GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY

Office of Government Ethics

VIA EMAIL

May 20, 2014 (Revised)[1]

[redacted]

Dear [redacted]:

This responds to your April 2, 2014, request for advice. In our conversation on April 2, 2014, you stated that you are an attorney leaving your position at the Office of the Attorney General ("OAG"), where you, for the last six years, were the Assistant Section Chief for [redacted] at the Office of the Deputy Mayor for Planning and Economic Development ("DMPED"). While working at DMPED, your duties included negotiating and drafting real estate transaction and financial documents and providing legal advice on complex real estate transactions and finance. You intend to open your own private law firm, [redacted] and want to know whether you can be hired by the District government as an outside vendor, working on the same particular matters involving specific parties that you worked on as a District employee. I conclude that, as long as you ensure that you meet the requirements set forth below, it is permissible for you to be hired by the District as an outside vendor and to work on the same particular matters on which you worked as a District employee, as long as you represent the interests of the District and only the District.

In our subsequent telephone conversations and email exchanges through May 9, 2014, you stated that you left District service and that your last day on payroll was April 18, 2014.[2] You also explained that you were not an OAG union member and that although you were paid directly by DMPED and your office was close to DMPED in the Wilson Building, your direct supervisor was an OAG Deputy Attorney General who completed your personnel evaluations. In addition, research has shown, and you acknowledge, that your signature blocks on your outgoing emails reflected that you were an OAG

[1] A written advisory opinion was issued to this requestor on April 24, 2014. Subsequent to that date, and before publication of the advisory opinion, however, the requestor contacted this Office with questions regarding the prohibition against appearing before OAG. In response to requests from this Office, the requestor provided additional factual information concerning her employment with the District. Accordingly, the written advisory opinion was revised and is being re-issued to the requestor.

[2] You provided that you gave notice of your departure on March 10, 2014, and submitted your formal resignation on April 10, 2014. You also explained that you used vacation time and assisted with the transition implementation in your final days, but your last day on the District's payroll was April 18, 2014.

employee, with no mention of your position at DMPED. For example, your signature block on a December 7, 2011, email was:

[redacted]
Assistant Section Chief
[redacted]
Office of the Attorney General for the District of Columbia
Office Phone: (202) [redacted]
Cell Phone: (202) [redacted]

Similarly, your signature block on a June 20, 2013, email was

[redacted]
Assistant Section Chief
[redacted]
Office of the Attorney General for the District of Columbia
1350 Pennsylvania Avenue, N.W., Suite [redacted]
Washington, DC 20004
Phone: (202) [redacted]
Cell Phone: (202)
Fax: (202)

Post–Employment Restrictions

Although the District has in place post-employment rules, they are not meant to prevent District employees from working in the private sector after their government service ends or to be so restrictive as to make following the post-employment rules impossible. There are, however, certain requirements you must follow.[3]

Identifying your Former Employing Agency

The post-employment restrictions discussed below apply only to dealings with your former agency, or in your case both of the agencies for which you worked -- OAG and DMPED. As discussed above, you were hired by OAG, you represented yourself solely as an employee of OAG to anyone to whom you sent an email, even during the period you were assigned to DMPED, and you were directly supervised by an OAG supervisor who completed your performance evaluations. Accordingly, OAG retained control over your employment, even when it assigned you to DMPED, by continuing to supervise you directly, and only OAG could have terminated your employment with the District. With respect to DMPED, you were assigned to DMPED for six years, working on DMPED matters, and working with DMPED employees and OAG employees assigned to DMPED.

Permanent and Temporary Restrictions

A former District employee is prohibited, for one year, from having any transactions with the employee's agency that are **intended to influence the agency** in connection with any particular government matter pending before the agency or in which it has a direct and substantial interest. Specifically, 6B DCMR § 1811.10 provides:

[3] The discussion of post-employment restrictions that follows is based on 6B DCMR Chapter 18, which was revised and became effective on April 11, 2014.

> A former employee (other than a special government employee[4] who serves for fewer than one-hundred and thirty (130) days in a calendar year) shall be prohibited for one (1) year from having any transactions with the former agency intended to influence the agency in connection with any particular government matter pending before the agency or in which it has a direct and substantial interest, whether or not such matter involves a specific party.[5]

Therefore, you, as a former District employee, are prohibited for one year from the date of your separation from service, from having any transactions with OAG or DMPED[6] that are intended to influence OAG or DMPED on any particular government matter pending before OAG or DMPED or in which OAG or DMPED has a direct and substantial interest. This prohibition applies regardless of whether the particular government matter involves a specific party and regardless of whether you participated in or had responsibility for that particular matter when you were an OAG employee. In addition, this prohibition applies to matters that first arose after you left District service, as long as they concern a particular government matter that was pending before OAG or DMPED when you worked there or in which OAG or DMPED has a direct and substantial interest. Although the term "direct and substantial interest" is undefined in 6B DCMR Chapter 18, it is clear that easily identified matters such as contracts, leases, and particular projects are included in the term.

Similarly, 6B DCMR § 1811.3 provides:

> A former government employee shall be permanently prohibited from knowingly acting as an attorney, agent, or representative in any formal or informal appearance before an agency as to a particular matter involving a specific party[7] if the employee participated personally and substantially in that matter as a government employee.[8]

This section seeks permanently to ban representational work for any matter involving a specific party that you worked on while in the government's employ.

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[4] 6B DCMR Chapter 18 defines special government employee as, "any officer or employee of an agency who is retained, designated, appointed, or employed to perform temporary duties either on a full-time or intermittent basis, with or without compensation, for not to exceed one hundred and thirty (130) days during any period of three hundred and sixty five (365) consecutive days."

[5] 6B DCMR § 1811.11 states that the "restriction in Subsection 1811.10 of this section is intended to prohibit the possible use of personal influence based on past government affiliations to facilitate the transaction of business. Therefore, the restriction shall apply without regard to whether the former employee had participated in, or had responsibility for, the particular matter, and shall include matters which first arise after the employee leaves government service."

[6] In our conversations, you mentioned working on matters for DMPED as an OAG attorney, so I refer to OAG and DMPED in this opinion. If, however, you worked on matters for other agencies, then those agencies are included in the same way that OAG and DMPED are.

[7] The phrase "particular government matter involving a specific party" is defined in 6B DCMR Chapter 18 as, "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter in which the District government is a party or has a direct and substantial interest, and which has application to one (1) or more specifically identified persons or entities."

[8] Similarly, 6B DCMR § 1811.4 provides that "[a] former government employee shall be permanently prohibited from making any oral or written communication to an agency with the intent to influence that agency on behalf of another as to a particular government matter involving a specific party if the employee participated personally and substantially in that matter as a government employee."

You also asked whether you are prohibited from representing clients before other District government agencies, where you are likely to interact with attorneys from those agencies' Offices of General Counsel, given that most of those attorneys are OAG employees placed in those agencies. After reviewing 6B DCMR Chapter 18, I conclude that there is no prohibition against you, in your representation of clients, appearing before or communicating with employees of your former agency, OAG, who work in other agencies, whether they have transferred there or been placed there. The prohibitions in 6B DCMR §§ 1811.10 and 1811.12 are as to your "former agency," which in your situation I have interpreted to mean both OAG, your former employing agency, and DMPED, the agency at which you worked for six years. I do not, however, interpret the references to your "former agency" to mean every District agency in which an OAG attorney has been placed or every District agency in which a former OAG employee now works. Accordingly, you are not prohibited, pursuant to the restriction in 6B DCMR §§ 1811.10 and 1811.12 from representing clients before District agencies other than OAG and DMPED.

Acting *"on behalf"* of the District rather than Adverse to it

Notwithstanding what may seem like a blanket prohibition for dealing with your previous agencies on a temporary or permanent basis, I interpret 6B DCMR §§ 1811.10, 1811.11, 1811.3, and 1811.4 to refer instead to matters in which the former employee is representing a person or entity whose interests are, or may become adverse to, those of the District. For example, if you were proposing to represent a client in a particular matter, such as a contract or lawsuit, in which the District is a party or has a direct and substantial interest, you would be prohibited from having any transactions with OAG or DMPED that are intended to influence OAG or DMPED, for one year from the date of your separation from District service. Similarly, you would be prohibited permanently from formal or informal appearances before OAG or DMPED, as well as oral or written communications to OAG or DMPED, if you participated personally and substantially in that matter as a District government employee.

You informed me, however, that the work you propose to do would be *on behalf of* the District, just as it was when you were employed by OAG. As such, the District would be your client, you would be both representing the District and acting on its behalf, and attorney-client confidentiality and representational rules would apply. It is not enough to say that your interests and the District's align. Instead, you actually must represent the District's interests, and only the District's interests, for you to avoid violating 6B DCMR §§ 1811.10, 1811.11, 1811.3, and 1811.4. To ensure that your work as an outside vendor will involve representing the District's interests and only the District's interests, there must be a specific written agreement in place that states that your services are representational.[9] In that situation, you would not be prohibited from having transactions with OAG or DMPED, having formal or informal appearances before OAG or DMPED, or having oral or written communications with OAG or DMPED.

[9] It is important to note, however, that simply because a former government employee is performing services on behalf of the government pursuant to a contract with the government, this does not mean that the former government employee "shares an identity of interests" with the government (U.S. Office of Government Ethics, "Letter to a Former Government Attorney," 82 x 16, November 5, 1982). *See also* U.S. Office of Government Ethics, "Letter to a Designated Agency Ethics Official," 08 x 7, March 28, 2008, which explains that just because the former employee's activity furthers the government's interests does not mean that the former employee is acting on behalf of the government. There must be "a specific agreement to provide representational services to the [government]." *Id.* at 2.

It is important to note, however, that to comply with 6B DCMR §§ 1811.10, 1811.11, 1811.3, and 1811.4, you would have to make sure that you do not represent yourself or another, such as your private law firm, in any negotiations with OAG or DMPED.[10] To the extent that a person is permitted to represent himself or herself before an agency, by appearance or through communications, such representation is limited to "matters of a personal and individual nature"[11] and do not apply to matters of a business nature, even if the former employee is a sole practitioner. I interpret 6B DCMR § 1811.10, however, to permit you to respond to a Request for Proposals ("RFPs") because 6B DCMR § 1811.17 states that 6B DCMR § 1811.10 also does not apply to appearances or communications by a former employee concerning "the application of these regulations to an undertaking proposed by a former employee." Responding to RFPs constitutes an undertaking proposed by you.

You are, however, prohibited under 6B DCMR § 1811.10 from handling, for yourself or your private law firm, matters such as contract negotiations and fee renegotiations. Similarly, you would be prohibited from calling, on behalf of yourself or your private law firm, an OAG or DMPED employee to request an extension, or sending an email complaining about a payment delay and requesting prompter payment.[12] In those situations, you would not be representing the District government. Instead, you would be representing your own interest or the interests of another entity, your private law firm, before your former employer, which is prohibited.[13] This restriction applies for one year for appearances before or communications with an agency that are intended to influence the agency in connection with any particular government matter pending before the agency or on which it has a direct and substantial interest, whether or not such matter involves a specific party.

You are permitted, however, to have another person in your firm, for example, a partner or associate, represent you in matters such as contract and fee negotiations, requests for extensions, and complaints about late payments. You also are permitted to hire an attorney or other representative to represent you in such matters. It is important to note that the restrictions in 6B DCMR §§ 1811.10, 1811.11, and 1811.12 are there to prevent former government employees from contacting former coworkers in an attempt to influence them in all situations where the former District government employee is representing interests that are not the District's. Having someone else from your firm, or someone you hire, deal with the District in such situations avoids that problem.

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[10] *See* U.S. Office of Government Ethics, "Letter to a Former Government Attorney," 82 x 16, November 5, 1982.

[11] 6B DCMR § 1811.17 states that the "one-year (1-year) restriction stated in Subsection 1811.10 of this section shall not apply to appearances or communications by a former employee concerning matters of a personal and individual nature, such as personal income taxes or pension benefits, or the application of these regulations to an undertaking proposed by a former employee. A former employee also may appear *pro se* (on his or her own behalf) in any litigation or administrative proceeding involving the individual's former agency."

[12] 6B DCMR § 1811.12 states that the "restriction in Subsection 1811.10 of this section shall apply whether the former employee is representing another or representing him or herself, either by appearance before an agency or through communications with that agency."

[13] *See* U.S. Office of Government Ethics, "Letter to a Former Government Attorney," 82 x 16, November 5, 1982, which states: "[y]ou may not, pursuant to our interpretation, represent your firm on such matters as contract negotiations, fee negotiations, and requests for additional personnel (and thus money for the firm), or on matters involving any questions of the competence of the services provided by the firm. If you did so, you would be acting as an agent of the firm in matters where there is controversy arising out of the business relationship between [the agency] and the firm. On the other hand, once your firm is hired, you may in the normal course of providing the litigation services required under the contract, contact [the agency], and discuss further strategy. In these instances, there is no element of intent to influence or controversy concerning the business relationship on your part. It is simply the flow of information necessary to carry out the contract." (p. 4.)

Effective Date of Rules and Date of Separation from the District

As noted above, the discussion of post-employment restrictions in this advisory opinion is based on 6B DCMR Chapter 18, which was revised and became effective on April 11, 2014. These revised rules are applicable to prohibited conduct occurring on and after April 11, 2014. For example, if you were to email DMPED in June 2014 to ask for an extension on work you were doing on behalf of DMPED, the one-year prohibition against communications with an agency that are intended to influence the agency in connection with any particular government matter pending before the agency or in which it has a direct and substantial interest, whether or not such matter involves a specific party, would apply. This would be the case regardless of whether you were still a District employee on April 11, 2014.[14] For example, if you had left District employment in December 2013, and were to email DMPED in June 2014 to ask for an extension on work you were doing on behalf of DMPED, the one-year prohibition described above would apply because June 2014 is within one year of your leaving DMPED and because the conduct, the email to DPMED with an intent to influence the agency, would occur after the revised 6B DCMR Chapter 18 took effect on April 11, 2014.

As a best practice, I recommend that if you obtain a contract with OAG or DMPED, you work with the appropriate agency to do the following:

1) Include in the contract documents a confidentiality clause[15] indicating that the contracting entity and its employees shall keep all information obtained through the performance of the contract confidential, shall not use such information in connection with any other matters, and shall not disclose any such information to any other person or entity, in accordance with District and federal laws governing the confidentiality of records; and

2) Include in the contract documents a written statement by the hiring agency that it is aware that you previously worked there and that, if applicable, you worked on a particular matter involving a specific party as a District employee that you will work on pursuant to your contract. The written statement also should include a determination, through the agency's own analysis, that the District is your client and your performance of services will involve your representing the District's interests and only the District's interests and that you will not represent any interests that are or may become adverse to the District's.[16]

Accordingly, you are not prohibited from obtaining a contract with OAG or DMPED where you will represent OAG's or DMPED's interests, as long as you do not represent yourself or your private law firm before OAG or DMPED in any negotiations with OAG or DMPED where your interests or your private law firm's interests are, or may become, adverse to the District's interests.

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[14] Even if you were using District government annual leave for the days leading up to April 18, 2014, you were still a District government employee and the District Code of Conduct was applicable to you while you were on annual leave. *See* U.S. Office of Government Ethics, "Letter to a Designated Agency Ethics Official," 98 x 20, December 8, 1998, which states that an individual on terminal leave, which is a subset of annual leave, taken after submitting a request for separation, remains a government employee.

[15] I note that confidentiality clauses are not uncommon and that such a clause already may be required in your contract with the District.

[16] BEGA already has confirmed with the Office of Contracting and Procurement ("OCP") that this is acceptable and that, if provided to OCP, the written statement will be maintained in the contract files.

This advice is provided to you pursuant to section 219 of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011 ("Ethics Act"), effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1162.19), which empowers me to provide such guidance. As a result, no enforcement action for violation of the District's Code of Conduct may be taken against you in this context, provided that you have made full and accurate disclosure of all relevant circumstances and information in seeking this advisory opinion.

You also are advised that the Ethics Act requires this opinion to be published in the District of Columbia Register within 30 days of its issuance, but that your identity will not be disclosed unless you consent to such disclosure in writing. We encourage individuals to so consent in the interest of greater government transparency. Please, then, let me know your wishes about disclosure.

If you have any questions or wish to discuss this matter further, I can be reached at 202-481-3411, or by email at darrin.sobin@dc.gov.

Sincerely,

Darrin P. Sobin /ps

DARRIN P. SOBIN
Director of Government Ethics
Board of Ethics and Government Accountability

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