Office of Government Ethics

99 x 14(1)

Letter to a Federal Employee
dated March 1, 1999

This is in reply to your letter of February 3, 1999, concerning the application of 18 U.S.C. § 207(a)(1) to former executive branch employees who may wish to have contact with the Government concerning the "sunset review" of [certain agency] orders. More specifically, you are currently employed by [an agency], but may seek work in the private sector in the foreseeable future. During your years of service as a personal assistant to individual [agency] Commissioners, you have provided advice relating to many of the "original" [agency] investigations that have led to the orders that are now being reviewed by both [your agency] and [a] Department.

In your letter, you advance three arguments in support of your view that section 207(a)(1) would not bar your post-employment contacts with any Federal department, agency, or court in relation to the sunset review of an [agency] investigation in which you participated as a personal assistant. First, you argue that a sunset review is a different "particular matter" than an original [agency] investigation. Second, you argue that you do not "participate" in investigations "personally and substantially" since you do not have "the ability to effectuate an outcome or result." Third, you suggest that your situation does not implicate the objectives of the permanent post-employment restriction as they were described in a 1977 Senate Report issued in connection with the revision of 18 U.S.C. § 207 by the Ethics in Government Act of 1978.

An employee's agency has the primary responsibility to provide advice concerning an employee's proposed post-employment activities. As a practical matter, the Office of Government Ethics (OGE) lacks the resources to field questions from all current and former Federal employees. More importantly, however, agency ethics officials have superior access to the facts concerning the scope and significance of an employee's participation in a particular matter. And, since an agency ethics official will ordinarily be more familiar with agency programs, OGE "generally defers to the cognizant agency ethics official when the issue is whether two particular matters are the same for purposes of the permanent bar." OGE Informal Advisory Letter 93 x 17.

While OGE usually relies on agency ethics officials to counsel individual employees and former employees concerning post-employment restrictions, OGE may respond directly to an employee in unusual circumstances. In OGE Informal Advisory Letter 93 x 26, for example, OGE advised a former employee that it was assuming a direct role for several reasons, including the possibility that the individual's question would require coordination with several other agencies. In this regard, you report that the Designated Agency Ethics Official (DAEO) at the [agency] considers a sunset review to be the same particular matter as the corollary original [agency] investigation. In contrast, it is your understanding that the DAEO at the Department has determined that an original investigation and a subsequent review are different particular matters for purposes of section 207(a)(1). We agree that this apparent inconsistency suggests that OGE should become involved.

You have asked, however, that we not disclose your identity during any consultations with the [agency's] DAEO and that we withhold your name if we eventually publish an opinion concerning the facts and issues you have presented. As a matter of policy, we omit names and certain other identifying details from our published opinions. On the other hand, since there is no attorney-client relationship between a Federal employee and a Federal ethics official, we have no obligation to provide advice on a confidential basis. We cannot protect an individual's identity when it would inhibit our ability to provide accurate prospective advice.[1] Certainly, to the extent that an individual argues that he has not participated personally and substantially in a particular matter, we must have the ability to gather facts from the agency to confirm the nature of the individual's involvement. We will not contact the [agency] concerning the issues you have raised, therefore, unless it is understood that we cannot do so "in strict confidence."

Subject to this understanding, we will contact the DAEO at the [agency] about the "same particular matter" issue. However, since we did not find your second argument persuasive, we would not expect to seek further information concerning the general nature of your participation in [agency] investigations. As described in your letter, a personal assistant may provide "advice and counsel" to an individual [agency] Commissioner. As defined in 18 U.S.C. § 207(i)(2), an employee is deemed to have "participated" in a particular matter if he

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[1] Moreover, we recognize our obligation to report possible violations of 18 U.S.C. § 207 to the cognizant Inspector General or to the Department of Justice. *See* 28 U.S.C. § 535.

has taken action through "decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other such action." As explained at 5 C.F.R. § 2637.201(d)(1), the term "personally" means "directly." And, in a subsequent regulation interpreting the phrase "personal and substantial participation" for purposes of 18 U.S.C. § 208, OGE specifically emphasized that "[p]articipation may be substantial even though it is not determinative of the outcome of a particular matter." 5 C.F.R. § 2640.103(a)(2). This statement applies equally in relation to the adverb "substantially" appearing in 18 U.S.C. § 207(a)(1). If you think that your participation in a particular investigation was of a purely administrative nature, was not in connection with the substantive merits of the matter, or was not otherwise personal and substantial, you should contact an [agency] ethics official directly for advice.

We also did not agree with your suggestion that post-employment conduct should not be prohibited if it "serves not a single purpose of the prohibitory legislation, as articulated by the Senate." The purpose of 18 U.S.C. § 207 is set forth in its terms. It is our practice to counsel individuals to avoid proposed conduct that appears to satisfy all elements of section 207(a)(1). Thus, even if it were true that your ability to exercise personal influence would be diminished as a result of the departure of some of the Commissioners with whom you worked as a Government employee, you would still violate section 207(a)(1) if you were to represent another by directing a prohibited communication to any current "officer or employee of any department, agency, court, or court-martial of the United States."

In conclusion, you have described circumstances in which we believe it would be appropriate for us to contact the DAEO at the [agency] on your behalf and to facilitate coordination with the DAEO at the Department, as necessary. We cannot agree, however, to do so in strict confidence. Thus, we would expect to disclose your identity during our discussions and to use your incoming letter or letters as a basis for those discussions.

If you wish to renew your request for advice from OGE in view of the foregoing, please do so in writing.

Sincerely,

Stephen D. Potts
Director