

New York State Ethics Commission

Advisory Opinion No. 94-6: Application of Public Officers Law §73(8) to a former State employee seeking to do business with State and local governmental agencies and the State Legislature.

Introduction

The following advisory opinion is issued in response to an inquiry from [a former employee] of the New York State Division of the Budget, requesting advice on the application of the post-employment restrictions of Public Officers Law §73(8) to his anticipated activities.

Pursuant to the authority vested in it by the Executive Law §94(15), the State Ethics Commission ("Commission") hereby renders its opinion on the application of Public Officers Law §73(8) to each of the requesting individual's specific inquiries.

Background

[The requesting individual] worked at the Division of the Budget "(DOB)" since []. In this position [the requesting individual] supervised [].

On April 7, 1993, [the requesting individual] submitted an inquiry on the application of the post-employment restrictions of Public Officers Law §73(8) to his circumstances. He indicated that he would be leaving DOB to form a partnership with an individual under the name [private company].⁽¹⁾ [The private company] will specialize in "economic and fiscal research and analysis." Clients would include "governments and private parties." [The requesting individual] asked a number of questions regarding his anticipated activities with [the private company] as they relate to DOB, other State agencies, local governments and the State Legislature. The Commission responded to these questions orally on June 23, 1993, and indicated that the Commission would issue a formal opinion. [The requesting individual] supplied additional information through telephone conversations with Commission staff.

Areas of Inquiry⁽²⁾

(1) When is a report an appearance or practice before the former agency?

A state agency (not DOB) [] that collects revenue wants [the private company] to provide them with recommendations on how they can collect more revenue. The effort involves collecting data, doing statistical analysis of that data, drawing analytical conclusions, developing recommendations, and preparing a written report summarizing our work and findings. Assume that implementing our recommendations will require the state agency to request appropriations to purchase additional equipment or sources. The appropriation request is reviewed by DOB.

Under what circumstances, if any, will such a report be a prohibited appearance or practice before my former agency (DOB)?

- a. Suppose that in support of their request, the client agency provides DOB with data and analysis that resulted from our work, but does not provide DOB with the report or any other information suggesting that the analysis was done by me.
- b. . . . I prepare the report with a reasonable expectation that the client agency will give the report, with my name on the cover, to DOB in support of their request for an appropriation

. . . .

- c. Assume that DOB never saw the report, and approved the appropriation based solely on the presentation by the state agency, and that the appropriation was included in the Executive Budget. The matter is now before the Legislature. As part of their review, legislative staff ask the client agency for backup information and the agency provides my report to legislative staff . . . Now assume further that legislative staff somehow give my report to DOB. Is that prohibited? . . .

(2) Communication with former agency

A local government asks [private company] for analysis of a local revenue source. I collect data, perform statistical analysis of that data, develop projections, and prepare a written report. As part of data analysis and projection, I speak with DOB employees who have intimate knowledge of the data, and who do forecasts of similar data, so that I may confer with someone else performing similar work. This is the sort of research that any analyst ought to do, and it is relatively common for DOB to speak with [individuals in the private sector]. This is the same courtesy that DOB staff would extend to anyone doing analysis for a local government.

(3) Lifetime Bar

Suppose a public interest group asks [private company] to prepare a report that analyzes the personal income tax, and evaluates ways to raise more revenue from the tax. They hope to redistribute the burden of the tax and raise revenue to support additional spending on social programs. They want the State Legislature to adopt such an income tax increase. While I have worked on many income tax proposals before, this is different in many ways from proposals I have worked on in the past.

Applicable Law

Public Officers Law §73(8) provides in part:

No person who has served as a state officer or employee shall within a period of two years after the termination of such service or employment appear or practice before such state agency or receive compensation for any services rendered by such former officer or employee on behalf of any person, firm, corporation, or association in relation to any case, proceeding or application or other matter before such agency. 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 in which he personally participated during the period of his service or employment, or which was under his or her active consideration.

Discussion

For purposes of the two-year bar of Public Officers Law §73(8), [the requesting individual's] former agency is the Division of the Budget. The Commission shall discuss the implications of §73(8) for [the requesting individual's] anticipated activities after he leaves State service.

(1) When is a report an appearance or practice before the former agency?

The definition of "appearance," for purposes of interpreting Public Officers Law §73(8), has been broadly construed.⁽³⁾ The term is not limited to a physical appearance before one's former agency and may include various types of submissions which are signed by the individual or which involve identifying matter specific to the individual.⁽⁴⁾

The Commission has deemed permit applications, grant applications, contract proposals and a professional stamp or seal to constitute prohibited appearances. The Commission has also held that a former State employee who assists a client in the preparation of such documents for submission to the former agency would also violate §73(8), since the former agency has jurisdiction over such matters at all times, whether or not the agency has physically received the documentation or was yet to be contacted on the matter.⁽⁵⁾

The Commission has addressed the circumstances under which a work product prepared for a State agency (not the employee's former agency) may constitute an appearance before the employee's former agency. In [Advisory Opinion No. 89-8](#), the Commission held that a former State employee was prohibited from providing consulting activities (e.g., the preparation of a permit application) to another State agency where such activities would be reviewed by his former agency. The Commission held:

if the requesting individual has no *reason to know or anticipate* that the [former agency] would be brought in by the [requesting agency] to consult on a particular matter and there is no statute, law or policy providing for such [former agency] involvement, there is no revolving door violation (emphasis added) . . .

Otherwise stated, if the former employee can reasonably assume that his/her work product will reach the individual's former agency, the employee would violate the two-year bar by receiving compensation for services rendered on a matter before his former agency.

In the scenario presented in [the requesting individual's] Question No. 1(a), the client agency provides DOB with "data and analysis that resulted from" [the requesting individual's] work, without [his] knowledge or expectation, and submits its report to DOB in support of a request for

additional appropriations.⁽⁶⁾ The client agency would not submit [the requesting individual's] report to DOB or any other information that identifies [him] or his firm as having prepared the initial data and analysis. In this scenario, it would not be an appearance before DOB if the client agency submitted the data and analysis that resulted from [the requesting individual's] work if [he] had no reason to know or anticipate such submissions.

In Question No. 1(b), [the requesting individual] would prepare the report with a reasonable expectation that the client agency will give the report, in its entirety, to his former agency in support of an appropriation request. In addition, [the requesting individual's] name would appear on the cover of the report. Because his work product, bearing his name, is submitted to his former agency, [the requesting individual] would be appearing before his former agency in violation of the two year bar.

Question No. 1(c) concerns matters before the Legislature. Use of [the requesting individual's] work product by legislative staff would not violate the two-year bar since the Legislature is not [his] former agency.

The Commission held in [Advisory Opinion No. 92-20](#) that for purposes of the §73(8) lifetime bar, a former State officer or employee is prohibited from receiving compensation for services rendered before the Legislature or any State agency in relation to any case, proceeding, application or transaction with respect to which such person was directly concerned and in which he or she personally participated or which was under his or her active consideration. Assuming the client agency's appropriation request was not a transaction with which [the requesting individual] was directly concerned, etc. while in State service, use of his report by the Legislature would not violate the lifetime bar.

Question No. 1(c) also inquires whether DOB's receipt of [the requesting individual's] work product from legislative staff members [who received it from the requesting individual's client] constitutes a prohibited appearance before his former agency, in violation of the two year bar. It does not. [The requesting individual] could not reasonably know or anticipate that his work product would reach DOB in this manner. At this point, he has "lost control" over his work product since preparing it for the client agency. A former employee cannot be held responsible for an "appearance" of this nature, that is inadvertent, unanticipated or remote.

(2) Communication with former agency

In Question No. 2, [the requesting individual] prepares an analysis of a local revenue source for a particular locality. The revenue may be implemented at the option of the locality and would require no State action. As part of his analysis, [the requesting individual] seeks to confer with "DOB employees who have intimate knowledge of the data, and who do forecasts of similar data" [The requesting individual] indicates that DOB analysts typically speak with [individuals in the private sector] "doing similar analysis for a local government."

The two year bar prohibits former State officers or employees from appearing or practicing before their former agency or receiving compensation for any services rendered "on behalf of any person, firm, corporation or association in relation to any case, proceeding, application or

other matter before such agency."⁽⁷⁾ The Commission has held that a "communication" by a former employee on behalf of a client or any other person amounts to an appearance or practice before his or her former agency, prohibited by §73(8). In [Advisory Opinion No. 89-7](#), the Commission indicated that where a former State employee contacted his former agency on behalf of a client within two years of termination of State service regarding "generic issues" relating to the policies and procedures of his former agency, these generic issues "fall within the 'other matters' category of proscribed circumstances and would be barred whether or not compensation is received for services rendered."⁽⁸⁾

The scenario presented by [the requesting individual] suggests that the information he would be seeking from DOB relates to the local revenue data, analysis and forecast for the local entity which has retained [the requesting individual]. Since DOB is not responsible for local budgets, it could be argued that this would not be a matter before [the requesting individual's] former agency. However, we need not decide this question.

In a letter to the Commission, in which this issue was discussed, the Director of the Division of the Budget stated:

The Division's interest in discussions involving [] a 'local revenue source' would be limited to explaining the basis of the statewide [] . . . and ensuring, to the maximum extent possible, that the information in its own statewide [] was not used in such a way as to produce misleading results. To further that interest, the Division would discuss with the 'private sector [individual]' the data, methodology and potential pitfalls that might exist in applying statewide information to any particular locality.⁽⁹⁾

This response indicates that the discussions between DOB staff members and [the requesting individual] would be limited to the application of statewide [] data and methodology in a "local" context. Since DOB is responsible for statewide [such] information, [the requesting individual's] communication would concern a "matter" before [his] former agency, and he would be prohibited by the two-year bar from engaging in such a communication.

In [Advisory Opinion No. 89-7](#), the Commission determined that a written request under the Freedom of Information Law by a former employee, whether with or without compensation, was a barred appearance within two years of that employee's termination. Such a request is of a lesser order and appearance than a telephone conversation with one's former agency about the ". . . methodology and potential pitfalls that might exist in applying statewide information to any particular locality." Certainly, the ability to access former colleagues, not only in one's former agency, but particularly in a bureau which was under his supervision, provides [the requesting individual] with unique access that is beyond what any other [private sector consultant] could obtain. It is for this exact reason, to level the playing field, that the "revolving door" provision was enacted. Under the facts provided, clients may count on [the requesting individual's] access to his former subordinates and quite likely judge his services as more productive for them than others. The level playing field expected by the public and competitors would be slanted if the Commission ruled otherwise.

The two-year bar would not prohibit [the requesting individual's] partner in [private company] from appearing, practicing or rendering service before [the requesting individual's] former agency.⁽¹⁰⁾ In [Advisory Opinion No. 90-14](#), the Commission held that "even if one member or associate of a firm is disqualified from appearing before his or her former agency, other members or associates of the firm would not be disqualified from engaging in the matter, as long as the distribution of net revenues from State-related activities is in accordance with [Public Officers Law] §73(10) and this Advisory Opinion."⁽¹¹⁾ This opinion defines the term "net revenues" as gross revenues received from appearing, practicing, communicating or otherwise rendering services in relation to any matter before, or transacting any business with, a State agency minus all fixed operating expenses in an appropriate proportion to such gross revenues of the firm. [The requesting individual] should consult [Advisory Opinion No. 90-14](#) regarding the net revenue rules should his partner seek to consult with or appear or practice before DOB.

(3) Lifetime Bar

The last question deals with the definition of the term "transaction" for purposes of applying the lifetime bar. [The requesting individual] states that while at DOB he worked on various [income tax matters] proposals. The situation upon which the Commission is asked to comment concerns the preparation of a report analyzing the [personal income tax] and evaluating ways to raise additional revenue and redistribute the tax burden. The report would ultimately result in a legislative proposal.

The Commission previously has considered how to construe the term "transaction" in the context of legislation or issues that ultimately become legislation. In [Advisory Opinion No. 92-20](#), the Commission held that "bills introduced in the same or even in different legislative sessions may constitute the same transaction, particularly when they affect the same or substantially the same population and issues Further, work on substantially the same issue may also be the same transaction. This can be true even when the form in which the issue is presented is not identical."⁽¹²⁾ The Commission also has ruled that participation by a former State employee in the development of regulations is not sufficiently different from participation by the same individual in the development of legislation upon which the regulations are based so as to constitute a different transaction.⁽¹³⁾

[The requesting individual] argues that personal income tax legislation not only varies between bills but will sufficiently vary from one legislative session to the next. He states:

Proposals abound to change the tax rate structure, allowable deductions, and income subject to tax. These and other provisions can be combined in an infinite variety of ways. . . . As a rule, the bills are not substantially the same from year to year. Furthermore, the bills cannot be said to be affecting the same parties unless anything that affects the State's millions of taxpayers, however different the impact on various segments of the population is from one proposal to the next, is said to be affecting the same parties.⁽¹⁴⁾

As a result of [the requesting individual's] extensive experience in [income tax matters], it is conceivable that [the requesting individual] could be hired as a private consultant to develop a report and legislative proposal that is similar to those he developed, reviewed and analyzed while

in State service. These activities could involve the same facts, parties and confidential information with which he was involved when he was employed by the State. It is also possible that other relevant facts may exist to sufficiently distinguish the project from [the requesting individual's] previous State experience. The Commission's conclusions in Advisory Opinion [No. 92-20](#) and [No. 93-2](#) were based upon painstaking comparisons of the legislation and regulations the individuals had worked on while in State service with the legislation and regulations concerning which the individuals later rendered service for compensation. It is impossible for the Commission to articulate a rule to apply to all potential studies [the requesting individual's] partnership may undertake based on the general characterizations he has provided. The most conservative course would be for [the requesting individual] to avoid working on any legislation that relates to the State's personal income tax until consulting projects that may potentially involve lifetime barred activities have been evaluated by the Commission on a case-by-case basis. Transactions that are not prohibited by the lifetime bar, would still be subject to all two-year bar limitations.

Conclusion

The Commission concludes that the post-employment restrictions of Public Officers Law §73(8) should be applied in the manner proscribed above.

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 or related supporting documentation.

All concur:

Joseph M. Bress, Chair

Barbara A. Black

Angelo A. Costanza

Robert E. Eggenschiller

Donald A. Odell, Members

Dated: May 3, 1994

Endnotes

1. [The requesting individual's] partner is also a former State employee who served with [another State agency]. Although not the subject of this inquiry, the individual should use this opinion in guiding his own actions with [the private company] and seek his own advisory opinion, if appropriate.

2. [The requesting individual's] letter dated April 7, 1993. [The requesting individual] indicated in that letter that the following assumptions should be used when considering the questions presented unless otherwise stated: (1) the work is done in the name of [private company]; (2) both [the requesting individual] and his partner will work on each research project; (3) any report prepared by the firm will include the name of the firm and the names of both partners on the document; and (4) the subject matter does not relate to a case, proceeding, application or transaction with respect to which either partner was directly concerned and personally participated in etc., so that the lifetime bar is not at issue.

3. [Advisory Opinion No. 89-11](#), p. 4-5. The Attorney General, in rendering an opinion concerning an "appearance" under the "revolving door" provision prior to its amendment in 1987, determined that participation in the submission of a response to a Request for Proposal by former employees of the Division of Criminal Justice Services to provide services to their former agency constituted an appearance within the meaning of the law as it was then written. See Op. Att'y Gen. F6 (1986).

4. See [Advisory Opinion No. 91-9](#).

5. See [Advisory Opinion No. 89-7](#).

6. The Commission assumes in its response to Question No. 1(a) that such "reasonable expectation" is not present since the concept is discussed in Question No. 1(b).

7. Public Officers Law §73(8).

8. [Advisory Opinion No. 89-7](#), p. 7-8.

9. March 15, 1994 letter from Rudy F. Runko to Joseph M. Bress.

10. However, [the requesting individual] partner would be prohibited from appearing before any State agency concerning transactions with which he was directly concerned and in which he personally participated or which were under his active consideration while he was an employee of [another State agency].

11. [Advisory Opinion No. 90-14](#), p. 7-8.

12. [Advisory Opinion No. 92-20](#), p. 8.

13. See [Advisory Opinion No. 93-2](#).

14. [The requesting individual's] letter to the Commission dated April 7, 1993.