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MEMORANDUM

To: Members, Application Review Task Force
California Institute for Regenerative Medicine

From: James C. Harrison

Date: October 22, 2012

Re: Communications Between Members of the Board and Applicants and their
Supporters (Our File No.: 2297-0)

INTRODUCTION

At the request of Dr. Bert Lubin, the Chair of the Application Review Task Force, we have reviewed various laws and policies governing communications between agency officials and applicants for contracts, entitlements to use, permits, and funding awards and their agents. We describe these policies below.

BACKGROUND

Generally, California law permits members of the public to contact agency officials regarding an item within the agency's jurisdiction. For example, the Bagley-Keene Open Meeting Act requires that agencies offer members of the public an opportunity to speak or otherwise participate at meetings. (Gov. Code, § 11125.7.) There are a number of laws and policies, however, that impose restrictions on communications during adjudicative proceedings (referred to as "ex parte communications") and on communications made by elected and administrative officials with their former agencies (referred to as "revolving door laws"). The purpose of these laws and policies is to ensure that decisions are made on the merits and not as a result of any improper bias. Although the laws and policies governing ex parte communications do not apply to CIRM, the Task Force may wish to consider them, along with the revolving door laws, in connection with its discussion concerning contacts between members of CIRM's Governing Board and applicants and their supporters. These laws and policies are summarized below.

A. Ex Parte Communications

Several state agencies have adopted policies to govern private communications between a person who has an interest in an adjudicative proceeding and an individual at the agency who is charged with making a decision in the proceeding. These off-the-record communications are frequently referred to as “ex parte communications.” The goal of these policies is to ensure fairness in the decision-making process and to prevent improper bias from affecting the agencies’ decisions.

The Administrative Procedure Act (“APA”) prohibits any communication, direct or indirect, to a presiding officer in an adjudicative proceeding from any party, unless there is notice and an opportunity for all parties to participate in the communication. (Gov. Code, §§ 11430.10-11430.80.) An “adjudicative proceeding” is defined as “an evidentiary hearing for determination of facts pursuant to which an agency formulates and issues a decision” regarding the legal rights of a person or entity (*Id.*, § 11405.20.) Thus, the prohibition on ex parte communications covers evidentiary hearings to determine legal rights and not proceedings that consider broader policy issues, rulemaking proceedings to adopt or amend regulations, and other non-adjudicative actions, including the award of grants by CIRM.¹

Although it is not required by the APA, some agencies nonetheless require members to disclose ex parte communications that occur in connection with non-adjudicative proceedings. For example, the California Air Resources Board encourages its members to communicate with interested parties concerning rule-making proceedings, such as the consideration of proposed regulations, but requires them to disclose the names of the individuals with whom they have had contact and the general nature of the communication.² The State Water Resources Control Board, by contrast, only prohibits ex parte communications made in connection with adjudicative proceedings. Communications concerning general policy issues within the Board’s jurisdiction and other non-adjudicative matters are not restricted, nor is disclosure required.³ The same is true of the Public Utilities Commission, which prohibits ex

¹ State law also prohibits ex parte communications in certain other contexts. For example, members of local transportation agencies are prohibited from engaging in ex parte communications regarding a pending request for proposals. (*See, e.g.* Pub. Cont. Code § 20216.)

² *See* <http://www.library.ca.gov/crb/08/08-001.pdf>

³ The Board’s Chief Counsel has, however, recommended that ex parte communications made during rulemaking proceedings be disclosed. *See* <http://www.library.ca.gov/crb/08/08-001.pdf>

parte communications in adjudicative and rate-setting hearings,⁴ but permits them in other proceedings with no reporting requirement. (Public Utilities Code, §§ 1701.2-1701.4.)

Other agencies are subject to specific statutory provisions concerning communications. For example, the California Integrated Waste Management Board, which has since been disbanded, was subject to Public Resources Code section 40412, which required members of the Board to disclose any oral or written communication concerning matters, other than purely procedural matters, under the board's jurisdiction. Section 40412 provided that such communications ceased to be considered ex parte communications once they were disclosed and made a part of the record. Similarly, members of the Coastal Commission are required to disclose any ex parte communications concerning matters within the Commission's jurisdiction, such as permit actions. (Public Resources Code, §30321 et seq.)

In summary, state laws and policies governing ex parte communications tend to be limited to adjudicative proceedings. Because these hearings involve the consideration of evidence affecting the legal rights of individuals, ex parte communications are generally barred in order to preserve fairness for all of the parties to the proceeding. State agencies permit ex parte communications in other contexts, although some agencies require that such contacts be disclosed on the record.

B. Revolving Door Laws

1. Permanent Ban

The Political Reform Act permanently prohibits former state officials from representing, for compensation, another person in any proceeding in which the former state official participated. (Gov. Code, § 87401.) A state official "participated" in a proceeding if he or she took "part personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information as an officer or employee." (Gov. Code, § 87400(d).) In addition, a former state official may not "for compensation aid, advise, counsel, consult or assist in representing any other person (except the State of California) in any proceeding in which the official would be prohibited from appearing under Section 87401."⁵ (*Id.*, § 87402.)

⁴ Ex parte communications during rate-setting hearings may be permitted by a commissioner in certain circumstances provided all parties are given an opportunity to respond. (Pub. Util. Code § 1701.3(c).)

⁵ Note that the permanent ban only applies if the former state official is being compensated for his or her efforts. If a former state official volunteers to help someone with a matter that is pending before his or her former agency, the permanent ban does not apply. (*Reames Advice Letter*, No. I-91-289.)

Proceedings that trigger the permanent ban include contracts, grants and requests for proposals.⁶ The permanent ban does not, however, apply to new proceedings involving different parties, different subject matters or different factual issues, even where that new proceeding is related to or grows out of a prior proceeding in which the state official did participate.⁷

2. One-Year Ban

Former elected and administrative officials are also subject to a one-year “revolving door” ban on certain communications with members and staff of their former agency. For example, a former state administrative official is barred from contacting his former agency, for compensation, for the purposes of influencing administrative action, including the award of a contract or grant. (Gov. Code, § 87406(d)(1).)

An “appearance” before a state agency is defined broadly to include “conversing by telephone or in person, corresponding with in writing or by electronic transmission, attending a meeting, and delivering or sending any communication.” (Cal. Code Regs., tit. 2, § 18746.2(a).) Such an appearance or communication “is for the purpose of influencing if it is made for the principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding.” (*Id.*) Former administrative officials, therefore, cannot, for one year, accept compensation to contact their former agency in person, in writing, by e-mail or by telephone, if their communication would be for the purpose of influencing administrative action, or the award of a contract or grant, regardless of whether they had involvement in the matter as a former agency official.

Unlike the permanent ban, which precludes a person from assisting others, the one-year ban does not prohibit compensation for behind-the-scenes advice, drafting documents or other work for a private entity, as long as the former state official is not identified in connection with any attempt to influence a state agency regarding administrative action. (*Bohart Advice Letter*, No. I-99-319.) The ban on communications also does not apply to work “to administer, implement, or fulfill the requirements of an existing permit, license, grant, contract, or sale agreement.” (Cal. Code Regs., tit. 2, § 18746.1(c); *Hanan Advice Letter*, No. I-00-209.) In addition, an individual is not in violation of the one-year ban when he or she:

⁶ Gov. Code, § 87400(c); *Morawcznski Advice Letter*, No. A-00-065; *Yates Advice Letter*, No. A-00-097.

⁷ *Souza Advice Letter*, No. A-06-114 (citations omitted).

- (1) Participates as a panelist or formal speaker at a conference or similar public event for educational purposes or to disseminate research and the subject matter does not pertain to a specific action or proceeding;
- (2) Attends a general informational meeting, seminar or similar event;
- (3) Requests information concerning any matter of public record;
or
- (4) Communicates with the press.

(Cal. Code Regs., tit. 2, § 18746.2(b).)

C. Other Research Funding Agencies

We have also sought information from other research funding agencies to determine whether they have policies governing ex parte communications. Neither Maryland nor the NIH appear to have rules governing such communications. We are awaiting information from Connecticut and New York.

CONCLUSION

Because CIRM is a public agency, it cannot prevent members of the public from communicating with the Board at a public meeting. The Board could, however, adopt policies to govern such communications outside of a public meeting, ranging from a requirement that Board members refrain from engaging in such communications to a requirement that Board members disclose such contacts.