

Office of Government Ethics
86 x 8 -- 08/07/86

Letter to a DAEO dated August 7, 1986

This informal advisory letter is in response to your request, dated July 7, 1986, for an opinion concerning the compensated participation of [your agency's] employees in a market research survey to be conducted by [a] corporation. Based upon our review of the facts, we conclude that [your agency's] service personnel should not accept compensation for their participation in [the corporation's] market research survey.

Facts

According to your letter, [the] corporation is a custom market research supplier, specializing in medical, pharmaceutical, and instrumentation product areas. [It] proposes to conduct a survey of Government hospital procurement procedures. In conducting its research, [the corporation] would survey [agency] supply service personnel at [certain agency] centers, offering each participant an honorarium in appreciation for his or her assistance. The survey would be conducted during non-duty hours, and [the corporation] would solicit only public or non-confidential information from the participating [agency] employees. According to [the corporation's] proposal, the areas of inquiry would include: (1) purchase or use of reagent consumables in the laboratory; (2) contract and non-contract procurement procedures; (3) advantages and disadvantages for the [agency facilities] of alternative procurement procedures; (4) factors affecting the selection of reagent suppliers; (5) use of clinical chemistry instruments related to the purchase of reagents; and (6) other related topic matter. However, a copy of the actual survey was not available for our review. From the information it obtains through the survey, [the corporation] plans to prepare a business analysis and report, which it will sell to hospital suppliers.

Discussion

In reaching the conclusion that [agency] employees should not receive compensation for their participation in [the corporation's] survey, we evaluated the facts presented in terms of the prohibition of 18 U.S.C. § 209 on compensation from nongovernmental sources and the [agency's version of the] following provisions in

the standards of conduct regulations: [5 C.F.R. § 735.201a(a); 5 C.F.R. § 735.203; and 5 C.F.R. § 735.206]. Each of these issues is addressed below, starting with 18 U.S.C. § 209.

18 U.S.C. § 209

According to 18 U.S.C. § 209, Government employees are prohibited from receiving compensation for their services as employees of the Federal Government. In your letter, you argue that participation in the survey would not constitute the performance of official duty. Therefore, 18 U.S.C. § 209 would not bar employees from receiving honoraria from [the corporation]. However, you state that these employees, in the course of their Government employment, provide publicly-available procurement information of the type [the corporation] is seeking through its survey to members of the public and firms who do business with the [agency]. If providing this type of information to the public is within the scope of the employee's responsibility as a Government employee, he or she should not be able to receive outside compensation for performing that function just by delaying the activity for a couple of hours, so that he or she can do it on his or her own time. Therefore, it is conceivable that 18 U.S.C. § 209 could be in issue, since the employee would be receiving compensation for providing [the corporation] with information that the employee would be required to provide within the scope of his or her Government position.

Standards of Conduct Regulations

Under the standards of conduct regulations, acceptance by [agency] employees of the proposed honoraria would violate [the agency's version of 5 C.F.R. § 735.201a(a)]. That provision states that an employee shall avoid any action which might result in, or create the appearance of, using public office for private gain. When a Government employee receives a payment from an outside source for supplying information that the employee is required to provide in the course of his or her official duties, the employee is using his or her position and the information he or she has acquired in that position for private gain. Even if the Government employee does not receive any payment for this activity, it might still involve some form of private gain. Where, as in this case, the private gain will be realized by some person or entity other than the Government employee, there may still be a violation of the regulation. (See Office of Government

Ethics, Memorandum on Participating in Privately-Sponsored Seminars or Conferences for Compensation, October 28, 1985, page 5 [85 x 18].) Your statement that "paid for public information provided by [agency] employees would not place [the corporation] in a better position than anyone else with respect to procurement information" might be correct in the sense that it will not assist [the corporation] in dealings with the [agency]. However, [the corporation] will gain financially by selling the information that it collects through its survey.

Since the proposal is to have the [agency] employees participate in [the corporation's] survey on their own time, the standards of conduct regulation on outside employment, [the agency's version of 5 C.F.R. § 735.203], would apply. According to that provision, an employee shall not engage in any outside activity that is not compatible with the full and proper discharge of his or her duties. Incompatible activities include the acceptance of anything of monetary value, which would include honoraria, in circumstances in which acceptance may result in, or create the appearance of, a conflict of interest. Since this proposal raises questions under 18 U.S.C. § 209 and appears to involve the use of public office for private gain and potentially the dissemination of nonpublic information, there is at least an appearance of a conflict of interest. As a result, the standards of conduct regulations would prohibit [an agency] employee from accepting the honorarium.

In your discussion of the use of public office for private gain, you refer extensively to the analysis contained in OGE's memorandum on participating in privately-sponsored conferences and seminars. In addressing the issue of outside employment as it pertains to lecturing and writing, the memorandum focused on subsection (c) of 5 C.F.R. § 735.203. The memorandum explained that the permissibility of participating in conferences or seminars which do not involve nonpublic information depends upon how closely the subject matter relates to the agency's responsibilities. We stated that an employee not covered by subsection (c) of 5 C.F.R. § 735.203 may lecture on a subject within his or her inherent expertise, even though the subject matter is related to the employing agency's activities. However, when the activity focuses specifically on the agency's responsibilities, policies, and programs, the employee is prohibited from receiving compensation for the activity.

In arguing that the proposed activity is permissible, you

state that the prohibition extends only to compensated outside activities which are related to official duties and which involve policy deliberation and determination. As a result, since the individual participants are lower-level employees who lack procurement responsibilities, you believe they may participate. By taking that approach, you have disregarded two considerations. First, OGE's memorandum states that an "employee will be prohibited from receiving compensation only when the activity focuses specifically on the agency's responsibilities, policies, and programs, when the employee may be perceived as conveying the agency's policies, or when the activity interferes with his or her official duties." If the activity focuses on the agency's responsibilities, the employee may not accept compensation for the activity, regardless of whether the employee may be perceived as conveying agency policy. Second, lecturing and writing are encouraged by [your agency's] standards of conduct. Other outside employment activities, such as the type you have described, do not enjoy such favored treatment. As a result, the discussion of the scope of permissible activity in that context does not necessarily apply to all other types of outside employment.

If, as you suggest, we were to extend the analysis contained in the memorandum to the present situation, it would cut against allowing [agency] employees to participate in [the corporation's] survey for compensation. As you have described the survey, it will be aimed at specific information about [the agency's] procurement procedures, rather than issues related to procurement in general. It does not appear that [the corporation] has requested assistance from [agency] supply service personnel because of their inherent expertise in the field; [the corporation] has sought out these individuals because they know specific [agency] procurement policies and how they are applied. A Government employee cannot receive compensation from an outside source for providing such information.

The misuse of information is governed by [the agency's version of 5 C.F.R. § 735.206] which prohibits [agency] employees from using, for the purpose of furthering a private interest, official information obtained through or in connection with their Government employment, which has not been made available to the general public. Although some of the information [the corporation's] proposal covers may be available to the general public, it is not clear that all of what they are requesting fits within that category. Without listing the actual questions it plans to ask, [the corporation] states that it would inquire into

contract and non-contract procurement procedures, advantages and disadvantages for the hospital of alternative procurement procedures, and other related topic matter. Because these topics are quite broad, it is possible that [agency] employees would be asked to provide information that goes beyond that which the [agency] has made public in the past or would like to have made public. Since both [the corporation] and the participating [agency] employee would be profiting from the use of this information, the proposal could run afoul of [the agency's version of section 735.206].

Conclusion

We believe the arrangement you described would violate the standards of conduct provision on the use of public office for private gain. In addition, it would raise other conflicts concerns under the standards of conduct and 18 U.S.C. § 209. As a result, we think that [your agency's] employees should not participate in [this corporation's] proposal as it has been described.

Sincerely,

David H. Martin
Director