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January 13, 2004

Mr. Doe: [A Former Public Official]

Re: Post-State Employment
Our File No. 665-04-0069

Dear Mr. Doe:

You have requested advice under AS 39.52.250(a). Until recently, you were the director of a Division of an executive branch department of state government (“the Department”). You left state service in late 2003 and are now employed by Private Consulting, Inc. (a pseudonym). Private Consulting has contracts with the Department to prepare study documents for two projects and would like to have you involved in another project that may go out to bid in the near future. The facts recited in this letter are based upon your December 3, 2003 letter received as an attachment to an e-mail of even date and my further discussions with you on December 15, 2003.

In December, we advised you that you could be involved in Projects A and B. We reserved judgment on Project C pending further analysis. We have now concluded that you may be involved in Project C.

If the advice in this letter differs in any respect from our oral advice, this letter controls. We first describe AS 39.52.180 and then analyze each project.

AS 39.52.180

For two years after leaving state service, AS 39.52.180(a) precludes a former public officer from (1) representing a person (2) for compensation (3) with regard to any matter that (4) was under consideration by the administrative unit of state government in which that officer served and (5) in which the officer participated personally and substantially, (6)

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through the exercise of official action.

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“The Department of Law has consistently read this subsection in accord with the legislature’s intent that AS 39.52.180 be narrowly applied.” 1997 *Inf. Op. Att’y Gen.* (Apr. 30; 663-97-0328)(citation omitted). In order to be disqualified from working on a matter during the two-year post-state employment bar, your activity must fall within all six section 180(a) criteria.

Most of the terms used in AS 39.52.180(a) are defined in the ethics act and related regulations. A “public officer” includes any public employee in the classified, partially exempt, or exempt service. AS 39.52.960(20), (21). A “person” includes a business. AS 39.52.960(17). “Compensation” means the receipt of money in return for services rendered to another. AS 39.52.960(7). AS 39.52.180(a) defines “matter” to include a contract. AS 39.52.960(1) defines “administrative unit” as “a branch, bureau, center, committee, division, fund, office, program, section, or any other subdivision of an agency.” “Agency”, in turn, includes an executive branch department.

Whether involvement in a matter is “personal and substantial” depends upon the circumstances of each case. However, general formulation of policy, routine processing of documents, general supervision of employees without direct involvement in a matter, and ministerial functions not involving the merits of a matter do not constitute “personal and substantial” involvement. 9 AAC 52.100(b). “Official action” is defined as “a recommendation, decision, approval, disapproval, vote, or other similar action, including inaction, by a public officer.” AS 39.52.960(14). We apply these definitions to the three contracts you wish to be involved in as an employee of Private Consulting.

Project A

You report that while you were employed by the Department you supervised staff that assisted in making recommendations and analysis on this project and reviewed presentation materials resulting from certain studies. You briefed the governor on the studies. You participated in discussions with the commissioner of the Department and other managers regarding preliminary considerations for study document requirements. You raised issues and pointed out options that required further review and evaluation by others.

However, at the time you were involved in this project you were working for a division of the Department. Effective September 10, 2003, Project A was transferred to a newly created authority. The authority is a public corporation and an instrumentality of the

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state within the Department PF but has a “separate and independent legal existence from the state.” An independent board of directors and an executive director manages the authority. The authority is not subject to the managerial authority of your former Department’s officials.

As stated above, the two year employment bar of AS 39.52.180(a) applies only to matters that were under consideration by the “administrative unit” of state government that you served during your tenure in state service. Project A is now a matter under consideration by the authority, not the division of the Department for which you worked. The authority will let its own contracts and make its own decisions with regard to the project and what aspects will be put out to bid. Any request for proposals advertised in the future will be prepared and awarded by the authority, not the Department. Under these circumstances, you may be involved in work related to Project A without obtaining a waiver of section 180: The “administrative unit” letting Project A contracts will be a different administrative unit than the one for which you worked as a state employee.

If you were personally and substantially involved in preparing RFPs that were subsequently adopted by the authority for use in a contract for Project A, you may be barred from working on that contract even though you never worked for the authority if the authority merely adopted your work product. However, those facts are not extant in your case.

We have long held that section 180’s two-year employment bar does not “extend to recommendations or general policies that, in turn, lead to a subsequent specific contract.” 1989 *Inf. Op. Att’y Gen.* (Dec 12; 663-89-0259). That same opinion concluded that members of state management committees who make decisions that later result in specific procurement contracts are not precluded from being involved in those specific contracts after leaving state service because the specific contracts are new “matters” under section 180. *Id.*

Your involvement in Project A was as a manager who discussed preliminary considerations of feasibility and funding and briefed high level officials on the results of studies prepared by others. These discussions did not ripen into a specific contract or plan before you left state service and, even if they did, those plans are now subject to the review and approval of an entirely independent state authority for which you never worked.

You are not barred from being involved in Project A because RFPs issued for this project will be issued by an administrative unit of state government for which you did not

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work while in state service and because your general discussions while in state service did not ripen into or concern a specific state procurement contract.

Project B

Private Consulting has a contract with the Department to prepare a study document for this project and, under that contract, could potentially perform additional services for the project as well. The contract was let while you were in state service.

You were involved in a single, early meeting concerning a comprehensive plan while you were in state service. The discussion during that meeting concerned “how to break the plan into smaller study documents that retained independent utility.” 12/3/2003 Doe letter at 2. That meeting led to other discussions in which you were not involved concerning how to parcel out certain aspects of the comprehensive plan into separate projects that retained independent utility. *Id.* These subsequent meetings, in turn, led to amendments to the comprehensive plan from which the Project B contract for the study document and possible follow-up services awarded to Private Consulting evolved.

As the division director, you delegated to other state employees the authority to contract for private services and the authority to decide which projects would be the subject of RFPs. You received reports from these employees but you did not take action to overrule their contracting decisions. The decision to put Project B out to RFP was made by an employee you supervised, but you took no part in making that decision.

We have narrowly interpreted the word “matter” limiting it in large part “to the items listed in the statute or some other specific exercise of the sovereign power.” 1989 *Inf. Op. Att’y Gen.* (Dec. 12; 663-89-0259). Section 180(a) specifically includes a contract in the term “matter.” Under our 1989 opinion, the legislative intent that section 180 be narrowly construed, and the definition of “matter” found in section 180, we conclude that the matter at issue is the Project B contract, not the Comprehensive Plan, which covers an entire region of the state. *See*, 1993 *Inf. Op. Att’y Gen.* (Jul 20; 663-94-0048)(An RFP is not the same “matter” where a public officer was involved in discussions concerning an RFP for a statewide analysis that was subsequently and materially changed and that resulted in a different RFP being issued.)

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Because you were not involved in drafting the RFP for the Project B contract and were not involved in the decision to put that RFP out for bid, you were not involved in that

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matter while in state service. Therefore, you may work on the Project B contract without obtaining a waiver from the state.

Furthermore, involvement in an early discussion concerning a comprehensive plan that led to a series of further discussions in which you were not involved which, in turn, led to amendments to the plan which you did not help to draft, which, in turn, led to the decision by a subordinate to put Project B out for RFP does not constitute “substantial” participation by you in the Project B contract. *See also* 9 AAC 52.100(b)(general supervision of subordinates without direct involvement in a matter is not “personal and substantial” involvement for the purposes of section 180).

Project C

Private Consulting has a contract with the Department to prepare a study document for this project. The contract was let while you were in state service.

About three years ago, you were involved in preliminary discussions regarding certain alternative actions related to Project C. Your staff briefed you on the viability of the alternatives. You thought that, if adopted, Alternative One would have a minor economic impact to the project’s functionality and potential substantial cost savings. You directed your staff to look closely at this alternative. The Department subsequently decided to put the preparation of a study document out for RFP. Private Consulting received the contract. Part of Private Consulting’s responsibilities will be to review Alternative One.

Your involvement in this issue is the most difficult of the three projects to analyze. On the one hand, discussion of Alternative One was “personal and substantial” involvement in the project and your direction to your staff to closely review Alternative One was “official action” because it constituted a “decision” by you. On the other hand, you were not involved in the decision to put the study document out for RFP and you took no action in the award of the RFP to Private Consulting.

In our opinion, whether you may be involved in this contract turns on what constitutes the “matter” in this situation. Since the inception of the ethics act, this office has held that the term “matter” was “specifically intended to be limited to the cases enumerated” in section 180(a). 1986 *Inf. Op. Att’y Gen.* (Sept. 24; 663-87-0109). The matters enumerated in section 180 are cases, proceedings, applications, contracts or determinations (but does not include

legislative or regulatory proposals). AS 39.52.180(a). Our 1986 opinion, which was issued shortly after the ethics act was enacted, examined the underlying purposes and goals of the act and concluded that in section 180 the phrases

“matter that was under consideration” and “the exercise of official action” refer to activities that either **involve the discretionary exercise of sovereign power or the distribution of state property** (through grants, contracts, sales, etc.). Those activities do **not** include a wide range of state-sponsored activity
...

The Act in general concerns itself with improper influences on official action – actions that determine the rights of others both in governmental regulatory functions and in distributing or allocating state property among the citizenry.
...

But the [two-year post-state employment] bar should not be extended to those types of activities that do not affect the rights of others. To do so would extend the bar unnecessarily, thus compromising the countervailing interests that ameliorate the potential harshness of the restrictions.
...

Given the language used, the overall purpose of the Act, and the intent that this section be narrow and precise, **we do not believe that the bar should be extended too far from the specific cases enumerated by the definitions.**

1986 *Inf. Op. Att’y Gen.* at 4-5 (Sept. 24)(emphasis added).

Shortly thereafter, we relied on our 1986 opinion to permit employment of a former public official by a company that had been involved in litigation in which the state had intervened and in which the former officer had been involved on behalf of the state. 1986 *Inf. Op. Att’y Gen.* (Nov. 13; 663-87-0203). We concluded that the officer could not discuss with his new employer any issues related to the litigation (because that was a “case” under section 180) and could not be involved in any contracts his new employer had with the state in which the official had been involved while in state service (because contracts are specifically included as “matters” under the act). *Id.*

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However, we permitted the official to represent the company in issues related to policy discussions and decisions made by the officer during his tenure in office concerning the state's interest in the subject area of the litigation

as long as those decisions did not coalesce into a particular and specific contract . . . or other similar action which involved determining the rights of third parties or the disposition of state property

1986 *Inf. Op. Att'y Gen.* (Nov. 13; 663-87-0203).

We subsequently concluded that one of the purposes of section 180 is

to prevent a state employee from 'directing' a developing project so that it will be more likely to be awarded to a particular contractor, and then leaving state employment to work for that contractor.

1990 *Inf. Op. Att'y Gen.* (Sep. 6; 663-91-0071).

In light of the policies underlying section 180, and the legislative intent that the term "matter" be narrowly and precisely applied, we believe that you may be involved in Project C. Your direction to your staff that it carefully review Alternative One is not an activity involving the "discretionary exercise of sovereign power or the distribution of state property" through a state contract. 1986 *Inf. Op. Att'y Gen.* at 4 (Sept. 24). While your direction to your staff related to a particular project, it did not relate to a particular contract. In fact, at the time you directed your staff to review this alternative closely no decision had been made to seek the services of a private consultant to prepare the study document.

The fact that no decision had been made to put the study document for this project out to bid at the time you were involved in this contract also lessens the likelihood that your actions were designed to direct the project to a particular contractor so you could leave state service and obtain private employment. Your direction to closely examine Alternative One did not "coalesce into a particular specific contract" that determined the rights of third parties or the disposition of state property. 1986 *Inf. Op. Att'y Gen.* (Nov. 13).

Our conclusion is further supported by other informal opinions. We have permitted former state officials to work for a private employer on a contract where the official had been involved in an early draft of an RFP that was later significantly changed. 1993 *Inf. Op. Att'y*

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Gen. (Jul 20; 663-94-0048); *see also* 1990 *Inf. Op. Att’y Gen.* (Sep. 6; 663-91-0071)(permitting a former employee who had substantially participated in drafting a work plan for an RFP to work on a contract after leaving state service because the RFP was substantially changed by others, even though the changes were made while he was still in state service.) In your case, you directed your staff to examine an aspect of a project three years ago. The decision to put out an RFP for the study document for that project was made by others. Others drafted the RFP without your participation. Under these circumstances, we do not think you were involved in the precise matter at issue here: the RFP for the study document. Therefore, you may work on Project C.

Conclusion

By law, this advice is subject to AS 39.52.250(b), which provides:

A former public officer is not liable under this chapter for any action carried out you in accordance with the advice of the attorney general issued under this section, if the public officer fully disclosed all relevant facts reasonably necessary to the issuance of the advice.

In addition, under AS 39.52.140 you and your immediate family members may not use undisseminated public information gained in the course of your employment to benefit your personal interests and may not disclose information that is required by law to be confidential. Ethics regulation 9 AAC 52.070 describes when public information is “disseminated.” The prohibition of section 140 is permanent and does not expire at the end of the two-year employment bar of section 180.

If you have any questions concerning the advice included in this letter, please do not hesitate to contact me.

Sincerely,

GREGG D. RENKES
ATTORNEY GENERAL

By:

Paul R. Lyle

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Sr. Assistant Attorney General