05 x 3

Letter to a Law Firm
dated June 8, 2005

This is in response to your May 31, 2005, letter requesting a formal advisory opinion concerning the post-employment activities of a former senior employee of [Component A of a Department] who is subject to the one-year cooling-off restriction of 18 U.S.C. § 207(c). [The former employee] is currently employed by [a] Corporation, which provides [certain] services in [a country] under a contract with [components B and C of the Department]. On behalf of [the former employee] and [the Corporation], you seek to determine whether section 207(c) permits [the former employee] to make certain communications with officers or employees of [Component A], in order to coordinate [certain services] for [the Corporation's] operations and personnel in [the country].

At the outset, we note that we have considered the criteria set forth in subpart C of 5 C.F.R. part 2638 and have determined that a formal opinion is not appropriate in this case.[1] Moreover, inasmuch as your letter requests post-employment advice that depends upon an understanding of the facts surrounding [the former employee's] former employment, the organizational structure and operations of [headquarters] in [the country], and the terms and operation of the [Corporation's] contract, we believe that the Designated Agency Ethics Official (DAEO) for [Component A] is in the best position to address the specifics of [the former employee's] situation. *See, e.g.*, OGE Informal Advisory Letter 99 x 11 (in most cases, agency in best position to make determination as to certain post-employment issues). Accordingly, we have spoken with

[1] We note also that the time necessary to follow the process for issuing a formal opinion, under subpart C of 5 C.F.R. part 2638, would not be consistent with your request that OGE provide your clients with expeditious assistance. In this connection, your suggestion on page 5 that the aforementioned regulations contemplate a 30-day period for issuing a formal opinion is not correct.

[Component A's] DAEO's office about your request and are providing that office with a copy of your submission and our response. We recommend that you pursue your specific questions directly with that office.[2]

Nevertheless, we address below certain legal issues of a more general nature that are raised in your submission. In view of the urgency of your request, this discussion will be relatively brief and will assume familiarity with the circumstances you have described.

The Scope of 18 U.S.C. § 207(c)

Your letter, at page 4, quotes a version of 18 U.S.C. § 207(c) that is not current. Section 207(c) no longer contains the language limiting the one-year cooling-off period to contacts concerning matters "pending before" the agency or department in which the former senior employee served. Largely in response to the decision in *United States v. Nofziger*, 878 F.2d 442 (D.C. Cir. 1989), Congress in 1989 deleted the language quoted in your letter and replaced it with language requiring only that the contact be made with "any officer or employee of the department or agency in which such person served . . . in connection with any matter on which such person seeks official action by any officer or employee of such department or agency." 18 U.S.C. § 207(c); *see* 135 Congressional Record S15954 (November 17, 1989)(explaining change). Consequently, we cannot agree with your argument that, because the [Corporation] contract is with separately designated components of the Department other than [Component A], [the former employee] would be permitted to make representational contacts with employees [of Division One of Component A] involved in [certain services] for [Corporation] operations. In any event, the provision of [certain services] for [Corporation] operations by [Component A] personnel clearly is a "matter," within the meaning of section 207(c), regardless of which [Department] components entered into the contract with [the Corporation]. *See* 17 Op. O.L.C. 37, 41-42 (1993)(broad construction of "matter").

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[2] We appreciate that you did seek guidance from an ethics counselor with [a subordinate legal office]. However, in these circumstances, we believe it is most appropriate to permit the DAEO's office to review your situation, since the DAEO has overall responsibility for the ethics program within [Component A].

Additionally, depending on the circumstances of [the former employee's] former employment with [Component A], his cooling-off restriction may apply to employees of other parts of [the Department] besides [Component A]. It was not apparent from your letter whether [the former employee] had been detailed, or otherwise assigned, to [headquarters] within his last year of service. However, we understand from discussions with the [Department's ethics] Office that [headquarters] is viewed as a part of the undesignated [Department] "parent," for purposes of the [Department] component designations under [citations deleted]. [The ethics office], therefore, advises current and former employees who were detailed to [headquarters] from [Component A] or other separately designated components that their former agency, for purposes of the cooling-off period, is *both* their originating component (e.g., [Component A]) and any other undesignated parts of [the Department] (including not only [headquarters] but also any part of the Office of the Secretary of [the Department] and other offices not specifically designated in Appendix B of 5 C.F.R. part 2641). *See* 18 U.S.C. § 207(g)(treatment of detailees). We recommend that you discuss [the former employee's] specific situation with [Component A's] DAEO's office to determine whether he has any restrictions regarding contacts with employees of components other than [Component A].

Intent to Influence

We cannot determine whether any of [the former employee's] proposed communications with employees of his former agency would be made with the intent to influence, based on the information provided in your submission. Such determinations typically are quite fact-sensitive, and we believe [Component A's] DAEO's office would be in a better position than OGE to develop and evaluate the relevant facts in the first instance. Nevertheless, we do want to point out some general legal principles that will be involved in any such evaluation.

First, the element of intent to influence is not lacking simply because a particular communication is made by an employee of a Government contractor in the course of performing a contract. Although certain routine or ministerial communications made during contract performance may lack the requisite intent to influence, many contract performance communications may involve the potential for improper influence because the contractor and the Government have potentially differing views or interests with respect to the matter being

discussed. *See* OGE Informal Advisory Letters 03 x 6; 99 x 19; 95 x 10; and 81 x 35.

Second, in view of the general description you provided concerning the types of communications in which [the former employee] seeks to engage, we believe that it probably would not be possible to give any blanket assurances in the abstract that he would be in compliance with section 207. It would be very difficult to say that he could have complete freedom to engage in questions and other communications about such issues as [the Corporation's] scope of work and its coordination of on-site activity" (p. 3 of your letter) with [Division One] personnel [performing certain services]. While it may be true that the [Corporation] contract is not directly with [Division One], we assume that the decisions of [Division One] personnel [performing certain services] can have an impact on the cost and feasibility of [the Corporation's] contract performance in some circumstances. We also note that the [Department] acquisition regulations that you attach to your letter appear to make [a certain service for] contractor personnel a responsibility that is to be delineated in the actual contract. [Citation deleted]. At least in some circumstances, one might anticipate the potential for differing interests and views on the part of [the Corporation] and the Government with respect to [certain services] for [Corporation] operations.

In evaluating any of [the former employee's] proposed communications, it is useful to keep in mind the following excerpt from a seminal opinion of the Office of Legal Counsel, Department of Justice, concerning the application of section 207 to communications on behalf of Government contractors: "Moreover, the prohibition . . . should not be confined to major disputes, renegotiation, or the like. Requests for extensions of interim deadlines or work orders, nonroutine requests for instructions or information from the agency, suggestions about new directions on even relatively minor portions of the contract, and explanation or justification of the manner in which the contractor has proceeded or intends to proceed would all be barred; they involve at least potentially divergent views of the Government and the contractor on subsidiary issues or an implicit representation by the agent that the contractor is in compliance with contract requirements." 2 Op. O.L.C. 313, 317 (1978).

Finally, we cannot accept your argument that [Department] acquisition regulations "require" [the former employee] to make the communications he proposes, within the meaning of 5 C.F.R.

§ 2637.204(e).[3] While the [Department] regulations no doubt contemplate interaction between contractors and [certain] Government [personnel], they do not appear to prescribe any particular communications from any particular contractor employee with regard to the matters described in your letter; what section 2637.204(e) addresses are filings and other communications that are specifically described in a law or regulation and which are conveyed under circumstances that do not involve "an appreciable element of actual or potential dispute or an application or submission to obtain Government rulings, benefits or approvals."

Special Knowledge Exception

We likewise do not agree that [the former employee] can rely on the "special knowledge" exception in 18 U.S.C. § 207(j)(4). We believe that [the former employee's] proposed statements would be made for "compensation," which would be inconsistent with the terms of the limitation in the exception. In this connection, we would have to reject any suggestion that a statement is not made for compensation unless the former employee is paid specifically for the particular statement. Consistent with our longstanding interpretation-—and, we believe, common sense-—the receipt of a salary, or other compensation for doing one's job generally, is sufficient, if the statement at issue is made as part of the individual's duties for his non-Federal employer. We assume that [the former employee] is compensated by [the Corporation] for his duties, and any statements that he would make to coordinate [the Corporation's] operations with [certain Division One] personnel would be part of those compensated duties.

[3] You should be aware that the regulations in 5 C.F.R. part 2637 interpret and implement the version of 18 U.S.C. § 207 that was in effect until January 1, 1991, as explained more fully in the Note at the beginning of the rule. OGE has proposed new comprehensive regulations interpreting the current version of section 207, *see* 68 *Fed. Reg.* 7844 (February 18, 2003), but no final rule has been promulgated. The most comprehensive source of guidance with respect to the current version of 18 U.S.C. § 207 is found in the summary of post-employment restrictions issued by this Office on July 29, 2004, available on the OGE web site at http://www.usoge.gov/pages/daeograms/dgr_files/2004/do04023a.txt.

Miscellaneous

We want briefly to address two remaining issues. First, it is not apparent from the materials that you submitted whether [the former employee] had any involvement with the [Corporation] contract while he was a Federal employee. We leave that factual issue for you to resolve with the DAEO, but, if [the former employee] were involved, he may have additional restrictions under section 207(a)(1)(permanent representational bar if personal and substantial participation) or 207(a)(2)(two-year bar if matter pending under official responsibility during last year of service). Second, some of your attached materials suggest that [the former employee] may already have had certain communications with Government officials regarding [certain] issues in [the country]. OGE is not sufficiently familiar with the context in which these communications were made to make any determination as to whether such communications were in compliance with section 207, and, in any event, OGE does not make findings with respect to violations of the criminal conflict of interest laws.

We trust that this guidance will be of assistance to you. As we indicated above, we recommend that you contact [Component A's] DAEO's office for more specific guidance concerning [the former employee's] situation.

Sincerely,

Marilyn L. Glynn
Acting Director