

FILE 2697 – July 12, 2017

**POSTEMPLOYMENT RESTRICTIONS**  
**FORMER DMS EMPLOYEE WORKING**  
**FOR BUSINESS ENTITY CONTRACTING WITH DMS**

To: *Mr. Timothy G. Schoenwalder, Attorney (Tallahassee)*

**SUMMARY:**

Under the circumstances presented, a former chief of staff in the Florida Department of Management Services is not restricted under Sections 112.313(9), 112.3185(3), or 112.3185(4), Florida Statutes, in his present employment with a software company which is a party to DMS contracts. CEO 12-4, CEO 11-24, CEO 09-5, and CEO 03-10 are referenced.<sup>1</sup>

**QUESTION:**

Is a former Department of Management Services chief of staff restricted under the Code of Ethics in his present employment with a software company which is a party to DMS contracts?

Under the circumstances presented, your question is answered in the negative.

In your letter of inquiry, you state that you write on behalf of a former Department of Management Services (DMS) employee who was employed by the agency in several positions classified as Senior Management Service (SMS). You state that he was employed as director of the office of communications from 2012 to 2014, acting chief of staff and director of the office of communications during 2014, and chief of staff from January 5, 2015, until his departure from DMS

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<sup>1</sup>Opinions of the Commission on Ethics may be obtained from [www.ethics.state.fl.us](http://www.ethics.state.fl.us).

on May 13, 2016. You state that these positions were within the Office of the Secretary of DMS and that the former employee never held a management position (such as division director or bureau chief) in either of the DMS workforce operations or business operations branches. You state that key DMS discretionary roles as to public contracts—e.g., contract solicitations, contract evaluations/awards, and contract performance oversight—were principally performed by personnel in these two branches of DMS and that the Deputy Secretaries overseeing the two branches reported directly to the Secretary and not to the former employee. You ask whether the Code of Ethics would prohibit or restrict his present employment with a company if such work includes seeking contracts for the company with agencies other than DMS, where such agencies are parties to DMS master contracts that exist in connection with separate, independently-procured contracts between such agencies and the company. The contracts concern the provision by DMS of centralized administrative support to State agencies and their employees, including planning and budget, human resources, purchasing, finance and accounting services, fiscal integrity oversight, and policies and procedures development.<sup>2</sup> You explain that the State agency contracts the former employee would seek to procure on behalf of the company would be "term" (not "master") contracts under which the company would be selected and paid by the procuring agency (not by DMS).

Further, you state that although the former employee made a suggestion for DMS decision-makers regarding the possible withdrawal of a 2015 contract procurement, which DMS later withdrew, he had no responsibility or discretion as to solicitation, evaluation, award, or oversight of DMS contracts. Since his departure from DMS in 2016, the former employee has been employed by

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<sup>2</sup>See [http://www.dms.myflorida.com/agency\\_administration](http://www.dms.myflorida.com/agency_administration)

a company which develops software and provides software solutions for DMS and other Florida agencies, and which is a signatory to two DMS contracts awarded while the former employee was employed at DMS and also is a signatory to two DMS contracts which were awarded after he left his DMS position.

The provisions of the Code of Ethics possibly implicated in the former employee's scenario are Sections 112.313(9)(a)4, 112.3185(3), and 112.313(4), Florida Statutes,<sup>3</sup> which can apply to former employees of State agencies. Section 112.313(9)(a)4, Florida Statutes, prohibits a former agency employee who was classified as SMS or Selected Exempt Service (SES), or certain other statuses, from personally "representing" another person or entity for compensation before the former employee's former agency for two years following the vacation of his or her public position.

The term "represent" is defined in Section 112.312(22), Florida Statutes, to mean:

. . . actual physical attendance on behalf of a client in an agency proceeding, the writing of letters or filing of documents on behalf of a client, and personal communications made with the officers or employees of any agency on behalf of a client.

Since you indicate that the former employee's most recent position at DMS was classified as SMS, this restriction would apply to him. However, you state that he does not intend to represent the company or any other person or entity before DMS, for compensation or otherwise, during the remainder of the two-year period that began May 13, 2016, the date of his departure from DMS. As

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<sup>3</sup>See CEO 11-24 for a discussion of the restrictions under Sections 112.3185(3) and 112.3185(4), Florida Statutes, which operate independent of the restriction in Section 112.313(9)(a)4, Florida Statutes. Also discussed in CEO 11-24 is Section 112.3185(5), Florida Statutes, which would apply to the former DMS employee if he were to be paid for employment or contractual services directly by DMS during the first year after his departure from DMS and which states that such payment shall not exceed his annual salary received on the date of cessation of his previous responsibilities.

long as he avoids all representation contact with DMS and its personnel, there will be no violation of Section 112.313(9)(a)4.

You also inquire concerning the implications of his seeking, on behalf of the company, contracts with agencies other than DMS, which agencies are parties to master contracts with DMS existing in connection with the separate agency contracts he would be seeking. As long as he does not represent<sup>4</sup> the company before DMS or its personnel during the two-year period after his departure from DMS, he would not be in violation of Section 112.313(9)(a)4, regardless of existing DMS contracts.<sup>5</sup>

Further, Section 112.3185(3) states in relevant part:

An agency employee may not, after retirement or termination, have or hold any employment or contractual relationship with any business entity other than an agency in connection with any contract in which the agency employee participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, or investigation while an officer or employee....

This statute prohibits a former State agency employee from going to work for a private business (prime contractor, subcontractor, or other) in connection with a contract where the agency

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<sup>4</sup>Please note that "representation" is very broadly defined, including almost all contact on behalf of the Company with DMS or its personnel for the two-year period, unless the contact is limited to rote, mechanical contact necessary to deliver or perform a contract and is not an attempt to request or persuade DMS or its personnel to do or not do something. CEO 12-4 and CEO 09-5.

<sup>5</sup>In CEO 03-10, we stated that Section 112.313(9)(a)4, Florida Statutes, would not prohibit the former Director of Legislative Affairs for DMS from representing clients for compensation before the so-called "dotted line" agencies administratively assigned to DMS—which, at the time, included the Correctional Privatization Commission, the Florida Commission on Human Relations, the Public Employees Relations Commission, the Division of Administrative Hearings, and the State Technology Office—within two years of vacating his position with DMS. Similarly, we now find that the former DMS employee would not be prohibited from representing his present employer before the present "dotted-line" agencies administratively assigned to DMS, or before agencies unconnected to DMS.

employee was personally and substantially involved in the procurement of the contract. Although the former employee (as acting chief of staff and as chief of staff) made general suggestions and at least one specific suggestion as to possible withdrawal of a DMS procurement, you state that he had no responsibilities or discretion as to DMS procurement of any contracts, including DHS' present contracts with the company that is now his employer. Therefore, his employment is not restricted under Section 112.3185(3), Florida Statutes, since, under the facts you have presented, he did not participate personally and substantially in the procurement of master contracts or other contracts during his employment at DMS.

Also relevant is Section 112.3185(4), Florida Statutes, which states in pertinent part:

An agency employee may not, within 2 years after retirement or termination, have or hold any employment or contractual relationship with any business entity other than an agency in connection with any contract for contractual services which was within his or her responsibility while an employee....

This provision prohibits a former State agency employee, for two years after the date he left his agency position, from going to work for any business entity in connection with a contract for contractual services which was within his responsibility or that of his agency (DMS) subordinates while he was with the agency. You state that, during his employment at DMS, the former employee did not supervise (or supervise those who supervised) the performance of any DMS contracts for contractual services and had no discretionary responsibility as to contract performance. Therefore, he is not restricted under Section 112.3185(4) as to employment in connection with a DMS contract for contractual services.

Thus, we conclude that the former DMS employee's present employment is not restricted under Sections 112.3185(3) or 112.3185(4), Florida Statutes, and, as long as he avoids representation for his employer (the company) or other persons or entities before DMS or its

personnel for the two-year period after his departure from DMS, Section 112.313(9)(a)4, Florida Statutes, will not be implicated.<sup>6</sup>

Your question is answered accordingly.

cc: Timothy G. Schoenwalder, Esquire

XXX/bd/dw

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<sup>6</sup>As you note in your letter of inquiry, the former employee also must comply with Section 112.313(8), Florida Statutes, which requires him to refrain from the use of information he gained by reason of his DMS employment and which is not available to the general public for his gain or benefit or the gain or benefit of any other person or business entity.

May 31, 2017

**ORIGINAL**

Via Hand Delivery

Virilindia Doss, Executive Director  
The Florida Commission on Ethics  
325 John Knox Road, Building E, Suite 200  
Tallahassee, Florida

**FLORIDA  
COMMISSION ON ETHICS**

**MAY 31 2017**

**Re: Ben Wolf**

**RECEIVED**

Dear Executive Director Doss:

We are assisting Ben Wolf in respect to matters under Chapter 112, Florida Statutes, which are within the purview of the Florida Commission on Ethics (the "Commission"). Mr. Wolf, a former employee of the Department of Management Services ("DMS"), and I appreciated having the recent opportunity to meet with Chris Anderson, the Commission's General Counsel and Deputy Executive Director, to seek guidance regarding certain provisions under Chapter 112. We submit this letter to identify certain points regarding Mr. Wolf's prior employment with DMS and current private sector employment, for purposes of respectfully asking the Commission to provide an informal opinion to Mr. Wolf if such is possible regarding these circumstances.

Background Facts – DMS Employment. Mr. Wolf was employed by DMS in the following capacities for the dates specified: (a) Director of the Office of Communications, December 2, 2012 to June 2, 2014; (b) acting Chief of Staff and Director of the Office of Communications, June 2, 2014 to January 5, 2015; and (c) Chief of Staff, January 5, 2015 to May 13, 2016. Mr. Wolf performed all of his roles and responsibilities within the Office of the Secretary, in senior management service positions as that term is used in section 110.402, Florida Statutes.

While employed by DMS, Mr. Wolf never held a management position (such as division director or bureau chief) within those branches of the agency which DMS characterizes as its workforce operations and business operations. The key DMS discretionary roles regarding public contracts – *e.g.*, contract solicitations, contract evaluations and awards, contract performance oversight – are principally performed by these two branches of DMS (with legal support provided by the DMS General Counsel and supporting lawyers).<sup>1</sup> The division directors who oversee the distinct divisions within these two branches of DMS directly reported to a designated Deputy Secretary (one Deputy Secretary oversaw DMS workforce operations; another Deputy Secretary oversaw DMS business operations). These two designated Deputy Secretaries reported directly to the DMS Secretary; neither Deputy Secretary reported to or was supervised by Mr. Wolf.

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<sup>1</sup> The relevant structure and reporting hierarchies of the DMS workforce branch and DMS business operations branch are illustrated and confirmed by three Agency Organization Charts, produced by DMS in response to a public records request, which are attached as follows: (i) Exhibit A – saved by DMS effective 1/16/15 (see notation); (ii) Exhibit B – saved by DMS effective 9/1/15 (see notation); and (iii) Exhibit C – saved by DMS effective 4/27/16 or 6/6/16 (see notation).



Sometime in the spring of 2016, before Mr. Wolf concluded his employment with DMS, the agency reconfigured its organization chart but once again did not give Mr. Wolf any supervisory roles over DMS business operations or DMS workforce operations. While the reconfiguration did maintain the division director for finance and administration's line to report to Mr. Wolf, and the division director could be required to sign a public contract with a vendor, she had no discretionary powers as to contract solicitations, contract evaluations and awards, or contract performance oversight. Accordingly, even in Mr. Wolf's final months with DMS, he still did not engage in any discretionary powers as to contract solicitations, contract evaluations and awards, or contract performance oversight. While he was apprised of developments within and decisions by other divisions that would result in new DMS contracts, in no way, shape or form did he supervise (or supervise those who supervised) the day-to-day performance of any DMS contracts while he was employed by the agency.

As a general practice, Mr. Wolf did not participate personally or substantially in DMS decisions relating to: approving or disapproving vendors who could be eligible for a public contract; developing, designing or providing advice regarding a public contract for goods or services that in any way tailored such contract for award to a particular company or firm; approving or disapproving or recommending an award of a public contract (please see our note below regarding Mr. Wolf's offering of suggestions for DMS decision-makers to consider in connection with a specific procurement which DMS subsequently withdrew); or auditing, investigating or regulating a vendor's performance of a public contract for goods or services.

Private Sector Employment. A few months after he concluded his employment at DMS, Mr. Wolf accepted a position with a company that develops software and provides software solutions for the benefit of clients that today include executive branch agencies of the State of Florida (the "Company"). Mr. Wolf is an employee of the Company but is not a direct or indirect owner of the Company. As a side note, Mr. Wolf during his employment with DMS was not familiar with the Company, the services provided by the Company, the Company's efforts to seek or renew contracts with DMS, or any other interaction between DMS and the Company. Mr. Wolf acknowledges that the Company is an existing and a potential signatory to certain contracts through DMS contract procurements, as identified below.<sup>2</sup>

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<sup>2</sup> The Company is a signatory to two Master Contracts which DMS awarded during Mr. Wolf's employment with DMS: (a) *Information Technology (IT) Consulting Services* (Contract #973-561-10-1)(DMS awards announced on November 12, 2013; Company signed contract on January 13, 2014); and (b) *IV&V Contract* (Contract # - 80101507-IVV-15-1) (DMS awards announced on April 4, 2016; Company signed contract on April 4, 2016).

The Company is a signatory and may become a signatory to the following contracts which DMS awarded after Mr. Wolf's employment with DMS: (a) *IT Staff Augmentation Contract* (Contract #80101507-SA-15-1)(DMS awards announced on July 12, 2016; a proposed contract is pending signature by DMS); and (b) *Alternate Contract Source #252-GSA, Schedule 70* (DMS awards announced December 2, 2016)(this contract replaces certain project areas for the existing *Information Technology (IT) Consulting Contract* (Contract #973-561-10-1) as of March 1, 2017).



Present Objective. First, we seek to clarify for purposes of this request what Mr. Wolf does not intend to do. He does not intend to represent the Company or any other entity before his former employer, DMS, for compensation or otherwise during the remainder of the two-year period that began May 13, 2016. As a related point, while Mr. Wolf is not aware that he has knowledge of information that would subject him to section 112.313(8), Florida Statutes, he understands this subsection does not permit him to use, and he does not intend to use, any such information for his personal gain or benefit or any other person or entity's gain or benefit.

Second, Mr. Wolf intends to seek public contract work for the Company with agencies ***other than DMS***. He understands that he can seek work from agencies other than DMS in respect to public contract procurements that do not in any manner pertain to DMS or his services at DMS. However, Mr. Wolf seeks if possible the Commission's guidance and confirmation regarding a specific set of facts: he desires confirmation that beginning on the present date and continuing thereafter, he may seek public contract work for the Company from Florida executive branch agencies – ***other than DMS*** – even if such agencies use DMS master contracts in connection with those same agencies' separate, independently-made decisions to contract with the Company and purchase services directly from the Company.

In respect to these procurements, the procuring executive branch agency could use a term contract developed by DMS as an "alternative contract source." In these circumstances, the Company must be hired and paid solely by the procuring executive branch agency (not DMS) that solicits the Company's services, and that agency (not DMS) will exercise its discretion when deciding to hire the Company to provide services which that agency desires to purchase. These contractual arrangements are contemplated under Florida law, as evidenced by sections 287.042(16) and 287.056, Florida Statutes, and Rule 60A-1.005, Florida Administrative Code. No portion of the Company's services under an "alternative source contract" are paid for by or subject to the approval of DMS.

Additional Observations. We wish to identify two points specific to Mr. Wolf's employment at DMS. First, we note that Mr. Wolf as acting chief of staff and chief of staff, spanning June 2, 2014 through May 13, 2016, occasionally mentioned general points to DMS decision-makers in support of the State of Florida executive branch's expressed desire to promote competition in public procurements, and did in a specific instance offer suggestions for DMS decision makers to consider regarding the possible withdrawal of DMS' 2015 solicitation of the *IT Staff Augmentation Contract* (Contract #80101507-SA-15-1), which DMS later withdrew. Second, we submit that Mr. Wolf's service to DMS in his capacity as communications director probably is at best tangential to this request. It is unlikely that Mr. Wolf's conventional job responsibilities as the DMS communications director, from December 2, 2012 through January 5, 2015, included roles that would be relevant to analysis of the applicability of ss. 112.3185(3)-(4), Florida Statutes.

#### Legal Considerations

We submit that Mr. Wolf's roles at DMS do not trigger either the permanent ban under s. 112.3185(3), or the two-year ban under s. 112.3185(4), regarding any of the four DMS contracts we have identified herein. As noted in CEO 07-10, "in order for the statutes [s. 112.3185(3)-(4)] to be applicable, one's post-public-employment work must be in connection with a particular contract regarding which the former public employee played a procurement role or had responsibility in his or her public capacity; the restrictions do not encompass entire subject matters of one's former public agency." CEO 07-10 (citing CEO 06-3 (note 6)).

The specific prohibitions under s. 112.3185(3) should not apply to Mr. Wolf's employment at DMS because he did not have a "personal and substantial role in the development or procurement" of any particular contract entered by DMS during his employment. As a point of clarification, we ask the Commission to consider that two of the four contracts identified above did not exist at the time when Mr. Wolf's employment at DMS concluded (see footnote 2). See CEO 02-17 (note 5) (the phrase "within responsibility" is not defined in the Code of Ethics; it "encompasses a monitoring, managing, or similar role regarding a contract, roles which cannot exist in relation to a contract which has not yet been entered into.").

In respect to s. 112.3185(4), we submit that this two-year ban should not apply to Mr. Wolf's circumstances because the work he intends to seek in the next twelve months, by pursuing public contracts with Florida executive branch agencies *other than DMS*, will not involve the discrete types of public contracts that could be subject to this subsection. The attached Agency Organizational Charts and points above regarding DMS division director reporting responsibilities support a determination that Mr. Wolf did not have direct supervisory duties regarding any of the public contracts in issue. From now through May 13, 2018, the two-year anniversary of Mr. Wolf's last day of employment with DMS, his expressed goal is to help the Company seek public contracts (a) with Florida executive branch agencies *other than DMS*, (b) paid for by Florida executive branch agencies other than DMS, (c) which should not be considered contracts or subcontracts with DMS, and (d) which should not be considered DMS contracts supervised by or otherwise within Mr. Wolf's responsibility as the DMS acting Chief of Staff or Chief of Staff.

#### Closing

We ask that the Commission consider the facts and legal points set forth above and the information provided with this request, and if possible under these circumstances, provide an informal opinion to Mr. Wolf confirming that (a) he is not subject to the prohibitions of s. 112.3185(3), Florida Statutes, regarding the contracts identified above because did not have a "personal and substantial role in the development or procurement" of any of these particular contracts entered by DMS during his employment, and (b) that he is not subject to the prohibitions of s. 112.3185(4), Florida Statutes, because the contracts he intends to seek on behalf of the Company from executive branch agencies other than DMS do not constitute contracts with DMS for purposes of this statute.

Virindia Doss, Executive Director  
The Florida Commission on Ethics  
May 31, 2017  
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Given Mr. Wolf's employment with the Company and his professional experience in Florida state government, the application of a bar that would preclude him from pursuing opportunities with Florida executive branch agencies other than DMS regarding state term contracts would impede his ability to earn a living in Florida and possibly force him to move either out of this community or even out of state.

Please contact me at your earliest convenience should you require anything further in respect to this request.

Sincerely,

A handwritten signature in black ink, appearing to read 'T. G. Schoenwalder', written over a horizontal line.

Timothy G. Schoenwalder

Attachments (also via hand delivery)

cc: C. Christopher Anderson, III, Esq.  
(also via hand delivery, w/attachments)  
Mr. Ben Wolf  
(via e-mail, w/attachments)