Office of Government Ethics
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Letter to a Division Chief of a Departmental Component dated November 5, 1996

This is in response to your letter of July 3, 1996, requesting a written opinion concerning the application of the Federal post-employment statute, 18 U.S.C. § 207, to [an employee], a GM-14 [official]. According to your letter, and to materials that your office provided to this Office on August 15, 1996, [the employee] is currently interviewing for a position with [a State agency]. 1 [The State agency] and your office within the Department are in the process of implementing a [Federal] program. [The employee] developed the draft proposal for this [Federal] program and continued to work on the proposed project until early 1996. Because his proposed duties with [the State agency] may involve the [Federal] program, you have requested guidance as to the application of section 207 to [the employee's] proposed employment. For the reasons discussed below, we are of the opinion that the [Federal] program was a particular matter involving specific parties at the time of [the employee's] involvement. His involvement in the program was also personal and substantial. [The employee's] potential employment with [the State agency] would therefore be subject to the restriction of section 207(a)(1). 2

[The employee's] proposed duties relating to the [State agency] program implicate the lifetime bar of 18 U.S.C. § 207(a)(1). 3 As you know, this statute prohibits former executive branch employees from making, with the intent to influence, any communication to or appearance before any officer or employee of a department, agency, or court of the United States in connection with a particular matter that involved specific parties at the time of such participation, where the United States has a direct and substantial interest and where the former employee participated personally and substantially in the matter as a Federal employee. For the prohibition to apply, all of the elements of the statute must be satisfied. Even then, there are statutory exceptions that may permit otherwise prohibited communications under certain circumstances. [The employee's] status as a Federal employee is clear, as is the fact that the United States has a direct and substantial interest in the [Federal] program (which is partially funded by the Federal Government). We therefore turn to the other elements of the statute to resolve the issue of whether [the employee's] proposed employment would violate section 207(a)(1).

Particular Matter Involving Specific Parties

A particular matter involving a specific party or parties is typically a matter such as a judicial or other type of proceeding, or one involving a particular claim or contract. 5 C.F.R. § 2637.102(a)(7). 4 It generally involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identifiable parties. 5 C.F.R. § 2637.201(c)(1). For the restriction of section 207(a)(1) to apply, the parties must have been identifiable both at the time of the individual's participation as a Government employee and at the time of the proposed representation. 5 C.F.R. § 2637.201(c)(4). It is clear that the [Federal] program agreement between [the State agency] and the [departmental component] currently constitutes a "particular matter involving specific parties" under section 207. According to the information that you provided to us, [the departmental component] and [the State agency] have reached an agreement on the [Federal] program, and funding for the program has been obtained from both the Federal and State Governments. Implementation of the agreement began in July of this year. We must therefore determine whether the [Federal] program was a "particular matter involving specific parties" at the time of [the employee's] involvement.

Determining the point when a matter becomes a particular matter involving specific parties must be resolved on a case-by-case basis. Ordinarily, a grant or contract involves specific parties when initial proposals or indications of interest are received by the Government. See 5 C.F.R. § 2637.201(c)(2), example 2. The language in both the regulatory text and in the example reserves the possibility that in unusual circumstances a party may be considered to be identified to a particular matter prior to the receipt of such a proposal or indication of interest. A review of the documents that you have provided to us concerning the [Federal] program at the time of [the employee's] involvement indicate that such unusual circumstances are present in this case. Unlike a typical contract or grant application, the [Federal] program is an outgrowth of an ongoing agreement between [the departmental component] and [the State agency]. Having successfully completed a program [in another area], the [Federal] program proposal recommended a renewed partnership between [the departmental component] and [the State agency] that would continue [an activity]. See [title deleted] by [the employee]. Indeed, [the employee] may have already been in contact with [the State agency] concerning this proposal, as indicated by his January 17, 1996 letter to [a State agency employee] responding to [the State agency employee's] inquiry concerning [the departmental component's] commitment to conducting such a program. In his letter to [another person] dated January 23, 1996, [the employee] indicated that he already had a copy of the [State agency] proposed budget

for the [Federal] program. In the draft decision memo attached to that letter, it is recommended that [the departmental component] participate in [the State agency's] proposed regulatory program.

Given the above facts, and based upon the information that you have provided to us, we believe that the [Federal] program was a "particular matter involving specific parties" at the time of [the employee's] involvement as a Government employee. At that time the State was identifiable as a party even though the formal agreement between [the departmental component] and [the State agency] had yet to be reached. The proposal was related to an ongoing agreement between [the departmental component] and [the State agency], and required a partnership between the two entities. We note that this conclusion is consistent with the text of 5 C.F.R. § 2637.201 and the examples included with that section.

[The employee's] counsel inquired as to whether [the employee's] proposed employment would be permitted under section 2637.201(c)(2), which reads:

(2) Technical matters . In connection with technical work, participation in projects generally involving one or more scientific or engineering concepts, in feasibility studies, or in proposed programs prior to the formulation of a contract will not restrict former Government employees with respect to a contract or specific programs entered into at a later date.

This subsection is a further explanation of the concept of when a matter involves specific parties. It emphasizes that technical proposals and feasibility studies generally do not fall within section 207's prohibition, as there are no specific parties identified to such matters during the early stages of the proposal's development. Thus, even where an employee's involvement is with a specific technical system, such as the satellite communications system discussed in example 2 under the subsection, the fact that an employee works on a specific technical system does not of itself indicate that the matter is one that involves specific parties. In [the employee's] situation, the example would be apt if [the employee] had conducted a scientific review [of an activity]. However, the [Federal] program proposal developed by [the employee] was a proposed partnership between [the State agency] and [the departmental component] applied to a specific situation. Because the program would be a partnership between the State and the Federal Government, [the employee] presented the plan to Federal and State officials in December 1995. Narrative of [the employee], page 1. The [Federal] program proposal, [the employee's] correspondence with [the State agency] and within [the departmental component], and [the

employee's] narrative statement all clearly anticipate a partnership between [the departmental component] and a specific party, [the State agency]. We therefore conclude that 5 C.F.R. § 2637.201(c)(2), dealing with technical matters only, does not apply to [the employee's] situation.

We also note that the extent of [the employee's] involvement in the [Federal] program further supports this conclusion. This situation is addressed by 5 C.F.R. § 2637.201(c)(3) and the example thereunder. In that subsection, it is noted that if a Government employee: (I) personally participated in that stage of the formulation of a proposed contract where significant requirements were discussed and one or more persons were identified to perform services thereunder, and (ii) actively urged that such a contract be awarded, then the contract may be a particular matter involving a specific party as to such former Government employee even where the contract was actually awarded after the Government employee leaves Government service. [The employee's] personal and extensive participation in the development of the proposed [Federal] program, discussed below, and his recommendation that the proposed [Federal] program be adopted through an agreement with [the State agency], further support our conclusion that the [Federal] program should be treated as a particular matter involving specific parties at the time of his involvement.

Personal and Substantial Involvement

To participate "personally" means to do so directly, and includes the participation of a subordinate when actually directed by the former Government employee. 5 C.F.R. § 2637.201(d)(1). The involvement by the former employee must have been "substantial" for the restriction to apply; that is, the former employee's involvement must have been of significance to the matter, or form a basis for a reasonable appearance of such significance. Based upon the information provided to us, we conclude that [the employee's] involvement in the [Federal] program was personal and substantial. The record indicates that from his position as Regional Program Manager [the employee] was actively involved as a senior decision maker in the development of the draft program plan and advocated its acceptance by [the departmental component]. He is listed as the author of the draft plan for the program, and presented it to [a] Panel for review and recommendations. Indeed, the [Panel] report refers to the plan as the "[Employee] Plan." [Panel] Report, page 2. As noted earlier, [the employee's] own narrative statement indicates that he developed the plan and presented it to State and Federal managers as well as to [the Panel]. Based upon the record that you have presented to us, we have no difficulty in concluding that his involvement in the [Federal] program was personal and substantial.

Communications with the Intent to Influence

Having concluded that [the employee] was personally and substantially involved in the [Federal] program, and that the program was a particular matter involving specific parties at the time of his involvement, we turn to the activities prohibited by section 207(a)(1). You should note that the statute only prohibits representational activity, i.e. , communications or appearances made to a Government employee with the intent
to influence. An intent to influence is an essential element of the criminal statute. Such an intent to influence may be found if the communication or appearance is made for the purpose of seeking a discretionary Government ruling, benefit, approval, or other action, or is made for the purpose of influencing Government action in connection with a matter which the former employee knows involves an appreciable element of dispute concerning the Government action to be taken. Section 207 does not, therefore, prohibit [the employee] from providing "behind-the-scenes" assistance to anyone in connection with any particular matter, so long as no communications or appearances are made to a Government employee with the
intent to influence that employee. For the same reason, a request for purely factual information or for public documents, or purely social contacts with former co-workers would not violate the statute. It would be permissible, for example, for [the employee] to inquire on behalf of [the State agency] whether [the departmental component] had [conducted an activity] as part of the [Federal] program. Although such communications are not prohibited, a former employee subject to the section 207 restrictions must be very careful when engaging in them. Should a factual communication give rise to a discussion of a dispute or even a potential area of controversy or disagreement between [the departmental component] and [the state agency] under the agreement, [the employee] would have to avoid further participation in the meeting or communication. See 5 C.F.R. § 2637.201(b)(5), and example 1 thereunder.

It is not clear from the facts presented whether [the employee's] proposed position with [the State agency] would require that he engage in representational activity. The job announcement for the position does not describe the duties with sufficient specificity for such an analysis. It does state that the Area Manager maintains liaison with other Governmental and private agencies in [certain] activities. This presumably would include dealing with the Federal Government on matters where [the State agency] has an interest. While [the employee] would be free to contact the Federal Government concerning matters that he had not been involved with as a Government employee, section 207(a)(1) would bar him from making certain communications to or appearances before any department, court or agency of

the United States, with the intent to influence the Government, on behalf of [the State agency] in connection with the [Federal] program. 5

Exception for Scientific and Technical Information

Although we have concluded that [the employee] would be barred from making certain communications to the Government on behalf of the [State agency] concerning the [Federal] program, there is the possibility that this bar could be removed through the application of the exception for scientific or technological information contained at 18 U.S.C. § 207(j)(5). Subsection 207(j)(5) states that the restrictions contained at section 207(a) (among others) shall not apply with respect to the making of communications solely for the purpose of furnishing scientific or technological information under certain circumstances. The statute establishes two mechanisms for the scientific and technical information exception. Under the first, otherwise prohibited communications are permissible if they are made under procedures acceptable to the department or agency concerned. At least one agency has established procedures under this exception. See 14 C.F.R. § 1207.202 (National Aeronautics and Space Administration). However, neither the Department nor [the departmental component] has established such procedures. Thus, to qualify under the exception, the second statutory mechanism would have to be followed.

The second mechanism permits the head of the department or agency concerned with the matter, in consultation with the Director of the Office of Government Ethics (OGE), to make a certification that the former officer or employee has outstanding qualifications in a particular 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. The statute requires that this certification be published in the Federal Register. This mechanism essentially enables agencies to resolve these issues on a case-by-case basis. The Secretary of [the department] would have to certify that the circumstances required under the statute exist in [the employee's] case, and (after consultation with OGE) the certification would have to be published in the Federal Register. We express no opinion as to the desirability of such a waiver at this time; under the statute the individual agency should make the initial determination and then consult with OGE prior to such a certification.

We hope that this information is helpful to you. Should you have any questions about the issues discussed in this letter, please feel free to contact our Office.

Sincerely,

Stephen D. Potts
Director

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1 According to your letter, [the employee] has properly recused himself from matters affecting [the State agency] in order to comply with the requirements of 18 U.S.C. § 208 and 5 C.F.R. part 2635. Our opinion will therefore focus upon the application of 18 U.S.C. § 207 to [the employee's] proposed employment with [the State agency].

2 This letter does not consider the application of 18 U.S.C. § 207 to a similar cooperative agreement between [the Department] and [the State agency] [in another area]. Although [the employee] served as the Authorized Departmental Officer's Designated Representative for this agreement, [a staff member] of your office has indicated that the project is either completed or is in the final stages of termination, rendering the question moot.

3 [The employee's] position does not meet the definitions of "senior" or "very senior" employee, and therefore he is not subject to the post-employment restrictions under section 207 or 207(d). Because your letter only requested an opinion as to the [Federal] program, our letter does not consider the two-year ban of section 207(a)(2). Of course, [the employee] remains subject to section 207(a)(2), and we assume that he has been counseled as to the scope of that restriction.

4 Section 207 was amended by the Ethics Reform Act of 1989, Pub. L. No. 101-194 (November 30, 1989). These amendments became effective on January 1, 1991, and apply to all employees who retire from the Government after that date. The regulations at 5 C.F.R. part 2637 predate these amendments. The provisions that apply to your situation, however, are substantially unchanged; part 2637 still provides guidance for these restrictions.

5 We again note that [the employee] remains subject to the two-year ban of 18 U.S.C. § 207(a)(2), which would prohibit him from attempting to influence any United States department, agency or court regarding any particular matter involving specific parties that [the employee] knows or reasonably should know was pending under his official responsibility during his final year of Government service.