POSTEMPLOYMENT RESTRICTIONS

DEPARTMENT OF CORRECTIONS EMPLOYEE ACCEPTING POST-PUBLIC-EMPLOYMENT WITH A VENDOR OF THE DEPARTMENT

To: Name withheld at person's request (Miami)

SUMMARY:

Under the circumstances presented, Sections 112.3185(3) and 112.3185(4), Florida Statutes, will not restrict an Assistant Warden with the Department of Corrections from leaving State employment and accepting a position with a vendor that is providing comprehensive healthcare for the Department. However, for two years after leaving State employment, Section 112.313(9)(a)4., Florida Statutes, will restrict him from representing the vendor for compensation before any agency officer or employee within his Departmental region. Referenced are CEO 19-5, CEO 18-18, CEO 18-9, CEO 12-4, CEO 11-24, CEO 09-6, CEO 09-5, CEO 07-16, CEO 07-10, CEO 07-6, CEO 06-3, CEO 05-16, CEO 05-4, CEO 03-8, CEO 00-6, CEO 93-2, CEO 90-27, CEO 89-20, CEO 88-79, and CEO 83-8.

QUESTION:

Would an Assistant Warden with the Department of Corrections be restricted under any post-public-employment provisions in the Code of Ethics from accepting an employment offer from a vendor providing comprehensive healthcare for the Department?

Under the circumstances presented, this question is answered in the affirmative.

In your letter of inquiry and additional information supplied to our staff, you indicate you are one of the Assistant Wardens for the Everglades Correctional Institution with the Florida Department of Corrections. You state your position as Assistant Warden is classified as Selected Exempt Service (SES) and that you have served in that capacity since March 2017. You relate your role as Assistant Warden largely pertains to overseeing the security operation of the Everglades Correctional Institution, and you have provided a job description for your position that indicates you also assist in supervising "the day-today functions of the [I]nstitution and monitor[ing] daily operations."

Your inquiry stems from a post-public-employment job offer that you have received from a Department vendor (hereinafter, "the vendor"). The vendor is currently contracting with the Department of Corrections to provide comprehensive healthcare for the inmate population at all the Department's correctional institutions. It has offered you the position of Health Services Administrator at the Dade Correctional Institution, which you indicate would require you to be physically placed at the Dade facility and would entail regularly interacting with Department staff. You have provided the vendor's job description of the Health Services Administrator position, which indicates this position is responsible for—among other duties—directing and supervising the work of the medical, dental, mental health, nursing, technical, clerical, and support service teams that the vendor has assigned to the Dade Correctional Institution.

You ask whether you will have a prohibited conflict of interest under any post-public-employment restriction in the Code of Ethics (Part III, Chapter 112, Florida Statutes) were you to accept the vendor's employment offer and serve as the Health Services Administrator at the Dade Correctional Institution. As explained below, under your unique set of facts, it does not appear the restrictions in Section 112.3185, Florida Statutes, will apply were you to accept the employment offer, but you would be prohibited for two years under Section 112.313(9)(a)4., Florida Statutes, from making any type of representation to your former agency on the vendor's behalf.[1]

Turning first to Section 112.3185, Florida Statutes, that statute contains several prohibitions of which the most relevant to your inquiry is Section 112.3185(4), Florida Statutes,[2] which states:

> 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. If the agency employee's position is eliminated and his or her duties are performed by the business entity, this subsection may be waived by the agency head through prior written approval for a particular employee if the agency head determines that the best interests of the state will be served thereby.

The provision prohibits you from being employed with any business entity for two years after you resign from the Department when your employment is related to a contract for contractual services that fell within your responsibilities while at the Department. This two-year prohibition is contract specific; it does not prevent you from working on programs or subject matter related to the Department, but only from working on contracts for contractual services that were within your responsibilities. See CEO 07-10 and CEO 06-3, n.6.

Certain statutory criteria in Section 112.3185(4) are present in your situation. From what you indicate, the contract between the Department and the vendor is for "contractual services"—as you relate it requires the vendor to provide healthcare to incarcerated patients at the Department's correctional institutions—and it appears your potential position with the vendor will be "in connection" with the contract as it will require you to work at a particular correctional institution to ensure all patients are receiving adequate care. The question remains whether the contract with the vendor falls "within your responsibility" as a current Department employee.

The phrase "within responsibility" is not defined in the Code of Ethics. See CEO 11-24. In the past, we have found a contract to be within a public employee's responsibility when he or she—or a subordinate—has monitored or managed the contract, or when a public employee has ultimate authority over a contract. See CEO 19-5, CEO 18-18, CEO 03-8 and CEO 93-2. If the employee merely has incidental contact with a contract, meaning they do not have a substantive role concerning it, then the prohibition in Section 112.3185(4) does not apply. See CEO 18-9, n.5, CEO 06-3 and CEO 93-2.

Here, you state you are not the monitor or manager on the Department's contract with the vendor. You indicate a separate Department employee, over whom you have no supervisory authority, monitors the vendor's performance of the contract in Region 4 of the Department, where the Everglades Correctional Institution and the Dade Correctional Institution are located.[3] You also state you have no "contractual oversight" or "decision-making authority" regarding the Department's contract with the vendor, and that your interaction with the vendor "is strictly operational and site-based[,]" meaning you interact with vendor staff only "in the context of [the] day-to-day institutional management and coordination" of your correctional facility. In other words, your involvement with the vendor is not because you have managerial responsibilities concerning the contract, but simply because, as an Assistant Warden, you oversee the general operation of your facility.

It is worth emphasizing that simply because you have no authority to make decisions concerning a contract does not mean you have no responsibilities concerning it. For instance, if your duties as Assistant Warden included evaluating the work performed by the vendor or collaborating with the vendor in providing services, Section 112.3184(4) could apply, even if you were not involved in making overall decisions concerning the contract.

However, the information that you have provided—particularly the information provided while this advisory opinion was being prepared—indicates you do not have the substantive responsibilities concerning the contract that Section 112.3185(4) is meant to address. As described above, you have no role in monitoring the contract. Nor do you review any work performed by the vendor pursuant to the contract. You do indicate the vendor's employees report security-related issues to you concerning Department employees. And you also indicate you are involved in inspecting the medical area of the facility for safety, security, and sanitation, which presumably is the area where the vendor's employees are working. But simply because you receive information from the vendor about security matters or inspect areas of the facility where the vendor may be present does not mean you have responsibilities concerning the vendor's contract. Indeed, you state the contract does not even create a duty on the part of the vendor to maintain the medical area of the facility.

In short, in your role as Assistant Warden, it appears any contact that you have with the vendor is by necessity and relates only to the general management of your correctional institution. You have no specific duties or role concerning the performance of the vendor's contract with the Department. For this reason, the two-year prohibition in Section 112.3185(4) will not apply were you to accept the vendor's employment offer.

That being said, regardless of Section 112.3185(4), another statute will be applicable were you to begin serving as a Health Services Administrator at the Dade Correctional Institution. This statute is Section 112.313(9)(a)4., Florida Statutes, which states:

> An agency employee, including an agency employee who was employed on July 1, 2001, in a Career Service System position that was transferred to the Selected Exempt Service System under chapter 2001-43, Laws of Florida, may not personally represent another person or entity for compensation before the agency with which he or she was employed for a period of 2 years following vacation of position, unless employed by another agency of state government.

Essentially, Section 112.313(9)(a)4. places a two-year prohibition on former agency employees representing persons or entities for compensation before their former agencies. For purposes of this prohibition, Section 112.313(9)(a)2.a.(I), Florida Statutes, defines an "employee" as "[a]ny person employed in the executive or legislative branch of government holding a position in the . . .Selected Exempt Service . . ." Because your position as Assistant Warden is classified as SES, you will be subject to the two-year prohibition in Section 112.313(9)(a)4. if you leave that position and enter the private sector.

An initial matter to consider in applying Section 112.313(9)(a)4. is what your "agency" will be for purposes of the statutory prohibition. Past Commission opinions have clarified that your "agency" will be Region 4 of the Department, as that Region encompasses the Everglades Correctional Institution where you are currently employed. See CEO 90-27, CEO 89-20, and CEO 88-79 (finding for purposes of Section 112.313 that the "agency" of a former Department employee will be the region in which his or her correctional institution is located). The Dade Correctional Institution, where the vendor intends to place you, is also located in Region 4. Considering this, the question becomes whether—if you accept the vendor's offer to serve as its Health Services Administrator at the Dade Correctional Institution—you will be required to make any "representations" before Region 4 personnel on the vendor's behalf within two years of leaving your position.

The term "representation" is defined in Section 112.312(22), Florida Statutes, as:

> 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 employes of any agency on behalf of a client.

This definition is very broad, precluding almost all contact between you and Region 4 officers and employees during the two-year period. See CEO 07-16, n.5 and CEO 05-4 (both opinions emphasizing the breadth of the definition). Examples of prohibited representations include attending agency meetings on behalf of a new employer, even without speaking (see CEO 07-6, Question 1), as well as communicating with agency personnel orally or in writing. In the past, the Commission has recognized that actions needed to carry out the terms of a contract may not always constitute "representation" within the meaning the prohibition. See, for example, CEO 09-6 and CEO 05-16. However, those opinions are confined to rote, mechanical contact where there is no discretion on the part of the agency that can be influenced (e.g., the mere conveyance of information to agency personnel). See CEO 11-24, n.10, CEO 09-5, and CEO 00-6. If the contact is intended to have the agency or its personnel take or not take some discretionary action, the prohibition will apply. See CEO 12-4, n.6.

Here, certain contact that you might have with Region 4 personnel as the Health Services Administrator at the Dade Correctional Institution might be mechanical or rote in nature. For example, you indicate the Health Services Administrator is responsible for passing along information to facility administration on security issues, such as if an inmate is working in the medical area without being assigned there or if Department personnel are not properly escorting nurses around violent or aggressive inmates. In these situations, it appears the Health Services Administrator merely conveys information about security matters to Region IV personnel. There is no

indication that the Health Services Administrator is involved in deciding whether to respond or what actions to take.

Similarly, you relate the Health Services Administrator is responsible for investigating complaints by inmates about the medical care being provided by vendor employees. You indicate the Health Services Administrator investigates each complaint to ensure that the vendor's employees are "conducting their duties and responsibilities as required." Conceivably, such an investigation may involve interviewing or discussing the matter with Region IV personnel, but only to collect information so that the vendor—not the Department—can make an informed decision.

These types of interactions do not appear to involve the Health Services Administrator attempting to influence discretionary decisions of Region IV personnel. In themselves, they do not appear to constitute the type of "representations" that Section 112.313(9)(a)4. prohibits. However, not all interactions between the Health Services Administrator and Region IV personnel may be categorized as this type of rote, mechanical contact.

One area of concern is the potential interactions that the Health Services Administrator may have if issues arise during medical inspections. You state the medical areas of each correctional institution are inspected "[c]ontinuously by staff and at least weekly by [institution] administration." If issues arise during an inspection, you indicate it is the responsibility of the Health Services Administrator assigned to that facility to coordinate "a plan of action [with institution administration] to resolve those issues." Presumably then, if you are employed as the Health Services Administrator at the Dade Correctional Institution, and if issues arise following an inspection, you will be responsible for working with Institution personnel in deciding what action(s) to take.

In addition, you relate the Health Services Administrator at the Dade Correctional Institution works with facility administration to resolve conflicts between Institution staff and vendor employees, such as when Institution staff is not cooperating, is hindering patient care, or is violating the Health Insurance Portability and Accountability Act (HIPAA). Some of these interactions may simply involve the Health Service Administrator reporting a conflict and leaving the matter with facility administration to address, which would not be a prohibited "representation." However, it is conceivable that more serious conflicts will require increased involvement by the Health Services Administrator, and that involvement, in turn, may influence personnel-related decisions by Region 4 administration.

These examples are not an exhaustive list, but they at least indicate the Health Services Administrator at the Dade Correctional Institution likely will have much more than rote, mechanical contact with Region IV officers and staff. This is of particular concern as you indicate the Health Services Administrator at the Dade Correctional Institution is required to be physically present and on-site, which increases the risk of you making a prohibited "representation" to a Region IV officer or employee. Any comment to Dade Correctional Institution personnel in your capacity as the Health Services Administrator beyond the mere conveyance of information—even your attendance in that capacity at an Institution meeting or workshop—will violate the statute. Essentially, while the two-year restriction in Section 112.313(9)(a)4. does not preclude you from accepting the employment offer from the vendor, it will limit the amount and type of communication that you may have with Institution personnel on the vendor's behalf.

In summary, the prohibitions in Section 112.3185 will not apply were you to accept the position of Health Services Administrator at the Dade Correctional Institution. However, you will be subject to the restriction in Section 112.313(9)(a)4., which will limit the types of communications that you may have with Region 4 personnel for two years after leaving public employment.

Your question is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on June 6, 2025, and **RENDERED** this 11th day of June 2025.

Luis M. Fusté, *Chair*

[1]Commission staff provided letters to you concerning your inquiry on April 4, 2025, and April 15, 2025. This advisory opinion is based on the information that you initially provided during the drafting of those letters, as well as on further information that you subsequently

provided during the preparation of this opinion. The guidance in this opinion supersedes any earlier recommendations provided in the letters.

[2]Section 112.3185(3), Florida Statutes, which is a separate subsection of the statute, prohibits you from accepting any employment or contractual relationship with a business entity that is "in connection with any contract in which [you] participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, or investigation while an officer or employee." The Commission has limited its interpretation of this list of activities to the procurement process. See CEO 00-6 and CEO 83-8. Here, from what you indicate, you were not involved in procuring the Department's contract with the vendor. Accordingly, Section 112.3185(3) will not apply were you to accept the vendor's employment offer.

[3]The Department's website indicates these Correctional Institutions are both in Region 4. See https://www.fdc.myflorida.com/institutions/institutions-list/region-4-office.

POST-EMPLOYMENT RESTRICTIONS

FORMER LEGISLATIVE ANALYST REPRESENTING CLIENTS BEFORE THE FLORIDA LEGISLATURE

To: Mr. Tomas M. Bowling (Tallahassee)

SUMMARY:

Section 112.313(9)(a)4., Florida Statutes, will not prohibit a Member Services Liaison for the Florida House Majority Office from representing clients before the Florida Senate within two years of leaving employment with the Legislature, but it will prohibit him, during that two-year period, from representing clients before the Florida House. Referenced are CEO 18-2, CEO 16-13, CEO 16-11, CEO 14-32, CEO 11-24, CEO 11-22, CEO 11-10, CEO 09-8, CEO 00-20, CEO 00-11, CEO 94-20, and CEO 87-2.

QUESTION:

Will a Legislative employee serving in an analyst position with the Florida House Majority Office be prohibited by Section 112.313(9)(a)4., Florida Statutes, from representing clients for compensation before both chambers of the Florida Legislature within two years of leaving employment?

This question is answered as follows.

In your letter of inquiry and correspondence with our staff, you indicate you currently serve as one of the Member Services Liaisons for the Florida House Majority Office. While this is your position title, you state the Legislature's Office of Human Resources categorizes your position as that of a "legislative analyst." You indicate your duties in the Office involve monitoring the news, social media, and committee meetings, summarizing bills and amendments, and creating informational graphics and publications. You relate your role is "largely behind the scenes," and that none of your responsibilities requires you to interface with House employees outside of your Office. In particular, you relate that contact with other parts of the chamber—such as with House members or their staff—typically is handled by your Office's Staff Director or Deputy Staff Director. You also state you have no responsibilities that would require you to interface with any member or employee of the Florida Senate.

Given your responsibilities, you inquire how the two-year postemployment restriction in Section 112.313(9)(a)4., Florida Statutes, will apply to you once you leave public employment. You specifically inquire whether the prohibition will prevent you from representing clients for compensation for two years before both chambers of the Legislature, or if it will only prevent you from representing clients for compensation before the Florida House.

Section 112.313(9)(a)4. prohibits a former agency employee from representing persons or entities before his or her former agency for two years after leaving public employment. See CEO 94-20. The prohibition states in relevant part:

> (9) POSTEMPLOYMENT RESTRICTIONS, STANDARDS OF CONDUCT FOR LEGISLATORS AND LEGISLATIVE EMPLOYEES.—
> (a) . . .
>
> 2. As used in this paragraph:
> a. "Employee" means:
>
> (IV) An executive director, staff director, or deputy staff director of each joint committee, standing committee, or select committee of the Legislature; an

> executive director, staff director, executive assistant, analyst or attorney of the Office of the President of the Senate, the Office of the Speaker of the House of Representatives, the Senate Majority Party Office, Senate Minority Party Office, House Majority Party Office, or House Minority Party Office, or any person, hired on a contractual basis, having the power normally conferred upon such persons, by whatever title.
>
> * * *
>
> 4. An agency employee, including an agency employee who was employed on July 1, 2001, in a Career Service System position that was transferred to the Selected Exempt Service System under chapter 2001-43, Laws of Florida, may not personally represent another person or entity for compensation before the agency with which he or she was employed for a period of 2 years following vacation of position, unless employed by another agency of state government.

(emphasis added). While your position title is Member Services Liaison—which does not appear on the list of Legislative employees in Section 112.313(9)(a)2.a.(IV)—you indicate that the Legislature's Office of Human Resources classifies your position as that of a "legislative analyst." Given this classification, and considering that analysts employed within the House Majority Party Office are listed as "employees," the two-year prohibition in Section 112.313(9)(a)4. will apply to you once you leave public employment.[1] The only question remaining concerns the extent of your "agency" for purposes of the statute, namely whether it covers only the Florida House or extends to the Florida Senate as well.

Preliminarily, we emphasize that, because your employment was with the Legislature, Section 112.313(9)(a)4. will not prohibit you from representing for compensation before other legislative branch entities outside the Legislature. The statute only applies to the "agency" where you were "employed[,]" which means you may represent clients or employers for compensation before other agencies—even other agencies in the legislative branch—without violating the prohibition. See CEO 16-13, Question 2 (stating the term "agency" as used in Section 112.313(9)(a)4. is confined "only to the particular public agency where a person was formerly employed"), CEO 00-20 (finding a former House member could represent clients for compensation before the Public Service Commission, a legislative agency, within two year of leaving his position), and CEO 00-11 (finding the former General Counsel of the Department of Environmental Protection, an executive branch agency, was not restricted by Section 112.313(9)(a)4. from representing clients before the Governor and the Cabinet). Accordingly, Section 112.313(9)(a)4. will not prohibit you from representing clients for compensation within two years of leaving public employment before, for example, the Office of the Auditor General or the Public Service Commission, despite the fact that they are both legislative branch agencies, as you were not "employed" by either entity.

Turning to the extent of your "agency" for purposes of the statute, we have found in the past, when analyzing the applicability of various ethics prohibitions to members of the Legislature, that their "agency" is the entire Legislature, not merely the chamber where they serve. See CEO 09-8 and CEO 87-2 (both opinions stating the "agency" of a serving House member is the Legislature itself). We have extended this finding to the post-office holding restriction for members of the Legislature,[2] concluding that they are prohibited from lobbying either legislative chamber for two years after leaving office. See CEO 00-20 (determining a former House member may not personally represent clients before any members of the Legislature or Legislative staff for two years after vacating office). It seems logical to conclude the "agency" of a member of the House or Senate is the entirety of the Legislature, as a member's activities and influence presumably extend to both chambers.

More complex are questions concerning the "agency" of legislative staff. In the past, when determining the "agency" of legislative staff for purposes of Section 112.313(9)(a)4., we have cited the opinions mentioned in the preceding paragraph and concluded the staff member's "agency" to be both chambers of the Legislature. For example, CEO 14-32 dealt with a deputy staff director of a House standing committee who inquired about how Section 112.313(9)(a)4. would apply were he to leave his position. Citing CEO 00-20 and CEO 87-2—which, as previously described, pertain to House members—we found the deputy staff director's "agency" to be the entirety of the Legislature, not merely the chamber where he served, for purposes Section 112.313(9)(a)4. And

CEO 11-22 addressed a staff director for a Senate standing committee and determined, for purposes of Section 112.313(9)(a)4., that his "agency" was the entire Legislature as well. To support this finding in CEO 11-22, we again cited CEO 00-20 and CEO 87-2, even though the "agency" in question was that of a member of legislative staff and the earlier opinions were issued to House members.

We see no need to revisit the outcomes reached in CEO 14-32 and CEO 11-22. Directors and deputy directors of House or Senate standing committees are positions of elevated importance among legislative staff. It may very well be that their influence extends throughout both legislative chambers, as would warrant treating their "agencies" as the entire Legislature for purposes of Section 112.313(9)(a)4. However, this does not reflect the reality of the position in question here—that of an analyst within a House Office with more limited responsibilities and influence. We find that using these prior opinions that conclude that the "agency" of each member of legislative staff mentioned in Section 112.313(9)(a)2.a.(IV) is the entirety of the Legislature—however great or small their role—paints with too broad a brush here, especially considering that the basis for these opinions were prior findings involving only House members. While there is no question that the two-year prohibition in Section 112.313(9)(a)4. applies to enumerated legislative staff, we find that notice must be taken of each staff member's position and responsibilities when determining if his or her "agency," for purposes of the prohibition, extends beyond the chamber in which they serve.

This approach reflects how the Commission has determined the "agency" of public officers and employees employed by state agencies other than the Legislature. In those situations, we have recognized that the term "agency," as defined in the Code of Ethics, can be narrowly drawn. Section 112.312(2), Florida Statutes defines the term to mean:

> . . . any state, regional, county, local, or municipal government entity of this state, whether executive, judicial, or legislative; any department, division, bureau, commission, authority, or political subdivision of this state therein; any public school, community college, or state university; or any special district as defined in s. 189.012.

Accordingly, we have found the term "agency" as used in Section 112.313(9)(a)4. does not necessarily refer to the whole of a department or division, but to the lowest departmental unit within which a public officer's or employee's influence might reasonably be considered to extend. See, among others, CEO 18-2 (finding the "agency" of a former SES employee of the Department of Health to be only certain Department units and boards, not the entirety of the Department); CEO 11-24 (finding the "agency" of a former SES employee of the Department of Children and Families to be only the Department's Central Region and a certain program office, as that was the extent of the employee's influence); and CEO 11-10 (finding the "agency" of a former SMS employee of Florida Department of Transportation to be only District Seven, and not the other Departmental Districts or the Turnpike Enterprise).

This reasoning seems equally applicable to determining whether the "agency" of a legislative employee —serving in a position listed in Section 112.313(9)(a)2.a.(IV)—should be limited to his or her chamber or encompass the entirety of the Legislature. The employee's position and responsibilities should be analyzed to determine if his or her influence extends beyond the chamber in which he or she is situated. It may be that the "agency" of certain positions enumerated in the statute will continue to be the Legislature as a whole. This may particularly be the case when a position's responsibilities require an employee to interface with both chambers. However, other positions enumerated in the statute have a more limited focus, perhaps not even requiring contact with the other chamber, and this approach will acknowledge that reality.

One example is the situation here, where your responsibilities as a Member Service Liaison for the House Majority Office are limited to the House chamber and do not require you to interact with any office, unit, or member of the Senate. Considering this, as well as the nature of your job responsibilities as previously described, we find your "agency" for purposes of Section 112.313(9)(a)4. to be the House chamber alone. Accordingly, while you will be prohibited from representing persons or entities for compensation before the House for two years after leaving public employment, the statute will not restrict you during that two-year period from representing persons or entities for compensation before the Senate, which is not your agency.

Inasmuch as this opinion finds that the "agency" of a legislative employee for purposes of Section 112.313(9)(a)4. may not always be the entire Legislature, and that such determinations will hinge upon an individualized assessment of the extent of the employee's influence, we recede from those portions of CEO 14-

32 and CEO 11-22, and any related opinions, stating otherwise. As a final note, it is well settled that the purpose of Section 112.313(9)(a)4. is to restrict influence peddling, meaning the use of a public position to create opportunities for personal profit once an officer or employee leaves his or her position. See CEO 14-32, CEO 11-22, and CEO 11-10. We believe that acknowledging the limited roles of certain legislative employees does not run counter to this goal. Without an indication that a legislative employee has some type of presence in the other chamber—or, at the very least, contact with the other chamber—the chance is minimal that he or she will have any influence in that other chamber that can be leveraged upon leaving public employment.

Your question is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on October 25, 2024, and **RENDERED** this 30th day of October, 2024.

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Luis M. Fusté, *Chair*

[1]To be clear, the sole basis for applying the statute to your position is due to Section 112.313(9)(a)2.a.(IV). Because the Legislature is not part of the State Personnel System, you are not subject to Section 112.313(9)(a)2.a.(I), Florida Statutes, which extends the two-year postemployment representation restriction to former State employees in Senior Management Service (SMS) and Selected Exempt Service (SES) positions. See CEO 16-11, n.2.

[2]Section 112.313(9)(a)3., Florida Statutes, applies to members of the Legislature a two-year postemployment restriction concerning representation before their former "government body or agency" that is nearly identical to the prohibition in Section 112.313(9)(a)4.

CEO 19-5—March 13, 2019

POSTEMPLOYMENT RESTRICTIONS

DCF FORMER ASSISTANT SECRETARY EMPLOYED BY DCF CONTRACTOR

To: Name withheld at person's request (Odessa)

SUMMARY:

A former employee of the Department of Children and Families (DCF) would not be prohibited under Section 112.3185(3) or (4), Florida Statutes, from accepting employment with a company that has DCF contracts, through application of Section 112.316, Florida Statutes, to the particular facts presented. CEO 12-20, CEO 07-16, and CEO 01-6 are referenced. [1]

QUESTION:

Would Section 112.3185, Florida Statutes, prohibit your holding employment or a contractual relationship, after you leave public employment with the Department of Children and Families, with a company in connection with contracts for which you were not personally and substantially involved in procurement, but which are among several legislatively-mandated Community-Based Care contracts with which your Department subordinates were somewhat involved in oversight?

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

In your letter of inquiry, additional information supplied to our staff, and telephone conversations between you and our staff, you relate that since 2002, you have been employed with the Department of Children and Families (DCF). You further relate that, in recent years, you have served in several roles, including as General Counsel (June 2014-December 2017) and Interim Secretary (September 2018-January 14, 2019). From December 2017 through August 2018, you served in your current role as Assistant Secretary of Operations—recently resuming this role when a full-time Secretary was named. You relate that in your role as Assistant Secretary of Operations, as well as while previously serving as Interim Secretary, you managed six Regional Managing Directors (RMDs),[2] who not only sign the contracts held with legislatively-mandated Community-Based Care (CBC) lead agencies[3], but also work on the specific performance of these same contracts.[4] You further relate that your present DCF responsibilities include supervision of agency operations for approximately 7,000 employees and programs in all 67 Florida counties under an annual agency budget of approximately 3.2 billion dollars.

You relate that the lead CBC agency for the Sixth and Thirteenth Judicial Circuits, Eckerd Connects (Eckerd), has offered you a position as Vice President (VP) of Community-Based Care at Eckerd. As VP, you relate that you would be assisting the chief of the CBC (an Eckerd employee) in the coordination, integration, and management of child protective services in both Circuits, as well as his overall efforts to improve the system for the children in care. You further relate that the position at Eckerd would include responsibilities in connection with the company's contracts for contractual services with DCF in both Circuits.

With respect to the Thirteenth Judicial Circuit, you relate that the original contract between DCF and Eckerd took effect on July 1, 2012, was renewed in June of 2017, and will expire in June of 2020.[5] You relate that although you were serving as legal counsel for the DCF SunCoast Region—where the Eckerd contract exists—when the original contract took effect, you did not participate, directly or indirectly, in the solicitation, procurement, approval or signing of the contract. You further explain that in 2011, when the contract was originally awarded, you were not working in the SunCoast Region. Rather, you were serving as Assistant Region Legal Counsel in the DCF Northwest Region (Tallahassee) and were specifically assigned to handle only matters in the Northwest Region, whereby you were unaware of the existence of Eckerd and any contractual relationship that it had with DCF. You also relate that you did not participate, directly or indirectly, in the solicitation,

procurement, approval or signing of the present contract, which took effect while you were serving as General Counsel for DCF.

With respect to the Sixth Judicial Circuit, you relate that Eckerd originally became a contracted lead agency with DCF in July 2008, when you were an Assistant General Counsel, and it subsequently renewed its contract with DCF on or about July 1, 2014, shortly after you began your role as General Counsel for DCF, and that the renewed contract will expire on June 20, 2019. You explain that you had no involvement with the July 2008 contract nor oversight of any employees who had involvement. Regarding the July 2014 contract renewal, you also relate that you did not participate, directly or indirectly, in the solicitation, procurement, approval or signing of the contract, and that the contract would have been reviewed by the legal department prior to you becoming General Counsel in June of 2014.

Two provisions of the Code of Ethics for Public Officers and Employees are relevant to your inquiry. The first is Section 112.3185(3), Florida Statutes, which states:

> 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. When the agency employee's position is eliminated and his or her duties are performed by the business entity, this subsection does not prohibit him or her from employment or contractual relationship with the business entity if the employee's participation in the contract was limited to recommendation, rendering of advice, or investigation and if the agency head determines that the best interests of the state will be served thereby and provides prior written approval for the particular employee.

Section 112.3185(3) contains a restriction, that is unlimited in duration, on former public employees holding employment or a contractual relationship with a business entity in connection with any contract in which the employee participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, or investigation while an employee. However, because you relate that you did not have *any* involvement with the procurement, development, award, or approval of the existing contracts between DCF and Eckerd, your prospective employment with the contractor (Eckerd) would not be restricted by this statute. In CEO 12-20, we opined that a similarly-situated DCF Assistant Secretary would not be subject to Section 112.3185(3) where he had not participated in the procurement of a DCF contract with his prospective new employer—a CBC lead agency.

The second provision of the Code of Ethics that is relevant to your inquiry is Section 112.3185(4), Florida Statutes, which states:

> 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. If the agency employee's position is eliminated and his or her duties are performed by the business entity, this subsection may be waived by the agency head through prior written approval for a particular employee if the agency head determines that the best interests of the state will be served thereby.

Section 112.3185(4) sets out a two-year restriction on former public employees holding employment or a contractual relationship with any business entity in connection with any contract for contractual services which was within the employee's responsibility. You do not dispute that the contracts between DCF and Eckerd are apparently contracts for contractual services, as defined in Section 287.012(8), Florida Statutes.[6] You further acknowledge that your responsibilities as VP of Community-Based Care at Eckerd would be "in connection with" the present DCF contracts. Therefore, as in CEO 12-20, the remaining issue is whether the relevant contracts were "within your responsibility," as an employee of DCF. We have previously determined that "within

responsibility" includes situations in which you personally monitored or managed a contract and situations in which your subordinates monitored or managed. *See* CEO 07-16 and CEO 01-6.

You relate that although you see the performance reports of every CBC lead agency, you are not personally responsible for the oversight and performance of the associated contracts and you have never signed or made decisions regarding either Eckerd contract.[7] Notwithstanding that the present contracts between Eckerd and DCF were signed by the RMDs *prior to your* becoming Assistant Secretary of Operations, based upon you being within the ultimate chain of supervision above the RMDs and DCF contract monitors and that, as part of your duties, you are informed of serious issues that may occur related to CBC contractors, including Eckerd, we find that the relevant contracts fall within your responsibility. As a result, upon leaving DCF, you would be restricted by Section 112.3185(4)—if applied in isolation—from working for your prospective employer on these contracts.

However, the particular circumstances of your inquiry include the following facts: The relevant contracts were negotiated, entered into and signed by persons other than you. When the Eckerd contracts were signed, you did not manage or monitor any DCF employee—including a RMD—who had oversight or signatory authority over the contracts. Unlike your former colleague, the Assistant Secretary in CEO 12-20, you have *never* served as a Managing Director of any DCF Region, whereby you would be directly responsible for subordinates who monitored quality and operations related to all DCF contracts within the particular region.[8] However, like your former colleague (the requestor of CEO 12-20), you similarly represent that since becoming Assistant Secretary for Operations in December 2017, you have not routinely reviewed corrective action plans or related information regarding the contracts or matters related to your prospective employer. You also relate that the relevant contracts are primarily monitored within DCF by a Contract Oversight Unit, which reports to the DCF Contracted Client Services Director and a Fiscal Monitor Unit, which reports to DCF's Chief Financial Officer, and that both units ultimately report to the Assistant Secretary for Administration. Therefore, as we found in CEO 12-20, these factors lend themselves to the application of Section 112.316. Florida Statues, which states:

> CONSTRUCTION.—It is not the intent of this part, nor shall it be construed, to prevent any officer or employee of a state agency or county, city, or other political subdivision of the state or any legislator or legislative employee from accepting other employment or following any pursuit which does not interfere with the full and faithful discharge by such officer, employee, legislator, or legislative employee of his or her duties to the state or the county, city, or other political subdivision of the state involved.

Based upon the foregoing, and in light of the remarkably similar circumstances presented in CEO 12-20, vis-Ã -vis the circumstances presented in your inquiry, we believe that it is appropriate to apply Section 112.316 to negate the restriction that would arise in your situation via the literal language of Section 112.3185(4).

Accordingly, under the specific circumstances of your inquiry, we find that you are not restricted by Section 112.3185, Florida Statutes, from working after you leave DCF employment in connection with the contracts between Eckerd and DCF.[9]

Your question is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on March 8, 2019, and **RENDERED** this 30th day of January, 2019.

Guy W. Norris, *Chair*

[1]Prior opinions of the Commission on Ethics may be obtained from its website (www.ethics.state.fl.us).

[2]You relate that these six RMDs are responsible for all 67 counties in the state.

[3]You explain that DCF holds contracts with entities to operate as lead CBC agencies in each of the Judicial Circuits.

[4]During conversations with our staff, you indicated that DCF's Secretary, not the RMDs, has the ultimate authority over the contracts.

[5]During conversations with our staff, you indicated that the "[u]pon renewal in 2016" reference in the second paragraph of your letter dated January 14, 2019, is a typographical error.

[6]"Contractual service" means the rendering by a contractor of its time and effort, rather than the furnishing of specific commodities. The term only apples to those services rendered by individuals and firms who are independent contractors. [Section 287.012(8), Florida Statutes.] *See also*, Section 287.012(8), for specific examples.

[7]During conversations with our staff, you related that the RMDs make recommendations regarding contract renewals for the CBC lead agencies to the Secretary.

[8]In CEO 12-20, one of the factors that we considered in applying Section 112.316, Florida Statutes was that the employee's oversight of supervisors of the relevant contract as Central Region Managing Director was limited to a ten-week period (prior to him becoming Assistant Secretary of Operations in September 2011), and nearly half of the two-year limitation period (which would have ended in September 2013) related to that position under Section 112.3185(4) had already lapsed by the time we considered the matter in August 2012. Here, the requestor of the instant opinion had no time period of involvement as a Managing Director (or any other position) where she would have had similar oversight of supervisors of the relevant contracts.

[9]You have indicated you understand that Section 112.313(9)(a)4, Florida Statutes, would prohibit you from personally "representing" your employer for compensation before DCF for two years following the vacation of your DCF position. "Represent" is defined in Section 112.312(22) as "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." Note that this definition is very broad, including almost all contact on behalf of your prospective employer with DCF 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 made in an effort to get DCF or its personnel to do or not do something. Also note that Section 112.313(8), Florida Statutes, which prohibits the use of "inside information" gained by virtue of public position, remains applicable even after you leave public employment. See CEO 12-20, footnote 12.

CEO 17-08—August 2, 2017

POSTEMPLOYMENT RESTRICTIONS

FORMER DMS EMPLOYEE WORKING FOR BUSINESS ENTITY CONTRACTING WITH DMS

To: Name withheld at person's request (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.[1]

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 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.[2] 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 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 112.3185(4), Florida Statutes,[3] 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 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[4] 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.[5]

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 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 DMS' 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 representing 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.[6]

Your question is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on July 28, 2017, and **RENDERED** this 2nd day of August, 2017.

Michelle Anchors, *Chair*

[1]Opinions of the Commission on Ethics may be obtained from www.ethics.state.fl.us.

[2]See http://www.dms.myflorida.com/agency_administration

[3]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.

[4]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.

[5]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.

[6]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.

POST EMPLOYMENT RESTRICTIONS

FORMER DCF CONTRACT MANAGER HOLDING EMPLOYMENT WITH ENTITY CONTRACTING WITH DCF

To: Name withheld at person's request (Seminole County)

SUMMARY:

Section 112.3185(4), Florida Statutes, would prohibit, for two years, a former Department of Children and Families employee from holding private employment with a community based care organization funded by the Department, because the employment would be in connection with a contract for contractual services that was within the employee's responsibility at DCF.[1] Referenced are CEO 15-15, CEO 14-22, CEO 12-20, CEO 11-24, CEO 07-16, CEO 07-11, CEO 06-3, and CEO 78-18.

QUESTION:

Would Section 112.3185(4), Florida Statutes, prohibit you from holding employment with a contractor, after you retire from the Department of Children and Families, when the position of employment is funded by a contract for contractual services you managed for the Department?

Your question is answered in the affirmative.

You state that you served as a contract manager for the Florida Department of Children and Families ("DCF"), in a Career Service position, until your retirement on May 31, 2016. In this position, you managed a contract that funds child welfare services in Seminole County. Contracts for community-based care, including the contract you managed, are awarded through a competitive bidding process, performance measures are established by DCF, and funding is based on a formula established by the Legislature.[2] Community Based Care of Central Florida ("CBCCF"), a private entity, disburses funds to various subcontractors who provide foster care, adoption, and independent living services to children in need. As contract manager, you monitored CBCCF to ensure compliance with relevant statutes, policies, and contract terms.

You would like to accept a position as Adoption Manager for CBCCF. Section 112.3185(4), Florida Statutes provides:

> 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. If the agency employee's position is eliminated and his or her duties are performed by the business entity, this subsection may be waived by the agency head through prior written approval for a particular employee if the agency head determines that the best interests of the state will be served thereby.

This provision prohibits you from being employed with any business entity,[3] for two years after your departure from DCF, when such employment is in connection with any contract for contractual services which fell within your responsibility while you were a DCF employee. The contract you managed at DCF funds child welfare services provided by CBCCF, including the Adoption Manager position you would like to accept. The DCF-CBCCF contract is a contract for "contractual services," as defined in Section 287.012(8), Florida Statutes, which includes social services provided by a contractor.[4] The contract falls "within your responsibility" because

you were the contract manager assigned to manage this agreement. Your duties included reviewing contract performance measures and deliverables, organizing and participating in System of Care meetings with regional managers from both DCF and CBCCF, processing invoices, and serving as an intermediary between the regional office and DCF Headquarters in Tallahassee.

The question is whether the position you hope to take at CBCCF is "in connection with" the DCF-CBCCF contract, thereby triggering the restrictions of Section 112.3185(4). At CBCCF, the Adoption Manager oversees subcontractors who provide services, including foster care, protective services, adoption, and independent living. You state that your primary responsibilities would include training and technical assistance for subcontractors, arranging post-adoption services, assisting with quality assurance reviews, and implementing the System of Care document. You state that you would not be involved in contract management at CBCCF. However, you would oversee subcontractors that are funded by the contract you managed at DCF, and these subcontractors are required to meet performance standards set by DCF. As in CEO 15-15 and CEO 06-03, which applied the two-year restriction found in Section 112.3185(4) to former employees whose work involved monitoring or managing private contractors, your proposed position with CBCCF would unavoidably be "in connection with" the DCF-CBCCF contract you formerly managed. Thus, Section 112.3185(4) restricts you from accepting the Adoption Manager position for two years from the date of your retirement.[5]

The second portion of Section 112.3185(4) describes a waiver that may be granted by an agency head, to a particular employee, when that employee's position is being eliminated or his or her duties are to be performed via private contract, as in CEO 14-22 and CEO 07-16. As there is no indication that DCF is contracting out your position, this provision does not apply to your situation.[6]

You asked that Section 112.316, Florida Statutes, be applied to negate the prohibition of Section 112.3185(4). This section provides:

> CONSTRUCTION. — It is not the intent of this part, nor shall it be construed, to prevent any officer or employee of a state agency or county, city, or other political subdivision of the state or any legislator or legislative employee from accepting other employment or following any pursuit which does not interfere with the full and faithful discharge by such officer, employee, legislator, or legislative employee of his or her duties to the state or the county, city, or other political subdivision of the state involved.

In CEO 12-20, upon which you rely, we applied this provision to find that a former DCF Assistant Secretary could accept a position as chief executive officer for a company that contracted with DCF, even though he had been responsible for subordinates who managed community-based care contracts with numerous entities. The facts of that opinion were substantially different from those you present, including the fact that the administrator had no personal day-to-day involvement in the contract management, and the fact that his oversight as an administrator was limited to a ten-week period that had ended almost one year prior to his departure from DCF. In contrast, according to your materials, your duties included "managing the contract, reviewing performance measures and deliverables, organizing and participating in System of Care meetings with DCF Regional Management, CBCCF management team, community partners," as well as "process[ing] monthly invoices" and "initiat[ing] all amendments/contracts." We cannot apply Section 112.316 in a circumstance which so squarely meets the parameters of the prohibition, as to do so would eviscerate the prohibition itself.

Accordingly, Section 112.3185(4) would prohibit, for two years, your holding the employment described.

ORDERED by the State of Florida Commission on Ethics meeting in public session on June 3, 2016, and **RENDERED** this 8th day of June, 2016.

Stanley M. Weston, *Chair*

[1] Prior opinions of the Commission on Ethics may be obtained from its website (www.ethics.state.fl.us).

[2]You state that you did not serve as the procurement manager, therefore you are not restricted by Section 112.3185(3), Florida Statutes. This section provides, 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.

[3]A nonprofit group can be a "business entity." See CEO 78-18 and CEO 07-11, Note 12.

[4]For the purposes of Section 112.3185(4), "contractual service" is defined in Section 287.012(8), Florida Statutes, to mean:

> The rendering by a contractor of its time and effort rather than the furnishing of specific commodities. The term applies only to those services rendered by individuals and firms who are independent contractors, and such services may include, but are not limited to, evaluations; consultations; maintenance; accounting; security; management systems; management consulting; educational training programs; research and development studies or reports on the findings of consultants engaged thereunder; and professional, technical, and social services.

[5]If the current contract between DCF and CBCCF expires and a new contract is issued, Section 112.3185(4) will not prohibit you from accepting employment related to the newly-issued contract, so long as you have not had responsibility for the new contract in your DCF capacity. Such work would not be in connection with the "old" DCF-CBCCF contract, which was within your responsibilities, but rather with the separate and newly awarded contract. See CEO 11-24.

[6]In your request, you mention a "grandfather clause" found in Section 112.313(9)(a)6. This can apply to employees in the Senior Management Service or in the Select Exempt Service, but only in reference to the prohibition of Section 112.313(9)(a)4, Florida Statutes, not to that of Section 112.3185(4).

POSTEMPLOYMENT RESTRICTIONS

DCF FORMER ASSISTANT SECRETARY EMPLOYED BY DCF CONTRACTOR

To: Name withheld at person's request (Ocoee)

SUMMARY:

A former employee of the Department of Children and Family Services would not be prohibited under Section 112.3185(3) or (4), Florida Statutes, from accepting employment as chief executive officer of a company in connection with a contract for contractual services, through application of Section 112.316, Florida Statutes, to the particular facts presented. CEO 12-04, CEO 11-24, CEO 01-6, and CEO 09-5 are referenced.[1]

QUESTION:

Would Section 112.3185, Florida Statutes, prohibit your holding employment or a contractual relationship, after you leave public employment with the Department of Children and Family Services, with a company in connection with a contract for which you were not personally and substantially involved in procurement but which is among many legislatively-mandated Community-Based Care contracts overseen by your Departmental subordinates?

Your question is answered in the negative, under the circumstances presented.

By your letter of inquiry and additional information provided, you relate that from July 1992 to the present you have been employed by the Department of Children and Family Services (DCF). From June 2007 to September 2011, you were Central Region Managing Director and from September 2011 to present, you have served as Assistant Secretary for Operations, statewide.

You further state that you are a candidate for the position of Chief Executive Officer (CEO) of Kids Central, Inc. (Kids Central), which is a company that contracts with DCF as a Community-Based Care (CBC) lead agency to provide contractual services for foster care and related functions for the five counties in the Fifth Judicial Circuit (formerly DCF District 13). The position with Kids Central would include responsibilities in connection with the company's contract for contractual services with DCF which expires June 30, 2016.

You relate that the Kids Central contract is one of many legislatively-mandated CBC contracts in Florida. You explain that the original contract between DCF and Kids Central took effect March 1, 2004, was renewed in 2007, and expired in 2010, requiring a new competitive solicitation. You state that you did not participate in the solicitation, procurement, approval or signing of the present Kids Central contract, which took effect July 1, 2011, while you were Central Region Managing Director and which was approximately ten weeks before you became Assistant Secretary for Operations.

You explain that as Central Region Managing Director, you were responsible for subordinates who monitored quality and operations related to all DCF contracts with the five-county Central Region, including program areas known as ACCESS Florida Food, Medical Assistance and Cash; Substance Abuse and Mental Health (SAMH); Adult Protective Services; Child Protective Investigations; Child Care Licensing; and CBC contracts, including the DCF contract with Kids Central. Your duties as one of six regional managing directors included interacting with the DCF office in Tallahassee as well as with persons in the communities served. Because CBC contractors, including Kids Central, obtain and supervise subcontracting service providers, you did not interact with providers.

You describe your present DCF responsibilities as follows:

- Supervision of statewide DCF operations through oversight of the Florida Abuse Hotline and Refugee services and program areas of ACCESS, Child Protective Investigations, Adult Protective Services, SAMH, and Child Care Licensing;
- Oversight of six regional managing directors whose subordinates oversee contracts, as stated above, including CBC contracts such as Kids Central; and
- Supervision of agency operations for 6,000+ employees and programs in all 67 Florida counties under an annual agency budget of approximately $2.8 billion.

As to your present role regarding the relevant contract and other CBC contracts, you state that, at the state level, the primary responsibilities for CBC contracts are shared by the Assistant Secretary for Administration, the statewide Family and Community Services Director, and the Office of the General Counsel. You relate that, as with other CBC contracts, the relevant contract is monitored within DCF by a Contract Oversight Unit, which reports to the DCF Contracted Client Services Director, and a Fiscal Monitor Unit, which reports to the DCF Chief Financial Officer, and that both units ultimately report to the Assistant Secretary for Administration. You explain that the CBC contractors also conduct their own internal reviews through a Memorandum of Understanding with the DCF Family Safety Program Office. You state that you are not involved in routine contract monitoring or corrective actions, which are handled as stated above, but that as Assistant Secretary for Operations you would expect to be informed of serious issues related to any CBC contractor's performance.

You write that, as chief executive officer of Kids Central, you would be responsible for managing and administering the company's services in connection with its DCF contract, and that such services primarily relate to foster care and related services for Circuit 5. You state that your primary responsibilities would be:

- Developing and sustaining a local system of care for coordination, integration, and management of all child protective services in Circuit 5;
- Ensuring continuity of care for all children referred to the local system of care;
- Providing all foster care and related services directly or through contracts with a network of subcontractors;
- Ensuring compliance with state and federal law and reporting performance outcomes;
- Assuming and managing financial risk based on a capped budget appropriated by the Florida legislature;
- Administering a workforce of approximately 100 employees and overseeing an annual budget of approximately $46 million; and
- Overseeing expansion of the company to bring in additional fund sources and contracts.

Section 112.3185(3), Florida Statutes, provides:

> 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. When the agency employee's position is eliminated and his or her duties are performed by the business entity, this subsection does not prohibit him or her from employment or contractual relationship with the business entity if the employee's participation in the contract was limited to recommendation, rendering of advice, or investigation and if the agency head determines that the best interests of the state will be served thereby and provides prior written approval for the particular employee.

Section 112.3185(3) prohibits you from having any employment with any business entity in connection with any contract in which you participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, or investigation.

Because you represent that you had no involvement, either as Central Region Managing Director or as Assistant Secretary for Operations, in the procurement, development, award, or approval of the existing contract

between DCF and Kids Central, your prospective employment with the contractor would not be restricted by this statute. In CEO 01-6, we opined that a former DCF district administrator would not be subject to Section 112.3185(3) where she had not participated in the procurement of a DCF contract with her new employer, a social services provider.

Section 112.3185(4),1 Florida Statutes, states:

> 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. If the agency employee's position is eliminated and his or her duties are performed by the business entity, this subsection may be waived by the agency head through prior written approval for a particular employee if the agency head determines that the best interests of the state will be served thereby.

Section 112.3185(4), Florida Statutes, prohibits you from being employed with any business entity within two years of your departure from DCF in connection with any contract for contractual services which was within your responsibility while you were an employee of the Department. The contract between DCF and Kids Central apparently is a contract for contractual services, and you do not dispute that it is such a contract, under the definition set forth above. Further, you acknowledge that your responsibilities as CEO of Kids Central would be "in connection with" the present DCF contract. Therefore, the remaining issue is whether the relevant contract has been "within your responsibility," as an employee of DCF since July 1, 2011, the date that the present Kids Central contract came into effect.

During approximately the first ten weeks of the existence of the relevant contract, from July 1 to September 15, 2011, you served as DCF Central Region Managing Director. In that position you were responsible for overseeing DCF employees who monitored operations of all contracts, including the Kids Central contract, for the Central Region. Currently, you oversee statewide DCF operations, including ultimately those operations related to CBC contracts, but state that you do not have knowledge of day-to-day operations of the contracts, including the contract with Kids Central.

We find that the relevant contract is within your responsibility. The facts you have presented reflect that, as Assistant Secretary for Operations, and formerly as Central Region Managing Director, your positions at DCF in the past year have been within the ultimate chain of supervision above DCF contract monitors and that, among other DCF duties, you are informed of serious issues that may occur related to CBC contractors, including Kids Central. This finding is in accord with our finding in CEO 01-6 construing "within responsibility" to include a situation in which an agency administrator is "ultimately . . . responsible for the provision of all services provided by [the agency] either directly or indirectly through contracts." Thus, Section 112.3185(4), if applied in isolation, would restrict your post-DCF employment regarding the provider.

However, the particular circumstances of your inquiry include, as set forth herein and provided by you, the following facts: The relevant contract was negotiated, entered into, and signed by persons other than you. Your oversight of supervisors of the contract as Central Region Managing Director was limited to a ten-week period, and nearly half of the two-year limitation period (which would end in September 2013) related to that position under Section 112.3185(4) has already lapsed. You represent that you have not, in your present position during the past year, routinely reviewed corrective action plans or related information regarding the contract or matters related to the company. You state that the contract is primarily monitored within DCF by a Contract Oversight Unit, which reports to the DCF Contracted Client Services Director, and a Fiscal Monitor Unit, which reports to DCF Chief Financial Officer, and that both units ultimately report to the Assistant Secretary for Administration. These factors lend themselves to application of Section 112.316, Florida Statutes, which provides:

> CONSTRUCTION.—It is not the intent of this part, nor shall it be construed, to prevent any officer or employee of a state agency or county, city, or other political subdivision of the state or any legislator or legislative employee from accepting other employment or following any pursuit which does not interfere with the full and faithful discharge by such officer, employee, legislator, or legislative employee of his or her duties to the state or the county, city, or other political subdivision of the state involved.

In light of the totality of the facts you provide, we believe it is appropriate to apply Section 112.316 to negate the restriction that would arise in your situation via the literal language of Section 112.3185(4).

Under the specific circumstances of your inquiry, we find that you are not restricted by Section 112.3185, Florida Statutes, from working after you leave DCF employment in connection with a contract between Kids Central and DCF.[2]

Your question is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on July 27, 2012 and **RENDERED** this 1st day of August, 2012.

Susan Horovitz Maurer, *Chair*

[1]For purposes of Section 112.3185(4), "contractual service" is defined in Section 287.012(8), Florida Statutes, to mean "the rendering by a contractor of its time and effort rather than the furnishing of specific commodities. The term applies only to those services rendered by individuals and firms who are independent contractors, and such services may include, but are not limited to, evaluations; consultations; maintenance; accounting; security; management systems; management consulting; educational training programs; research and development studies or reports on the findings of consultants engaged thereunder; and professional, technical, and social services."

[2]You have indicated you understand that if you move to new employment Section 112.313(9)(a)4, Florida Statutes, would prohibit you from personally "representing" your employer for compensation before DCF for two years following the vacation of your position. "Representing" is defined in Section 112.312(22) as "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." Note that this definition is very broad, including almost all contact on behalf of your prospective employer with DCF 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 made in an effort to get DCF or its personnel to do or not do something. See CEO 12-04, CEO 11-24 (note 10) and CEO 09-5. Also note that Section 112.313(8), which prohibits the use of "inside" information gained by virtue of public position, remains applicable even after you leave public employment.

POSTEMPLOYMENT RESTRICTIONS

FORMER FDOT EMPLOYEE EMPLOYED BY COMPANY CONTRACTING WITH FDOT

To: Name withheld at person's request (Lakeland)

SUMMARY:

Advice about post-employment restrictions is provided to a former employee of the Florida Department of Transportation under her work history. CEOs 12-4, 11-24, 08-17, 05-13, 02-17, and 00-6 are referenced.[1]

QUESTION:

What is the applicability to you, a former employee of the Florida Department of Transportation ("FDOT") now working for a private firm, of the post-public-employment restrictions of Part III, Chapter 112, Florida Statutes, under your FDOT work history and in relation to particular contracts as described herein?

Under the situation presented, your question is answered as set forth below.

By your letter of inquiry, correspondence from our staff to you, and additional correspondence from you to our staff, you relate that you resigned from employment with the Florida Department of Transportation ("FDOT") in December 2011, vacating a Career Service System position (Project Manager in FDOT District One). Further, you state that you began employment with FDOT in 2006, in another Career Service position, and that all of your positions at FDOT were Career Service positions.

In addition, you relate that you have accepted a position with a private firm, that your private work will not involve any FDOT contract which existed (which had been entered into) while you were employed by FDOT and which was monitored or managed by you or your FDOT subordinates, and that your private work likely will involve a FDOT contract which was entered into after you left FDOT but regarding which you had no FDOT procurement/development role.

Also, you state that your firm will be competing for FDOT's award of two consultant construction engineering and inspection ("CEI") contracts which are expected to be entered into later this year. Further, you relate that you had a personal role as an FDOT employee regarding both of these CEI contracts, but that you do not consider the role to have been "substantial." Regarding the two contracts and your FDOT role, you state that the contracts are based on sixty pages of boilerplate language as to which you had no input, but that you did "review" the scope of services and the man-hour estimate. And, you write:

> I was asked to perform the review out of courtesy since I potentially could have been assigned as the project manager after the contract execution. Therefore, I would have had to discuss any errors or changes with the [FDOT] consultant contracts manager. The consultant contracts manager would take my comments into consideration and could or could not make the suggested changes. . . . . Therefore, my review was not required and not a part of the process to develop the contract. The consultant contracts manager, who was responsible for this step of the process, asked me to review the contract and after my review it went back to the consultant contracts manager as he had the authority and responsibility to develop the contract for the Bartow Operations Office.

Further, you state that in your FDOT position you did not have the ability to make the decision as to what scope of services or man-hour estimate would be the scope and estimate in the contracts; that you did not have the ability to approve or disapprove the scope or estimate; that you did not conduct investigation as to the scope or the estimate; and that you did not, at least not in an affirmative sense, make a recommendation or render advice as to the scope or estimate. Additionally, regarding the two contracts, which, you emphasize, have yet to be awarded, you write:

> The CEI contracts procurement and selection is a multistep process with many different [parts of FDOT] involved. While working as a Project Manager I did not have any authority or responsibility on any contract until they were executed. I resigned from the department well before these contracts were scheduled to be advertised[;] therefore I resigned months before I would have had any responsibility or authority related to the above referenced contracts . . . .
>
> . . . the contracts manager [, an FDOT employee,] develops the man-hour estimate based on the required staff needed to manage the project along with the current projected construction project time. The scope of services and man-hour estimate will remain in draft form through advertisement, selection and negotiations and will not be finalized until the CEI contract is executed. The portion of the scope of services and the man-hour estimate I reviewed was directly related to the current projected construction contract time. On both projects, the construction contract time has changed since my review (and later resignation from the department) and yet again, even prior to advertisement (scheduled in mid-February), the scope of services and the man-hour estimate will be revised.

Also, in response to our staff's question to you as to whether your passing along the scope of services and man-hour estimate without affirmative recommendation of change by you ("as is") to the consultants contracts manager substantively amounted to a recommendation by you regarding the scope and estimate, you write:

> I did not have the authority or responsibility to recommend approval or disapproval of the documents. The consultant contracts manager was responsible for representing the Bartow Operations Office throughout the contract development process, negotiations with awarded/selected firm and through execution of the contract. I only reviewed 2 sections of the 20 page (plus) scope. Therefore, sending the scope back "as is" to the consultant contracts manager (CCM) may default to a recommendation on those two sections but not a recommendation for the entire document. In addition, I reviewed the manhour estimate to ensure it matched the two sections I reviewed in the scope (completed by the responsible [FDOT] employee, consultant contracts manager, CCM). Therefore, by sending the estimate back "as is" [I] informed the CCM that the estimate passed a quality control check, [and that] it appeared there were no errors[; the sending back was] not a recommendation of the man hour estimate in its entirety.

Restrictions (prohibitions)[2] relevant to your inquiry provide:

> An agency employee, including an agency employee who was employed on July 1, 2001, in a Career Service System position that was transferred to the Selected Exempt Service System under chapter 2001-43, Laws of Florida, may not personally represent another person or entity for compensation before the agency with which he or she was employed for a period of 2 years following vacation of position, unless employed by another agency of state government. [Section 112.313(9)(a)4, Florida Statutes.]
>
> 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. When the agency employee's position is eliminated and his or her duties are performed by the business entity, this subsection does not prohibit him or her from employment or contractual relationship with the business entity if the employee's participation in the contract was limited to recommendation, rendering of advice, or investigation and if the agency head determines that the best interests of the state will be served thereby and provides prior written approval for the particular employee. [Section 112.3185(3), Florida Statutes.]

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. If the agency employee's position is eliminated and his or her duties are performed by the business entity, this subsection may be waived by the agency head through prior written approval for a particular employee if the agency head determines that the best interests of the state will be served thereby. [Section 112.3185(4), Florida Statutes.]

The sum of money paid to a former agency employee during the first year after the cessation of his or her responsibilities, by the agency with whom he or she was employed, for contractual services provided to the agency, shall not exceed the annual salary received on the date of cessation of his or her responsibilities. This subsection may be waived by the agency head for a particular contract if the agency head determines that such waiver will result in significant time or cost savings for the state. [Section 112.3185(5), Florida Statutes.]

Regarding Section 112.313(9)(a)4, which prohibits "representation"[3] by certain former public employees before their former public agency for two years after vacation of public position, we find that you are not restricted. Your work history shows that you always were a Career Service System employee of FDOT, not a Selected Exempt Service ("SES") employee, a Senior Management Service ("SMS") employee, or other type of employee encompassed by the statute. CEO 12-4.

As to Section 112.3185(4), which would prohibit, for two years after your vacation of FDOT employment, your working for the firm in connection with any contract for contractual services which was within your responsibility as a FDOT employee, we find that you are not restricted regarding any contract which was not in existence (which was not entered into) until after you left FDOT employment. This would include the two CEI contracts which may be, if your firm is successful, entered into between your firm and FDOT later this year.[4] See, for example, CEO 11-24, finding that in order for a contract to have been "within one's responsibility" as a public employee, the contract would have to have existed while one was a public employee.

Concerning Section 112.3185(5), we find that you are not restricted as to the two CEI contracts your firm is seeking. This statute applies to situations in which a former public employee is paid by his former public agency either directly as a natural person or via the former employee's closely-held or controlled entity; it does not apply in situations, such as the one you present, where the former public employee works arms-length for a bona fide entity. CEO 05-13.

Regarding Section 112.3185(3), unlike Section 112.3185(4), it can apply to a contract not coming into existence (not entered into) until after one leaves public employment, provided that one had, while a public employee, the requisite personal and substantial procurement/development role regarding the "future" contract. See, for example, CEO 11-24 (note 6). More particularly, in order to be restricted by Section 112.3185(3), a former public employee must hold employment or a contractual relationship with a business entity, the employment/contractual relationship must be in connection with a particular contract, the former employee (while he or she was a public employee) personally must have had a procurement/development role regarding the contract, and that personal role must have been "substantial." If one or more of these elements is missing from a given former public employee's situation as to a particular contract or contracts, he or she is not restricted by Section 112.3185(3) as to their post-public-employment private work regarding those contract(s).

As to the two CEI contracts which your firm seeks, we find that your involvement (reviewing the scope of services and the man-hour estimate) was, obviously, personal to you, and we find that it involved a procurement/development role (in substance, a recommendation). However, under the situation presented, we do not find that your role was "substantial." While "substantial" is not defined within the Code of Ethics, we have noted its meaning in Federal law, in applying it in particular situations. See CEO 00-6, in which we quoted from Federal law[5]:

> "Substantially" means that the employee's involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participation in a critical step may be substantial.

In your situation, too, we find this quote instructive. It is apparent that your FDOT involvement with the development of the two contracts (which was a limited "review" of scope of services and man-hour estimates which were, or will be, altered at least once since your limited input) should not be considered important or critical to the formation of the contracts. Our finding as to your situation does not thwart the purpose of Section 112.3185(3): to prevent a public employee from having substantial input into the design of a contract, thereby "tailoring" it for award to a particular company or firm, which would then "reward" the former public employee with "golden parachute" or "feathered nest" private employment in connection with the same contract. Further, we find that your situation is similar to other decisions of ours finding Section 112.3185(3) not to be applicable. See, for example, CEO 08-17 (employee of FDOT District accepting offer of employment from contractor contracting with FDOT) and CEO 02-17 (former FDOT employee employed by firm in connection with firm's research for FDOT). In CEO 08-17, the employee recommended changes to mow or disc a ten-foot strip to allow for fence maintenance, made suggestions concerning the hours the contractor would be required to provide security at a rest area, and contributed approximately twelve sentences to a scope of services regarding mowing width, timeliness of fence repair, and informing potential contractors about new warranty inspection and landscaped area coordination responsibilities. In CEO 02-17, the employee had limited involvement, subordinate to the involvement of others, in a multi-stage process, where contract content substitutions occurred after the employee's involvement.

Your inquiry is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on March 30, 2012 and **RENDERED** this 4th day of April, 2012.

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Robert J. Sniffen, *Chairman*

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[1] Prior opinions of the Commission on Ethics may be obtained from its website (www.ethics.state.fl.us).

[2] For purposes of Section 112.313(9)(a)4, Florida Statutes, but not for purposes of Section 112.3185, Florida Statutes, Section 112.313(9)(a)2.a., Florida Statutes, does not define "employee" to include persons in the Career Service System, unless they hold the equivalent of Selected Exempt Service employment, Senior Management Service employment, or certain other employment. For purposes of Section 112.3185, "employee" has its usual and ordinary meaning. .

[3] Defined in Section 112.312(22), Florida Statutes.

[4] The contracts you would not be restricted in regard to under Section 112.3185(4) also include contracts which were in existence when you were at FDOT, if, in fact, the contracts were not monitored, managed, or similarly administered by you or your FDOT subordinates.

[5] Then, at 5 C.F.R. Section 737.5(d). Similar language now is found in 5 C.F.R. Part 2641.201.

POST-EMPLOYMENT RESTRICTIONS

AGENCY ASSISTANT SECRETARY BECOMING EMPLOYED BY AGENCY CONTRACTOR

To: Mark Herron, (Attorney, Tallahassee)

SUMMARY:

A defined employee of the Department of Children and Families would not be prohibited by Sections 112.3185(3) or (4), Florida Statutes, from accepting employment as Chief Financial Officer of an entity contracting with the Department, because such employment would not be "in connection with" the contract between the provider and the agency. The employee would be prohibited for two years by Section 112.313(9)(a)4, Florida Statutes, from personally representing another person or entity for compensation before the Department.

QUESTION:

Would the Code of Ethics for Public Officers and Employees be violated were you, an Assistant Secretary and Acting Deputy Secretary with the Department of Children and Families, to become employed as Chief Financial Officer by a provider whose contract you approved as Assistant Secretary?

Your question is answered in the negative, under the circumstances presented.

You write on behalf of Melissa Jaacks, who is currently Acting Deputy Secretary of the Department of Children and Families (DCF) and who has been offered a position as Chief Financial Officer for Eckerd Youth Alternatives, Inc., ("Eckerd").

You advise that DCF has outsourced its child welfare function to "CBC's"—Community Based Care lead agencies throughout the state. Eckerd has programs in nine states, you relate, and their largest contract, constituting $50 million of Eckerd's $125 million in contracts, is with the DCF in Pasco/Pinellas Counties. You state that as CFO, the Acting Deputy Secretary will be responsible for financial reporting, budgeting, financial management, banking and tax reporting for all aspects of Eckerd's operations, and will have ultimate fiscal responsibility for the Eckerd contract with DCF to the same extent and to the same degree as other program contracts.

You relate that at all times pertinent to this opinion, the Acting Deputy Secretary served as Assistant Secretary of Administration of DCF. In that capacity, you write, she had responsibility in the areas of Budget, Financial Management, Information Technology, Human Resources, General Services, and Contracted Client Services.[1] You state that CBC's are selected through a competitive procurement process and that the position of Assistant Secretary is generally not involved in the competitive procurement process; rather, the development and review of the Invitation to Negotiate and negotiation of the contract "are all matters managed generally at the Region level by administrators who report to a different Assistant Secretary." However, you relate that the Acting Deputy Secretary was involved in the Eckerd Pasco/Pinellas contract in the following ways:

- In fall 2007, she chaired a workgroup which reviewed the operations of the company that then held the Pasco/Pinellas contract. The workgroup's report was critical of that contractor, and recommended several options to the Secretary, one of which was a competitive procurement.

- Several of her subordinates were on the procurement team for the Eckerd contract, although, you relate, they did not report to her regarding any of their activities.
- She signed, on behalf of the DCF Secretary, letters to the Governor, Speaker of the House, and Senate President, certifying Eckerd's readiness to take over as lead CBC.[2]
- She signed an "Approval of Contract/Renewal Annualized Amount Over $1,000,000." You advise that this is a document signed by the Deputy Secretary and the Assistant Secretary for Administration in order to give the Regional Director authority to sign the contract. You have provided a policy memorandum dated April 30, 2007 speaking to this requirement. It states that requests for approval for any contracts, renewals, or amendments exceeding $1 million must be forwarded to the Assistant Secretary for Administration "for coordination, then to the Deputy Secretary for approval." The memorandum also makes a change to the Department's operating procedures to require that such contracts, amendments, and renewals must be approved by the Deputy Secretary "with concurrence of the Assistant Secretary for Administration."
- The Acting Deputy Secretary's job duties, as Assistant Secretary for Administration, included oversight of Contracted Contractual Services, whose functions include developing and maintain contract operating procedures, procurement documents, model contracts, monitoring tools, and cost analysis instruments. You relate that this section also provides contract related technical assistance, oversight and training to DCF personnel involved with contracts.
- In July of last year, the Contract Oversight Unit, which performs on-site monitoring of DCF contracts[3] was placed under the direct supervision of one of the Acting Deputy Secretary's subordinates.
- The CBC Fiscal Monitor Group, a function which engages in analysis, on-site reviews, and technical assistance beyond that engaged in by the COU and which was developed during the 2007/2008 fiscal year, is under the supervision of a another direct subordinate. This group has completed two reviews of the Eckerd Pasco/Pinellas contract.

Section 112.313(9)(a)4, Florida Statutes, provides in relevant part:

> No agency employee shall personally represent another person or entity for compensation before the agency with which he or she was employed for a period of 2 years following vacation of position, unless employed by another agency of state government.

Section 112.313(9)(a)4, Florida Statutes, prohibits a former agency employee from representing another person or entity for compensation "before the agency with which he or she was employed" for a period of two years following vacation of her position. The term "employee" is defined in Section 112.313(9)(a)2.a.(I), as including members of the Selected Exempt or Senior Management Service. You advise that the Acting Deputy Secretary is a member of the Senior Management Service. Accordingly, Section 112.313(9)(a)4 prohibits her from representing any other person or entity before the DCF[4] for a period of two years after terminating her employment. "Representation" is defined at Section 112.312(22), Florida Statutes, as "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," and would include such activities as discussing future contracts between the DCF and Eckerd.

Sections 112.3185(3) and (4), Florida Statutes, also apply in post-employment situations involving potential employers who contract with a State employee's agency. These provisions state:

> (3) No agency employee shall, 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.

(4) No agency employee shall, within 2 years of 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.

In CEO 01-6, we observed, "Neither Section 112.3185(3) nor Section 112.3185(4) strictly prohibits a former State employee from going to work for an entity that has contracted with his or her agency. Instead, the statutes prohibit that employment only if it is 'in connection with' the contract." That opinion dealt with a DCF District Administrator who was to become employed with an agency provider as its Regional Director for Family Preservation Services. We noted that her employment would encompass a great deal more than the contract between DCF and the provider, which itself was winding down. For example, she would be responsible for managing and administering the provision of all of the provider's services in the region, which included not only Adult and Family Substance Abuse Services under the DCF contract, but services to the Lee County School District and to one or two elementary schools, the provision of services outside of any contract she was involved in as District Administrator, and the expansion of services by the provider in the region and the search for additional contracts and sources of funding for the provider. Similarly here, it appears that your responsibilities as CFO for the company, which has programs in nine states, will entail much more than the contract between DCF and Eckerd, such that it cannot be said that your employment in that capacity is "in connection with" the contract.

As we have determined that the Acting Deputy Secretary's employment as CFO is not "in connection with" the Pasco/Pinellas contract, it is not necessary for us to determine whether her participation in the procurement process was "personal and substantial," for purposes of Section 112.3185(3) or "within her responsibility" for purposes of Section 112.3185(4). Although the Acting Deputy Secretary initially suggested that she may have other duties in addition to her responsibilities as CFO[5], you represent that any additional responsibilities she may someday have with Eckerd are, at this point, speculative. If at some future date, she is asked to perform duties which she is concerned may be considered to be "in connection with" the contract, we invite the Acting Deputy Secretary to seek further advice.

Your question is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on June 12, 2009 and **RENDERED** this 17th day of June, 2009.

Cheryl Forchilli, Chair

[1] You advise that the Acting Deputy Secretary's new position did not bring with it any new responsibilities for existing or new contracts and that she will not be signing or negotiating new contracts.

[2] Section 409.1671(1), Florida Statutes, requires the Department to conduct a readiness assessment of the district and the lead agency, and the secretary to certify in writing to the Governor and the Legislature that the district is prepared to transition the provision of services to the lead agency and that the lead agency is ready to deliver and be accountable for such service provision.

[3] You state that the Contract Oversight Unit has not yet visited Eckerd's.

[4] In previous opinions, we have found that the prohibition applies to representations before any part of the agency by which the employee was retained. See, CEO 09-5, CEO 06-1, and CEO 04-16.

[5] In a previous request for an informal opinion, the Acting Deputy Secretary indicated that the fiscal staff at the Pasco/Pinellas CBC may report to someone who either reports directly to her, or to someone who reports to someone who is a direct report of hers, and that she might be called upon to resolve operational issues with the Pasco/Pinellas contract.

POSTEMPLOYMENT RESTRICTIONS

FORMER EXECUTIVE DIRECTOR OF COMMISSION FOR THE TRANSPORTATION DISADVANTAGED EMPLOYED WITH CONTRACTOR OF THE COMMISSION

To: Name withheld at person's request (Tallahassee)

SUMMARY:

A former Executive Director of the Florida Commission for the Transportation Disadvantaged is not prohibited by Section 112.313(9)(a)4, Florida Statutes, from representing her employer in a competitive process to become a Community Transportation Coordinator; from representing her employer before other community transportation coordinators; and from participating in the employer's business activities so long as she does not personally communicate with the Commission.

QUESTION:

Are you, the former Executive Director of the Florida Commission for the Transportation Disadvantaged, prohibited from representing your employer in a competitive process to become a Community Transportation Coordinator or before other Community Transportation Coordinators, and from participating in the employer's business activities, so long as you do not personally communicate with the Commission?

Your question is answered in the negative, under the circumstances presented.

In your request for an opinion and subsequent email communications with staff, you ask us to discuss the applicability of the post-employment restrictions of the Code of Ethics for Public Officers and Employees [Part III, Chapter 112, Florida Statutes] on your involvement in various competitive processes concerning your new private sector employer. You advise that you are the former Executive Director for the Florida Commission for the Transportation Disadvantaged ("Commission"), having resigned from the Commission on October 13, 2008. You were hired by TMS Management Group, Inc. ("TMS") on December 1, 2008 to serve as their Director of Business Development. You state that TMS currently contracts to deliver Medicaid non-emergency transportation services to eligible Medicaid recipients in Brevard, Broward, Manatee, and Sarasota Counties.

The Florida Commission for the Transportation Disadvantaged, though housed within the Florida Department of Transportation for administrative and fiscal accountability purposes, functions independently of the control, supervision, and direction of the Department of Transportation.[1] The Commission contracts with the Agency for Health Care Administration ("AHCA") to manage the Medicaid Non-Emergency Transportation program, which provides transportation services to Medicaid recipients in each county.

These services are provided with the assistance of local government entities throughout the State. The highest level local entity is the Official Planning Agency, which is either a Metropolitan Planning Organization or some other designated planning agency. (The Commission designates the Official Planning Agency if that area is outside of the purview of a Metropolitan Planning Organization.[2]) Below the Official Planning Agency is the Local Coordinating Board, which is appointed by the Official Planning Agency and helps coordinate services to the transportation disadvantaged.[3] The Official Planning Agency is also responsible for recommending a single Community Transportation Coordinator for each county to the Commission.[4] The Commission is

responsible for approving all Community Transportation Coordinators,[5] which either provide the transportation services or contract with providers (like TMS) for transportation services, and which are monitored by the Local Coordinating Boards.[6] There are also Purchasing Agencies, State agencies who also need transportation services for their clients and whose duties and responsibilities are provided for in Section 427.0135, Florida Statutes.[7]

In light of the foregoing, you inquire whether Section 112.313(9)(a)4, Florida Statutes, would prohibit your being involved in a competitive process wherein your employer seeks to contract with the Local Planning Agency to be a Community Transportation Coordinator. Section 112.313(9)(a)4 provides:

> An agency employee, including an agency employee who was employed on July 1, 2001, in a Career Service System position that was transferred to the Selected Exempt Service System under chapter 2001-43, Laws of Florida, may not personally represent another person or entity for compensation before the agency with which he or she was employed for a period of 2 years following vacation of position, unless employed by another agency of state government.

For purposes of Section 112.313(9)(a)4, the term "agency" means:

> any state, regional, county, local, or municipal government entity of this state, whether executive, judicial, or legislative; any department, division, bureau, commission, authority, or political subdivision of this state therein; or any public school, community college, or state university. [Section 112.312(2), Florida Statutes.]

Section 112.313(9)(a)4 prohibits an Executive Director from personally representing another person or entity for compensation before the agency with which she was employed for a period of two years following vacation of her position.[8] We have not, until this occasion, had the opportunity to address the extent of one's agency in a structure where, as here, the Legislature delegated functions to hierarchically subordinate units that are either separate, independent agencies or private companies.

In CEO 00-11, we opined that even though the former general counsel of DEP served as staff to the Board of Trustees of the Internal Improvement Trust Fund, on which the Governor and cabinet members sat, he was not prohibited from representation before the Governor or any other Cabinet Officer in their capacity as a member of the Board of Trustees of the Internal Improvement Trust Fund. The rationale of the opinion was that "the language in the statute seems clear that a former employee is restricted from representing clients 'before the agency with which he or she was employed.'" The lynchpin of this rationale was the fact that the attorney was an employee of the Department of Environmental Protection, not the Board. That rationale was followed in CEO 02-12, where we stated that a former attorney for AHCA was not prohibited from representing clients before the DOH or various boards under the DOH.

Turning now to your first question, you advise that TMS would like you to be involved in its bid submitted to the Central Florida Regional Planning Council ("Council") to serve that jurisdiction as a Community Transportation Coordinator. The Council is a Regional Planning Council created pursuant to Section 186.501, et. seq. Most of the Council's powers and responsibilities are contained in Chapter 186, Florida Statutes. It is subject to the Sunshine Laws and Public Records laws. Pursuant to Chapter 186, the Council has the authority to maintain an office, enter into contracts, sue and be sued in its own name, and hire staff among numerous other things.

The Council was appointed by the Commission as the local planning agency for Hardee, Highlands, and Okeechobee Counties. Because of this appointment, the Council also has the functions delegated to it pursuant to Section 427.015, Florida Statutes, and applicable provisions of the Florida Administrative Code. However, there is no indication in either Chapter 186 or Chapter 427 that the Legislature meant to make the Council a part of the Commission. Absent a clear indication from the Legislature that it intended to include within the Commission

previously existing agencies, with their own independent statutory basis and responsibilities, we cannot say that the Council would be a lower organizational unit of the Commission.

In light of the foregoing, we cannot find that the agency with which you were employed includes the Council. Therefore, you would not be prohibited from representing TMS in its pursuit of the Council's bid.

You also inquire whether you would be prohibited from representing TMS in its efforts to contract as an operator with a Community Transportation Coordinator. All of the Community Transportation Coordinators are either a local governmental entity, each with its own constitutional or statutory basis, or are a private company.[9] Under the same rationale as applied in answering your first question, it is clear that none of the Community Transportation Coordinators would be considered to be a part of the Commission. Therefore, Section 112.313(9)(a)4, Florida Statutes, does not prohibit your participation in the competitive process to become an operator for a Community Transportation Coordinator.

Your third inquiry concerns whether you can be listed in bid response documents before the Commission as the Director of Business Development and assist with transition and start-up activities at the local level (should TMS be chosen as the contractor). You advise that you will not personally appear before the Commission nor discuss with any Commissioner business opportunities on behalf of TMS for a period of two years.

As previously mentioned, Section 112.313(9)(a)4 prohibits you from personally representing any person or entity for compensation before the Commission for a period of two years. Key to the analysis of this question is the definition of represent. "Represent" is defined in Section 112.312(22), Florida Statutes as:

> 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.

Under the plain language of the statute, it appears that the Legislature intended to prohibit former employees from personally attending an agency proceeding, from personally writing letters or filing documents on behalf of a client, and from personally communicating with the officers or employees of his or her former agency on behalf of a client. See CEO 00-20, CEO 00-11, and CEO 02-12.

We answer this inquiry in the negative. Were someone to write a letter mentioning your status, file documents referencing your employment, or contact the Commission or its staff and reference you, we do not believe that this would constitute your personal representation before your former agency. Section 112.313(9)(a)4 prohibits your personal involvement.

In the same vein, you inquire whether you can communicate with Commission staff members as it pertains to information needed for TMS to operate. You cite the example of a request for public information or documentation that is required to be completed by another state agency or organization in their out of state bid process to which TMS is responding. In a line of opinions, we have consistently held that actions necessary to carry out, as opposed to actions to obtain, a contract with one's former agency do not constitute "representation" within the meaning of the prohibition. See, for example, CEO 00-6. Consistent with this rationale, we believe that requesting public records and information that TMS needs regarding contracts which are currently in existence, and which you did not participate personally or substantially in the determination and/or procurement of, would also not constitute "representation." However, without knowing more about the nature and context of your proposed contacts with Commission staff, we are unable to provide more definite advice.

Accordingly, we find that you are not prohibited from participating in TMS' efforts to become a Community Transportation Coordinator for the Central Florida Regional Planning Council. Additionally, we find that you are not prohibited from participating in TMS' efforts to contract as an operator with Community Transportation Coordinators. We also find that others are not prohibited from mentioning you in communications

with the Commission. Finally, we find that you are not prohibited from contacting Commission staff members in order to accomplish contracts your employer may have with the Commission or with local transportation agencies.

ORDERED by the State of Florida Commission on Ethics meeting in public session on March 6, 2009 and **RENDERED** this 11th day of March, 2009.

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Cheryl Forchilli, Chair

[1]Section 427.012(9), Florida Statutes.

[2]Section 427.013(22), Florida Statutes.

[3]Section 427.0157, Florida Statutes.

[4]Section 427.015(2), Florida Statutes.

[5]Section 427.013(11), Florida Statutes.

[6]Section 427.0155(1), Florida Statutes.

[7]The Commission's Transportation Disadvantaged Program Concept Chart is available online at: http://www.dot.state.fl.us/ctd/programinfo/commissioninformation/commissioninformattion.htm.

[8]Because the question at issue concerns the extent of your former agency rather than whether certain professional activities constitute representation, we pause to note that the term "represent" is defined at Section 112.312(22), Florida Statutes.

[9]A list of the Community Transportation Coordinators is available for review on the Commission's website located at: http://www.dot.state.fl.us/ctd/contacts/ctcsbycounty.htm.

CEO 09-5 – March 11, 2009

POSTEMPLOYMENT RESTRICTIONS

FORMER FDOT EMPLOYEE ENGAGED IN VARIOUS ACTIVITIES WITHIN TWO YEARS OF LEAVING FDOT

To: Dennis Dwayne Kile, P.E. (Clearwater)

SUMMARY:

Advice is provided to a former SES employee of the Department of Transportation concerning the application of the two-year revolving-door restriction contained in Section 112.313(9)(a)4, Florida Statutes, in a variety of circumstances. CEO 08-18, CEO 06-1, CEO 05-16, CEO 04-16, CEO 00-20, CEO 00-6, and CEO 94-20 are referenced.[1]

QUESTION:

What is the application to you (a former Selected Exempt Service employee of the Department of Transportation), under the situations treated herein, of the two-year postemployment "representation" restriction codified in Section 112.313(9)(a)4, Florida Statutes?

Your question is answered as set forth below.

By your letter of inquiry, an earlier letter from you, and a letter from our staff to you, we are advised that you were employed by the Florida Department of Transportation (FDOT) from October 3, 1997 through May 8, 2008,[2] holding the position of FDOT District Seven[3] Design Engineer, a position within the Selected Exempt Service (SES) as defined in Section 110.602, Florida Statutes.[4] Further, you advise that your FDOT responsibilities included oversight of a 45-person staff, oversight of all design projects, setting District guidance through memoranda/documents regarding design criteria, representing the District in meetings with government officials, and having final authority for design parameters on consultant projects.

In addition, you advise that you have obtained employment with a consultant which is doing business with District Seven, occupying a position responsible for operations, securing new contracts, delivering contract performance to clients, and relationship development and maintenance as to clients. Further, you advise that you are responsible for effectively communicating with the consultant's staff, overseeing staff development efforts, and signing and negotiating contracts. Also, you advise that you lead contract pursuits, development of proposals and presentations, and strategic teaming, and that you schedule periodic meetings with the consultant's key client (presumably, District Seven).

Thus, you seek our guidance as to:

A. Whether the restriction of Section 112.313(9)(a)4, Florida Statutes, encompasses only representation occurring prior to the entry into a contract with the District (is the prohibited representation limited to representation for the purpose of marketing/seeking District projects or other District work)?

B. Whether the restriction would prohibit your collecting information from the District on the performance of your employer's staff regarding District contracts obtained by your employer before you left FDOT employment?

C. Whether the restriction would prohibit your contacting or interacting with the District for your employer for the purpose of performing work on contracts obtained by your employer after you left FDOT employment?

D. Whether the restriction prohibits your signing supplemental agreements (related to contracts between your employer and the District entered into without your representation for your employer) between your employer and the District, or prohibits your participation in negotiations concerning proposed supplemental agreements?

E. Whether the restriction would prohibit your participating in, or merely attending, general District informational meetings related to upcoming work program projects?

F. Whether the restriction would prohibit your signing letters of interest or signing contracts between your employer and the District?

G. Whether the restriction applies to your representation regarding FDOT's central office, regarding FDOT Districts other than District Seven, and regarding the Florida Turnpike Enterprise?

Section 112.313(9)(a)4, Florida Statutes, provides:

> An agency employee, including an agency employee who was employed on July 1, 2001, in a Career Service System position that was transferred to the Selected Exempt Service System under chapter 2001-43, Laws of Florida, may not personally represent another person or entity for compensation before the agency with which he or she was employed for a period of 2 years following vacation of position, unless employed by another agency of state government.

For purposes of the statute's two-year restriction, a former "employee" includes a person who was employed in the Selected Exempt Service. Section 112.313(9)(a)2.a.(I), Florida Statutes. And for purposes of the restriction, "represent" or "representation" is defined, in Section 112.312(22), Florida Statutes, as follows:

> 'Represent' or 'representation' means 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.

As a former SES employee, Section 112.313(9)(a)4 restricts (prohibits) your personal,[5] compensated "representation" of your employer (or of any other person or entity) before your former public agency for a period of two years following your vacation of public position.

More particularly, regarding item "A," above, we find that the restriction encompasses conduct in behalf of your employer, or another, which would come within the definition of "represent" codified at Section 112.312(22), occurring prior to your employer's entry into a District contract (e.g., representation by you toward District Seven or its personnel in marketing or seeking District projects or other District work for your employer). However, we also find that the restriction encompasses conduct of yours occurring after the entry into a contract, as more specifically discussed below.

Regarding item "B," we find that your personally contacting District personnel, or otherwise personally doing things vis-à-vis the District which mechanically or by rote come within the definition of "represent," would not be prohibited, provided that your contact or conduct, in collecting information from the District on the performance of your employer's staff regarding District contracts, or otherwise, is for the purpose of fulfilling

your firm's obligations under the contracts and is not for the purpose of getting the District to do something for your employer or another. In accord with our finding are CEO 00-6 and CEO 05-16.

Treating item "C," which essentially poses the same question as item "B," we find that your contact with the District which is limited to performing a contract (contact not for the purpose of getting the District to do something) would not be prohibited, regardless of whether the contract was obtained by your employer before or after you left FDOT. While the facts of CEO 00-6 and CEO 05-16 indicate that the contracts present there, which would merely be performed or delivered through interaction of the former public employee with his or her former agency, were entered into before the former public employee left his or her public position, the chronology of contract entry was not the issue in those decisions; rather, as here, the issue was mere performance and delivery versus trying to get the former agency to enter into a contract or otherwise do something for one's employer or another.

Regarding item "D," we find that you would be prohibited from signing supplemental agreements between your employer and the District, and we find that you would be prohibited from participating in negotiations with the District concerning proposed supplemental agreements, even where the agreements or proposed agreements relate to contracts between your employer and the District (initial or original contracts) entered into without your representation for your employer. We find that your signing of a contract would constitute the writing of a letter, the filing of a document, and/or a communication with officers or employees of the District, within the meaning of "represent," and we find that your personal participation in negotiations concerning proposed supplemental agreements between your employer and the District would constitute actual attendance on behalf of your client (employer) in a District proceeding and/or a communication with officers or employees of the District, within the meaning of "represent."

Concerning item "E," we find that you would be prohibited during the two-year period from attending or participating in general District informational meetings related to upcoming work program projects. Such conduct by you would fit within the definition of "representation" and would not merely be for the delivery or performance of a contract.

As to item "F," we find that you would be prohibited from signing letters of interest, or signing contracts, between your employer and the District, under the reasoning of item "D" above.

Lastly, as to item "G," we find that the advice provided above applies to you regarding the whole of FDOT, including but not limited to all of its Districts and its central office; its application is not limited to your conduct regarding District Seven. In other words, in accord with our decision in a previous matter concerning a former FDOT employee (CEO 04-16), we find that the agency with which you were employed for purposes of Section 112.313(9)(a)4 is the whole of FDOT.[6] However, we do not find that the two-year restriction applies to you regarding the Florida Turnpike Enterprise; see CEO 08-18, in which we found, in considering an inquiry concerning Section 112.313(9)(a)4, that the Florida Turnpike Enterprise and FDOT are separate agencies.

ORDERED by the State of Florida Commission on Ethics meeting in public session on March 6, 2009 and **RENDERED** this 11th day of March, 2009.

Cheryl Forchilli, Chair

[1]Prior opinions of the Commission on Ethics can be accessed via its website: www.ethics.state.fl.us

[2]Your employment history, as provided, does not indicate applicability of a "grandfather clause" to you under Section 112.313(9)(a)6, Florida Statutes, inasmuch as such relief from the restriction of Section 112.313(9)(a)4, Florida Statutes, is anchored, in part, in one's public employment with an agency beginning on or prior to July 1, 1989. CEO 94-20.

[3]You advise that District Seven includes Pinellas, Hillsborough, Pasco, Hernando, and Citrus Counties.

[4]Your inquiry refers to your former FDOT position as "traditional select exempt." We see no indication in your inquiry, in Section 110.602, Florida Statutes, or in Section 110.205, Florida Statutes (which addresses exemptions from Career Service and which is referenced in Section 110.602)that your former position was not a Selected Exempt Service position within the meaning of Section 112.313(9)(a)4, Florida Statutes.

[5]The statute does not prohibit representation by employees or agents of your employer who are not themselves former public employees subject to the restriction. See CEO 00-20.

[6]Consequently, wherever this opinion refers to "District Seven" or "the District" in providing guidance to you, you should read it to mean that you are restricted, or not restricted, as applicable, regarding the whole of FDOT. Also, note that conduct of yours coming within the definition of "represent," vis-à-vis FDOT, can violate the prohibition even if FDOT is not the decisionmaker (is not the locus of authority to take final action) on a matter. CEO 06-1.

CEO 08-17--July 30, 2008

POSTEMPLOYMENT RESTRICTIONS

EMPLOYEE OF FLORIDA DEPARTMENT OF TRANSPORTATION DISTRICT ACCEPTING OFFER OF EMPLOYMENT FROM CONTRACTOR CONTRACTING WITH THE DEPARTMENT

To: Name withheld at person's request

SUMMARY:

An employee of the Florida Department of Transportation would not be prohibited from accepting employment with an independent contractor responsible for maintaining certain Department assets, because her involvement with the contract was not "substantial;" nor would the salary she would receive be limited under Section 112.3185, Florida Statutes. CEO 82-67, CEO 83-8, CEO 88-32, CEO 00-6, CEO 01-6 and CEO 02-17 are referenced.

QUESTION:

Would Section 112.3185, Florida Statutes, prohibit you, a Florida Department of Transportation Career Service employee, from leaving that employment and becoming employed by an independent contractor, or limit your salary in that job?

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

You advise that you are a Career Service employee of the Florida Department of Transportation ("FDOT"). You have been offered employment with an independent contractor ("Contractor") which would begin after you resign from FDOT. You advise that the Contractor is responsible for maintaining the FDOT property and structures on Interstate 75 in Manatee, Sarasota, Lee, Collier, and Broward Counties. The contract, referred to as the "Ultra" contract, was the result of an effort to consolidate several asset maintenance contracts. The "Ultra" contract contemplates the provision of mowing services, fence maintenance, and maintenance of structures at rest areas. You were not involved in the decision to create the "Ultra" contract. You advise that you did not participate in any of the restructuring, funding, advertising, or extension process. You advise that another employee was "responsible for creating, assembling, structuring, editing, reviewing, evaluating and processing the proposed contract up to the point it was presented to the procurement division for advertising and letting." You advise that in response to this employee's request you provided "minor technical and editorial input into the proposed contract's wording and supporting technical data." Additionally, you state:

> The contract is so broad in its scope (manage, maintain, and facilitate the operation of 220 miles of interstate and rest areas in seven counties) that my minor input in modifying the contact (clarifying interchange mowing width and timeliness of panther fence repair, and informing the potential contractors of the new warranty inspection and landscaped area coordination responsibilities) was not substantive in its effect on the vast amount of work already required under the boilerplate.

Thereafter, an Assistant District Maintenance Engineer requested staff's help answering prospective bidders' Requests for Additional Information. You advise that you provided additional technical data in response to her request for help. The Assistant District Maintenance Engineer, in turn, drafted responses to the Requests for Additional Information, combining staffs' answers, which were given to the District Contracts Administrator.

The District Contracts Administrator then communicated them to the potential bidders. Prior to bidding, you arranged times for some of the facilities to be visited by bidders. Other than the foregoing, you did not participate any further in the formation of the "Ultra" contract.

The "Ultra" contract was awarded to the Contractor in August 2007. This was done through a multi-step procurement and selection process, in which you were not involved in any way. You also advise that you did not participate in reviewing the technical proposals or evaluating the bids. For various reasons, the "Ultra" contract's execution was delayed. During the delay, the majority of the services contemplated in the "Ultra" contract were performed by the Contractor under a temporary contract you called the "Interim" contract.

After the "Ultra" contract was awarded, there were significant changes in your employment with FDOT. First, your position was changed to a "District position" which was to be placed under the District Asset Maintenance Program Administrator. The responsibility for the inspector you supervised was transferred to the District Asset Maintenance Program Administrator. You were advised that you would have less administrative duties and would no longer be a project manager. These organizational changes took place upon the effective date of the "Interim" contract. You advise that since the hiring of the District Asset Maintenance Program Administrator your duties have changed drastically. This Administrator has performed the role of project manager for both the "Interim" and "Ultra" contracts. You advise that you are only assigned secretarial support duties. You advise that there are no inspection duty needs left for you.

In light of the foregoing facts, you inquire whether the provisions of Section 112.3185, Florida Statutes, would apply to prohibit proposed employment with the Contractor or to limit your salary with the Contractor. We first address Section 112.3185(3), Florida Statutes, which provides:[1]

> 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. When the agency employee's position is eliminated and his or her duties are performed by the business entity, this subsection does not prohibit him or her from employment or contractual relationship with the business entity if the employee's participation in the contract was limited to recommendation, rendering of advice, or investigation and if the agency head determines that the best interests of the state will be served thereby and provides prior written approval for the particular employee.

Section 112.3185(3) restricts the employment that you may seek after leaving FDOT by prohibiting you from becoming employed by a business entity in connection with a contract in which you participated personally and substantially through "decision, approval, disapproval, recommendation, rendering of advice, or investigation." In CEO 83-8, we limited our interpretation of this list of activities to the procurement process.

In CEO 88-32 and subsequent opinions, we referred to the Code of Federal Regulations for guidance on how to interpret "personally" and "substantially." Those opinions cite the language of Office of Government Ethics' Regulations, which provide:

> To participate 'personally' means directly, and includes the participation of a subordinate when actually directed by the former Government employee in the matter. 'Substantially,' means that the employee's involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be

> insubstantial, the single act of approving or participation in a critical step may be substantial. [5 C.F.R. Section 2637.201(d)] [Emphasis Supplied.]

We first address whether you participated "personally" and "substantially" through decision, approval, disapproval, recommendation, rendering of advice, or investigation in connection with the "Ultra" contract while an FDOT employee.[2] You provided emails that you sent in response to others' requests for assistance in authoring the contract. Those emails contain substantive changes clarifying the duties of the successful bidder. For example, one of the changes that you recommended being made was the requirement to mow or disc a five to ten foot strip to allow for fence maintenance. You also made suggestions concerning the hours that the contractor would be required to provide security at a rest area. You also gave information which was used in the responses to Requests for Additional Information from three contractors. In light of your direct participation in the formation of the language of the contract, we find that you participated "personally" in the "Ultra" contract formation.

Next, we turn to the inquiry of whether your involvement with the "Ultra" contract was "substantial." You advise that the final contract incorporates by reference all FDOT manuals, topics, procedures, policies, standards and design indices as well as the winning bidder's technical proposal. You further state that the final contract consists of 527 pages of text, excluding those documents incorporated by reference. You have provided approximately thirty five pages titled "Scope of Services, Highway Asset Maintenance Contract" and highlighted which parts of the "Scope" you contributed. Of the "Scope," your participation contributed approximately twelve sentences. Those sentences, as you represented, concern "clarifying interchange mowing width and timeliness of panther fence repair, and informing the potential contractors of the new warranty inspection and landscaped area coordination responsibilities."

In determining whether your participation was "substantial", we are mindful of 5 C.F.R. Section 2637.201(d) which contemplates the importance of the employee's effort in determining that she participated substantially. We also note that under that Section of the Code of Federal Regulations, substantiality "requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue." In light of the foregoing, we find that your participation was not substantial. This finding is bolstered by your limited involvement in the procurement process, the multi-stage nature of the process, and the fact that you were not responsible for creating the entire contract. See CEO 00-6 and CEO 02-17. Therefore, you are not prohibited by Section 112.3185(3), Florida Statutes, from accepting this subsequent employment with the Contractor.

We now turn to Section 112.3185(4), Florida Statutes, which provides:

> An agency employee may not, within two 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. If the agency employee's position is eliminated and his or her duties are performed by the business entity, this subsection may be waived by the agency head through prior written approval for a particular employee if the agency head determines that the best interests of the state will be served thereby.

Section 112.3185(4) prohibits you from becoming employed by a business entity other than an agency in connection with a contract for contractual services which was within your responsibility as an employee of FDOT during the two year period following vacation of your public position.

In CEO 82-67, we noted that Section 112.3185(4) differs from Section 112.3185(3) in three ways. First, it is more limited as to the time period it governs--specifically, a two-year period following resignation or termination. Secondly, it is more general as to what activities of a former agency employee are prohibited. Thirdly, it applies only to contracts for contractual services. See CEO 01-6. The Code of Ethics for Public Officers and Employees does not define "official responsibility." By analogy to the federal standard, however, it

is defined at 18 U.S.C. 202 as, "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve or disapprove, or otherwise direct Government actions." In determining whether a contract was within an employee's official responsibility, we again turn to the Code of Federal Regulations which provides:

> Determining official responsibility. Ordinarily, the scope of an employee's 'official responsibility' is determined by those areas assigned by statute, regulation, Executive Order, job description or delegation of authority. All particular matters under consideration in an agency are under the 'official responsibility' of the agency head, and each is under that of any intermediate supervisor having responsibility for an employee who actually participates in the matter within the scope of his or her duties. [5 CFR Section 2637.202(b)(2)].

As described above, you have represented that your duties were significantly reduced. In your letter dated June 19, 2008, you provided a list of clearly clerical duties which you advise is all that you have done since the effective date of the "Ultra" contract.[3] Additionally, you advise that the "Ultra" contract has been in effect for only 44 days as of May 15, 2008. In light of the foregoing, we find that the employment with the Contractor would not be in connection with a contract which was within your responsibility while an FDOT employee. Therefore, you are not prohibited by Section 112.3185(4), Florida Statutes, from accepting the employment offer with the Contractor.

Finally, Section 112.3185(5), Florida Statutes, is inapplicable to the circumstances herein. That Section does not apply in a situation in which a former employee left a public agency to work for a business entity contracting with the agency. See CEO 93-2 and CEO 05-13, where we emphasized that the statute addressed the sum of money paid to the former employee by the agency.

Though we have found that Section 112.3185 would not prohibit your employment with the Contractor, we caution you about the potential applicability of Section 112.313(8), Florida Statutes.[4] This opinion is limited to the facts as stated herein.

Accordingly, we find that you would not be prohibited from accepting the offer of employment from the Contractor.

ORDERED by the State of Florida Commission on Ethics meeting in public session on July 25, 2008 and **RENDERED** this 30th day of July, 2008.

Albert P. Massey, III, Chairman

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[1]Because you advise that you would leave FDOT to pursue employment with the Contractor, Section 112.3185(2), Florida Statutes, which prohibits certain employment while a public employee, is inapplicable. Additionally, Section 112.313(9)(a)(4), Florida Statutes, is not implicated because you advise that you are not, and have never been, and SES or SMS employee.

[2]In your letter initial inquiry of May 15, 2008, you phrased your inquiry as follows:

> Would Sections 112.3185(2), (3), (4) and/or (5), F.S., limit salary for or prohibit a non-management Career Service FDOT employee, after leaving FDOT employment, from being employed to perform quality assurance and to research and draft technical proposals and sub-contracts for a contractor holding the contract with which the employee had been involved in the limited manner described below; also would the same sections limit the employee, after leaving FDOT employment, in drafting technical proposals which the contractor may present to FDOT in the future?

Further, in your letter dated June 19, 2008, in which you request the Commission to issue a formal opinion, your stated, "Thus, I do not believe that the series of insignificant clerical duties that I now perform should prohibit me, under Section 112.3185(4), F.S., from

employment with the contractor in a role of developing and evaluating sub-contracts and sub-contractors to implement the subject contract."

In light of the foregoing, we find that your proposed employment would be in connection with the "Ultra" contract.

[3]Though too lengthy to publish in full here, we note that you represent that your duties are essentially transmission of data, track items, by checking them off of a list, perform "keystroking" functions, etc. You also represent that you do not perform any of the substantive duties for FDOT. Additionally, we note that your supervisor has congratulated you for receiving the offer of employment with Contractor.

[4]Section 112.313(8), Florida Statutes, provides:

> DISCLOSURE OR USE OF CERTAIN INFORMATION.- A current or former public officer, employee of an agency, or local government attorney may not disclose or use information not available to members of the general public and gained by reason of his or her official position, except for information relating exclusively to governmental practices, for his or her personal gain or benefit or for the personal gain or benefit of any other person or business entity.

POSTEMPLOYMENT RESTRICTIONS

DCF FORMER EMPLOYEE PRIVATELY EMPLOYED IN CONNECTION WITH DCF CONTRACT

To: Mr. Stephen Conrad (Jacksonville)

SUMMARY:

Through the application of Section 112.316, Florida Statutes, to the particular facts of this inquiry, a former employee of the Department of Children and Family Services is not subject to the two-year post-public-employment restriction of Section 112.3185(4), Florida Statutes. CEO 05-19, CEO 01-6, and CEO 95-19 are referenced.[1]

QUESTION:

Would Section 112.3185(4), Florida Statutes, prohibit your holding employment or a contractual relationship [after you leave public employment with the Department of Children and Family Services (DCF)] with a company in connection with a contract regarding which you had the limited DCF responsibility described below?

Under the particular circumstances of your inquiry, this question is answered in the negative.

By your letter of inquiry and additional information provided to our staff, we are advised that you are employed by the Department of Children and Family Services (commonly known as the Department of Children and Families or DCF), District 4, as the District Manager for Administrative Services, and that one of the sections you supervise includes contract managers for community based care organizations contracting with DCF. In addition, you advise that because your DCF position is being eliminated with a reorganization of DCF effective July 1, 2007, you have applied for a private position with a community based care provider as its chief operations officer, with the position including your working for the provider in connection with a contract for contractual services between DCF and the provider which expires in February 2009.

Further, you advise that the contract was signed in 2004, that you began your employment with DCF in 2005, and thus that you did not participate personally and substantially through decision, approval, disapproval, recommendation, rendering advice, or investigation regarding the contract. However, regarding the particular contract and similar contracts, you describe your DCF role to include:

- My primary role was to make sure the contract managers had a professional relationship with the community based care providers and the tools and skills to perform their functions.
- Before September 2006, I supervised the contract manager supervisor who supervised the individual contract managers who were by statute assigned to contracts. It was only coincident with the elimination of the contract management supervisor that I became the direct supervisor for contract managers. At the time of my request for an advisory opinion, I had been doing this for six months.
- My position is being eliminated with the reorganization of the Department of Children and Families effective July 1, 2007 and the contract managers will be assigned to another individual and staff element for supervision.
- When I took the position as district manager for administrative services in October 2005, there was another position that supervised the contract managers. This position, contract manager supervisor, reported to me along with the public information officer and the client relations staff. The contract management supervisor had all of the contract managers working for him. I was even further removed than I am today.
- However, as a temporary measure as a result of the budget issues for FY 06/07 for District 4, in September 2006 the position of contract management supervisor was not filled. It also was not deleted. So for the past

six months we have not had a contract management supervisor and the contract managers have reported to me.

- Originally, my task was to ensure that the contract managers, through the contract management supervisor, were doing their jobs. My focus was on assessing their performance functions as contract managers. I continued this focus when the contract management supervisory position was filled.
- The NEW Department of Children and Families reorganization recently approved by the Secretary of the Department of Children and Families has the contract managers assigned to a unit that is not under my purview.
- Contract managers have the responsibility for overseeing contract performance measures for their respective contracts. If a measure needed attention by the provider, it was either the contract manager or the District Administrator that signed a request to the provider for a corrective action plan. I did not sign corrective action plans.
- Contract monitoring is performed by the Department of Children and Families' contract oversight unit. This is not part of my organization. The contract managers take the relevant findings from the contract oversight unit and ask for corrective action plans. Additionally, our zone program office also monitors contract performance and requests that the contract managers request information from the providers relevant to these issues.
- My most substantive role was to ensure that the contract management supervisor position (when filled) and all contract managers worked with their providers in a professional manner and that they had the training and experience to perform their functions.

Section 112.3185(4),[2] Florida Statutes, provides:

> 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. If the agency employee's position is eliminated and his or her duties are performed by the business entity, this subsection may be waived by the agency head through prior written approval for a particular employee if the agency head determines that the best interests of the state will be served thereby.

Inasmuch as you have represented that your work after you leave DCF will be in connection with a DCF contract for contractual services,[3] we must determine whether the contract was "within your responsibility" while you were a DCF employee.

We find that the contract was within your responsibility. The relevant scenario that crystallizes from your inquiry is that you (in your DCF capacity) were in the chain of supervision above contract monitors/managers who managed the particular contract with the provider, and that, among other DCF duties of yours concerning the monitors/managers, you saw or reviewed their corrective action plans or related information regarding the contract and the provider. This finding is in accord with our finding in CEO 01-6 construing "within responsibility" to include situations in which one is the supervisor of one who actually participates regarding a matter. Thus, Section 112.3185(4), if applied in isolation, would restrict your post-DCF employment regarding the provider.

However, under the particular circumstances of your inquiry, which include the contract in question having been designed and entered into by persons other than you prior to your employment with DCF, your short tenure as a DCF employee, the responsibilities of the District Administrator and the contract oversight unit, and your not having been the contract monitor/manager of the contract, we believe that it is appropriate to apply Section 112.316, Florida Statutes,[4] thereby negating the restriction that would arise via the literal language of Section 112.3185(4). See CEO 95-19 (former AHCA employee employed by prepaid Medicaid health plan provider contracting with AHCA) in which we observed that "Section 112.3185(4) was designed to prevent State employees from using their public positions to conceive of a need for services, develop a contract to obtain those

services, and then to 'switch sides' and go to work for the entity that was awarded the contract that they conceived and developed while public employees."

Accordingly, under the specific circumstances of your inquiry, we find that you are not restricted by Section 112.3185, Florida Statutes,[5] from working after you leave DCF employment in connection with a contract between your private employer or a related entity and DCF.

ORDERED by the State of Florida Commission on Ethics meeting in public session on June 8, 2007 and **RENDERED** this 13th day of June, 2007.

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Norman M. Ostrau, Chairman

[1]For prior opinions of the Commission on Ethics, go to www.ethics.state.fl.us

[2]We find that Section 112.3185(3), Florida Statutes, would not be violated by your working for the provider in connection with the contract because you represent that you did not have a procurement role as described in the statute and because you represent that the contract was entered into prior to your DCF employment. Section 112.3185(3) provides:

> 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. When the agency employee's position is eliminated and his or her duties are performed by the business entity, this subsection does not prohibit him or her from employment or contractual relationship with the business entity if the employee's participation in the contract was limited to recommendation, rendering of advice, or investigation and if the agency head determines that the best interests of the state will be served thereby and provides prior written approval for the particular employee.

[3] In correspondence with our staff following your letter of inquiry, you and an officer of the umbrella organization you plan to work for suggested that perhaps the restriction of Section 112.3185(4) could be avoided by your being employed by an entity within their organization that does not have a contract with DCF, with the entity then subcontracting with the organization's entity that is the DCF provider for you to provide services as the chief operations officer of the entity that is the DCF provider. We find that this would not eliminate the restriction. The statute encompasses employment or a contractual relationship with "any business entity," if the work is in connection with a contract for contractual services which was within one's public agency employee responsibility.

[4]Section 112.316 provides: CONSTRUCTION - It is not the intent of this part, nor shall it be construed,to prevent any officer or employee of a state agency or county, city, or other political subdivision of the state or any legislator or legislative employee from accepting other employment or following any pursuit which does not interfere with the full and faithful discharge by such officer, employee, legislator, or legislative employee of his or her duties to the state or the county, city, or other political subdivision of the state involved.

[5]By telephone, you stated that your position with DCF is a Selected Exempt Service (SES) position. SES positions are among the positions subject to the two-year restriction of Section 112.313(9)(a)4, Florida Statutes, regarding lobbying or "representation" after leaving a covered public position. However, your making contact with DCF regarding the provider's delivering on the particular contract would not, in and of itself, constitute representation; nevertheless, contact other than that concerning delivery (for example, contact to secure another contract) could constitute prohibited representation. CEO 05-19 (note 5). Thus, govern yourself accordingly regarding Section 112.313(9)(a)4 and your contact with DCF within two years of leaving DCF; and note the broad definition of "represent" or "representation" codified at Section 112.312(22), Florida Statutes.

CEO 07-15 -- June 13, 2007

VOTING VOTING CONFLICT

CITY COMMISSIONER VOTING ON LAWSUIT MATTERS

To: Kenneth L. Weiss, Attorney at Law (St. Pete Beach)

SUMMARY:

A city commissioner is not presented with a voting conflict under Section 112.3143(3)(a), Florida Statutes, regarding measures to hire or dismiss city attorneys or regarding measures to settle comprehensive land use plan lawsuits in which the commissioner is named but for which the commissioner personally will not pay for the litigation. CEO 85-46 and CEO 86-57 are referenced.[1]

QUESTION 1:

Is a city commissioner presented with a voting conflict regarding measures to put forth a request for proposals seeking a city attorney, to retain or terminate the current city attorney (where the current city attorney is counsel of record for the city in two lawsuits involving the commissioner in a non-city capacity), and to hire a new city attorney?[2]

Question 1 is answered in the negative.

By your letter of inquiry and accompanying information, additional correspondence from you, and other information submitted at the request of our staff, we are advised that ... (Commissioner) serves as a City Commissioner of the City of St. Pete Beach, having been elected and sworn in to office in March of this year. In addition, we are advised that the Commissioner, another City Commissioner, and others are defendants in two lawsuits [one filed by the City (City's lawsuit) and one filed by a developer (developer's lawsuit)][3] arising out of changes to the City's comprehensive land use plan, the Commissioner's and others' petition efforts to repeal the changes, and related matters. Essentially, you advise, the two lawsuits seek a court determination that the petitions are invalid and that the electorate does not have a right to repeal the changes. Further, you advise that the continued prosecution of both the City's lawsuit and the developer's lawsuit is again[4] at issue before the City Commission, there being a pending motion for summary judgment in both suits. Also, you advise that the Commissioner personally has not had to bear and will not have to bear any attorney fees and costs in either suit because a citizens' petition committee has and will pay them, as it did in the earlier suit.[5] Thus, in order to obtain guidance for the Commissioner in avoiding potential ethics conflicts, you seek our opinion in the Commissioner's behalf.

Section 112.3143(3)(a), Florida Statutes, is the portion of the voting conflicts law applicable to elected, local public officers such as city commissioners. The statute provides:

VOTING CONFLICTS. - No county, municipal, or other local public officer shall vote in an official capacity upon any measure which would inure to his or her special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained, other than an agency as defined in s. 112.312(2); or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer. Such public officer shall, prior to the vote being taken, publicly state to the assembly the nature of the officerâ€™s interest in the matter from which he or she is abstaining from voting

and, within 15 days after the vote occurs, disclose the nature of his or her interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting, who shall incorporate the memorandum in the minutes.

In past opinions, we have not found the statute to be applicable to measures where there was sufficient uncertainty at the time of the vote as to whether, and, if so, to what extent, gain or loss would result from the measure, that we found such gain or loss to be remote and speculative. In the situation presented, we too find that the statute is not applicable and that no voting conflict is created. While a City Commission measure to retain or terminate an attorney as City Attorney would inure to the special private gain or loss of the attorney, it is uncertain that such a measure would directly result in gain or loss to the Commissioner.[6] Assuming arguendo that a dismissal of the lawsuits or a change in the City's position regarding the lawsuits would inure to the special private gain or loss of the Commissioner (a defendant in the lawsuits)[7] and assuming arguendo that a new attorney for the City would recommend dismissal or a change in position, such dismissal/change of position would not directly result from a replacement of the City's Attorney, inasmuch as the advice of a lawyer is not required for or would not bind the City Commission's decisions regarding dismissal/change of position. In other words, whether there will be a dismissal or a change of position regarding the lawsuits will depend on many factors, the predominant one being a decision of the City Commission and not the advice of its lawyer. See, for example, CEO 85-46. Therefore, we find that the Commissioner is not presented with a voting conflict regarding the measures.

QUESTION 2:

Is the Commissioner presented with a voting conflict regarding a measure for the City to retain outside counsel to evaluate the merits of both the City's lawsuit and the developer's lawsuit in order to render an independent legal opinion to the City Commission as to the efficacy of the litigation, or regarding a measure to hire a particular attorney as outside counsel?

Question 2 is answered in the negative. Under our reasoning regarding Question 1, we find that no voting conflict is created because any gain or loss to the Commissioner would be remote or speculative.[8]

QUESTION 3:

Is the Commissioner presented with a voting conflict regarding a measure to dismiss the City's current counsel of record (outside counsel and the City Attorney) in the lawsuits and to retain new counsel?

Question 3 is answered in the negative. As with Questions 1 and 2, we find that no voting conflict is created because any gain or loss to the Commissioner would be remote or speculative.

QUESTION 4:

Is the Commissioner presented with a voting conflict regarding a measure concerning continuation of the litigation, such as a measure concerning whether the City should dismiss or settle the lawsuits?

Question 4 is answered in the negative. Unlike a situation in which a public officer personally faces fees or costs in an insular, purely private matter, the Commissioner's situation involves her being a nominal defendant in what can be referred to as public interest litigation, and involves her not personally financing costs or fees involved in the lawsuits. See CEO 86-57 (Question 2), in which we found that a county commissioner was not presented with a voting conflict where the commissioner would not be required to expend personal funds in a lawsuit. Further, in CEO 86-57 we stated:

Nor do we feel that the fact that an individual may threaten a future lawsuit or appeal of an official's action should be sufficient to disqualify that official from taking any action. Otherwise, any person might be able to disqualify an entire board from taking action simply by advising the board that he would appeal their decision or file a lawsuit against them if the board were to take action adverse to the individual.

QUESTION 5:

Is the Commissioner presented with a voting conflict regarding a measure to repeal the ordinance that fostered the comprehensive land use plan changes, thereby possibly causing the lawsuits to be dismissed as moot?

Question 5 is answered in the negative under our reasoning regarding Question 4.[9]

Accordingly, we find that the Commissioner is not presented with a voting conflict regarding measures as discussed herein.

ORDERED by the State of Florida Commission on Ethics meeting in public session on June 8, 2007 and **RENDERED** this 13th day of June, 2007.

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Norman M. Ostrau, Chairman

[1] For prior opinions of the Commission on Ethics, go to www.ethics.state.fl.us

[2] Questions herein are restated (as to form, not substance) from the wording presented in your inquiry.

[3] Another lawsuit, filed by the City before the filing of the two pending lawsuits and naming the Commissioner as a defendant in his capacity as an officer of a citizens' petition committee, which sought to have the court declare that proposed City charter amendments were unconstitutional, is over, having been resolved in favor of the committee, you advise. In addition, you advise that the attorney fees and costs of the defendants in that suit were paid by the committee-that the Commissioner did not pay any legal fees or costs in that action.

[4] You advise that the current City Attorney (who also served the previous City Commission which instituted the City's lawsuit and which agreed with the developer's position in the developer's lawsuit) and the previous City Commission refused to dismiss the City's lawsuit or to consider settlement when requested to do so by you and other citizens after the electorate's repeal of the land use plan changes.

[5] You advise that the committee's funding from which the fees and costs will be paid, if necessary, does not include contributions from the Commissioner, that the Commissioner is not expected to contribute to the committee's funding, and that the Commissioner will not contribute to its funding. Further, you advise that past contributions by the Commissioner to the committee were expended prior to the Commissioner's election to office and that the Commissioner will not receive any moneys back from the committee when it winds up its operations.

[6] It therefore follows, and we so find, that the statute also is not applicable to a measure regarding whether the City should issue a request for proposals for the services of a City Attorney.

[7] See Questions 4 and 5 below.

[8] Your phrasing of Question 2 included the wording "provided [the Commissioner] has no contractual relationship with said attorney." While we find that the voting conflicts law would not be implicated by the Commissioner's voting on a measure affecting an attorney who also represents the Commissioner (e.g., a measure to hire the attorney as outside counsel for the City on a lawsuit) because, inter alia, one's attorney is not one's principal but rather is one's agent, we also find that such a hiring would implicate Section 112.313(7)(a), Florida Statutes, in that the Commissioner would hold a contractual relationship with the attorney (a business entity doing business with the Commissioner's agency).

[9] Your inquiry includes a sixth question. However, this question does not present a concrete situation susceptible to our analysis. Please inquire of us or our staff in the future if any additional concrete questions regarding the Code of Ethics, materially different from those answered herein, present themselves.

POST-OFFICEHOLDING

FORMER COUNTY COMMISSIONER ATTENDING MEETINGS

To: Ron Pritchard (former Brevard County Commissioner)

SUMMARY:

A former county commissioner is not prohibited by Section 112.313(14), Florida Statutes, from merely attending, in behalf of a client, gatherings which are not regular meetings of the county commission and which are not advertised or noticed under the Sunshine Law; however, the former commissioner is prohibited from making comments in behalf of a client at such a gathering if a county commissioner or one or more enumerated county employees is present. CEO 92-3 and CEO 06-22 are referenced.[1]

QUESTION 1:

May you, a former county commissioner, attend for compensation in behalf of another person or entity, within two years of vacating office, meetings or gatherings, not noticed or advertised as meetings of the county commission, which also are attended by county commissioners, commissioners' aides, the county manager, or any of the immediate support staff of the county manager, provided you do not address the event panel or make comments while attending?

Question 1 is answered in the affirmative.

By your letter of inquiry, additional written information provided by you to our staff, our taking notice of our previous opinion to you (CEO 06-22), and a telephone conversation between you and our staff, we are advised that you left office as a Brevard County Commissioner in November 2006 and that you have additional questions about the application of Section 112.313(14), Florida Statutes, to you if you attend meetings in behalf of a client. More specifically, you advise that the meetings could be arranged by anyone (e.g., the press), would contain a question and answer panel, would be for the purpose of discussing issues of interest to County government and others (e.g., issues concerning development of affordable housing), might or might not be open to the public, would not be advertised or noticed as a meeting of the County Commission, but would be attended by one or more County Commissioners, Commissioners' aides, the County Manager, or immediate support staff of the County Manager.

Section 112.313(14), Florida Statutes, provides in part:

> (14) LOBBYING BY FORMER LOCAL OFFICERS; PROHIBITION.—A person who has been elected to any county, municipal, special district, or school district office may not personally represent another person or entity for compensation before the government body or agency of which the person was an officer for a period of 2 years after vacating that office. For purposes of this subsection:
>
> (a)The "government body or agency" of a member of a board of county commissioners consists of the commission, the chief administrative officer or employee of the county, and their immediate support staff.

Previously, in CEO 06-22 (Question 2), in reliance on our decision in CEO 92-3 (Question 1),[2] we advised that you would be prohibited by the statute from merely attending County Commission meetings or workshops in behalf of another for compensation, reasoning that your attendance, even without speaking or asking questions (attending merely as an observer for your client), would constitute "representation" within the meaning of Section 112.312(22), Florida Statutes.[3] However, we do not find that you would be prohibited from merely attending the meetings described in your instant inquiry, provided that the meetings are not noticed or advertised as meetings or workshops of the County Commission,[4] because we do not find that such privately orchestrated or informal gatherings constitute an "agency proceeding" within the meaning of Section 112.312(22).

Question 1 is answered accordingly.

QUESTION 2:

Would you be prohibited by Section 112.313(14) from making comments at such meetings in behalf of a client, where one or more County Commissioners or County employees noted above (persons holding a County position identified in CEO 06-22) is in attendance?

Question 2 is answered in the affirmative.

In CEO 92-3 (Question 2), we opined that a similar restriction prohibited a former legislator from asking questions about a legislative proceeding or proposed legislation from a legislative staff member for informational purposes only, in behalf of another for compensation, reasoning that such questioning came within the applicable definition of "representation,"[5] and stating:

> . . . the definition of 'represent' specifically includes 'personal communications made with the officers or employees of any agency on behalf of a client.' Because asking questions from a legislative staff member would constitute personal communications with an employee of your former agency and because your questions would be on behalf of another, this action would constitute representing another before the Legislature. Asking questions for informational purposes only may not necessarily involve any communication intended to influence legislative action, but it appears to us that this is a blanket prohibition, designed to preclude a former agency official from being compensated for actions in behalf of another that involve the agency. In addition, we note that many questions, in the guise of asking for 'information,' actually could be intended to communicate a client's position or affect legislation.

Our decision in CEO 92-3 recognizes the reality and substance of what constitutes a "communication," irrespective of the label (e.g., "informational question," "rhetorical statement," "statement to a panel," "comment to an entire audience") that might attach to it. In your situation, such comments by you, if made in behalf of another person or entity for compensation, would constitute personal communications made with an officer or enumerated employee of your former government body or agency, if such a person was in attendance at the meeting.

Question 2 is answered accordingly.

QUESTION 3:

When is your attendance at an agency proceeding, or your personal communication with an officer or employee of your former government body or agency, "in behalf of another person or entity for compensation?"

Question 3 results from a portion of your inquiry that states:

> It is my understanding my limitation is if I am 'compensated' when I attend. If the subject was 'less taxes' at a budget meeting I could speak on behalf of lowering taxes or less government. As long as I am not 'compensated' I may attend any meeting regardless of who is on the panel or in attendance. Is that correct?

We are unable to definitively opine in a universal or comprehensive manner as to Question 3 because an answer regarding a given situation necessarily is dependent on detailed facts and evidential nuances not susceptible to treatment in the context of a request for an advisory opinion. Those circumstances would include but would not be limited to facts concerning County interests, County action/inaction, or potential County action/inaction regarding particular subject matters or issues of concern to one's client. We caution that, in our view, the prohibition could apply to situations in which a former officer's client (a person or entity compensating the former officer) pays the former officer to monitor, deal with, or handle his or its affairs regarding County government, even though the former officer also personally has interests or affairs regarding County government as to the same or similar subject matters or issues that concern the client.[6]

Question 3 is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on March 2, 2007 and **RENDERED** this 7th day of March, 2007.

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Norman M. Ostrau, Chairman

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[1]For prior opinions of the Commission on Ethics, go to www.ethics.state.fl.us

[2]In CEO 92-3 (Question 1), we opined that a former State Representative's monitoring and attending publicly noticed committee meetings or sessions of a legislative house in order to advise his client of what occurred at the meetings constituted "representation."

[3] Section 112.312(22) provides:

> 'Represent' or 'representation' means 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.

[4]Such advertisement or notice, even if not for a regular or conventional meeting of a public board, is often made by governmental entities in order to comply with the Sunshine Law (Section 286.011, Florida Statutes) when two or more members of a public board are expected to attend a gathering to discuss some matter on which foreseeable action may be taken by the board. Hough v. Stembridge, 278 So. 2d 288 (Fla. 3d DCA 1973).

[5]The same definition, codified at Section 112.312(22), Florida Statutes, applies to the statute at issue in your inquiry.

[6]Also, note that one represents another person or entity for compensation when one represents one's wholly-owned corporation. See In re MICHAEL E. LANGTON, Commission on Ethics Complaint No. 90-86.

CEO 05-4 -- April 26, 2005

POST-OFFICEHOLDING RESTRICTIONS

FORMER COUNTY COMMISSION MEMBER REPRESENTING CLIENTS BEFORE COUNTY BOARDS AND STAFF

To: Mark Herron, Attorney (Tallahassee)

SUMMARY:

No prohibited conflict of interest would be created under Section 112.313(14), Florida Statutes, were a former member of a Board of County Commissioners to represent clients for compensation before the County Planning and Zoning Board, the Board of Adjustments, or the County Planning, Zoning and Development Division within two years of leaving office. A conflict would be created were the former member to represent clients for compensation before members of the County Commission either sitting as a board or individually, or before aides to the Commission members.

QUESTION 1:

Would Section 112.313(14), Florida Statutes, be violated were a former member of the Santa Rosa Board of County Commissioners to represent clients before the County Planning and Zoning Board or Board of Adjustments, or the County Planning, Zoning and Development Division, but not before the County Commission or individual Commissioners or their aides?

Your question is answered in the negative.

By letter of inquiry and additional materials supplied to this office and conversations with staff, we are advised that W.A. "Buck" Lee served on the Santa Rosa County Commission until his term expired in November 2004. He owns a consulting business and would like to represent or assist individuals in planning and permitting activities and wishes to know whether such representation would violate the post-officeholding restriction of the Code of Ethics for Public Officers and Employees. He plans to represent clients before the Planning and Zoning Board, the Board of Adjustments, and the staff of the County Planning, Zoning and Development Division, but does not intend to represent persons before the County Commission sitting as a board or before individual members of the commission or their aides.

The former Commissioner anticipates that about 90 percent of his consulting work will involve applications for zoning changes. Such applications are initially submitted to the Planning, Zoning and Development Division, which serves as staff to both the Planning and Zoning Board and the Board of Adjustments. The Director of the Division is appointed by the County Administrator[1] and advises both Boards. The Planning and Zoning Board is a ten member body whose members are appointed by the County Commission.[2] When a zoning change is requested, the Division provides a report to the Planning and Zoning Board commenting on the proposed change. In addition, according to the County Land Development Code, the Board must "hear and evaluate comments from the County Planning and Zoning Division and such other departments as may be pertinent."

The former Commissioner contemplates that he would appear before staff of the Division and before the Planning and Zoning Board itself. The Board's decision automatically is reviewed by the County Commission, but he states that he would retain another person to appear before that body. The Board of Adjustments is a five member body also appointed by the County Commission. The former Commissioner's appointee still serves on this Board. The Board hears requests for variances from the County Land Development Code, and its decisions are final unless appealed to the County Commission. Again, the former Commissioner anticipates dealing with

staff of the Division and appearing when necessary before the Board, but not before the County Commission or any member thereof or his or her aide.

Section 112.313(14), Florida Statutes, provides:

> LOBBYING BY FORMER LOCAL OFFICERS; PROHIBITION. -- A person who has been elected to any county, municipal, special district, or school district office may not personally represent another person or entity for compensation before the governing body of which the person was an officer for a period of 2 years after vacating that office.

As a former elected member of the Santa Rosa County Commission, the former Commissioner is prohibited from representing clients before Santa Rosa's governing body for two years after leaving office. "Representation" is defined as "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." Section 112.312(22), Florida Statutes. The definition is very broad and includes making inquiries of staff (CEO 01-3) and attendance at a meeting to observe the proceedings. CEO 92-3. All of the contacts described above, including the filing of the application, would constitute representation under this definition. However, it does not appear that either the Planning and Zoning Board, the Board of Adjustment, or the staff of the Planning, Zoning and Development Division are either the "governing body" or part of the "governing body" of which the former Commissioner was an officer.

We have not had occasion to consider the parameters of Section 112.313(14) in the context of an opinion, although we have had addressed the extent of other post-employment and post-officeholding restrictions. In CEO 92-3, we dealt with the restriction found in Article II, Section 8(e), Florida Constitution and Section 112.313(9)(a)3, Florida Statutes, which provides that "[n]o member of the legislature or statewide elected officer shall personally represent another person or entity for compensation before the government body or agency of which the individual was an officer or member for a period of two years following vacation of office." There, we found that the provision prohibited a former legislator not only from appearing before the Legislature, but also from asking informational questions of staff and attending committee meetings within two years of vacation of office. In CEO 02-12, we found that an attorney employed in the Practitioner Regulation Section of the General Counsel's Office of the Agency for Health Care Administration (AHCA) was prohibited by Section 112.313(9)(a)4, Florida Statutes, from representing clients not only before that division but also before any other division of AHCA and before personnel transferred from AHCA to the Department of Health as part of an anticipated transfer of the practitioner regulation component. Similarly, in CEO 04-16, we advised an individual formerly employed in District 1 of the Department of Transportation that he was prohibited from representing clients before the entire Department for two years after leaving employment.

As is clear from the foregoing, we have taken a broad view of the post-employment and post-officeholding limitations. This is in part because the purpose of the "revolving door" prohibitions is to prevent the appearance of impropriety by preventing public officials from exploiting the special knowledge or influence gained from their public position for private gain after leaving that position, and to restrict interactions between a former officer or employee and his or her former colleagues. See, CEO 95-14, CEO 93-14, and CEO 02-12. Nevertheless, we recognize that the various sections dealing with post employment or officeholding restrictions use slightly different language. Section 112.313(14) uses the term "governing body," while Article II, Section 8 and Section 112.313(9)(a)3 use the phrase "government body or agency," and Section 112.313(9)(a)4 (the provision applicable to state employees) uses the term "agency by which he or she was employed." By using a different and more limited terminology, it would appear that the legislature intended the post-officeholding prohibition applicable to elected county, municipal, special district, or school district officers to be less restrictive than the prohibitions applicable to other officers and employees.

We do not go so far as to adopt the position that the prohibition is limited to appearances before the County Commission sitting as a board. Such an interpretation would render the statute a nullity, as it would have the absurd effect of prohibiting former officials from representing clients in a public meeting of the body on

which they served, while allowing them to meet privately, one-on-one and behind the scenes, with the very same persons or, in what would amount to almost the same thing, their aides. Construction of a statute which would lead to an absurd result should be avoided. McKibben v. Mallory, 293 So.2d 48, 51 (Fla. 1974).

Accordingly, we find Section 112.313(14), Florida Statutes, would prohibit a former member of the Santa Rosa County Commission from representing clients for compensation before members of the County Commission either sitting as a board or individually, or before aides to the Commission members, but would not prohibit him from representing clients before the Planning and Zoning Board, the Board of Adjustments, or the County Planning, Zoning and Development Division.

ORDERED by the State of Florida Commission on Ethics meeting in public session on April 21, 2005 and RENDERED this 26th day of April, 2005.

Joel K. Gustafson, *Chair*

[1]Although Section 2.02.00 of the County Land Development Code states that the Director is appointed by the Commission, you have provided a letter from the County Attorney which states that this provision has been superseded by a later ordinance.

[2]Neither of the former Commissioner's two appointees still serve on the Board.

CEO 01-6 -- March 20, 2001

POST-EMPLOYMENT RESTRICTIONS

FORMER DCF DISTRICT ADMINISTRATOR EMPLOYED BY PRIVATE PROVIDER WHOSE CONTRACT SHE APPROVED

To: Frances H. Gibbons, Former District Administrator, Department of Children and Families (Lehigh)

SUMMARY:

A former DCF District Administrator who was employed by DHRS, the predecessor of DCF, prior to 1989, is not prohibited from representing a provider of social services, whose contract she ultimately approved in her capacity as District Administrator, before the Department of Children and Families, including her former District, for a period of two (2) years following the termination of her employment with the Department. Section 112.313(9)(a)6a and b applies to exempt her from the prohibition of Section 112.313(9)(a)(4), which prohibits agency employees from representing another person or entity for compensation before the agency with which they were employed for a period of two years following vacation of their positions.

Because the former District Administrator's employment by the provider would not be "in connection with" any existing contract between the provider and the District, or "in connection with" any contract that she was involved in the procurement or development of as District Administrator, neither Section 112.3185(3) nor Section 112.3185(4), Florida Statutes, prohibits her from becoming employed as Regional Director of the provider.

QUESTION:

Would the Code of Ethics for Public Officers and Employees be violated were you, a former District Administrator with the Department of Children and Families, to become employed by a social services provider whose contract you approved as District Administrator?

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

In your letter of inquiry, you ask whether the Code of Ethics prohibits you, a former District Administrator with the Department of Children and Families ("DCF") from becoming employed as Regional Director for Family Preservation Services, Inc. ("provider"), a private provider contracting with your former DCF district. You advise that you became employed by the Department of Health and Rehabilitative Services in 1976 and were promoted over the years to District Administrator of DCF District 8. As District Administrator, you advise, you supervised the delivery of services in a seven (7) county area that included two (2) major

institutions and 2,750 employees.[1] You also write that you administered a budget in excess of $150 million.

You advise further that DCF contracts with private providers for the delivery of many of its services. Consequently, as District Administrator, you signed hundreds of contracts for services. However, you claim that, notwithstanding your signing the contracts, District staff determined which services to purchase and from whom they would be purchased. You neither chose the provider nor the services to buy, you write.

As required by law, DCF continues to privatize the delivery of children's services, you write. However, authority over these matters now has been transferred to newly formed community alliances which will make all future decisions about service delivery to children. You relate that, as a member of the newly formed alliances representing DCF, you had not met with any of the alliances by September 13, 2000, when you were notified by the Secretary of DCF that your services were no longer needed. You advise further that a new District Administrator was appointed to replace you prior to any meeting being held by the alliances.

We are advised that the subject provider, a private social services agency that operates in fifteen states, is relatively new to Florida. You write that it is in the process of reorganization and will hire a Regional Director for Southwest Florida, a position that you are interested in.[2] You advise that, in addition to supervising a staff of approximately 40 employees, the primary responsibilities of the Regional Director will include the following:

< Managing and administering the provider's services, including needs assessments, program development, grant writing, implementation and monitoring in accordance with the provider's policies and procedures and ensuring that the provider's services meets the needs of the local community;

< Ensuring program quality assurance by, among other things, ensuring compliance with the provider's quality improvement plan and policies and procedures, and ensuring compliance with state contract requirements and other standards set forth by other programs and other funding sources;

< Expanding the services that the private provider currently offers by working with all agencies in the area to increase referrals;

< Developing relationships with other area providers to ensure the maximum availability of services, as well as initiating strategic alliances;

< Working with community and governmental agencies to develop new services to meet identified needs;

< Providing leadership for the development, implementation and coordination of all aspects of the provider's division's/region's public relations, including building and maintaining good community relations on behalf of the provider and promoting a positive image of the

provider in the community, and participating in the solicitation of funding from individuals and other sources; and

< Negotiating contracts and making proposals and presentations to funding sources on behalf of the provider.

You also advise that within the past two (2) years, the provider began delivering services to children with developmental disabilities and children in need of mental health and substance abuse services.[3] Although Medicaid reimburses the provider for many of the services it renders, some of its services are purchased through contracts with DCF and other government agencies. You have provided us with a list of five contracts between the provider and the District that originally were entered into while you served as District Administrator. If the contracts were not signed by you, they were signed for you by an acting District Administrator, you advise.

The contract for "Supervised Visitation" services, which was listed by you, already has ended, you write. You advise that the contract for "Caregiver Home Studies" services, which was scheduled to terminate on June 30, 2001, has been terminated. Similarly, the contract for "Foster Care Licensing Home Studies" services, which was scheduled to terminate on June 30, 2001, has been terminated. You advise that the contract for "Adoption Home Studies" services also has ended. Therefore, the only remaining contract between the District and the provider that was entered into while you served as District Administrator, you advise, is for the provision of "Adult and Family Substance Abuse" services. You advise that the contract originally was funded for $140,091.00 but that its funding subsequently was increased by $21,000.00. You also advise that as of February 6, 2001, only $11,488.93 remained to fund the contract until its termination on June 30, 2001. Thus, out of a total of $328,341.00 that the provider contracted with the District to receive under the five (5) contracts, only $11,488.93 remains to fund the one (1) remaining contract that was entered into while you served as District Administrator.

We also are advised that in addition to the one remaining contract discussed above, the provider serves Developmental Services clients under a Medicaid Waiver program. It also bills the Medicaid program of the Agency for Health Care Administration ("AHCA") for ITOS (Intensive Mental Health Services) for children, you advise. It contracts with the Lee County School District for the provision of additional children's services at approximately $3,000.00 per month. It has entered into a "small" contract with Lehigh Elementary School for the provision of non-Medicaid mental health services, and it has a entered into discussions with the Lake Trafford Elementary School relative to a services contract. Lastly, you advise that the provider bills DCF for the provision of supervised visitation services at approximately $2,500.00 per month.

Relevant to your inquiry are the following provisions of the Code of Ethics for Public Officers and Employees, which provide as follows:

> POSTEMPLOYMENT RESTRICTIONS; STANDARDS OF CONDUCT FOR LEGISLATORS AND LEGISLATIVE EMPLOYEES.--
>
> (a)1. It is the intent of the Legislature to implement by statute the provisions of s. 8(e), Art. II of the State Constitution

relating to legislators, statewide elected officers, appointed state officers, and designated public employees.

2. As used in this paragraph:

a. 'Employee' means:

(I) Any person employed in the executive or legislative branch of government holding a position in the Senior Management Service as defined in s. 110.402 or any person holding a position in the Selected Exempt Service as defined in s. 110.602 or any person having authority over policy or procurement employed by the Department of the Lottery.

. . . . .

4. No agency employee shall personally represent another person or entity for compensation before the agency with which he or she was employed for a period of 2 years following vacation of position, unless employed by another agency of state government.

5. Any person violating this paragraph shall be subject to the penalties provided in s. 112.317 and a civil penalty of an amount equal to the compensation which the person receives for the prohibited conduct.

6. This paragraph is not applicable to:

a. A person employed by the Legislature or other agency prior to July 1, 1989;

b. A person who was employed by the Legislature or other agency on July 1, 1989, whether or not the person was a defined employee on July 1, 1989;

c. A person who was a defined employee of the State University System or the Public Service Commission who held such employment on December 31, 1994;

d. A person who has reached normal retirement age as defined in s. 121.021(29), and who has retired under the provisions of chapter 121 by July 1, 1991; or

e. Any appointed state officer whose term of office began before January 1, 1995, unless reappointed to that office on or after January 1, 1995. [Section 112.313(9)(a), Florida Statutes.]

CONTRACTUAL SERVICES.--

(1) For the purposes of this section:

(a) 'Contractual services' shall be defined as set forth in chapter 287.

(b) 'Agency' means any state officer, department, board, commission, or council of the executive or judicial branch of state government and includes the Public Service Commission.

. . . . .

(3) No agency employee shall, 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.
>
> (4) No agency employee shall, within 2 years of 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. [Section 112.3185, Florida Statutes.]

For purposes of Section 112.3185(4), "contractual services" is defined as set forth in Section 287.012(7), Florida Statutes, to mean

> the rendering by a contractor of its time and effort rather than the furnishing of specific commodities. The term applies only to those services rendered by individuals and firms who are independent contractors, and such services may include, but are not limited to, evaluations; consultations; maintenance; accounting; security; management systems; management consulting; educational training programs; research and development studies or reports of findings of consultants engaged thereunder; and professional, technical, and social services. 'Contractual service' does not include any contract for the furnishing of labor or materials for the construction, renovation, repair, modification, or demolition of any facility, building, portion of building, utility, park, parking lot, or structure or other improvement to real property entered into pursuant to chapter 255 and rules adopted thereunder.

SECTION 112.313(9)(A) 4, FLORIDA STATUTES

Section 112.313(9)(a)4, Florida Statutes, prohibits agency "employees," as that term is defined at Section 112.313(9)(a)2, Florida Statutes, from representing another person or entity for compensation before the agency with which they were employed for a period of two years following vacation of their positions, unless their employment falls within the terms of an exemption contained in Section 112.313(9)(a)6, Florida Statutes. In CEO 94-34, we interpreted the 1994 amendments to Section 112.313(9)(a)6 to permit an employee who was not in a defined position on July 1, 1989, for example, a Selected Exempt Service ("SES") or Senior Management Service ("SMS") position, but who was otherwise employed by an agency on that date, to later accept a defined position with that agency after July 1, 1989 and continue to be exempt upon leaving the defined position. This is in contrast to the situation presented in 94-20[4], where we refused to conclude that any public employment prior to July 1, 1989 amounted to a lifetime exemption from the post-employment restrictions of Section 112.313(9). Rather, we linked the exemption in Section 112.313(9)(a)6 to the employment that gave rise to the potential "revolving door" prohibition. See also CEO 00-1.

Inasmuch as you were employed by DHRS, the predecessor of DCF, prior to 1989 and served continuously thereafter, we are of the opinion that Sections 112.313(9)(a)6a and 6b apply to exempt you from the prohibition of Section 112.313(9)(a)(4). We conclude that you are not prohibited from representing the provider before DCF, including the District, for a period of two (2) years following the termination of your employment with DCF.

SECTIONS 112.3185(3) AND (4), FLORIDA STATUTES

Section 112.3185(3), Florida Statutes, also restricts the employment that you may seek after leaving employment with DCF by prohibiting you from becoming employed by a business entity in connection with a contract in which you participated personally and substantially through "decision, approval, disapproval, recommendation, rendering of advice, or investigation." See CEO 83-8, in which we limited our interpretation of this list of activities to the procurement process. Similarly, Section 112.3185(4) prohibits you from becoming employed in a non-agency capacity in connection with any contract for contractual services which was within your responsibility as a DCF employee during the two-year period following your vacating your position.

In CEO 82-67, we noted that Section 112.3185(4) differs from Section 112.3185(3) in three ways. First, it is more limited as to the time period it governs--specifically, a two-year period following resignation or termination. Secondly, it is more general as to what activities of a former agency employee are prohibited. Thirdly, it applies only to contracts for contractual services.[5]

In CEO 88-32 we observed that Federal law provides a similar limitation on former officers and employees of the executive branch of the United States Government. Under 18 U.S.C. Section 207(a), for example, a former Government employee is prohibited from representing any other person before, or with the intent to influence by making any oral or written communication on behalf of any other person to, the United States in connection with any particular Government matter involving a specific party in which matter such employee participated personally and substantially as a Government employee. See 5 CFR Section 2637.201(a). For purposes of implementing this prohibition the Office of Government Ethics Regulations state:

> To participate 'personally' means directly, and includes the participation of a subordinate when actually directed by the former Government employee in the matter. 'Substantially,' means that the employee's involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participation in a critical step may be substantial. [5 C.F.R. Section 2637.201(d)] [E.S.]

Because we find that your involvement with the last remaining contract was direct, that is, you personally signed the contract, and because your participation in the process by signing the contract was highly significant, that is, the contract could not become executory unless and until it was approved by you or by an assistant district administrator on your behalf, we find that your participation in the procurement of the contract was both "personal" and "substantial." Therefore, if we determine that your employment with the provider is "in connection with" the one remaining contract, then we are of the opinion that Section 112.3185(3) would prohibit you from being employed by the provider in connection with that contract.

We also find that if your employment with the provider is "in connection with" the one remaining contract, then Section 112.3185(4) also would operate to prohibit your employment with the provider, because we are of the opinion that the subject contract was within your responsibility as District Administrator. As with CEO 88-32, our finding here is buttressed by our reference to the United State Code and the Code of Federal Regulations ("CFR").

The term "official responsibility," which is not defined in the Code of Ethics, is defined at 18 U.S.C. 202 as, "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve or disapprove, or otherwise direct Government actions." The Office of Government Ethics Regulations, at 5 CFR Section 2637.202(b)(2), provides further assistance in determining whether a particular matter comes within an employee's "official responsibilities." It reads as follows:

> Determining official responsibility. Ordinarily, the scope of an employee's 'official responsibility' is determined by those areas assigned by statute, regulation, Executive Order, job description or delegation of authority. All particular matters under consideration in an agency are under the 'official responsibility' of the agency head, and each is under that of any intermediate supervisor having responsibility for an employee who actually participates in the matter within the scope of his or her duties.

Thus, notwithstanding the fact that you may not have directly managed the subject contract by monitoring the provision of services, because it was subject to your approval and could not have become executory without your signature or without someone signing it on your behalf, and because you ultimately were responsible for the provision of all services provided by the District either directly or indirectly through contracts, we are of the opinion that the contract was within your "official responsibility" as District Administrator.

However, we do not find that your employment by the provider would be "in connection with" the one remaining contract between the provider and the District. Neither Section 112.3185(3) nor Section 112.3185(4) strictly prohibits a former State employee from going to work for an entity that has contracted with his or her agency. Instead, the statutes prohibit that employment only if it is "in connection with" the contract. Generally speaking, these provisions were adopted to prohibit State employees from being in a position to create a position with a private employer through influencing the award of a contract with that employer or mismanaging their responsibilities over that contract, and then leaving public employment to take that private position, or to prohibit the appearance of same.

Clearly, your employment would encompass a great deal more than the subject contract, which itself is winding down. For example, you would be responsible for managing and administering the provision of all of the provider's services in the region. This would include not only the provision of Adult and Family Substance Abuse Services under the subject contract, but the provision of services to the Lee County School District and to one or two elementary schools, the provision of intensive mental health services for children outside of any contract for the purchase of services that you were involved in as District Administrator, and for which Medicaid is billed,[6] the provision of services to DCF Developmental Services clients under a Medicaid Waiver program[7] outside of any contract for the purchase of services that you were involved with,[8] and the provision of supervised visitation services which is billed to DCF, and which is provided outside of any contract that you were involved in as District Administrator. Furthermore, your position would encompass expanding the services provided by the provider in the region, seeking additional contracts and sources of funding for the provider, and supervising 40 employees, one of whom presumably would be responsible for managing the one remaining contract between the District and the provider.

Accordingly, because your employment by the provider would not be "in connection with" any existing contract between the provider and the District, or "in connection with" any contract that you were involved in the procurement or development of as District Administrator, we are of the opinion that neither Section 112.3185(3) nor Section 112.3185(4) Florida Statutes, prohibits you from becoming employed as Regional Director of the provider.

ORDERED by the State of Florida Commission on Ethics meeting in public session on March 15, 2001 and **RENDERED** this 20th day of March, 2001.

Howard Marks
Chair

[1] The Legislature at Section 20.19(5)(a) 10 and 11, Florida Statutes, created Subdistrict A of DCF District 8. It consists of Sarasota and DeSoto Counties. Charlotte, Lee, Glades, Hendry and Collier Counties make up Subdistrict B.

[2] Comprising the Southwest region will be Charlotte, Lee, Collier, Hendry, and Glades Counties, you write.

[3] You advise that the provider also serves two (2) DCF districts on Florida's east coast and one in Southwest Florida.

[4] CEO 94-20 was appealed to the First District Court of Appeal, which affirmed the opinion by a "Per Curiam Affirmed" decision, as Anderson v. Commission on Ethics, 651 So. 2d 1198 (Fla. 1st DCA 1995).

[5] The subject of CEO 82-67 was a former District Grants Specialist for DHRS who was employed as a fiscal manager by a corporation which was under contract with the Department. Because the former employee's private employment was not in connection with any contract in which he "substantially participated" while employed by the Department, and because the former employee's private employment was not "in connection with" any contract for contractual services which was within his responsibility while a State employee, we found that no prohibited conflict of interest existed.

[6] You advise that one of the criteria employed by the AHCA to certify a provider for payment of Medicaid funds is that the provider has a contract with DCF for the provision of mental health services. Although you write that the provider has used the Adult and Family Substance Abuse Services, contract which you signed and which it refers to as a "mental health" contract as the basis for qualification for the payment of Medicaid funds, you advise that you were not involved with any such existing mental health services contract between the provider and DCF.

[7] According to Rule 59G-8.200, F.A.C. [Home and Community-Based Waivers], Florida obtained waivers of federal Medicaid requirements to enable the provision of specified home and community-based (HCB) services, such as services that can be provided by the provider, to persons at risk of institutionalization. Through the administration of several different federal waivers, Medicaid reimburses enrolled providers for services that eligible recipients may need to avoid institutionalization. Under the Developmental Services Medicaid Waiver program, participants must be (1) clients of the DCF Developmental Services Program; (2) eligible for admission to an intermediate care facility for the mentally retarded-developmentally disabled (ICF/MR-DD);and (3) have elected to receive services in the community rather than in an ICF/MR. In addition, the HCB waiver services must be designed to allow the recipients to remain at home or in a home-like setting.

[8] Although you advise that you signed a Developmental Services Medicaid Waiver agreement in February 2000, that allowed Independent Support Coordinators to choose the provider for the provision of services to DCF Developmental Services clients (See CEO 93-20 for a discussion of how the Medicaid Waiver program operates relative to Independent Support Coordinators), it did not commit the District to either the expenditure of any funds or to the purchase of services from the provider.

CEO 00-6 -- March 10, 2000

POST-EMPLOYMENT RESTRICTIONS

FORMER GOVERNOR'S OFFICE AND DEPARTMENT OF TRANSPORTATION EMPLOYEE REPRESENTING CONSORTIUM OF PUBLIC AND PRIVATE ENTITIES BEFORE GOVERNOR'S OFFICE, LEGISLATURE, AND DEPARTMENT IN CONNECTION WITH STUDY GRANT

To: Travis P. Dungan, Manager, Fast Track, Economic Development & Space, Florida Department of Transportation (Tallahassee)

SUMMARY:

Section 112.313(9)(a)4, which prohibits specified agency "employees" from representing another person or entity for compensation before the agency with which they were employed for a period of two years following vacation of their positions, unless their employment falls within the terms of an exemption, would not apply to prohibit a former Governor's Office employee who was neither in a Senior Management Service ("SMS") nor Selected Exempt Service ("SES") position, nor in a position having the power normally conferred upon such positions while he was employed by the Governor's Office, from representing a coalition of public and private entities formed to apply for funding to study the feasibility of a cross-State rail system through a central Florida transportation corridor before the Governor's Office for a period of two years following his vacating his position. Because the employee was never employed by the Legislature, this provision also would not apply to prohibit him from representing the coalition of public and private entities before the Legislature.

Because the employee's Department of Commerce employment prior to May 1988 in an SES position does not relate to his current employment as an SES employee with the Florida Department of Transportation ("FDOT"), which he accepted after July 1, 1989 and which gives rise to the potential "revolving door" prohibition, he is not exempt from the two-year prohibition after leaving employment with the FDOT.

In addition, because communicating, as the paid Executive Director of the Consortium, with the FDOT on behalf of the Consortium for purposes of negotiating an agreement would involve the employee's attempting to influence the FDOT's decisions relative to the Consortium's implementation of the study grant, such communication falls within the blanket prohibition of Section 112.313(9)(a)4 and is prohibited. Similarly, any communication by the employee within two years of his vacating his FDOT position, as a paid representative of the Consortium, for purposes of either extending the grant or developing a new project would be prohibited by this provision.

However, a distinction can be made between the above types of communications, which are meant to influence the FDOT's decision-making, and the communications that the employee would have with the FDOT while the Consortium is implementing and fulfilling its responsibilities under the Study grant and negotiated agreement. The latter types of communications are not prohibited by Section 112.313(9)(a)4, Florida Statutes.

Neither Section 112.3185(3) nor Section 112.3185(4) prohibits the employee from accepting employment with the Consortium for purposes of implementing the study grant following his vacation of his position with FDOT. Neither Section 112.3185(3) nor Section 112.3185(4) have any application to his employment with the Governor's office because his employment was not in connection with a contract in which he participated personally or substantially through decision, approval, disapproval, recommendation, rendering of advice, or investigation, or which was

within his responsibilities while he was employed by the Governor's Office. Section 112.3185(4) also will not be applicable to his new employment because, upon terminating his employment with the FDOT and accepting the Executive Director position with the Consortium, the employee's new employment will not be in connection with any contract for "contractual services" which was within his responsibility while he was an FDOT employee inasmuch as the grant was not in existence while he was employed with FDOT. Furthermore, although the employee participated "personally" in the first phase of the Fast Track Grant process while he was employed by the FDOT, his participation was not "substantial." His involvement was not of much significance in the Selection Committee's recommendation of the Consortium's proposal to the FDOT Secretary or in the recommendation of the FDOT Secretary or the Governor's Office and will not be of much significance in the Legislature's approval of the project. The employee's role in the process appears to have been limited to acting as a facilitator, at most, in the first phase in the process.

QUESTION:

Are you, an employee of the Department of Transportation and a former employee of the Governor's office, prohibited from leaving the Department for employment as the Executive Director of a consortium of public and private entities and representing the Consortium before the Governor's Office, the Legislature, or the Department of Transportation, or working with the Department to implement a study grant received from the Department within two years of vacating your employment with the Governor's office and the Department?

Your question is answered in the negative, subject to the limitations noted below.

In your letter of inquiry, you advise that you became employed in the Executive Office of the Governor ("EOG") in January 1999 in a professional staff category referred to as "Pay Plan 7," which technically ranks below a "Selected Exempt Service" ("SES") position, as that term is defined at Section 110.602, Florida Statutes, and a "Senior Management Service" ("SMS") position, as that term is defined at Section 110.402, Florida Statutes, although your continued employment still was at the pleasure of the Governor. Then, on September 1, 1999, you write, you became employed in an SES position with the Florida Department of Transportation ("FDOT"), a position that you continue to hold today. This is the second time that you have been employed in an SES position, you write. You advise that you were employed in a SES position as Assistant Secretary of Commerce from about January 1987 through May 1988.

We are further advised that you now are considering an offer to leave your employment with the FDOT to become employed as the Executive Director of a private consortium comprised of a number of "major" private businesses, a chamber of commerce, a regional economic development commission, and a "major" public airport authority. Although the membership of the Consortium will be predominantly private, you write, it likely also will include one or more State universities, one or more private universities, one or more seaport authorities, an additional airport authority, and possibly other "economic development/transportation groups," both public and private.

The Consortium, you advise, essentially was formed to apply for funding to study the feasibility of a cross-State rail system through a "major" central Florida transportation corridor. The application, you write, was submitted to the FDOT's Fast Track Program on November 1, 1999, while you were employed by the FDOT. It proposed that the study be funded by both a minimum $100,000 in private funds and $900,000 of FDOT Fast Track funds. The FDOT Fast Track Funds, you advise, must be approved by the Legislature as the fourth and final step in the Fast Track Grant program.

You advise that among your duties during your employment with the Governor's Office was development of the FDOT Fast Track Grant program. You relate that during this process you interacted continually with the FDOT Secretary. Thereafter, you accepted employment with FDOT in order to implement and manage the program.

You write that there are four steps in the Fast Track Grant process. They are: (1) review of the applications by a Fast Track Selection Committee for purposes of recommending to the FDOT Secretary the projects that should be funded by the Program; (2) a "personal" and independent review by the FDOT Secretary of the applications for purposes of recommending to the Governor the projects that the Secretary believes, based on his own judgment and information obtained from outside the Fast Track office, should be funded by the Legislature; (3) review by the Governor and his Executive Office of the Governor ("EOG") policy and budget staff of the applications and recommendations of the Fast Track Selection Committee and the FDOT Secretary for purposes of making funding recommendations to the Legislature[1] ; and (4) review and final approval by the Legislature of the projects that ultimately will be funded through the Fast Track Program. You write that the first three steps have been completed.

You also write that because you were responsible for managing and implementing the Fast Track Grant Program, including providing administrative support to the Fast Track Selection Committee, you were actively involved in Step #1 of the Fast Track process. However, you advise that you did not serve on the Program's Selection Committee and that you had no voting authority or ex-officio status on the Committee. The Selection Committee, you write, was a strong and independent-minded five-person group led by senior executives of CSX Intermodal, the Jacksonville Port Authority, the Metropolitan Planning Organization Advisory Council, and representatives of the Governor's Office and the FDOT Secretary, which took its work seriously despite having 174 proposals to evaluate and make recommendations on within 18 days of receipt of each application.

In addition to staff review of the applications, you advise, each Selection Committee member read every grant application relative to the mode of transportation within his or her expertise, and, when members had expertise in more than one transportation mode, they reviewed those applications related to that transportation mode, as well. You advise that you supported the Selection Committee by leading discussions, responding to requests about the basic intent and criteria specified by the Governor and Secretary for selecting grant proposals, researching project-specific inquiries, handling logistics, documenting the process, and handling calls from the press, the applicants, and the public.

Staff review of the grant applications also was led by you, you write. You advise that you divided the transportation modes and a special "other" category among your small staff. One professional took primary responsibility for rail, seaport, and airport proposals, another took primary responsibility for "transit and intermodal," and you took the lead on space and on the 54 gray-area applications, which were either ineligible or questionably eligible for grants, and ensured that they received "reasonable" consideration. You write that you also reviewed selected "modal" applications in the other transportation modes when they were unusually innovative, extremely complex, or if they genuinely had statewide or "super-regional" impact. However, you advise that you did not have the lead on rail mode projects, although you read the Consortium's proposal because it was innovative and one of a handful of projects that had more than a local impact.

You write that you were involved with the Consortium's Cross-State Rail Study application in two ways. First, because of the policy debate among the Selection Committee members regarding whether to recommend only construction projects that were already designed and ready to go to construction and exclude any study-type projects which were only in the first phases of what eventually might become "real" projects, you advise, you continually reminded the Committee of the Governor's "vision" for the Program: that it stir up some competitive and creative "juices" that will result in innovative solutions to problems impacting Florida's economic competitiveness, Florida's most critical industries (e.g., space, tourism, defense, high technology, etc.), and the freight business. You relate that you illustrated your points by referencing several proposals, including the Consortium's proposal. Secondly, you advise that you spoke, answered questions, and provided a "range" of comments on many projects, including the Consortium's proposed project. However, you relate that you did not emphasize any one of the proposals more than the others and, in discussing the projects with the Selection Committee, you did not recommend one project over another. Sometimes the Committee listened to you, you write, but often they did not.

We are advised that on November 18, 1999 the Selection Committee made its decisions, all unanimous, on which projects to recommend to the FDOT Secretary. Among the 29 recommended projects, you write, the Consortium with which you are considering becoming associated was recommended by the Committee for a $900,000 grant matched by a minimum of $100,000 in local share funds donated by members of the Consortium.

In Step #2, the FDOT Secretary conducted a personal review of all of the recommended proposals. As part of his review process, and to ensure maximum objectivity, you write, the FDOT Secretary essentially built a "firewall" between himself and the FDOT Fast Track office. He relied instead on information requested of the FDOT Districts and on his own judgment of how each project fit within FDOT's overall plans for the future and on whether each was consistent with FDOT policies and philosophy. You advise that your role was limited to a single response to a request that the Secretary also made to the Aviation, Rail, Transit and Seaport/Intermodal managers in FDOT. That request was to propose alternative projects in the event that he did not accept one or more of the Selection Committee's recommendations.

Because the Consortium's proposal was under review, your recommendations on alternative proposals are irrelevant to the issues that we are being requested to opine on, you advise. We are advised that the Secretary deleted six (6) projects from the original 29 that were recommended and added four (4) alternative projects. You advise that he made no changes or adjustments to the Consortium's grant proposal.

In Step #3, during early January 2000, the Governor and his EOG staff reviewed and approved the Secretary's recommendations. The projects were announced as part the Governor's budget recommendations to the Legislature on January 18, 2000. You advise that you had no role and provided no input during the third step of the Fast Track process.

We are advised that the Fast Track program now has entered the fourth step of the process, that is, the Legislature's review of the FDOT Work Program and the Governor's budget requests, in which the Fast Track recommendations are contained, including the Consortium's proposal, which amounts to $900,000 out of the total $60,000,000 that the Governor is requesting. You write that you will have no role or responsibility in this step because the Secretary usually speaks for himself or relies on his Legislative Affairs staff to represent him before the Legislature. Furthermore, you believe that the Consortium's Board of Directors will lobby on its own behalf before the Legislature.

Relevant to your inquiry are the following provisions of the Code of Ethics for Public Officers and Employees, which provide as follows:

> POSTEMPLOYMENT RESTRICTIONS; STANDARDS OF CONDUCT FOR LEGISLATORS AND LEGISLATIVE EMPLOYEES.--
> (a)1. It is the intent of the Legislature to implement by statute the provisions of s. 8(e), Art. II of the State Constitution relating to legislators, statewide elected officers, appointed state officers, and designated public employees.
> 2. As used in this paragraph:
> a. 'Employee' means:
> (I) Any person employed in the executive or legislative branch of government holding a position in the Senior Management Service as defined in s. 110.402 or any person holding a position in the Selected Exempt Service as defined in s. 110.602 or any person having authority over policy or procurement employed by the Department of the Lottery.
> . . . . .
> (VI) Any person having the power normally conferred upon the positions referenced in this sub-subparagraph.
> . . . . .
> 4. No agency employee shall personally represent another person or entity for compensation before the agency with which he or she was employed for a period of 2 years following vacation of position, unless employed by another agency of

state government.
5. Any person violating this paragraph shall be subject to the penalties provided in s. 112.317 and a civil penalty of an amount equal to the compensation which the person receives for the prohibited conduct.
6. This paragraph is not applicable to:
a. A person employed by the Legislature or other agency prior to July 1, 1989;
b. A person who was employed by the Legislature or other agency on July 1, 1989, whether or not the person was a defined employee on July 1, 1989;
c. A person who was a defined employee of the State University System or the Public Service Commission who held such employment on December 31, 1994;
d. A person who has reached normal retirement age as defined in s. 121.021(29), and who has retired under the provisions of chapter 121 by July 1, 1991; or
e. Any appointed state officer whose term of office began before January 1, 1995, unless reappointed to that office on or after January 1, 1995. [E.S.][2] [Section 112.313(9)(a), Florida Statutes.]

CONTRACTUAL SERVICES.--
(1) For the purposes of this section:
(a) 'Contractual services' shall be defined as set forth in chapter 287.
(b) 'Agency' means any state officer, department, board, commission, or council of the executive or judicial branch of state government and includes the Public Service Commission.
. . . . .
(3) No agency employee shall, 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.
(4) No agency employee shall, within 2 years of 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.
(5) The sum of money paid to a former agency employee during the first year after the cessation of his or her responsibilities, by the agency with whom he or she was employed, for contractual services provided to the agency, shall not exceed the annual salary received on the date of cessation of his or her responsibilities. The provisions of this subsection may be waived by the agency head for a particular contract if the agency head determines that such waiver will result in significant time or cost savings for the state.
[Section 112.3185, Florida Statutes.]

For purposes of Section 112.3185(4), "contractual services" is defined as set forth in Section 287.012(7), Florida Statutes, to mean

the rendering by a contractor of its time and effort rather than the furnishing of specific commodities. The term applies only to those services rendered by individuals and firms who are independent contractors, and such services may include, but are not limited to, evaluations; consultations; maintenance; accounting; security; management systems; management consulting; educational training programs; research and development studies or reports of findings of consultants engaged thereunder; and professional, technical, and social

> services. 'Contractual service' does not include any contract for the furnishing of labor or materials for the construction, renovation, repair, modification, or demolition of any facility, building, portion of building, utility, park, parking lot, or structure or other improvement to real property entered into pursuant to chapter 255 and rules adopted thereunder. [E.S.]

SECTION 112.313(9)(a)4, FLORIDA STATUTES

Section 112.313(9)(a)4, Florida Statutes, prohibits agency "employees," as that term is defined at Section 112.313(9)(a)2, Florida Statutes, from representing another person or entity for compensation before the agency with which they were employed for a period of two years following vacation of their positions, unless their employment falls within the terms of an exemption contained in Section 112.313(9)(a)6, Florida Statutes. In CEO 94-20[3], we concluded that the exemption in Section 112.313(9)(a)6 must relate to the employment that gives rise to the potential "revolving door" prohibition, with the result that a person who began employment with an agency after July 1, 1989 would not be exempt from the two-year prohibition after leaving employment with that agency, regardless of whether the person had been employed with another agency prior to or on July 1, 1989 or had some earlier period of employment with the same agency that ended prior to or on July 1, 1989. We wrote:

> To interpret the language of the exemption provision to be applicable to any person employed in any capacity by the Legislature or any agency[4] prior to July 1, 1989, regardless of whether there is any relationship between that employment and the subsequent "high ranking" employment, would base the exemption on fortuitous circumstances and possibly exempt out more persons than are subject to the prohibition.

Then, in CEO 94-34, we interpreted the 1994 amendments to Section 112.313(9)(a)6 to permit an employee who was not in a defined position on July 1, 1989, for example, a SES or a SMS position, but who was otherwise employed by an agency on that date, to later accept a defined position with that agency after July 1, 1989 and continue to be exempt upon leaving the defined position. This is in contrast to the situation presented in CEO 94-20, where we refused to conclude that any public employment prior to July 1, 1989 amounted to a lifetime exemption from the post-employment restrictions of Section 112.313(9) and instead linked the exemption in Section 112.313(9)(a)6 to the employment that gave rise to the potential "revolving door" prohibition. See also CEO 00-1.

Because you were neither in an SMS nor SES position, nor in a position having the power normally conferred upon such position while you were employed by the Governor's Office, and because you never were employed by the Legislature, we are of the opinion that Section 112.313(9)(a)4 would not apply to prohibit you from representing the Coalition before either the Governor's Office or the Legislature for a period of two years following your vacating your current position with the FDOT.

However, if you accept employment with the Coalition, it does appear to us that the two year prohibition of Section 112.313(9)(a)4 may apply under certain circumstances to prohibit you from representing the Coalition before the FDOT. Despite the fact that you were in an SES position while you were employed with the Department of Commerce prior to May 1988, your Department of Commerce employment does not relate to your employment as an SES employee with the FDOT which now gives rise to the potential "revolving door" prohibition. Consequently, because you became employed by the FDOT after July 1, 1989, we are of the opinion that you are not exempt from the two-year prohibition after leaving employment with the FDOT.

However, you have indicated that you are contemplating becoming either an employee of the Consortium, or one of the its members which includes several public agencies, or an independent contractor to the Consortium.[5] In any of these capacities, you write, your primary responsibility will be to implement and

carry out the Cross-State Rail Study grant by, among other things, communicating by telephone, mail, and in person with the FDOT regarding that agency's own studies, "efforts," research, and input into, feedback concerning, and critiques of, the Consortium's work. For example, you indicate that you would cooperate with the FDOT regarding an on-going State-Amtrak Inter-City Rail Study; you would use previous research data compiled by and reports prepared by FDOT and/or its consultants, if appropriate; and you would interact with the FDOT relative to other related studies and "active proposals." Assuming that you are hired by the Consortium and it receives funding to do the proposed study, we must determine whether and to what extent you can communicate with FDOT on behalf of the Consortium (your new employer), that is, whether the activities that you contemplate undertaking with the FDOT to implement and carry out the grant on behalf of the Consortium constitutes "representation" of the Consortium, as that term is defined at Section 112.312(22), Florida Statutes.[6] In two opinions, CEO 91-49 (which concerned a former public employee) and CEO 92-3 (which concerned a former legislator), we addressed the question of what conduct constituted "representation" for purposes of both Article II, Section 8(e), Florida Constitution, and Section 112.313(9) (a)3 and 4, Florida Statutes.

In CEO 91-49, we found that Section 112.3141(1)(d), Florida Statutes (now Section 112.313(9)(a)4), did not prohibit a former Senior Attorney with the Governor's Office who had been assigned to work as counsel to the Administration Commission from mediating cases pending before the Administration Commission within 2 years of vacating his former position. As a former SES employee, we wrote, Section 112.3141(1)(d) would apply to him. However, because acting as a mediator or as a neutral third party is not the same as "representing" [as that term is defined at Section 112.312(22), Florida Statutes] a party before a former employing agency, he was not prohibited by the Code of Ethics from acting as a mediator in such cases. As a mediator, we wrote, the former Senior Attorney would be attempting to facilitate an agreement that could be presented to the Administration Commission, his former agency, for final action rather than "representing" a person or entity. For the same reason, we found that he also would not be prohibited from acting as a mediator in disputes pending before the Florida Land and Water Adjudicatory Commission or in cases in which the Department of Community Affairs was a party.

We also concluded that, in other contexts, the determination of whether the former Senior Attorney could represent a client before his former employing agency did not depend on whether his proposed action was "advocacy" or "non-advocacy," but on whether the action required by the agency was a routine, ministerial function, leaving the agency with no discretion to take any action which might benefit his client. If there was no discretion left in the agency, we opined, then the action was permitted; if not, then it was prohibited.

Thereafter, in CEO 92-3 we found that a former State Representative was prohibited from attending and monitoring legislative committee meetings or sessions and from asking questions about a proceeding or proposed legislation of a legislative staff member, even for informational purposes only, when done on behalf of another for compensation during the two years following his leaving office. There, we concluded that the term "represent" is defined at Section 112.312(22), Florida Statutes, to include physical attendance in an agency proceeding and personal communications with the officers or employees of an agency, who would be involved in attending and monitoring legislative committee meetings or sessions, and in asking questions about a proceeding or proposed legislation of a legislative staff member, even for informational purposes only. Although attending legislative meetings would not involve writing letters, filing documents, or personal communications with legislative personnel, we opined, the definition of "representation" also specifically includes "actual physical attendance on behalf of a client in an agency proceeding." Therefore, we concluded that attending and monitoring legislative meetings constituted actual physical attendance in a legislative proceeding.

While we recognized in CEO 92-3 that the phrase "in an agency proceeding" contemplates a degree of participation in the proceeding with an intent to influence the agency's action, as opposed to simply sitting as a member of the audience at a meeting or hearing in order to observe the proceedings, and that the phrase "at an agency proceeding" would have more clearly encompassed the action of observing the agency proceeding when that phrase was contrasted with the other two activities that comprise the definition, both of which expressly entail communicative actions, whether written or oral, we concluded that the Legislature's intent was not to prohibit only activities that involved a form of active communication from the former officeholder. If the

Legislature's intent was to prohibit activities involving only active communications, we wrote, the definition's inclusion of "personal communications," "the writing of letters," and "the filing of documents" would have sufficed, and the addition of "actual physical attendance . . . in an agency proceeding" would have been unnecessary. Instead, we found that because the definition of "represent" or "representation" specifically mentions attendance as an additional form of representation, the Legislature must have intended to refer to action other than writing letters, filing documents, or personal communications because we could envision instances where actual physical attendance without any form of active personal communication could have the effect of representing the intentions or interests of another person or entity.

We responded to the second question in CEO 92-3 by concluding that the definition of "represent" or "representation" also prohibits a former legislator from asking legislative staff questions about a proceeding or proposed legislation for informational purposes only on behalf of another for compensation. We found that because a former legislator's asking questions of a legislative staff member would constitute personal communications with an employee of the former legislator's former agency, and because his questions would be on behalf of another, his actions would constitute representation of another before his former agency. While asking questions for informational purposes only may not necessarily involve any communication intended to influence legislative action, we concluded that Section 112.313(9)(a)3 appears to be a blanket prohibition designed to preclude a former agency official from being compensated for actions taken on behalf of another that involve his or her former agency. We noted that many questions asked in the guise of seeking "information" actually could be intended to communicate a client's position or to affect legislation.

Essentially, we have determined that the term "representation" encompasses such activities as making discovery requests, taking depositions, examining witnesses, filing documents with one's former agency or agency personnel, or engaging in personal communications with personnel of his or her former agency. See CEO 93-14. In contrast, we also have found that providing bona fide, good faith responses to requests for information on specific subjects by legislators, not having been solicited directly or indirectly by the former legislator, does not constitute "representation" for purposes of Section 112.313(9)(a)4. See CEO 90-4, Question 4.

Here, you indicate that, as Executive Director of the Consortium, you might be communicating with the FDOT in order to negotiate a Joint Partnership Agreement setting forth the responsibilities of both the Consortium and the FDOT under the grant prior to the Legislature's final approval of the study proposal. You also indicate that you would be communicating with the FDOT for purposes of implementing the grant.

With respect to your communicating, as the paid Executive Director of the Consortium, with the FDOT on behalf of the Consortium for purposes of negotiating an agreement, we find that because such communications necessarily would involve your attempting to influence the FDOT's decisions relative to the Consortium's implementation of the study grant, it falls within the blanket prohibition of Section 112.313(9)(a)4 and is prohibited. Similarly, any communication by you within two years of vacating your position with the FDOT, as a paid representative of the Consortium, for purposes of either extending the grant or developing a new project also would be prohibited by this provision. However, we find that a distinction can be made between the above types of communications, which are meant to influence the FDOT's decision-making, and the communications that you would have with the FDOT while the Consortium is implementing and fulfilling its responsibilities under the Study grant and negotiated agreement.

With respect to the latter type of communications, we are of the opinion that a strict and literal reading of Sections 112.313(9)(a)4 and 112.312(22) (the definition of "represent" or "representation") would have the unintended consequence of prohibiting former public officers and employees from becoming employed in connection with projects funded by their former agencies that they had no role in procuring and which were not within their responsibilities as employees of their agencies, where the agencies' decision-making regarding the responsibilities of the grantees under the grants had already been determined and the communications between the grantees and the agencies would relate solely to the implementation of the grants. Such restrictions, in our opinion, would be contrary to the intent of the Legislature as stated at Section 112.311(4), Florida Statutes, to implement the objectives of the Code of Ethics of protecting the integrity of government and of facilitating the

recruitment and retention of qualified personnel by prescribing restrictions against conflicts of interest without creating unnecessary barriers to public service and, specifically, the Legislature's intent in enacting Section 112.313(9)(a)4 or preventing the appearance of impropriety by prohibiting public officers and employees from exploiting the special knowledge or influence gained from their public positions for private gain after leaving their public positions, and to restrict interactions between the former public officers and employees and their former colleagues. See CEO 95-14. By recognizing a distinction here, we accept the fact that there is a difference between communications with an agency that are intended to get the agency to do something for one's employer/client and the communications needed to fulfill a contract between one's employer/client and the former agency.

For purposes of the executive branch lobbyist registration law, we determined in Fla. Admin Code Rule 34-12.170(5) that advice or services communicated to an agency which arise out of an existing contractual obligation to the agency to render the particular advice or services provided do not constitute executive branch lobbying, requiring one to register as a lobbyist. Similarly, for purposes of Section 112.313(9)(a)4 we conclude that this kind of communication can be distinguished from that intended to be prohibited by Section 112.313(9)(a)4.

Accordingly, we find that were you to communicate with the FDOT as a paid representative of the Consortium after you terminate your employment with the FDOT regarding the Consortium's implementation of the grant and the negotiated agreement, no violation of Section 112.313(9)(a)4, Florida Statutes, would exist.

SECTION 112.3185(3) AND (4), FLORIDA STATUTES

Section 112.3185(3), Florida Statutes, restricts the employment that you may seek after leaving employment with the Governor's Office and the FDOT by prohibiting you from becoming employed by a business entity in connection with a contract in which you participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, or investigation. See CEO 83-8, in which we limited our interpretation of this list of activities to the procurement process. Similarly, Section 112.3185(4) prohibits you from becoming employed in a non-agency capacity in connection with any contract for contractual services which was within your responsibility as an employee during the two-year period following your vacating your position. During your first year after you terminate your employment with FDOT, Section 112.3185(5) also prohibits you from being paid for services provided to FDOT more than the annual salary that you received prior to your termination of your employment, which prohibition may be waived by the FDOT Secretary if he determines that such waiver will result in significant time or cost savings to the State.

In CEO 82-67, we noted that Section 112.3185(4) differs from Section 112.3185(3) in three ways. First, it is more limited as to the time period it governs--specifically, a two-year period following resignation or termination. Secondly, it is more general as to what activities of a former agency employee are prohibited. Thirdly, it applies only to contracts for contractual services. The subject of CEO 82-67 was a former District Grants Specialist for DHRS who was employed as a fiscal manager by a corporation which was under contract with the Department. We found that no prohibited conflict of interest existed because the former employee's private employment was not in connection with any contract in which he substantially participated while with the Department, and the former employee's private employment was not in connection with any contract for contractual services which was within his responsibility while a State employee.

Similarly, we find here that neither Section 112.3185(3) nor Section 112.3185(4) have any application to your employment with the Governor's office because your employment was not in connection with a contract in which you participated personally or substantially through decision, approval, disapproval, recommendation, rendering of advice, or investigation, or which was within your responsibilities while you were employed by the Governor's Office. You have indicated that your employment with the Governor's office was, among other things, in connection with the development of the FDOT Fast Track Grant program rather than in connection with any specific contract or grant application.

The question remains, however, whether, because of your employment and responsibilities with FDOT implementing and managing the Fast Track Grants Program, Sections 112.3185(3) and (4) prohibit you from accepting employment with the Consortium as its Executive Director. We have evaluated these statutory provisions in analogous situations in a number of our prior opinions. For example, in CEO 86-23, we opined that no prohibited conflict of interest would be created were a former Assistant Secretary for Programs of the Department of Corrections to provide technical consulting services as a member of a project team of a firm receiving a contract from the Department to provide medical inspections of county jail facilities. There, we determined that neither Section 112.3185(3) nor Section 112.3185(4) would apply as the employee had no responsibility in the development or award of the contract.

Again, in CEO 93-2, we opined that the Code of Ethics would not prohibit a Public Transportation Specialist with the Office of Florida Turnpike in the FDOT from leaving public employment for employment with a consulting firm that had been awarded a five-year traffic engineering contract with the Florida Turnpike. Under the circumstances presented, we found that the employee did not participate personally and substantially in the award of the contract, and the contract also was not within his responsibility. The Turnpike employee merely reviewed drafts of reports prepared by the firm and made corrections or changes necessary to ensure the accuracy of the information contained in the draft. In addition, after the employee's supervisor ordered work from the firm and approved its invoices, the employee distributed or filed the invoices and firm reports as required. Under these circumstances, we concluded, the firm's contract with the Florida Turnpike was not within the employee's responsibilities and, therefore, Section 112.3185(4) did not prohibit him from leaving the FDOT to go to work for the firm. We found that neither Section 112.3185(3) nor (4) applied under the circumstances.

We also opined in CEO 93-2 that Section 112.3185(5) was not applicable under the circumstances, because the statute only limits the sum of money "paid to a former agency employee . . . by the agency," language that does not directly apply where the employee leaves public employment to work for a business entity under a contract in existence before the employee resigns. Furthermore, the history of the provision indicated to us that it was intended to apply only to situations where the employee contracted directly with his or her former agency, which was not the situation presented to us. Similarly, we conclude that Section 112.3185(5) would not limit your compensation by the Consortium.

In CEO 95-19, we determined that the Code of Ethics permitted a medical/health care program analyst for the Agency for Health Care Administration ("AHCA") to leave her position for employment with a health management company which contracted with the State to provide managed care services for Medicaid recipients. Although as an AHCA employee the analyst reviewed the health care company's application to become a Medicaid HMO contractor by reviewing language in the application, comparing it with the required language and requesting supplementation when necessary, we found that her involvement in that review process was not so "substantial" that her employment would violate Section 112.3185(3).

Finally, in CEO 95-22 we opined that neither Section 112.3185(3) nor (4) prohibited a Human Services Program Supervisor II in the Area 3 Medicaid Office of the AHCA to leave her position for employment with an HMO which contracted with the State to provide managed care services for Medicaid recipients because she had no involvement in the procurement or development of the contract while she was employed with the AHCA and that the contract was not within her responsibility while an AHCA employee.

Here, we find that Section 112.3185(4) would not be applicable to your situation because, upon terminating your employment with the FDOT and accepting the Executive Director position with the Consortium, your employment will not be in connection with any contract for contractual services which was within your responsibility while you were an FDOT employee. While the grant might be considered to be a contract for "contractual services," as that term is defined at Section 287.012(7), Florida Statutes, it was not in existence while you were employed with FDOT. Therefore, the grant was not within your responsibility while you were an FDOT employee.

This leaves us with having to determine whether you are prohibited by Section 112.3185(3) from accepting employment with the Consortium to serve as its Executive Director in connection with the

implementation of the study grant, a "contract," that will neither be in existence nor effect at the time that you terminate your FDOT employment. Although we have indicated that the non-existence of a contract for contractual services or the award of a contract after an employee terminates his or her employment with an agency would negate the existence of a possible Section 112.3185(4) violation, because the contract could not possibly be within an employee's responsibilities if it does not exist, we have not found this fact to be dispositive in applying Section 112.3185(3). See CEO 84-30 and CEO 88-32. Furthermore, we previously have advised that Section 112.3185(3) applies where one has participated in the procurement or development of a contract. See CEO 83-8. Consequently, we find that you would be prohibited by Section 112.3185(3) from accepting employment as the Executive Director of the Consortium in connection with the implementation of the study grant if we also find that your involvement with the procurement of the study grant was "personal" and "substantial," through decision, approval, disapproval, recommendation, rendering of advice, or investigation.

We observed in CEO 88-32 that the Federal law provides a similar limitation on former officers and employees of the executive branch of the United States Government. Under 18 U.S.C. Section 207(a), former officers or employees are prohibited from representing any person other than the United States before any agency of the United States in connection with any proceeding, contract, claim, or other particular matter involving a specific party "in which he participated personally and substantially as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, while so employed . . . ." For purposes of implementing this prohibition, we observed, the Office of Personal Management Regulations explain:

> To participate 'personally' means directly, and includes the participation of a subordinate when actually directed by the former Government employee in the matter. 'Substantially,' means that the employee's involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participation in a critical step may be substantial. [5 C.F.R. Section 737.5(d).]

Therefore, we concluded that these types of considerations require a detailed review of the employee's involvement with each particular project regarding which he or she seeks private employment.

Here, you were involved in the first step of the four step Fast Track Grant program process in the following ways:

1. By participating in the Fast Track Program's staff review of the grant applications; and
2. By supporting the Fast Track Grant Selection Committee by
   a. Leading discussions of the Committee;
   b. Responding to requests about the basic intent and criteria specified by the Governor and the FDOT Secretary for selecting grant proposals;
   c. Researching project-specific inquiries;
   d. Handling logistics;
   e. Documenting the process; and
   f. Handling calls from the press, applicants, and the public.

Essentially, you spoke, answered questions, and provided a "range" of comments on many projects, including the Consortium's proposed project, but you did not recommend the Consortium's proposal over any of the other

projects. In reminding the Committee members of the Governor's "vision" for the program when making their recommendations, you also illustrated your points by referencing a number of proposals, including the Consortium's proposal. Your involvement in the second phase was limited to providing the FDOT Secretary with alternative recommendations to the Selection Committee's recommendations. This did not affect the Consortium's proposal since it was one of those that had been recommended by the Selection Committee for funding. You were not involved in the third phase and will not be involved in the fourth phase.

Although we find that you participated "personally" in the first phase of the process, we do not find that your participation was "substantial," that is, that it was of much significance in the Selection Committee's recommendation of the Consortium's proposal to the FDOT Secretary for funding or in that of the FDOT Secretary or the Governor's Office or in the Legislature's approval of the project (assuming that it is approved). Under the circumstances presented, it does not appear that you participated "substantially" through decision, approval, disapproval, recommendation, rendering of advice, or investigation in the procurement of the Consortium's proposed Cross-State Rail Study project, as it was the members of the Consortium, the Fast Track Selection Committee, the FDOT Secretary, the Governor's office, and the Legislature and its staff who have been and will be responsible for the award of the grant. Moreover, it appears that your role was limited to acting as a facilitator, at most, in the first phase in the process.

Accordingly, we are of the opinion that neither Section 112.3185(3) nor Section 112.3185(4) prohibits you from accepting employment with the Consortium as its Executive Director for purposes of implementing the Cross-State Rail Study grant, following your termination of your FDOT employment.

ORDERED by the State of Florida Commission on Ethics meeting in public session on March 9, 2000 and **RENDERED** this 10th day of March, 2000.

Peter M. Dunbar

Chair

[1]The Governor's recommendation is reflected in his Legislative Budget Request.

[2]This statute was adopted first in 1989, when it was codified as Section 112.3141(1), Florida Statutes (1989). Chapter 89-380, Laws of Florida, eff. July 1, 1989. In 1991, the statute was transferred to Section 112.313(9), Florida Statutes, by Chapter 91-85, Laws of Florida. Chapter 94-277, Laws of Florida (eff. Jan. 1, 1995), amended Sec. 112.313(9)(a) to include appointed state officers, SUS employees, and PSC employees. In addition, the 1994 amendments rewrote 112.313(9)(a)6 to add the categories that now appear as 6.b., 6.c., and 6.e.

[3]CEO 94-20 was appealed to the First District Court of Appeal, which affirmed the opinion by a "Per Curiam Affirmed" decision, as Anderson v. Commission on Ethics, 651 So. 2d 1198 (Fla. 1st DCA 1995).

[4]We note that the term "agency" is not defined in Sec. 112.313(9)(a), but is defined in Sec. 112.312(2), where it includes not only entities of State government, but also local government entities.

[5]Section 112.313(9)(a)4 exempts from its prohibition your representation of the Consortium or one of its members before the FDOT if you are employed by another "agency of state government." In In re George Stuart, COE Final Order 94-01, 16 FALR 1499, 1504 (1994), we adopted the Administrative Law Judge's determination that there is no reason to differentiate between the term "state agency" and "agency of the State." Although the Legislature sometimes uses one phrase and sometimes the other, the ALJ reasoned, the courts and the Attorney General's opinions have used the terms interchangeably. Therefore, if you were to perform the same functions that you would be performing as an employee of the Consortium as an employee of one of the consortium members that is a State University or other State agency, the exemption may apply under the circumstances to negate the existence of the two-year prohibition.

[6]For purposes of Section 112.313(9)(a)4, the terms "represent" or "representation" are defined at Section 112.312(22) 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.

CEO 88-2 -- February 4, 1988

CONFLICT OF INTEREST

DEPARTMENT OF BUSINESS REGULATION ATTORNEY CONTRACTING TO WRITE MANUSCRIPT FOR PUBLISHING COMPANY DOING BUSINESS WITH DEPARTMENT

To: *Mr. Karl M. Scheuerman, Staff Attorney, Department of Business Regulation, Tallahassee*

SUMMARY:

No prohibited conflict of interest would be created under Section 112.313(7)(a), Florida Statutes, were a staff attorney for the Department of Business Regulation to write a manuscript for a publishing company which is doing business with the Department, where the attorney is not responsible for purchasing publications for use by the Department and where the Department only purchases updates for particular publications from the publishing company and the publishing company is the sole source of these updates. Under these circumstances, Section 112.316, Florida Statutes, would apply as the attorney's private endeavor would not interfere with the full and faithful discharge of his public duties. CEO 86-6 is referenced.

QUESTION:

Would a prohibited conflict of interest be created were you, an attorney for the Department of Business Regulation, to contract to write a legal manuscript for a publishing company from which the Department purchases updates for legal publications?

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

In your letter of inquiry you advise that you are employed in the Office of the Secretary of the Department of Business Regulation as a staff attorney. You further advise that you are in the process of writing a manuscript for a publishing company. The contract proposed by the publishing company provides that you will be paid $25 per printed page, and you believe that payment to you in the aggregate under the proposed contract would be between $500 and $1,000. In a telephone conversation with our staff you advised that the manuscript will be a summary of declaratory statements concerning condominium law issued by the Bureau of Condominiums within the Division of Florida Land Sales, Condominiums, and Mobile Homes of the Department. You have worked in the area of condominium law at the Department for five years, and all of the materials which you would utilize in writing the manuscript are public records.

The Code of Ethics for Public Officers and Employees provides in relevant part:

> CONFLICTING EMPLOYMENT OR CONTRACTUAL RELATIONSHIP. -- No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he is an officer or employee . . . ; nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his private interests and the performance of his public duties or that would impede the full and faithful discharge of his public duties. [Section 112.313(7)(a), Florida Statutes (1987).]

This provision prohibits a public employee from having a contractual relationship with a business entity which is doing business with his agency.

The term "agency" is defined in Section 112.312(2), Florida Statutes (1987), as

> any state, regional, county, local, or municipal government entity of this state, whether executive, judicial, or legislative; any department, division, bureau, commission, authority, or political subdivision of this state therein; or any public school, community college, or state university.

In previous opinions, we have expressed the view that the legislative intent of this definition was to define an employee's "agency," for purposes of the Code of Ethics, as the lowest departmental unit within which his influence might reasonably be considered to extend. See CEO 77-83. As your position is assigned to the Office of the Secretary of the Department, we find that your "agency" consists of the entire Department.

You advise that the Department has purchased legal publications from the publishing company which are updated on an annual subscription-type basis. In a telephone conversation with our staff you advised that there were six payments made to the publishing company by your agency during the past year in the amounts of $95.00, $598.50, $402.50, $125.00, $95.00, and $35.00. You advise that your duties as Staff Attorney do not include the purchase of legal or any other publications for use by the Department or its legal section, and that you have never recommended the purchase of a particular publication to anyone charged with purchasing.

The Code of Ethics provides several exemptions to Section 112.313(7)(a), including one where the total amount of a subject transaction is not more than $500. However, that subsection may not apply to all transactions between the Department and the publishing company while you are under contract with the company, as one of the transactions between your agency and the publishing company exceeded that sum. See Section 112.313(12)(f), Florida Statutes. You have inquired as to whether this exemption would be applicable if the total amount paid to you by the publishing company did not exceed $500. In all previous opinions interpreting the exemption of Section 112.313(12)(f) except CEO 82-17, we have applied the $500 exemption to the amount of public funds expended between the business entity and the agency, rather than to the amount of compensation received by the public officer or employee from the business entity. See, for example, CEO 85-25, CEO 85-11, and CEO 84-67. As it appears that the other exemptions of Section 112.313(12) are directed at

transactions between one's agency and the private business entity, we hereby revoke CEO 82-17 and conclude that the $500 exemption would not apply to the amount of compensation you receive from the publishing company. Thus, the situation about which you inquire may violate Section 112.313(7)(a).

Another provision within the Code of Ethics contains an exemption where

> [t]he business entity involved is the only source of supply within the political subdivision of the officer or employee and there is full disclosure by the officer or employee of his interest in the business entity to the governing body of the political subdivision prior to the purchase, rental, sale, leasing, or other business being transacted. [Section 112.313(12)(e), Florida Statutes (1987).]

This exemption requires that the business entity involved is the sole source of supply within the political subdivision. The term "political subdivision" is defined by Section 1.01(9), Florida Statutes, to include "counties, cities, towns, villages, special tax school districts, and all other districts in this state." Therefore, we are of the view that by its terms this exemption may not be applied in cases pertaining to business conducted by a State agency.

However, the Code of Ethics also provides:

> Construction. -- It is not the intent of this part, nor shall it be construed, to prevent any officer or employee of a state agency or county, city, or other political subdivision of the state or any legislator or legislative employee from accepting other employment or following any pursuit which does not interfere with the full and faithful discharge by such officer, employee, legislator, or legislative employee of his duties to the state or the county, city, or other political subdivision of the state involved. [Section 112.316, Florida Statutes (1987).]

This provision mandates that the Code of Ethics not be construed to prohibit a public employee from engaging in private pursuits which do not interfere with the full and faithful discharge of his public duties. One of the fundamental purposes of Section 112.313(7)(a) is to prohibit those situations in which a public officer or employee could obtain preferential treatment from, or award public business to, a business entity with which he is associated. Thus, we have interpreted Section 112.316 to apply to situations in which an employee is not in a position to give advice or recommendations regarding any business transacted between his agency and a business entity.

We are of the opinion that Section 112.316 would be applied appropriately in your situation. Here, the only business conducted between the Department and the publishing company consists of the purchase of updates for particular publications, and the publishing company is the only source of updates for these volumes. We note further that, although you may be in a position to give advice or recommendations regarding the purchasing of legal publications, you have advised that your duties as staff attorney do not include the purchase of any publications and that you have not recommended the purchase of a particular publication to anyone charged with purchasing. Under these circumstances, we conclude that your

relationship with the publishing company would not interfere with the full and faithful discharge of your responsibilities as a staff attorney with the Department.

We do not find that any other provision of the Code of Ethics would prohibit this endeavor. In particular, Section 112.313(8), Florida Statutes, provides:

> DISCLOSURE OR USE OF CERTAIN INFORMATION. -- No public officer or employee of an agency shall disclose or use information not available to members of the general public and gained by reason of his official position for his personal gain or benefit or for the personal gain or benefit of any other person or business entity.

We note that you have advised that any information gained through your position and used in the manuscript would be limited to official public records. In a previous case, we found that an assistant public defender who wrote a published commentary had not violated Section 112.313(8) where the subject matter of the article was job- related. All the information used in this commentary was a matter of public record and therefore available to members of the general public. See CEO 86-6.

Accordingly, we find that no prohibited conflict of interest would be created under Section 112.313(7)(a), Florida Statutes, were you, a staff attorney for the Department of Business Regulation, to contract to write a legal manuscript for a publishing company which is doing business with the Department, when the Department only purchases updates for particular publications from the publishing company and the publishing company is the sole source of these updates, where your duties do not include the purchasing of publications, and where you have not recommended the purchase of any publications.

CEO 83-8 -- January 27, 1983

CONFLICT OF INTEREST

FORMER EMPLOYEE OF DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES BEING EMPLOYED BY NONPROFIT CORPORATION CONTRACTING WITH THE DEPARTMENT

To: Mr. Terrell R. Harper, District Program Specialist, D.H.R.S. District V Alcohol, Drug Abuse, and Mental Health Program Office

SUMMARY:

Section 112.3185, Florida Statutes, would not prohibit a District Program Specialist in the District V Alcohol, Drug Abuse, and Mental Health Program Office of the Department of Health and Rehabilitative Services from leaving the Department for employment with a nonprofit corporation which has contracted with the District Mental Health Board to provide community mental health and community alcohol services, where he has been responsible for the annual monitoring of the corporation's alcohol detoxification program. Here the employee was not involved in any capacity in the procurement or development of the contracts with the corporation. In addition, the alcohol detoxification program monitored by the employee does not constitute a "contractual service" within the meaning of Section 112.3185(4), as it is excluded from the definition of "contractual service" appearing in Section 287.012(3), Florida Statutes.

QUESTION:

Would the Code of Ethics for Public Officers and Employees be violated were you, a District Program Specialist in the District V Alcohol, Drug Abuse, and Mental Health Program Office of the Department of Health and Rehabilitative Services, to leave the Department for employment with a nonprofit corporation which has contracted with the District Mental Health Board to provide community mental health and community alcohol services, where you have been responsible for the annual monitoring of the corporation's alcohol detoxification program?

Your question is answered in the negative.

In your letter of inquiry you advise that currently you are a District Program Specialist in the District V Alcohol, Drug Abuse, and Mental Health Program Office of the Department of Health and Rehabilitative Services. You also advise that you have been offered the position of Director of Centralized Services with a private, nonprofit corporation which is designated and funded as a comprehensive community mental health center. The corporation receives State and federal funding through contracts with the District Mental Health Board. As Director of Centralized Services, your duties will include administering the corporation's alcohol detoxification program, crisis stabilization unit, release-on-own- recognizance court program,

mental health emergency services, mental health half-way house and family intervention team (child abuse).

In your present position with the Department, your responsibilities have included the annual program monitoring of the alcohol detoxification program of the corporation, which monitoring includes comparing program policies, procedures and client records to the Department's requirements contained in Chapter 10E-3, Florida Administrative Code, and certification under Rule 10E-3.60 for insurance payments. You also have worked with the corporation as the Department's contract manager, licensing representative, and program monitor for drug abuse services.

In your letter of inquiry and in a telephone conversation with our staff, you advised that you played no role in the procurement or the award of the community mental health and community alcohol services contract between the Department and the corporation, or for any of the other services provided by the corporation which you would oversee in the your new employment. You also advised that in your new position you would not have any responsibility for the drug program for which you currently are contract manager.

The Code of Ethics for Public Officers and Employees provides in part:

> No agency employee who participates through decision, approval, disapproval, recommendation, preparation of any part of a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity in the procurement of contractual services shall become or be, while an agency employee, the employee of a person contracting with the agency by whom the employee is employed. [Section 112.3185(2), Florida Statutes, (Supp. 1982).]

This provision prohibits an agency employee from being employed concurrently by a business entity which is under contract with the employee's agency, if he participated in any capacity in the procurement of those contractual services. As you would resign your position with the Department prior to beginning your new job with the corporation, this provision would not apply.

The Code of Ethics also provides:

> No agency employee shall, 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. [Section 112.3185(3), Florida Statutes, (Supp. 1982).]

This provision restricts the employment which you may seek after leaving the Department by prohibiting you from being employed by a business entity in connection with a contract in which you participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, or investigation. As you will not be

employed in connection with the drug abuse service contract for which you are Contract Manager, this provision would not prohibit your employment.

We also find that this provision would not prohibit your employment as administrator of the corporation's alcohol detoxification program because, although you did monitor the program as an employee of the Department, you had no responsibility in the procurement or development of that contract. In our view, the prohibition of Section 112.3185(3) is directed to those persons who participated in the procurement or development of a contract through "decision, approval, disapproval, recommendation, rendering of advice or investigation." We limit the interpretation of this list of activities to the procurement process because the same language is used in Section 112.3185(2), which clearly pertains only to actions of an agency employee in the procurement of a contract. This interpretation is buttressed further by the Senate Staff Analysis and Economic Impact Statement for Senate Bill 387 (April 19, 1982), which states:

> Retired or terminated agency employees would be prohibited from contracting with an agency in connection with any contracts that the former employee participated in developing.

The Code of Ethics further provides:

> No agency employee shall, within 2 years of 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 the agency employee's responsibility while an employee. [Section 112.3185(4), Florida Statutes, (Supp. 1982).]

This provision would prohibit your proposed employment if that employment is in connection with any contract for "contractual services" which was within your responsibility as an employee of the Department. We are of the view that the alcohol detoxification program (of the contract for community alcohol services) of the corporation was within your responsibility as an employee of the Department because of your responsibility for monitoring that program. The final question which must be addressed, then, is whether that contract for community alcohol services is a "contract for contractual services" within the meaning of this section.

Section 112.3185(1), Florida Statutes, (Supp. 1982), provides that the term "contractual services" is defined as set forth in 287.012(3), Florida Statutes, (Supp. 1982). In summary, the term "contractual service" is defined in Section 287.012(3) as the "rendering by a contractor of its time and effort rather than the furnishing of specific commodities," including the furnishing of social services, but excluding "health services involving examination, diagnosis, treatment, or prevention; or services provided to persons with mental or physical disabilities by not-for- profit corporations" which have obtained a federal tax exemption. Parenthetically, we note that this definition describes those situations in which a State agency is required to use a competitive bidding process for the award of a contract for services. The contract between the Department and the corporation for community alcohol services is part of a contract under which the corporation also provides community mental health services. In a telephone conversation with our staff, the Contract Administrator for the

Department advised that the Mental Health Program Office of the Department interprets these services as exempt from the requirement of competitive bidding, based upon their coming within the exclusion from the definition of "contractual services" for health services and services to persons with mental or physical disabilities. After review of the pertinent contract, we agree with the Department's interpretation, which we note has been made by the agency with the greater expertise in health services and services to the mentally and physically disabled. For this reason, we find that the prohibition of Section 112.3185(4) also would not apply to the employment which you contemplate.

Accordingly, we find that the Code of Ethics for Public Officers and Employees does not prohibit you from being employed as Director of Centralized Services with a nonprofit corporation which is under contract with the Department of Health and Rehabilitative Services, in light of your responsibilities as an employee of the Department.