice Letter, No. A-89-463.)

You permanently left your position of Deputy Director at OEIS in August 2023 and are subject to the prohibitions contained in the permanent ban.

1. Clean Climate Tech Group

The tech group you consult for aims to meet with OEIS and develop comments to participate in the regulatory process. However, the permanent ban only applies to a 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. The permanent ban does not generally apply to participation in a regulatory matter that is not specific to the tech group. If you have any questions regarding your involvement in a proceeding specifically involving the tech group in which you previously participated as a state official, or which was previously under your supervisory authority. You may wish to seek additional advice identifying the proceeding and your involvement.

2. Investor-Owned Utility

You have indicated that in your former position you participated in evaluating the 2023-2025 base year Mitigation Plans and you worked on the guidelines for the 2025 Plan Updates. As stated above, the permanent ban potentially applies to 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 that you previously participated in as a state official. Based upon the description of the proceeding, the evaluation of 2023-25 base year Mitigation Plan is a specific proceeding involving the investor-owned utility that has submitted the plan. Accordingly, you are permanently prohibited from aiding, advising, counseling, consulting, or assisting the investor-owned utility in relationship to its 2023-2025 base year Mitigation Plan as you have indicated that you previously participated in the review of the plans. Nonetheless, we must further examine whether assisting the public-owned utility with its 2025 Plan Update is the same proceeding as the 2023-25 base year plan or whether the update is considered a “new” proceeding for purposes of the permanent ban.

As noted above, a proceeding can still be “new” even if it is related to a prior proceeding in which you have participated. For example, the awarding of a contract is separate from the performance of the contract. However, please note “the ‘performance’ or ‘implementation’ proceeding is narrowly construed and limited to the execution of the existing terms of an existing contract.” (*Lujan* Advice Letter, No. A-14-009.) Generally, a ‘new’ proceeding 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.) Here, the 2025 Plan Update will require a reexamination and potential amendment of the base year plan. The update is not limited to performing the base year plan or submitting a new base year plan. Further, the update involves the same parties as the base year plan, and the subject matter and factual issues to be examined in the update are the same or nearly the same as those evaluated in the base year plan. Accordingly, the 2025 Plan Update is merely further consideration of the initial proceeding in which you previously participated, the 2023-25 base year plan. Based on the facts provided, the permanent ban would prohibit you from assisting the public-owned utility in any way with the 2025 Plan Update.

3. Other State's PUC

Based off the facts provided, the work you will perform for the out of state PUC is not related to any work you performed while working at OEIS. You would be hired to develop processes and evaluate Wildfire Mitigation Plans of another state, wholly unrelated to the Wildfire Mitigation Plans for California and not subject to the authority or review of OEIS. While you may be asked to seek general information or guidance from OEIS to assist in developing this new framework, this would not be prohibited by the permanent ban as the formulation of the PUC's plan is not a proceeding before the OEIS in which you previously participated as a state official.

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

Sincerely,

Dave Bainbridge
General Counsel

By: 
Valerie Nuding
Counsel, Legal Division

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