



Proposed Draft Guidance Clarifying the Post-Employment Restrictions of Former State Employees Who Seek to Obtain Certain Information through the State Freedom of Information Law (“FOIL”), or through Other Means Generally Available to the Public

The Joint Commission on Public Ethics is considering issuing new guidance that would clarify the post-employment restrictions contained in Public Officers Law §73(8)(a) for former State employees who seek to obtain certain information through the State Freedom of Information Law (“FOIL”), press conferences, or other means generally available to the public.

The Commission is seeking input from individuals and entities that would be impacted by the proposed guidance, as outlined at the bottom of this notice. If you have comments, questions, or suggestions, please contact legal@jcope.ny.gov no later than October 31, 2014.

Post-Employment Restrictions Generally

As a reminder, the post-employment restrictions contained in Public Officers Law §73(8)(a) are the two-year bar and the lifetime bar.

➤ **Two-Year Bar**

The two-year bar, contained in Public Officers Law §73(8)(a)(i), prohibits former State officers and employees, for two years following their separation from State service, from (a) appearing or practicing before their former agencies (the “appearance/practice” clause), and (b) rendering services for compensation, in relation to any case, proceeding, application, or other matter before their former agency (the “back room services” clause). Among the activities the Commission and its predecessor agencies have determined to be prohibited by the appearance/practice clause during the two-year period are: negotiating a contract with a former agency; submitting a grant proposal or application to a former agency; representing a client in an audit before a former agency; or engaging in settlement discussions with a former agency.

The “back room services” clause of Public Officers Law §73(8)(a)(i) precludes a former employee from rendering services in relation to any case, proceeding or application or other matter before the individual’s former agency, “even in the absence of a personal appearance.” The Commission and its predecessor agencies have determined that during the two-year period, the clause precludes, among other things, a former State employee from accepting compensation to prepare documents for a private firm when it is reasonably foreseeable that the documents will be reviewed by the individual’s former agency. Moreover, a former State employee may not accept compensation for assisting another person in the creation or development of (i) an application to be submitted to the former employee’s State agency, or (ii) a plan or strategy for influencing a decision of the former employee’s State agency.

➤ **Lifetime Bar**

The lifetime bar is set forth in Public Officers Law §73(8)(a)(ii). The bar prohibits a former State employee from providing services of any kind in relation to any case, proceeding, application, or transaction in which the former employee was directly concerned and in which he or she personally participated or which was under his active consideration while in State service. When the former State employee provides such services on behalf of any individual or entity before any State agency, the bar applies even if the former State employee is not being compensated for his services. When the former State employee is providing such services before any other entity, the lifetime bar prevents the former State employee from receiving compensation for those services.

A former State employee’s mere acquaintance with a matter is insufficient to trigger the lifetime bar. Rather, the facts must clearly show personal participation, direct concern, or active consideration.

Overview of Current Application of Post-Employment Restrictions in the Context of FOIL and Requests for Information Generally

The Commission’s predecessor agencies have issued a number of advisory opinions that relate to a former State employee’s requests for information from his former agency. Those opinions have generally found violations of the post-employment restrictions when a former employee communicates with his agency in order to influence the agency or access **non-public** information from his former agency. Additionally, the opinions have found a violation when the former State employee advises someone else working on a matter with

him as to how to contact the former employee's agency for non-public information. *See* Advisory Opinions Nos. 99-17; 97-01.

In contrast, where a former employee seeks **public** information from his former agency, the Commission's predecessor agencies have generally found that he would not be prohibited by the two-year bar from seeking that information. *See* Advisory Opinions Nos. 04-05, 93-18.

With respect to Freedom of Information Law ("FOIL") requests, the current rule prohibits a State employee, within two years of termination from State service, from submitting a FOIL request to his former agency on behalf of another individual or entity. A former employee who is acting solely on his own behalf, however, may make a FOIL request to his former agency without violating the two-year bar. *See* Advisory Opinions Nos. 89-07, 97-12. The new proposed guidance would make changes to this rule.

Proposed Guidance

Below is a chart outlining proposed guidance for former State employees who seek to obtain information through the State Freedom of Information Law ("FOIL"), press conferences, or other means generally available to the public.

Again, the Commission is seeking input from individuals and entities that would be impacted by the proposed guidance. If you have comments, questions, or suggestions, please contact legal@jcope.ny.gov no later than October 31, 2014.

Proposed Rules

	Former State employee acting on his own behalf	Former State employee acting on behalf of another
FOIL	<p>Two-year bar does not prohibit a former employee from submitting a FOIL request to his former agency. The former employee must not make the request informally but must instead follow all of the agency's FOIL requirements.</p>	<p>Same</p>
	<p>Two-year bar prohibits a former employee from appealing the denial of his FOIL request. The former employee can, however, enlist another individual to make the appeal on his behalf.</p>	<p>Two-year bar prohibits a former employee from appealing the denial of FOIL request on behalf of another individual or entity. The former employee also may not provide back room services for compensation in connection with an appeal of a denial of a FOIL request from his former agency.</p>
	<p>Lifetime bar does not prohibit a former employee from submitting a FOIL request on his own behalf. The lifetime bar does, however, prohibit a former employee from appealing the denial of his FOIL request if he was involved in the classification of the document for FOIL purposes while in State service.</p>	<p>Same</p>
Public Information /Press Conferences	<p>Two-year bar does not prohibit a former employee from seeking information that is available to the general public, provided that the former employee obtains the information in the manner or form by which the agency makes such information available to the general public.</p> <p>By way of example, a former employee may call an agency's information officer or press liaison or attend a press conference. A former employee may not, however, call or approach employees of her former agency in non-public settings to obtain information.</p>	<p style="text-align: center;">Same</p> <p>Additionally, back room services clause of the two-year bar prohibits a former employee from receiving compensation for assisting others in connection with seeking information from his former agency that is not generally available to the public.</p>
	<p>Lifetime bar does not prohibit a former employee from seeking public information.</p>	<p>Same</p>