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

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Office of Government Ethics

VIA U.S. MAIL & EMAIL

September 25, 2014

Ms. [redacted]

Dear Ms. [redacted]:

This responds to your request of August 26, 2014, for a formal advisory opinion regarding the post-employment restrictions that will apply to you, now that you have left District government service. Based on an earlier discussion we had on August 15, 2014, and on follow-up emails in which you provided additional information, I can provide the following advice.

You state that you left your position as Director of the Office of Policy and Legislative Affairs ("OPLA") in the Executive Office of the Mayor ("EOM") to work for a private law firm and that your last day of work was Friday, September 5, 2014. Further, you state that your position involved, in short, coordinating the policy decision-making process that informed the implementation of the Mayor's policy and legislative agendas. More specifically, you were responsible for policy development, maintaining relations with the federal government and with the Council, and drafting or reviewing all agency testimony given at Council hearings and all legislation introduced by the agencies. You also state that, as part of your position at the private law firm, you will be working in the public policy practice group, representing clients in their navigation of government, including the District of Columbia government.

Post-Employment Restrictions

Although the District has implemented post-employment regulations, they are not intended to prevent its employees from working in the private sector after their government service ends or to be so restrictive as to make following the regulations themselves impossible. There are, however, certain requirements[1] that former employees must abide by during three somewhat overlapping post-service time periods. Those time periods are a one-year "cooling-off" period, a two-year ban on behind-the-scenes activities and working on matters over which employees may have had official responsibility, and a permanent ban on working on particular government matters

[1] The discussion of post-employment requirements in this advisory opinion is based on 6B DCMR, Chapter 18 (employee conduct), which was revised and became effective on April 11, 2014. *See* 61 DCR 3799.

involving specific parties. I will, in that order, discuss the restrictions imposed in each of the time periods, especially because the regulations underlying the cooling-off period raise the threshold question of how to define your former agency.

One-Year Cooling-Off Period

A former District government employee – other than a special government employee[2] who serves for fewer than one-hundred and thirty (130) days in a calendar year – is "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." 6B DCMR § 1811.10 (emphasis added).

The restriction in 6B DCMR § 1811.10 "is intended to prohibit the possible use of personal influence based on past government affiliations to facilitate the transaction of business," 6B DCMR § 1811.11, which explains why the one-year prohibition is sometimes referred to as a cooling-off period.[3] Accordingly, the prohibition applies "without regard to whether the former employee had participated in, or had responsibility for, the particular matter, and [includes] matters that first arise after the employee leaves government service." *Id.* The prohibition also applies whether the former employee represents him or herself or someone else, either by appearance before the former agency or through communications with the agency. *See* DCMR § 1811.12.

While the foregoing restrictions may appear to be clear enough, what, for you, as the former OPLA Director, constitutes your former agency is not. Some discussion, then, is necessary in order for this advice to be most useful to you.

The term "agency" is defined as "any unit of the District of Columbia government required by law, by the Mayor of the District of Columbia, or by the Council of the District of Columbia to administer any law, rule, or any regulation adopted under authority of law." 6B DCMR § 1899.1. The former agency for most employees can be ascertained fairly easily. However, the EOM presents at least two definitional difficulties. First, the District Personnel Manual ("DPM"), which is codified in 6B DCMR, does not define the EOM. Second, as an operational matter, each Mayor configures the EOM to suit his or her particular official needs. Therefore, these obstacles must be overcome by finding guidance outside of the DPM itself, and a logical starting point is the Charter, the source of the District's governmental authority.

Section 422 of the Charter (D.C. Official Code § 1-204.22) provides that the Mayor is "the chief executive officer of the District government," and, as such, generally is "responsible for the proper execution of all laws relating to the District, and for the proper administration of the affairs of the District coming under his jurisdiction and

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[2] A special government employee is "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." 6B DCMR § 1899.1.

[3] In your email of September 2, 2014, you asked on what date the one-year cooling off period would begin, given that your last day of work was set to be Friday, September 5, 2014. Assuming you worked the typical Sunday to Saturday payroll period, your last day on payroll was Saturday, September 6, 2014, and your one-year cooling off period began on Sunday, September 7, 2014, at 12:00 a.m.

control." Further, the Mayor may, with certain exceptions not relevant here, delegate any of his functions to, among others, "any officer, employee, or agency of the executive office of the Mayor . . . ." *Id.* at section 422(6) (D.C. Official Code § 1-204.22(6)).

The Charter does not define the phrase "executive office of the Mayor." *See id.* at section 103 (D.C. Official Code § 1-201.03). Useful support, however, is provided by the Government Reorganization Procedures Act of 1981 ("Reorganization Procedures Act"), effective October 17, 1981 (D.C. Law 4-42; D.C. Official Code § 1-315.01 *et seq.*), which was passed to implement the Mayor's authority to "reorganize the offices, agencies, and other entities within the executive branch of the government of the District."[4]

Section 3(3) of the Reorganization Procedures Act (D.C. Official Code § 1-315.02(3)) defines "Executive Office of the Mayor" to mean "those offices or agencies expressly established to provide managerial, budgetary, personnel, secretarial, planning, informational, and special assistance to the Mayor in carrying out the Mayor's administrative functions in the management of the District government."[5] Further, section 7 of the Reorganization Procedures Act (D.C. Official Code § 1-315.06) requires the Mayor annually to submit to the Council a chart "detailing the organization and structure of the District government."

I verified with Mayor Gray's General Counsel, who formerly was the General Counsel to the Council, that the only time a Mayor submits an organization chart to the Council is as part of the annual budget proposal. The organization chart for the current fiscal year, Fiscal Year 2014, can be accessed at http://cfo.dc.gov/node/467962, and it lists OPLA as one of several offices comprising the EOM.[6] Further, the EOM itself is elsewhere described in the budget materials as "provid[ing] District agencies with vision and policy direction and provid[ing] agencies with the leadership, support, and oversight to implement specific policy goals and objectives."[7]

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[4] Section 422(12) of the Charter (D.C. Official Code § 1-204.22(12)).

[5] Section 3(1) of the Reorganization Procedures Act (D.C. Official Code § 1-315.02(1)) expressly excludes the EOM from the definition of the term "agency." That exclusion, however, is understandable for purposes of the Reorganization Procedures Act itself. Section 4 of the Act (D.C. Official Code § 1-315.03) defines reorganization generally as an "action which results in the transfer, consolidation, abolition, or authorization with respect to functions and hierarchy, *between or among agencies*, and which affects the structure or structures thereof." (Emphasis added.) On the other hand, the Mayor's configuring (or reconfiguring) agencies and offices within the EOM represents a realignment, rather than a reorganization accomplished pursuant to the Reorganization Procedures Act. *See* Mayor's Order 2009-90 (dated June 2, 2009) (explaining that the Order "applies to realignments *within* a District government department or agency that affect the *internal* structure or functions of the department or agency but do not constitute a reorganization") (emphasis added).

[6] The other offices listed in the chart and elsewhere in the Fiscal Year 2014 budget materials as making up the EOM include the Office of the Chief of Staff, the Office of Budget and Finance, the Office of Communications, the Mayor's Correspondence Unit, the Scheduling Unit, the Office of Support Services, Fleet Management, the Office of Cable Television, the Office of Boards and Commissions, the Office of Community Affairs, the Office of Community Relations and Services, the Office of Partnerships and Grant Services, the Office on Ex-Offenders Affairs/Office on Returning Citizen Affairs, the Office on Women's Policy and Initiatives, the Commission on Women, Serve DC, the Youth Advisory Council, the Office of African Affairs, the Office of Asian & Pacific Islander Affairs, the Office of GLBT Affairs, the Office on Latino Affairs, the Office of Religious Affairs, the Office of Veteran Affairs, the Office of the Secretary, and the Office of the General Counsel.

[7] Fiscal Year 2014 Budget and Fiscal Plan at A-29.

Based on the foregoing, I conclude that, for purposes of the one-year post-employment cooling off period, your former agency is the EOM. More specifically, your former agency is the Mayor and the agencies and offices designated by the Mayor, including OPLA, as comprising the EOM in the Fiscal Year 2014 budget submission to the Council. Notably, neither the subordinate agencies of the District, the offices of the various Deputy Mayors, nor the Office of the City Administrator fall within the definition.

That said, you are prohibited for one year from September 7, 2014, from having any transactions with the EOM that are intended to influence the agency on any particular government matter pending before it or in which it has a direct and substantial interest.[8] Although the term "particular government matter" is not defined in 6B DCMR § 1899.1, matters such as contracts, leases, and other projects involving specific parties are clearly included in it. Ordinarily, matters of general rulemaking, policymaking, and legislation are not particular matters. In some limited situations, however, they may be so narrowly focused on discrete and identifiable classes of persons, even if they do not involve specific parties, that they may nonetheless meet the prohibition. *See* Memorandum from Robert I. Cusick, Dir., U.S. Office of Government Ethics, to Designated Agency Ethics Officials on "Particular Matter Involving Specific Parties," "Particular Matter," and "Matter," at 8 (DO-06-29; Oct. 4, 2006) ("Essentially, the term [particular matter] covers two categories of matters: (1) those that involve specific parties ..., and (2) those that do not involve specific parties but at least focus on the interests of a discrete and identifiable class of persons, such as a particular industry or profession."). On the other hand, "consideration or adoption of broad policy options directed to the interests of a large and diverse group of persons" does not fall within this category of matters. *Id.* at 9.

Two Year Ban: Behind-the Scenes Advice and Official Responsibility

Former District government employees are also subject to a two-year ban that can take either or both of two forms. The first prohibits former employees from giving behind-the-scenes advice or assistance to someone else in representing another person before *any* District agency. Specifically, 6B DCMR § 1811.8 prohibits former employees for two years from knowingly "aiding, counseling, advising, consulting, or assisting" in representing any other person (except the District) before an agency as to a particular government matter involving a specific party,[9] if the former employee participated personally and substantially in that matter as a government employee.

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[8] Note that, while it may not come into play in your case, an exception to this general one-year prohibition does exist. If the District were to become your client during the period, and you would be both representing the District and solely acting on the District's behalf, you would not be prohibited from having transactions with the EOM, making formal or informal appearances before the agency, or having oral or written communications with it. There are two formal advisory opinions on our website that address this exception in substantially more detail. The first opinion was issued on April 17, 2014, to a former Department of General Services employee, and it can be accessed at http://www.bega-dc.gov/sites/default/files/documents/1165-001%20-%20Advisory%20Opinion.pdf. The second opinion was issued on May 20, 2014, to a former Assistant Attorney General, and it can be accessed at http://www.bega-dc.gov/sites/default/files/documents/1167-001%20-%20Advisory%20Opinion%20-%20Redacted.pdf.

[9] The term "particular government matter involving a specific party" is defined in 6B DCMR § 1899.1 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."

Although the term "participated personally and substantially" is not defined in 6B DCMR § 1899.1, relevant federal regulations do define the term, and I turn to them here.[10] To participate "personally" means to participate "(i) [d]irectly, either individually or in combination with other persons; or (ii) [t]hrough direct and active supervision of the participation of any person he supervises, including a subordinate." 5 C.F.R. § 2641.201(i)(2). To participate "substantially" means that the employee's involvement is "of significance to the matter," 5 C.F.R. § 2641.201(i)(3), and, of note for purposes of the second form of the two-year ban, "requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue." *Id.* In your case, for example, you mentioned that, while at OPLA, you worked on a tax abatement/rebate matter relating to a particular entity and that you understand that you cannot work on that matter, as a private attorney, for the life of the matter. You represented that firewalls have been set up in your private law firm to address that issue. I agree that your work on the tax abatement/rebate matter relating to a particular entity amounted to personal and substantial participation. Pursuant to 6B DCMR § 1811.8, then, you are prohibited, as a private attorney, from giving any behind-the-scenes advice or assistance on the matter for two years. Indeed, as explained below with respect to the permanent ban, you cannot do any work on the matter during its lifetime.

The second form of the two-year ban prohibits former District employees from working on matters in which they did not participate personally and substantially, but over which they had official responsibility. Specifically, 6B DCMR § 1811.5 prohibits them for two years from knowingly "acting as an attorney, agent, or representative in any formal or informal matter before an agency if [they] previously had official responsibility for that matter."[11] The term "official responsibility" is defined in 6B DCMR § 1899.1 as "direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, personally or through subordinates, to approve, disapprove, or otherwise direct governmental action." Generally, I apply the definition to former managers or agency heads, such as yourself as the Director of OPLA, who had oversight of many matters under their jurisdiction, but generally did not perform the work on those matters. Instead, these individuals provide general supervision over the matters for which they ultimately were responsible.

Permanent Ban for the Lifetime of Particular Matters Involving Specific Parties

A former District government employee also is "permanently prohibited from knowingly acting as an attorney, agent, or representative in any formal or informal appearance before [any] agency as to a particular matter involving a specific party if the employee participated personally and substantially in that matter as a government employee." 6B DCMR § 1811.3. Similarly, 6B DCMR § 1811.4 provides that a former employee is "permanently prohibited from making any oral or written communication to [any] agency with the intent to influence that agency on behalf of another as to a particular government

[10] *See* 6B DCMR § 1811.1 ("District employees shall comply with the provisions of 18 U.S.C. § 207 and implementing regulations set forth at 5 C.F.R. Part 2641, Subparts A and B [post-employment conflict of interest provisions].").

[11] For purposes of § 1811.5, 6B DCMR § 1811.6 provides that "a matter for which the former government employee had official responsibility is any matter that was actually pending under the former employee's responsibility within a period of one (1) year before the termination of such responsibility." Further, 6B DCMR § 1811.7 provides that the two-year period in 6B DCMR § 1811.5 is to be "measured from the date when the former employee's responsibility for a particular matter ends, not from the termination of government service, unless the two (2) occur simultaneously."

matter involving a specific party if the employee participated personally and substantially in that matter as a government employee."

These two provisions, in other words, operate as permanent bans on your undertaking representational activities as a private attorney, including other than routine communications, regarding any particular matters involving specific parties on which you did substantive work while in the government's employ – not just during your time at OPLA. The bans apply to engaging in such activities before all District agencies and last, in any given case, for the lifetime of the matter.

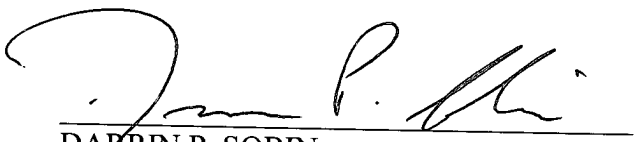
Conclusion

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
Director of Government Ethics
Board of Ethics and Government Accountability

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