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August 3, 2007

Former Employee

Re: Post-State Employment
AGO File No. 661-07-0027

Dear Former Employee:

This letter responds to your request for an advisory opinion under AS 39.52.250(a) of the Alaska Executive Branch Ethics Act regarding your eligibility to perform consulting services for Company A. You are employed by Consulting Firm and Company A is requesting that you undertake an investigation and research regarding the title to certain lands. In particular, you are being asked to retrace work done by a Company A employee in 2005, update the information learned at that time, and make recommendations to Company A management about title issues that may be pursued with the Bureau of Land Management. This letter will confirm our discussion by phone and advise that you may participate in the work.

You explained in your e-mail and in our phone conversations that in 2000, during your tenure with the State of Alaska, you researched the title status of submerged/shore lands in the same area and reported on your factual findings and conclusions. You advise that this effort was not undertaken in connection with any pending decisions or action related to the interests of any outside party but rather as a matter of internal due diligence. The services sought by Company A would involve the same research as you undertook in 2000 but with updated findings and conclusions.

We previously outlined the restrictions imposed by the Executive Branch Ethics Act on a former state employee's post-state employment in David Jones' letter of general advice

to you. As we discussed, the recent amendments to the Act do not apply to you as you left state service prior to their effective date of July 10, 2007.

As you know, the Ethics Act addresses post-state employment in AS 39.52.180. Under AS 39.52.180(a), a two-year prohibition applies to certain post-state employment. For two years after leaving state service, a former state officer may not “represent, advise, or assist a person for compensation regarding a matter that was under consideration by the administrative unit served by that public officer, and in which the officer participated personally and substantially through the exercise of official action.”

“The Department of Law has consistently read this subsection in accord with the legislature’s intent that AS 39.52.180 be narrowly applied.”¹ Thus, subsection 180(a) prohibits an activity during the two-year post-state employment period only if the activity meets each of the elements of that subsection. The circumstances of the proposed employment by Company A require that we focus on whether the term “matter” applies to your 2000 activity.

The definition of “matter,” as it applies to you, includes “a case, proceeding, application, contract, or determination,” but does not include the proposal or consideration of legislation or the proposal, consideration or adoption of regulations. In an early interpretation of the post-state employment provision, we focused particularly on the terms “matter” and “exercise of official action.” We concluded:

That a “matter that was under consideration” and “the exercise of official action” refers 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, including the hypothesized promotional activities designed to strengthen private enterprise in the state.²

In another early opinion, we also said that, based on the legislative history, “matter” should be “narrowly circumscribed around the examples specifically listed” and concluded that general formulation of policy does not constitute a “matter” for purposes of post-state employment restrictions. In applying that conclusion, we found that so long as policy

¹ 1997 Inf. Op. Att’y Gen. at 3 (Apr. 30; 663-97-0328) (citation omitted).

² 1986 Inf. Op. Att’y Gen. (Sept. 24; 663-87-0109).

discussion and decisions concerning the state's interest in the subject "did not coalesce into a particular and specific contract, case, application, determination, proceeding, or other similar action which involved determining the rights of third parties or the disposition of state property (including money), this person is not barred from dealing with future subjects or matters, even though they may be the outgrowth of those policy decisions."³

Based on your description, it appears that the activities you undertook in 2000, while not policy matters as such, were intended to provide supporting or background information for the management of the area and possible policy decisions or perhaps other more specific future action but did not "coalesce into a particular and specific contract, case, application, determination, proceeding, or other similar action" at the time. Therefore, we conclude that the Ethics Act does not bar your proposed work for Company A.

We also remind you that there is another restriction that can affect post-state employment. A "current or former public officer may not disclose or use information gained in the course of, or by reason of, the officer's official duties that could in any way result in the receipt of any benefit for the officer or an immediate family member, if the information has not also been disseminated to the public."⁴ For purposes of this restriction, "information has been disseminated to the public if it has been published through newspaper publication; broadcast media; a press release; a newsletter; a legal notice; a non-confidential court filing; a published report; a public speech; or public testimony before the legislature, a board, or a commission."⁵ Furthermore, current and former public officers "may not disclose or use, without appropriate authorization, information acquired in the course of official duties that is confidential by law."⁶ These restrictions do **not** have a two-year time limit.

We understand that you are not in possession of any of your 2000 work product and that you believe you do not have any confidential or undissemintated public information related to the title work. We nevertheless suggest that you be mindful of the restriction on the use of confidential information or undissemintated public information as you address particular circumstances arising during your post-state employment activities.

³ 1986 Inf. Op. Att'y Gen. at 2-3 (Nov. 13; 663-87-0203). *See also*, 9 AAC 52.100(a).

⁴ AS 39.52.140(a).

⁵ 9 AAC 52.070.

⁶ AS 39.52.140(b).

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 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.

This advisory letter is based on the facts set forth above. The legal protection afforded you by subsection 250(b) does not apply if our factual statements are inaccurate or incomplete. Therefore, you must notify us immediately if our factual statements are incorrect so that we may reconsider our advice and ensure that you are adequately protected.

If you have questions about the advice in this letter or desire additional advice concerning particular situations as they develop during your post-state employment, please don't hesitate to contact this office.

Sincerely,

TALIS J. COLBERG
ATTORNEY GENERAL

By:

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