Office of Government Ethics
81 x 35 -- 12/16/81

Letter to a DAEO dated December 16, 1981

You have posed a number of questions on the application of the post employment prohibitions of 18 U.S.C. § 207(c) to the proposed activities of [a former employee of your Department involved in procurement management].

You inform us that a private corporation has a contract with [the Department] for providing architectural-engineering and purchasing services for [a] Project which is managed by [your Department]. [The Corporation] subcontracts, in turn, with other private firms. [The former employee] has been employed by [the Corporation] to serve as project purchasing manager for [the Project]. As manager, [the former employee] would have to be in frequent consultation with [the Department] regarding the procurement needs of [the Project], the preparation of requests for proposals from subcontractors, and the award of subcontracts in accordance with practices and procedures approved by [the Department's] staff. Questions do arise regarding the interpretation of [the Department's] procurement regulations on which there have been differences of opinion in the past between [the Corporation] and [the Department].

[The former employee] was not engaged in [the Project] during his Federal employment. He occupied a Senior Employee position designated as such by this Office in 5 C.F.R. § 737.33 for purposes of subsection 207(c) of title 18, United States Code. Under the circumstances, we are not concerned with subsections (a) and (b), only with subsection (c) of section 207. This subsection imposes a criminal penalty against a former Senior Employee who within one year after leaving the Federal Government "knowingly acts as agent or attorney for, or otherwise represents, anyone other than the United States in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of anyone other than the United States, to" the Department in which he or she served in connection with any matter which is pending before such Department.

The very terms of the contract between [the Department] and [the Corporation] require communications between the two

entities. Their personnel must confer on the terms of subcontracts which [the Corporation] has authority to recommend or award depending on the size of the subcontract. These communications, contractually appropriate, would become legally prohibited in most instances by subsection (c) if [the individual in question], a former Senior Employee, should perform these services for [the Corporation]. The purpose of the post employment provisions is to avoid the "revolving door" syndrome inherent in which are the potentialities for the use of inside information and for continuing personal influence. See B. Manning, Federal Conflict of Interest Law, 179-180 (1964); S. Rep. No. 170, 95th Cong., 1st Sess. 31-33 (1977).

[The Corporation] points to the implementing regulations of this Office contained in part 737 of title 5 of the Code of Federal Regulations as authorizing the communications in question. It cites, in particular, the policy statement in 5 C.F.R. § 737.1(c)(2), reading as follows:

> Similarly, when a former high-level employee assists in representing another by personal presence at an appearance before the Government regarding a matter which is in dispute, such assistance suggests an attempt to use personal influence and the possible unfair use of information unavailable to others. Different considerations are involved, however, with respect to assistance given as part of customary supervisory participation in a project funded by a Government contract or grant, since a former employee's knowledge may benefit the project and thus the Government, and regular communications with associates may properly be regarded as inherent in managerial responsibility. Such assistance, when not rendered by personal presence during an appearance, is not covered by the statute.

[The Corporation] argues that [the former employee] would be participating "in a project funded by a Government contract" where "regular communications with associates may properly be regarded as inherent in managerial responsibility." Under this interpretation, [the former employee] would be allowed to discuss matters with [the Department]. The answer, however, is that the term "associates," as used, refers not to [the former employee's] former [Department] associates but rather to his present associates in [the Corporation].

5 C.F.R. § 737.1(c)(2) tracks subsection 207(b)(ii) of title 18, United States Code, as amended.**1** In that context, the import of the policy statement is clear. Under the Ethics in Government Act as originally enacted in October 1978 (Pub. L. No. 95-521), subsection (b)(ii) prohibited former Senior Employees from advising or assisting in representing any other person "concerning" any formal or informal appearance before an agency or a court in a particular matter involving specific parties. The word "concerning" caused many top employees to fear that they would be barred from returning to or entering managerial positions outside the Government where they would have to assist their business associates in grants or other activities that could affect their former agencies. Many threatened to resign and the Administration sought and obtained an amendment to (ii) substituting "by personal presence at" for "concerning" (Pub. L. No. 96-28). The necessity for the amendment was explained during the Senate debates on the legislation:

> The present language makes it hard to determine what specific activities are prohibited. Because of this, it had the unintended effect of leading many individuals to believe that they would expose themselves to jeopardy when they engaged in activities which, I am sure, we would all regard as legitimate and productive.
>
> The problem might typically arise when an employee who had designed or worked on a project which was the subject of a Government contract or grant later took employment with an organization -- a university, research institution or private corporation -- as a manager, where his responsibilities included supervision of many projects, including some he may have worked on while with the Government.
>
> Here is how the present language would impact this situation. When this individual conducted managerial activities -- that is, when he decided how his organization would be run, including how its resources were to be utilized and on what terms -- such activity might have been considered to be "assisting" representatives of his organization in an appearance, since such decisions must be communicated to the Government. Now, we can provide in regulations that communication of management decisions is lawful, even

if they affect matters under [g]overnment contracts.
125 Cong. Rec. S. 3872 (daily ed. April 4, 1979).

See also H.R. Rep. No. 115, 96th Cong., 1st Sess. 1 (1979).

Section 737.1(c)(2) would allow [the former employee] to confer with and advise his associates in [the Corporation] about matters involving [the Department]. It does not authorize his conferring with his former associates in the Government. Had the word "concerning" in the original legislation not been stricken, [the former employee] might have been prohibited from engaging in legitimate managerial activities at [the Corporation]. And such assistance, as this regulation states, is not covered by the statute "when not rendered by personal presence during an appearance" before the agency. See 5 C.F.R. § 737.9(c).

We come now to what communications, if any, [the former employee] may have with [the Department]. Subsection (c) of 18 U.S.C. § 207 prohibits [the individual] as a former Senior Employee from:

(1) knowingly representing [the Corporation] before [the Department], or

(2) "with the intent to influence," making any oral or written communication on behalf of [the Corporation] to [the Department].

The phrase "with the intent to influence" modifies only oral or written communications (2), not representation (1). This is clear from the structure of the sentence. Additionally, it is highlighted in the Senate Report on S.555, the bill which was the forerunner of the Ethics in Government Act: "It should be noted that subsection (c)(2) requires that oral or written communications must be made with the intent to influence that proceeding, but subsection (c)(1) on appearance and attendance has no such intent requirement." S. Rep. No. 170, 95th Cong., 1st Sess. 152-53 (1977).

"Intent to influence" [the Department] need not be shown, therefore, if [the former employee] were to represent [the Corporation] before [the Department]. An appearance per se before [the Department] would be outlawed if there were an actual or potential dispute. As to oral or written communications to [the Department] by [the former employee], "intent to influence"

would have to be present. This "intent" could be inferred from the fact that he would be making these communications on behalf of his employer -- [the Corporation]. In our regulations we recognize that some contacts -- whether by appearance before the agency or by oral or written communication to it -- can be proper, such as requests for information since they are in essence non-controversial. 5 C.F.R. § 737.11(e) provides:

> The prohibition on acting as a representative or attempting to influence applies to situations in which there is an appreciable element of actual or potential dispute or an application or submission to obtain Government rulings, benefits or approvals, and not to a situation merely involving, for example: the transmission or filing of a document that does not involve an application for Government benefit, approval or ruling; a request for information; purely social or informational communications; or those required by law or regulations (in situations other than adversary proceedings).

Section 737.11(e) paraphrases, in effect, the Senate Report which states: "The [prohibited] contact must be on a matter of business. Casual, social communication, such as 'cocktail party' conversation, is not included unless it relates to a pending matter of business." S. Rep. No. 170, supra, at 153.

In answer to specific questions you have raised, [the former employee] could submit subcontracts to [the Department], provide [the Department] with status information on subcontracts and receive directions from [the Department's] employees on matters under his supervision, including the meaning of [Department] directives, provided he enters into no argument about these matters. And so, if in the course of an otherwise permissible appearance for information from [the Department] an unanticipated dispute should arise, [the former employee] would have to excuse himself from further participation. See 5 C.F.R. § 737.5(b)(5). The line is difficult to draw as to when [the former employee] would transcend the level of purely informational discussion to controversial presentation from which he would be barred.

There is an exception in our regulations to 18 U.S.C. § 207 if [the Department's] representatives should visit the offices of [the Corporation] for [the Department's] convenience and in the course of their visit discuss, on their own, matters

with [the former employee]. Section 737.5(b)(4) of our regulations states:

> Neither a prohibited appearance nor communication occurs when a former Government employee communicates with a Government employee who, at the instance of the United States, visits or is assigned to premises leased to, or owned or occupied by, a person other than the United States which are or may be used for performance under an actual or proposed contract or grant, when such communication concerns work performed or to be performed and occurs in the ordinary course of evaluation, administration, or performance of the actual or proposed contract or grant.

The rationale for this exception is that Federal personnel who visit a Government contractor should not be hampered in their investigation if one of the contractor's employees, such as [this former employee], should happen to be a former Senior Employee of the Government. [Department] employees can confer freely with [the former employee] when they visit the offices of [the Corporation] where its procurement functions under the contract with [the Department] are administered. For such on-site visits [the former employee] would not be subject to the prohibitions of subsection 207(c). See S. Rep. No. 170, 95th Cong., 1st Sess. 153 (1977).

These on-site visits, however, cannot be contrived to avoid the consequences of the statute; they must be strictly for the Government's convenience and at its request. Communications between [the Department] and [the former employee] at the [Corporation] offices would have to be initiated by [the Department] and could not become a vehicle for [the former employee] to argue the position of [the Corporation] on issues other than those raised by [the Department].

There is no representation or assertion on your part that [the former employee] has scientific or technological information that might warrant the use of exception (f)**2** to section 207. You have advised us, moreover, that [one of the Department's organic acts (citation deleted)] which has a civil provision similar to section 207(c) contains no such exception and that accordingly you could not employ this exception under your Act. For these reasons, we shall not address the implications of subsection (f) of section 207.

In summation, the types of situations in which [the former employee] may involve himself with [the Department] either by direct representation or telephone or written communications are strictly limited. The fact that the contract between [the Department] and [the Corporation] requires communication between them on many questions arising under [the Project] does not authorize [the former employee's] participation in such communications. He is subject to the prohibitions of subsection (c) of 18 U.S.C. § 207. For the period of one year after he terminated his employment with [the Department], [the former employee] should not make any appearance before [the Department] or have any communications with [the Department] except for routine informational matters relative to the project or during on-site visits by [Department] personnel. He can, however, offer behind-the-scenes advice and assistance to [the Corporation's] associates on any matters involving [the Project] and [the Department].

We trust that our discussion and analysis of the subjects you have raised will guide you in answering any questions that have arisen or may arise with respect to [the former employee's] activities for [the Corporation] and similar situations.

While we have discussed your questions at length, our response should not be treated as a formal advisory opinion since it is not issued in compliance with the procedures required under Subpart C of Part 738 of 5 C.F.R.

Sincerely,

J. Jackson Walter
Director

---

1 Subsection (b)(ii) of section 207 of title 18, U.S. Code, applies only to those matters in which the former employee participated personally and substantially. This was made clear by the amendment to the Ethics in Government Act contained in Pub. L. No. 96-28. The subsection is not pertinent to [the former employee's] case since he was not involved during the Government employment with [the Project]. We find it necessary, however, to discuss the subsection because of the argument made by [the Corporation] and because a study of its background clarifies the ambit of permissible communications by former Government employees.

2 Subsection (f) of 207 provides: "The prohibitions of subsections (a), (b), and (c) shall not apply with respect to the making of communications solely for the purpose of furnishing scientific or technological information under pocedures acceptable to the department or agency concerned, or if the head of the department or agency concerned with
the particular matter, in consultation with the Director of the Office of Government Ethics, makes a certification, published in the Federal Register, that the former officer or employee has outstanding qualifications in a scientific, technological, or othe technical discipline, and is acting with respect to a particular matter which requires such qualifications, and that the national interest would be served by the participation of the former officer or employee."