
Office of Government Ethics

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Letter to a Private Attorney dated June 26, 1997

Your letter of May 13, 1997, requested advice for [a former Federal employee] about proposed employment activities with various persons and entities, following her employment with [an agency] in [a] Department. We received your letter at the Office of Government Ethics (OGE) on May 20. The following information provides procedural background, a factual basis for analyzing [the former employee's] proposed employment activities with [a] County, [State], and OGE's analysis and advice concerning application of the relevant criminal statute, 18 U.S.C. § 207, to those activities.

BACKGROUND

On June 4, OGE's Office of General Counsel participated by telephone in a general discussion with you and [the former employee] about the issues arising under 18 U.S.C. § 207 and our procedures for responding to your inquiry. [A staff member of a U.S.] Senator's office was also a party to that conversation. Thereafter, we received your follow-up correspondence dated June 4, requesting that [the former employee's] proposed employment activities with [the] County be given priority and addressed first, leaving the other proposed activities described in your letter for later advice.

Under our regulations in 5 C.F.R. parts 2637 and 2638, questions of this nature are ordinarily resolved by ethics officials with the former employee's department or agency, since they are in the best position to develop a factual basis about the particular matters on which the former employee worked, and to

analyze whether his or her current activities may entail prohibited contacts with Federal officials concerning these same matters. Under the circumstances in this case, however, OGE will provide direct guidance by means of this letter to you concerning [the former employee's] proposed work for [the] County, since she was referred to us by [the agency] and since you and the office of [the] Senator have highlighted the immediacy of the ongoing County flood damage repair projects.

All other proposed employment activities of [the former employee] that do not relate to [the] County, as described in your correspondence, have been referred to the Designated Agency Ethics Official at [the Department], for response directly to you. These include questions about her proposed work for other counties in [two States], individual landowners, Native American tribes, consultants, and various individuals or entities, as well as volunteer work for [the agency].

Our Office of General Counsel at OGE discussed your inquiry on June 9 with [an] ethics officer for [the agency's regional office], which includes [the State], where [the former employee] worked. He had provided initial advice to her about post-Government activities, by memorandum of April 29. On June 10, OGE initiated an ongoing dialogue with the Office of General Counsel at [the Department's] headquarters, with whom [the ethics officer] had consulted in April and May. Together with that [Department] office, OGE's Office of General Counsel spoke by phone on June 13 with [the head of the agency office] for the State, to obtain background information and a factual basis for analyzing the legal issues relating to your inquiry about working for [the] County. Our Office of General Counsel had follow-up discussions with [the State agency head] on June 17.

Based on your letter and information obtained from the phone conversations referenced above, we understand the following facts pertaining to County projects conducted by [the

agency] and [the former employee's] participation in them. Because of the urgency expressed by you and by the office of [the] Senator in obtaining our advice, we have decided to use this method of determining a factual basis, rather than exchanging written communications with the various offices that have relevant information. While the latter method may afford more complete accuracy of details, we believe that all material facts are as outlined below.

[AGENCY] FLOOD PROJECTS IN [THE] COUNTY

[The former employee] served as a GS-11 [agency specialist] with [the agency] in [a State], until she left Government employment in late February or early March 1997. When floods resulting from snow-melt occurred along [a] River in [two] Counties in [the State] during the first week of January 1997, she served as a team leader for the conduct of damage survey reports (DSRs) in [one] County on the Upper [section of the] River, as further described below.

The [agency] is responsible for assessing and estimating damage, establishing sponsor agreements with the county or other entity, developing rehabilitation designs and methods, entering project agreements with the sponsor, and establishing contracts to repair damage along flooded rivers. Repairs may include stabilizing and restoring the bank and course of the river, some bridge and utility repairs, and some farm irrigation restoration. The [agency] is required by law to work through a local government sponsor, and it does this during the DSR process by establishing a sponsor agreement with the county where the damage occurred, or in some cases with a State agency, Native American tribe, or other governmental body. The sponsor determines private land rights by arranging land easements and access permits, maintains direct contact with the landowners, and coordinates with [the agency].

Although [the agency] was responding to the entire River flood, each specific area of damage generated a DSR. These DSRs were initiated either by [the agency], the county government, or individual landowners. [The] County is a major sponsor for flood work projects in its borders, though in some cases there will be multiple sponsors for a single DSR and repair project, such as when bridges and farm irrigation repair is involved. Of the approximately 120 DSRs resulting from the January 1997 flood, about half involve the River and [two] Counties, with about 30 of these located in [the] County. [The agency] tries to establish sponsor agreements early, usually within the first two weeks. For the River flood, most DSRs were begun and sponsor agreements entered during the period January to March 1997. About 75% to 80% of the DSRs from the January 1997 floods were completed by February 25, before [the former employee] left [the agency], though a few additional DSRs may yet be initiated.

The DSRs include damage assessment and evaluation, negotiating a sponsor agreement, determination of initial eligibility as a repair project, landowner identification, preliminary engineering and cost estimates, a statement of environmental impact, a determination of the best economic advantage for [the agency] in the rehabilitation process, and a preliminary plan for cleanup and restoration. Based on a completed DSR, [the agency's] civil engineers then establish a rehabilitation design. The design outlines a plan to repair the damage, including methods, materials, quantities, quality, and costs. It may discuss, for example, removal of soil, debris, and gravel bars, the building of levees and dykes, and the use of alternative treatments such as vegetative or rock restoration along the river bank.

Once the design is completed, [the agency] enters into a project agreement with the county or other entity that previously entered a sponsor agreement with [the agency]. The project

agreement contains the sponsor's guarantee that it will certify to [the agency] the necessary land access permits and easements required for the project to go forward. The project agreement also contains a cost estimate and includes a financial commitment from the sponsor, who must pay 25% of the ultimate cost. The sponsor may negotiate with landowners to recover some of that expense. After entering a project agreement, [the agency] opens bids and establishes contracts with private companies to perform the work required and to obligate the funds from Federal appropriations and the local sponsor.

[The former employee's] team was one of several that worked on the DSRs for the [River] and other rivers that were flooded in January 1997. The team members included interdisciplinary specialists such as a civil engineering technician and a plant biologist, since part of the DSR work involves preliminary repair planning and estimates. [The former employee's] team would have worked on most of the approximately 30 DSRs relating to [the] County, as hers was the primary team assigned to the Upper [section of the] River. Her responsibilities as team leader included personal involvement with all DSRs handled by her team. She participated directly in the work for some of the DSRs, discussed the other DSRs with her team members, and signed all completed DSRs conducted by her team.

[The former employee] would not have been involved in developing the engineering designs resulting from the DSRs, though her DSRs contained initial repair planning. Most of the actual designs would have been developed after she left [the agency]. Had she stayed with [the agency], she would have coordinated with the county sponsors on the resulting project agreements and contracts, as team leaders usually have ongoing responsibility for the projects resulting from their DSRs. Since she resigned from [the agency], they have assigned a temporary replacement to her team.

The DSR damage assessment, cost estimates, and preliminary plans are revised as the design is developed and project agreements entered with sponsors. Costs may be modified substantially, based on follow-up surveys after the water has receded, or because of design changes from the initial DSR plan. Currently, DSRs involving the River are being revised, as [the agency] completes its design work, prepares contracts, and finishes site surveys and cost determinations so that the repair work can begin. As of June 1997, only about 20% of the completed DSRs have been addressed with actual project agreements and repair contracts, so the remaining DSRs still require coordination with the county or other sponsor. [The] County is a party to most of the project agreements within its borders, each based on a DSR. Each DSR and resulting design, project agreement, and contracts concern a specific project.

In addition to obtaining access agreements and easements with landowners and certifying these to [the agency], the county sponsor also has input to [the agency] on the overall project requirements, designs, and costs. If the county or its individual landowners disagree with an aspect of the design for a particular project, the sponsor may discuss changes with [the agency]. Even after the project agreements are entered, modifications may be required. There may be multiple landowners and multiple government sponsors for some projects, which can complicate reaching final designs and project agreements.

If [the former employee] now begins to work for [the] County as its project coordinator, she might be providing advice to the county about its responsibilities, assisting it with land right determinations, and overseeing the administration of financial accounting for the county on cash and in-kind repairs. The county coordinator serves as a conduit of information with [the agency], which helps [the agency] in making decisions and monitoring the status of projects.

Additionally, [the former employee] and [the agency] may want to discuss substantive matters, which would require that she be in contact with her replacement at [the agency] and her former team members concerning the projects resulting from her team's DSRs. As a sponsor, [the] County is the point of contact with [the agency], to coordinate the project agreements and ongoing changes to designs, to certify the land access rights, to relay concerns of landowners, and to suggest priorities in addressing various DSRs. The county can influence [agency] decisions, and it has a direct financial interest, as it must provide 25% of the repair costs. Your letter acknowledges that, as [the] County's project coordinator, [the former employee] could have a role in these contacts, indicating that she might be called upon by [the agency] for technical assistance with designs, or that she might need to consult with [agency] personnel about compliance with their specifications and standards for designs. You also indicate that she might need to consult other Federal agencies about procedural approval on designs.

APPLICATION OF 18 U.S.C. § 207

Since [the former employee] appears to have been personally and substantially involved in each DSR that her team processed, rather than as a supervisor, the applicable law is section (a)(1) of 18 U.S.C. § 207. That criminal statutory provision prohibits former Federal executive branch employees from knowingly making, with the intent to influence, any communication to or appearance before an employee of the Federal executive branch or courts on behalf of someone other than themselves or the United States in connection with a particular matter involving a specific party in which they participated personally and substantially while a Government employee, and in which the United States is a party or has a direct and substantial interest. This bar on communications and appearances continues throughout the existence of the particular matter.

On June 3, 1997, OGE provided to you by fax a twelve-page summary of 18 U.S.C. § 207, dated November 4, 1992, and we discussed some of its contents with you during our phone conversation of June 4, 1997. That summary, which was written in conjunction with the Department of Justice, offers our most comprehensive interpretation of the current statute, as revised. Additionally, OGE's informal advisory letters and memoranda provide some further guidance. As indicated in our fax of June 3, those informal opinions may be located and researched on our World Wide Web site, at www.usoge.gov, and our fax referenced several specific OGE opinions.

As we previously discussed with you, 18 U.S.C. § 207 does not prohibit former Federal employees from accepting employment with any private or public employer after Government service. It only prohibits them from engaging in certain activities on behalf of someone other than themselves or the United States. Therefore, [the former employee] could, without violating 18 U.S.C. § 207, contract with or otherwise be

employed by [the] County to advise and assist it with the ongoing repair projects being administered by [the agency], even though she worked on the DSRs which form the basis for these projects. However, she could not, with an intent to influence, make communications or appearances on behalf of [the] County to [the agency] or another Federal agency in connection with any of these projects resulting from the DSRs in which she participated personally and substantially while an [agency] employee.

The phrase “participate personally and substantially” is defined at page four of the summary that we faxed to you. It may include directing the participation of others, as well as any other direct involvement that is significant to the matter. Thus, [the former employee] would have participated personally and substantially when, for example, she actually conducted the assessments, evaluations, and determinations connected with a particular DSR, or when she assisted team members with their DSRs through discussion or otherwise, or when she approved and signed a DSR.

Under the facts as outlined above, each DSR concerning [the] County projects became a particular matter involving specific parties as soon as a sponsor agreement was entered between [the agency] and [the] County, if not before. Most of the sponsor agreements were entered within two weeks of a DSR’s initiation, most of the DSRs were completed prior to February 25 (before [the former employee] resigned from [the agency]), and [the former employee] was personally and substantially involved in each DSR assigned to her or to a member of her team. The subsequent designs, project agreements, and repair contracts relate to a specific DSR and its sponsor agreement. Each DSR and its sponsor agreement concern the same basic facts, issues, and parties as the resulting design, project agreement, and repair work.

Under these facts, we conclude that each project agreement with [the] County for repair work constitutes the same particular matter involving specific parties as the DSR and sponsor agreement with [the] County on which that project agreement and work is based. Therefore, communications to, and appearances before, [the agency] or another Federal agency by [the former employee] on behalf of [the] County, with an intent to influence, in connection with project agreements and repair work resulting from DSRs in which she participated personally and substantially as an [agency] employee would violate 18 U.S.C. § 207(a)(1).

Prohibited communications could include oral, written, and electronic transmissions made with the intent to influence. Prohibited appearances may include mere presence before an employee of [the agency] or another Federal agency, when the circumstances make it clear that there is an intent to influence. An intent to influence will exist if the communication or appearance is made for the purpose of seeking a discretionary Government ruling, benefit, approval, or action, or for the purpose of influencing a Government action which [the former employee] knows involves an appreciable element of dispute. This would not occur with purely social contacts, requests for publicly available documents, requests for purely factual information, or with the supplying of such information.

An intent to influence would likely occur in connection with communications or appearances by [the former employee] on behalf of [the] County to [the agency] or another Federal agency which concern: reassessing damages that were initially determined in a DSR, or any other revisions to a DSR; establishing, modifying or coordinating project agreements; certifying land access permits and easements; developing, changing, or seeking approval for designs or cost estimates; establishing or urging changes in priorities among various project agreements and contracts; requesting deadline extensions

or justifying delays; and any other issues involving an element of controversy, potentially divergent views, Government discretion, or even an inchoate adversariness.

As discussed in the phone conversation of June 4 with OGE, this could include relatively minor matters, such as scheduling or arrangements for meetings, wherein [the agency] has discretion. Also as discussed in that phone conversation, there is no exception in the statute for communications and appearances wherein [the] County and the United States may share the same objectives.

The statute does not, however, bar [the former employee] from assisting [the] County with these matters behind the scenes, such as by negotiating with landowners for access permits and easements, conducting the County's financial accounting, or otherwise advising and assisting [the] County where no communication between her and [the agency] or another Federal agency is involved. She could also prepare, but not sign or use her name in connection with, documents for [the] County to transmit to [the agency], which certify the land rights or fulfill other commitments in a project agreement, or which urge the terms for or changes in designs, surveys, costs, project agreements, project priorities, and related matters.

Additionally, [the former employee] could communicate with [the agency] to exchange factual information about project status, confirm receipt of documents or previously scheduled times for meetings, ascertain points of contact, and offer or receive any similar information that is purely factual. Finally, the restrictions of 18 U.S.C. § 207(a)(1) would not apply to [the former employee] for projects resulting from DSRs in which she did not participate personally and substantially while employed at [the agency], such as DSRs identified for her team just prior to her leaving, or DSRs arising after her departure.

If, however, there were any DSR projects in which [the former employee] did not actually participate personally and substantially but that had been identified for her team or were under consideration by it before she left [the agency], they will be considered to have been pending under her official responsibility as team leader. In that event, section (a)(2) of 18 U.S.C. § 207 applies. That provision is identical to section (a)(1), except that the communication and appearance bars only apply for two years following Government service, and it requires only that the former employee have had official responsibility for a particular matter while a Government employee, not that she have participated personally and substantially therein.

CONCLUSION

We hope that this discussion and analysis will prove useful to you in advising [the former employee] about her post-Government activities for [the] County. As mentioned above, we have referred all remaining questions about her proposed employment activities to the Designated Agency Ethics Official for [the Department]. We will provide appropriate consultation with his staff, if any unusual legal issues arise in the course of their analysis.

Thank you for your patience while we gathered the additional factual information required for us to prepare this legal analysis.

Sincerely,

Stephen D. Potts
Director