

# New York State Ethics Commission

---

**Advisory Opinion No. 91-2:** Application of the lifetime bar of §73(8) of the Public Officers Law to a former employee who contracted with his former agency to perform consulting services.

---

## Introduction

The following advisory opinion is issued in response to a written inquiry from the [public benefit corporation] on the application of the lifetime bar of §73(8) of the Public Officers Law to the circumstance where the [public benefit corporation] has entered into a contract with a former [public benefit corporation] employee to perform consulting services for the [public benefit corporation] more than two years after the employee left State service.

Pursuant to the authority vested in the New York State Ethics Commission ("Commission") by §94(15) of the Executive Law, the Commission hereby renders its opinion that the lifetime bar restriction of §73(8) of the Public Officers Law prohibits the former employee from consulting and advising the [public benefit corporation], for a fee, on any case, proceeding, application or transaction in which the former employee was directly concerned and in which he personally participated or which was under his active consideration while employed at the [public benefit corporation]. The Commission finds no violation of the lifetime bar under circumstances where the State agency contacts a former officer or employee to provide, without fee, information gained while in State service or employment.

## Background

The [public benefit corporation] was created by the Legislature, pursuant to [cite deleted], as a public benefit corporation to improve and develop an area [location] in the interests of the City of New York and of the State as a whole.<sup>(1)</sup> The [public benefit corporation]'s membership consists of three members appointed by the Governor with the advice and consent of the Senate. The [public benefit corporation] supervises the infrastructure and site development for a mixed commercial project on approximately ninety-two acres owned by the [public benefit corporation]. In furtherance of its powers and responsibilities under the Act, the [public benefit corporation] engages in complex financial and real estate transactions, including issuing bonds and leasing real property to private developers.

The former employee of the [public benefit corporation], who is the subject of this opinion, worked for the [public benefit corporation] for fifteen years until his retirement in January, 1988.<sup>(2)</sup> The individual initially served as the Accounting Manager, then as Treasurer, and was later promoted to Vice President-Finance/Treasurer, the position from which he retired. In this last position, he was instrumental in assisting the [public benefit corporation] in all aspects of

financing, accounting and internal controls as well as certain aspects of planning and policy. His job description for this position included the following responsibilities:

[F]ormulates policy and also exercises a major role in personnel administration.

Manages the accounting, budget, payroll, investment and cash flow functions of the [public benefit corporation]. Prepares special analyses, forecasts and other financial reports as necessary. Serves as financial advisor to the President and Members.

....

He serves as Chief Financial Officer and Advisor to the President and the Members of the [public benefit corporation]. He recommends fiscal policies and investment actions and executes related decisions.

Following his termination of service with the [public benefit corporation], the [public benefit corporation] entered into an agreement with the former employee on February 1, 1988.<sup>(3)</sup> The Agreement provided that the [public benefit corporation] would retain the individual to act as a consultant to the [public benefit corporation], commencing February 1, 1988, on the following terms and conditions:

1. You [the former employee] agree to consult and advise [the public benefit corporation], its Members, Officers and employees on matters relating to finance, accounting, lease, bond or similar negotiations, matters of historical value to [public benefit corporation] and other matters of interest to it.
2. [Public benefit corporation] will pay you an annual retainer of \$8000 payable in quarterly installments of \$2000 commencing May 1, 1988, upon submission of an invoice.
3. In addition [public benefit corporation] will reimburse you for your actual expenses incurred in the performance of this agreement including telephone, travel and other expenses in connection therewith.
4. This Agreement may be terminated by [public benefit corporation] at the end of any quarterly period upon 30 days prior written notice to you.

According to the [public benefit corporation], the former employee has no other clients or consulting arrangements with any other entity other than the [public benefit corporation].

The [public benefit corporation] has stated that it entered into the contract with the former employee to utilize the individual's expertise and vast knowledge of the history of the [public benefit corporation], since the individual was privy to information that has not been formally memorialized and that could not be derived from any other source. As the [public benefit corporation] indicated, "[a]lthough specific transactions are new and different, they may be integrally related to old transactions in which the former employee was involved, i.e., refinancing a bond issue, amending a lease or revising accounting systems. In order for [public benefit corporation] to make the most prudent business decisions, we have considered it appropriate to consult with this former employee . . ."

## Discussion

Subdivision 8 of §73 of the Public Officers Law contains two restrictions on the post-employment activities of former State officers and employees--the two-year absolute bar and the lifetime bar. Since the two-year bar has lapsed, this opinion will focus on the application of the lifetime bar. Section 73(8) provides in relevant part the following:

No person who has served as a state officer or employee shall after the termination of such service or employment appear, practice, communicate or otherwise render services before any state agency or receive compensation for any such services rendered by such former officer or employee on behalf of any person, firm, corporation or other entity in relation to any case, proceeding, application, or transaction with respect to which such person was directly concerned and which he personally participated during the period of his service or employment, or which was under his active consideration . . . .

The purpose of the revolving door subdivision is to preclude the possibility that a former State employee may leverage his or her knowledge, experience and contacts gained in State service to his or her *own* advantage or that of a client, thereby securing unwarranted privileges, consideration or action.

The Attorney General, in interpreting the previous revolving door provision contained in former §73(7) of the Public Officers Law, stated that the purpose of the subdivision was to "address the ethics problems that arise when a State employee leaves State service to work in the private sector." (Op. Atty. Gen. No. 84-F20; Op. Atty. Gen. No. 84-F12.) The subdivision seeks to eliminate any public doubt as to whether the actions by the officer or employee prior to separating from State service were in the public interest. (Op. Atty. Gen. No. 84-F20.)

In the instant case, the lifetime bar of §73(8) would be applied to any case, application, proceeding or transaction with which the former employee had been directly concerned and in which he or she personally participated or which was under his active consideration while he was employed at the [public benefit corporation].<sup>(4)</sup> It appears from the information supplied by the [public benefit corporation] that no particular "case, application, or proceeding" will be implicated by the former employee's services. The Commission must focus its attention to defining and applying the "transactions" to which the lifetime bar will apply.

*Black's Law Dictionary*, 5th Edition, defines "transaction" as follows:

[T]he act of transacting or conducting any business; negotiations; management; proceeding; that which is done; an affair. It may involve selling, leasing, borrowing, mortgaging, or lending. Something which has taken place whereby a cause of action has arisen. It must therefore consist of an act or agreement, or several acts or agreements having some connection with each other, in which more than one person is concerned, and by which the legal relations of such person between themselves are altered. It is a broader term than "contract."

Similarly, *Webster's Ninth New Collegiate Dictionary*, defines "transaction" to include "[a] communicative action or activity involving two parties or things that reciprocally affect or influence each other."

Comparing the language of the lifetime bar with the two-year bar proscribed by §73(8) of the Public Officers Law, the Commission notes that the two-year bar precludes certain services "in relation to any case, proceeding or application or *other matter*"; the lifetime bar speaks to "case, proceeding, application or *transaction*." It seems clear that the two-year bar, which is absolute with respect to a former employee's former State agency, was meant to prohibit the widest possible scope of activities. The lifetime bar, which applies to the prohibited activities before all State agencies, is narrower in scope. The prohibited acts are very specific.

With the foregoing analysis in mind, the Commission addresses the [public benefit corporation's] specific questions concerning their contact with their former employee. Upon the Commission's request, the [public benefit corporation] has provided specific illustrations of the type of contacts that the [public benefit corporation] anticipates having with the former employee.

**1. "Can this former employee be called upon by [public benefit corporation] for recitation of facts on past matters if they may have impact on current or future issues?"**

The Commission has recognized that the lifetime bar of §73(8) is an extraordinary limitation imposed to restrict former employees from using specific inside knowledge about a case, proceeding, application or transaction at any time, and before any State agency, forever.<sup>(5)</sup> Since there is no case, proceeding or application involved, in order to trigger this limitation, the individual must have personally participated and been directly concerned with the same transaction, or must have had the same transaction under his active consideration during employment.

The statutory language clearly evidences the legislative intent that mere acquaintance with or knowledge of a fact or circumstance is insufficient to trigger the lifetime bar. More is needed--active involvement in the nature of *both* personal participation *and* direct concern or active consideration of the transaction.

In response to the first inquiry from the [public benefit corporation], the individual may not, for a *fee*, recite specific facts to his former State agency on past transactions, including any particular investments, in which he personally participated and was directly concerned or which were under his active consideration.<sup>(6)</sup> The purpose of the lifetime bar is to prohibit personal gain to a former employee because of contacts or information gained by his or her State service or employment. This includes circumstances where the former State agency is compensating the former employee for information which is gained as an employee. The Commission believes that, if necessary, the former officer or employee involved could be hired as a part-time or full-time employee to provide such information. The distinction drawn between consulting and employment is not slight--as an employee, the former officer or employee would again be subject to all the provisions of the Ethics Law and use of the information he provides would be subject to the control of the employer.

The lifetime bar of §73(8) would not prohibit the individual from reciting general facts on past transactions or reciting facts relative to transactions in which he possessed a mere acquaintance. Therefore, the level of involvement in a past transaction by the former employee becomes of utmost significance in assessing whether the past transaction is covered by the lifetime bar.<sup>(7)</sup>

Thus, under the illustrations provided by the [public benefit corporation], the former employee could not provide information, for a fee, as to the substance of conversations he had with the Internal Revenue Service, regarding the settlement of a specific matter concerning construction bonds and whether the [public benefit corporation] was able to prepay the construction loan bond, as this goes beyond the recitation of general facts of past transactions or those transactions that he possessed a mere acquaintance. Likewise, the former employee should receive no compensation for information regarding a specific discrepancy in a billing matter and how he finally reconciled the specific discrepancy, as this is a transaction in which he personally participated and which he was directly concerned or which was under his active consideration.

The lifetime bar of §73(8) also precludes the former employee from providing information to his former agency, for a fee, concerning the calculations by a specific developer on its return on equity for this would encompass a past transaction in which he personally participated and which he was directly concerned or which was under his active consideration. The former employee could not state how he personally calculated the return on equity or what were the specifics of conversations and negotiations he had with the developer regarding any changes in the return on equity.

The key to the Commission's analysis here is that it is the former State agency which is seeking the services of a former employee to provide information--the employee is being compensated for relating information for which he was paid as an employee.<sup>(8)</sup> The statutory language of §73(8) bars certain communications with or without compensation. However, the Commission will not interpret the lifetime bar in such a way as to hamstring State agencies from obtaining needed information. The Commission believes that it was not the Legislature's intent to preclude State agencies from contacting former State officers or employees concerning matters with which they dealt while in State service or employment. Where the State agency seeks certain information from a former officer or employee about his acts as an officer or employee, and no compensation is provided, we would not find such communication to be barred under the lifetime bar provision--because the agency seeks such information solely for its use and not for any other advantage.<sup>(9)</sup>

## **2. "Can this former employee advise current decision making employees on financial related issues based upon his understanding of historical strategy and intent of the [public benefit corporation]?"**

The lifetime bar prohibition of the revolving door does not prevent a former employee from rendering services concerning contracts or financial transactions which are new or not ones on which he worked. The former employee's understanding of historical strategy and intent of the [public benefit corporation] is general knowledge which he received while employed at the [public benefit corporation] and it could be utilized by any party (not only the [public benefit corporation]), provided that the advice does not refer to specific transactions in which the

individual personally participated and was directly concerned or specific transactions which were under his active consideration while at the [public benefit corporation]. The former employee cannot advise [public benefit corporation], for compensation, as to the specific application of the [public benefit corporation's] strategy or policy as to any particular transaction covered by the lifetime bar.<sup>(10)</sup>

The former employee could explain what the [public benefit corporation] did in the past if this information refers to the [public benefit corporation's] general policies and procedures and not to specific transactions in which the former employee personally participated and was directly concerned or which were under his active consideration. Finally, the former employee could utilize his knowledge of past policies and procedures to provide advice on new transactions.

### **3. "Can this former employee advise [public benefit corporation] whether certain documents or information exists and if so, where they can be found?"**

The individual may advise the [public benefit corporation] whether certain documents exist and, if so, where they can be found, as the location of documents is not a transaction subject to the lifetime bar provision.

This Opinion, until and unless amended or revoked, is binding on the Commission in any subsequent proceeding concerning the person who requested it and who acted in good faith, unless material facts were omitted or misstated by the person in the request for opinion.

All concur:

Joseph M. Bress, Chair

Norman Lamm  
Angelo A. Costanza  
Donald Odell, Members

Dated: March 14, 1991

---

## **Endnotes**

1. [Footnote deleted.]

2. The application of the "revolving door" provision of the Public Officers Law to employees who left State service prior to January 1, 1989, was challenged in two separate suits against the Commission, and, in each, the New York Court of Appeals held that the application of the provisions to officers and employees who terminated from State service before January 1, 1989, to acts engaged in on or after the effective date of §73(8) is constitutional. See *Forti v. NYS Ethics Commission* and *Kuttner v. Cuomo*, 75 N.Y.2d 596 (1990).

3. The Commission concludes that, had such contract been entered into on or after January 1, 1989, the contract would have contravened §73(8) of the Public Officers Law. Section 73(8) prohibits certain activities in the post-employment period whether the contacts are initiated by the State agency or are "beneficial" to the agency. Under the two-year bar of §73(8), State agencies are precluded from hiring their former employees as consultants because the former employees would have to make a prohibited appearance, practice or rendition of services for compensation before their former State agency. (See Commission's Advisory Opinion No. 89-9.) Whether any violation of §73(8) has occurred in the instant case would have to be determined after a finding of reasonable cause and a subsequent hearing on the merits.

The Commission has proposed, in the 1990 Governor's Program Bill #258, that the "revolving door" restriction of subdivision 8 be modified to permit the State agencies to contract, in limited circumstances, with a former employee when it is necessary to serve the interests of the State as certified by the appropriate appointing authority. The 1990 Program Bill was not acted upon by the Legislature. The Commission concludes that the Legislature's failure to act upon the proposal is indicative of its approval of the Commission's current prohibition on State agencies' contracting with their former employees in the post-employment period.

Until such time that §73(8) is amended, a State agency may only rehire a former employee as an employee of the agency (not as a contractor), should the services of that former employee be required.

4. From both the individual's job description and the [public benefit corporation's] characterization of the individual's responsibilities, it appears that the former employee was clearly in a senior management position with the [public benefit corporation] where he personally participated in and was directly concerned with financial, budgetary and operational transactions or that such types of transactions were under his active consideration while he was employed.

5. See [Advisory Opinion No. 90-16](#).

6. The Commission draws a distinction between the recitation of facts of past transactions and the recitation of facts of past transactions which will be used by the [public benefit corporation] in relation to new and different transactions. It is permissible for former employees to draw on their information concerning "old" transactions if the information bears a relationship to current transactions. For example, he may provide suggestions and information to anyone relevant to a refinancing of a bond issue, even if he personally participated in the original bond issue. He may utilize his knowledge of the old transaction while performing services relative to the new transaction. However, if the question refers only to a past transaction, the former employee, may not, for a *fee*, provide information to his former State agency if he personally participated, and, was directly concerned in or actively considered the transaction while an employee. He may only impart this information without compensation to his former State agency.

7. For example, mere presence at a meeting, at which a certain matter is discussed, does not subject the former employee to the lifetime bar concerning the matter.

8. Arguably, the former employee has a duty to provide information to his former State agency, relative to his employment there, for free.

9. This is not to say that all uncompensated activities of former employees covered by the lifetime bar are exempt from §73(8). The lifetime bar prohibits appearing, practicing, and communicating *with* or *without* compensation. The former employee may not make an uncompensated appearance or represent himself or a client, for free, before any State agency on a matter covered by the lifetime bar. He may, as this opinion indicates, make an uncompensated appearance or communication when a State agency seeks certain information concerning his previous State employment and the obtaining of the information solely benefits the requesting State agency.

10. For example, he could not advise the [public benefit corporation], for a fee, why he specifically recommended or approved a particular investment. He could advise the [public benefit corporation], as well as any other party, for a fee, what were the general investment policies and strategies at the time of his employ by the [public benefit corporation].