



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 539

June 1, 2016

Whether the revolving door law prohibits a former employee of the Texas Commission on Environmental Quality from performing certain services related to the remediation of leaking underground storage tanks. (AOR-611)

The Texas Ethics Commission (“commission”) has been asked whether the state “revolving door” law would prohibit a former employee of the Texas Commission on Environmental Quality (“TCEQ”) from receiving compensation from a private employer for performing services related to the remediation of leaking underground storage tanks.

Background

The former employee who requested this opinion states that she was employed with the TCEQ (and its predecessor agencies, such as the Texas Natural Resource Conservation Commission) from 1991 to 2011. The period of time relevant to this opinion is 2009 to 2011, during which the former employee was a project manager in the TCEQ Remediation Division and worked in the agency’s Responsible Party Reimbursement (“RPR”) ¹ and State-Lead (“SL”) programs conducted to clean up leaking petroleum storage tanks (“LPSTs”). The former employee retired from the TCEQ in 2011.

The TCEQ Remediation Division oversees the assessment and cleanup of LPSTs, which include sites that are handled by parties responsible for the site (“RPs”) or by the state. The program’s mission is to supervise the cleanup of spills from regulated storage tanks by recording and evaluating all reported incidents of releases of petroleum and other hazardous substances from underground and above-ground storage tanks. The Remediation Division monitors all reported leaking incidents, from initial environmental assessments through corrective action plans and requests for closure. The requestor states that a remediation at any particular site could last many years and often lasts decades.

While the RPR program was active, the agency reimbursed an RP for pre-approved expenditures for cleanup of an LPST site. During that process, consultants for the RP would submit a work proposal with estimated costs that were typically approved, as long as the request was reasonable and met all guidelines. An RP could also request to be transferred to the SL program.

If an RP is unknown or unavailable, or is unable or unwilling to conduct the corrective action at the site, then cleanup can be conducted through the SL program, by which the state leads the cleanup effort. Under the SL program, correction actions are directed by TCEQ project managers and the contracts are managed through a contracting program that includes a competitive bidding process. The TCEQ project managers evaluate and approve independent contractors’ work plan proposals for site-specific remediation activities, produce work orders, oversee field activities, and review and approve reports, invoices, and other contract-related submittals. The independent contractors can, at a TCEQ project manager’s direction, perform such corrective actions as emergency abatement, site investigation, monitoring, remedial action plan development, site remediation, closure, system design and installation, and operation and maintenance.

Employment at TCEQ

The requestor states that while she was at the TCEQ, she was part of a team that approved claims for reimbursement in the RPR program and approved invoices for payment in the SL program. Her role was primarily to determine whether remediation work had actually been conducted in accordance with guidelines and work proposals in the RPR program or in accordance with work orders in the SL program.

In the RPR program, a consultant for an RP sought reimbursement from the agency for expenses related to narrow remediation tasks, such as the installation of a monitor well. The process generally began when the consultant submitted a work proposal and cost estimate in advance of performing the work, which the requestor would review and make comments and recommendations to the RP. After conducting the work, the consultant would submit a report to the agency, which the requestor would review and make additional comments and recommendations. The consultant would then submit an invoice to receive reimbursement for the work, and the requestor would review reports related to that invoice to verify whether the work had been conducted. The reports usually included a proposal for future action, which the requestor would be required to review and approve if appropriate. In that capacity, the requestor could advise but not require responsible parties to conduct specific work. If the work had been conducted appropriately, other agency staff would approve reimbursement.

In the SL program, the requestor reviewed the same types of reports as in the RPR program to ensure that work orders were appropriately implemented and that the state received the best value for its funds. She worked with and directed state contractors to ensure that sites were appropriately evaluated and remediated within the budgets and constraints of the program. The requestor worked with assigned contractors to develop work plan proposals based upon TCEQ guidance and the most recent site data.

Prospective Employment

The requestor is presently a project scientist for a private firm and wishes to perform services for the firm for compensation that include implementing decisions made by TCEQ project managers in the agency's SL program. Some of those decisions may relate to contaminated sites on which the requestor had worked as a TCEQ employee. The requestor states that the services may include overseeing field staff, reviewing current gauging and analytical data and making recommendations to the TCEQ based on that data, drafting and sealing new reports as a professional geoscientist, assisting TCEQ project managers with developing strategies to remediate sites, and drafting work proposals and invoices after receiving instructions from a TCEQ project manager to submit work order proposals and invoices.

With respect to reviewing reports, the requestor proposes that she might review the same types of reports that she had reviewed as a TCEQ employee for assessment, groundwater monitoring, and product recovery. She also states that the specific activities undertaken as a contractor would be new, such as the installation of new monitor wells, gauging and sampling monitor wells, and new product recovery events. She states that she would not typically review previous reports or invoices in which she had participated as a TCEQ employee, but might be required to review technical recommendations or conclusions that either she or a previous consultant or contractor had made in previous reports to make sure that recommendations on future actions are technically consistent or to explain why a different task should be performed. The requestor also states that her future work might require her to review such a report or invoice to understand the history of a remediation site, but that such a site would mostly be at a state of assessment or remediation that is different from when she would have worked on the site as a TCEQ employee.² Given that the requestor's future work might involve sites to which she had been previously assigned as a TCEQ employee, the requestor asks whether the revolving door law would prohibit her from performing services in the RPL or SL programs related to work at such sites.

Revolving Door Law

Section 572.054(b) of the Government Code states:

A former state officer or employee of a regulatory agency ... may not represent any person or receive compensation for services rendered on behalf of any person regarding a particular matter in which the former officer or employee participated during the period of state service or employment,

either through personal involvement or because the case or proceeding was a matter within the officer's or employee's official responsibility.

Gov't Code § 572.054(b).³

A "particular matter" is "a specific investigation, *application*, request for a ruling or determination, rulemaking proceeding, contract, *claim*, charge, accusation, arrest, or judicial or other proceeding." *Id.* § 572.054(h)(2) (emphasis added). "Participated" means "to have taken action as an officer or employee through decision, approval, disapproval, recommendation, giving advice, investigation, or similar action." *Id.* § 572.054(h)(1). A "particular matter" refers to a specific proceeding, including a contract, involving the exercise of discretion by an agency, rather than a particular subject matter. Ethics Advisory Opinion Nos. 419 (1999), 397 (1998). Whether a person participated in a "particular matter" as an employee of a state agency depends upon the specific facts.

Returning to the facts in this request, the issue is whether any of the requestor's prospective work for the private employer regards a "particular matter" in which she participated as a TCEQ employee.⁴ In the case of the RPR program, the requestor participated in the review of reports and invoices as part of a process by which the agency approved or denied an application or claim for reimbursement of expenses pursuant to TCEQ rules.⁵ In that role, the requestor's responsibility was to make a determination as to whether claimed work had been performed. The requestor also provided recommendations to RPs to conduct specific work for which the RPs could seek reimbursement. In the SL program, the requestor reviewed similar reports and invoices to determine whether specific work had been appropriately performed by a contractor so that the agency could pay the contractor for that work. The requestor also directed state contractors to perform specific work.

As indicated by the requestor's facts, the review of a report, invoice, or work order each involved an exercise of agency discretion as to whether particular work had been performed and thus was a "particular matter" in which the requestor participated. A recommendation made to an RP as part of the claim reimbursement process or direction given to a state contractor to perform specific work in the SL program would also constitute a "particular matter" in which the requestor participated. To the extent that a review, recommendation, or direction was a single step within a larger process of approving a claim or application for reimbursement or payment, such a claim or application similarly was a particular matter in which the requestor participated.

The requestor now wishes to work as a contractor to perform corrective actions within the RPL and SL programs that might occur on the same sites where remediation in which she had participated as a TCEQ employee had occurred. She has suggested that future work on a site that requires her to review a report, invoice, or work order that she had reviewed as a TCEQ employee would be prohibited. Thus, the issue is whether the review of a report, invoice, or work order related to a site and the performance of work as a contractor to perform corrective action on the same site are the same "particular matter" as contemplated by the revolving door law.

In prior opinions, we have said that two separate exercises of discretion by an agency, such as two separate contracts, are generally not the same "particular matter," but rather are separate matters.⁶ Similarly, the fact that two matters relate to the same general subject matter of an agency project does not make them part of the same "particular matter."⁷ We assume from the requestor's facts that a long-term remediation project or a series of remediation projects at a particular site consists of numerous individual exercises of agency discretion, and such a project would not constitute a single "particular matter." Thus, in our opinion, the requestor is not prohibited from all work on a particular site solely because she, as a TCEQ employee, had reviewed reports, invoices, or work orders or given recommendations or directions related to remediation at that same site. However, whether any prospective future work regards a "particular matter" in which the requestor participated, and is thus prohibited, depends upon the precise nature of the work and the pertinent circumstances. For example, if the requestor had, as a TCEQ employee, made a recommendation or given direction to a consultant or contractor to perform specific work at a site, then the requestor could not carry out that same recommendation or direction for the private firm.

The requestor has also suggested that she would be prohibited from working on a site that would require her to “review” a report that she previously reviewed or approved as a TCEQ employee, including a review of conclusions made in such a report. We have recognized in several opinions, each addressing specific circumstances, that two matters that are “interdependent pieces of a larger project” are considered the same “particular matter” if a former employee’s work on a matter includes the review or analysis of work that the former employee performed on the other related matter.⁸ Thus, to the extent that the requestor’s review of a report as a TCEQ employee and the future review of that report on behalf of a private firm are interdependent pieces of a larger remediation project, we caution that the review or analysis of a decision, recommendation, or direction made by the requestor would generally be prohibited. For example, if the requestor had previously reviewed a report as a TCEQ employee and, as a private employee working on the same remediation project, evaluates or analyzes the report to determine whether a conclusion she made in the report was correct, then the services would be prohibited.⁹

However, the requestor states that any review of a prior report or invoice would be made for the purpose of understanding the history of a particular site and that the actual remediation work would be based upon current data and site conditions, which would make earlier reports obsolete. In our opinion, the review of a report or invoice solely to obtain historical knowledge for the purpose of performing specific remediation services that are separate from the remediation services that were the subject of the report or invoice would be a separate matter from the requestor’s review of the report or invoice performed as a TCEQ employee. Thus, such a historical review would not be prohibited by the revolving door law. Accordingly, assuming that the requestor’s review of prior reports or invoices that she had previously reviewed as a TCEQ employee consists only of such a historical review, the revolving door law would not prohibit the requestor from performing those services.¹⁰

SUMMARY

The revolving door law provided by section 572.054(b) of the Government Code does not prohibit a former TCEQ employee from performing certain services described in this opinion on behalf of a private firm related to the remediation of leaking underground storage tanks.

¹ The state had maintained a fund (the Petroleum Storage Tank Remediation fund) to reimburse responsible parties for remediation of contamination resulting from leaking petroleum storage tanks. That particular fund has been discontinued by the legislature and the agency no longer provides the reimbursements. The other relevant remediation program is the Responsible Party Lead (“RPL”) program, in which a “responsible party” must perform remediation or hire contractors to perform remediation without reimbursement from the agency.

² As an example, the requestor states that a previous report and the data contained in the report are part of a site’s history, but that additional information gained from subsequent work, such as the collection of soil or groundwater data, tends to make earlier reports obsolete, except to understand why previous actions or decisions were made.

³ The revolving door restriction applies to state employees of executive branch agencies who were compensated over a certain amount prescribed by the General Appropriations Act. *Id.* § 572.054(c)(2). The requestor states that her compensation met or exceeded that amount.

⁴ The requestor does not present a specific instance of future services for our consideration, but presents general questions regarding a range of services that she might consider rendering in the future. Accordingly, we can only consider the requestor’s circumstances generally.

⁵ See 30 T.A.C. §§ 334.301-.322.

⁶ See, e.g., Ethics Advisory Opinion Nos. 364 (1997), 353 (1996).

7 *See, e.g.*, Ethics Advisory Opinion Nos. 523 (2014) (selecting a consultant to prepare a feasibility study regarding state highway construction project and managing quality assurance for work on the project were two separate matters), 496 (2011) (state road construction projects that were rejected and redesigned were considered separate matters), 345 (1996) (an application for a federal grant and the selection of a contractor through a competitive bidding process related to the same transportation project were separate matters), 324 (1996) (review of permit for landfill and certification of groundwater monitoring system for same landfill were separate matters).

8 *See* Ethics Advisory Opinion Nos. 507 (2012) (former employee may work pursuant to a general engineering consultant contract to oversee a state highway design-build contract in which he was involved if the former employee does not perform review or analysis of essential components of the design-build contract), 496 (2011) (former employee was not prohibited from working on new road projects assuming that the work would not use or incorporate the reports or studies on which she worked as a project manager overseeing environmental assessment related to prior road construction projects in the same area), 397 (1998) (former employee who evaluated consultants seeking to contract with an agency to perform a feasibility study on a project did not participate in a subsequent study of the environmental impact of the alternatives proposed in the feasibility study because his work was unrelated to the substantive conclusions of the feasibility study that were to be examined in the environmental study), 337 (1996) (an audit and an appeal of the findings reached in the audit are part of the same matter).

9 Similarly, if the requestor, as a private employee working on the same remediation project, reviewed her prior approval of an invoice to determine whether the approval was appropriate, then the services would be prohibited.

10 We cannot address any TCEQ rules or policies that impose additional restrictions. *See also* Gov't Code § 2252.901 (prohibiting a state agency from entering into certain contracts). Additionally, we note that section 572.069 of the Government Code prohibits a former state officer or employee of a state agency who during the period of state service or employment participated on behalf of a state agency in a procurement or contract negotiation involving a person may not accept employment from that person before the second anniversary of the date the officer's or employee's service or employment with the state agency ceased. Gov't Code § 572.069 (eff. September 1, 2015). The requestor's employment with TCEQ ceased prior to the effective date of that law, and we therefore do not address it in this opinion.