

Letter to a Designated Agency Ethics Official
dated August 3, 2007

This is in response to your letter of June 14, 2007, in which you request our guidance concerning the application of 18 U.S.C. § 207(c) to former senior employees who wish to perform training services under a contract between your Department and a training company.

Your letter pertains to several former senior employees of [an] Office, which is an agency and designated component of [your] Department, pursuant to 18 U.S.C. § 207(h). As former senior employees, within the meaning of 18 U.S.C. § 207(c)(2), these individuals are prohibited for one year from making any communication or appearance on behalf of another person with the intent to influence any employee of the [Office] in connection with any matter in which they seek official action. You have concluded that the proposed training activities will not involve representing another person with the intent to influence the [Office]. As explained below, although we cannot rule out the possibility that some communications and appearances made during the course of performing a training contract may involve the intent to influence the [Office] on behalf of the contractor, many activities may be permissible.

According to your letter, the [Office] has entered into a contract with a private company to provide qualified instructors to train new [analysts]. You state that the [Office] "expects that the most qualified individuals from the private sector will be former senior-level [analysts]."¹ Each trainer hired by the

¹ According to your letter, the [Office] has an urgent training need that can be met in the most cost-effective manner through "a single third-party clearinghouse," and "the agency believes its best resource will be its former senior employees" working for the contractor. Your letter does not indicate how many of these former senior employees will be persons still within their one-year cooling-off period, under 18 U.S.C. § 207(c). However, in this letter, all references to "former senior employees" or "former employees" are to those who are still within their cooling-off period under section 207(c).

contractor will lecture on various topics, review new [analyst] work in a classroom setting (including feedback on pending applications), and provide one-on-one coaching to [analysts] with regard to pending application assignments. You indicate that the [Office] "will prepare all curriculum and teaching materials to be used by the contractor."

As you state, section 207(c) applies only to those communications and appearances that are made with the "intent to influence" officers or employees of the individual's former agency. An intent to influence may be found if, *inter alia*, the communication or appearance "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 particular Government action to be taken." OGE Informal Advisory Memorandum 04 x 11, Attachment at 3-4. The basic question posed by your letter is whether any communications and appearances by former senior employees while they are performing training services under the contract would be made with the intent to influence the [Office].

It is well-established in our opinions that a communication made by a former employee in the course of performing a Government contract can involve an intent to influence the Government. As we recently explained:

Employees sometimes assume, incorrectly, that section 207 applies only to communications about the award or modification or other major business aspects of a contract. However, section 207 also can apply to communications that a former employee makes while performing work under the contract, even if the contract specifically requires contractor personnel to communicate with the Government. Of course, certain routine or ministerial communications would not be covered, for example, making routine factual statements that are not potentially controversial. However, many communications made while the former employee is performing the contract may involve the intent to influence the Government, because the contractor and the Government have potentially differing views or interests on the matter being discussed."

OGE Informal Advisory Memorandum 06 x 7, Attachment at 11. See also OGE Informal Advisory Letters 05 x 3; 03 x 6; 99 x 19; and OGE Informal Advisory Article 95 x 10.

Likewise, the Office of Legal Counsel (OLC) long has recognized that the restrictions of section 207 "should not be confined to major disputes, renegotiation, or the like" and that the potential for controversy between a contractor and the Government may arise in a variety of contexts. 2 O.L.C. 313, 317 (1978). OLC has cited numerous such examples:

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.

Id.

The same analysis applies to communications made during the performance of training contracts. Of course, we have no reason to question your assertion that the contractor has no substantive interest in the subject matter of the training, including any particular application or decision that may be used simply as an instructional tool or training opportunity. And we agree that merely lecturing on a particular topic in which the contractor has no substantive interest is more in the nature of a routine factual statement that is not potentially a subject of dispute between the contractor and the agency. See, e.g., 5 C.F.R. § 2637.201(b)(5).² However, the contractor still has its own interests in performing the contract and satisfying the Department that the requirements of the contract are being met. Therefore, certain communications that might be made in connection with the training should not be made by the former senior employees.

² The regulations at 5 C.F.R. part 2637 relate to a version of 18 U.S.C. § 207 that was superseded as of January 1, 1991. However, part 2637 still provides useful guidance concerning elements of section 207 that remain essentially unchanged from the prior version of the statute.

For example, communications about the adequacy of contract performance, including the preparation and presentation of the particular trainer, should not be made by a trainer who is a former senior employee. If a trainer were to find himself in the position of defending the quality of his treatment of a particular subject, either to his student audience or to other agency officials who have input into the Government's evaluation of the contractor's performance, he could be making at least "an implicit representation . . . that the contractor is in compliance with contract requirements." 2 O.L.C. at 317.³ In any event, when the element of intent to influence is at issue during the performance of a contract, these "determinations typically are quite fact-sensitive." OGE 05 x 3.

On several occasions, we have given oral advice concerning the performance of training services, and we have identified certain considerations that may be relevant to determining the presence of intent to influence in a particular situation:

For one thing, an agency and a training contractor can reduce the likelihood that a trainer may become engaged in controversy by making it clear that the trainer is not the appropriate person to handle complaints about the training. It may be possible, for example, for the contractor to designate another person as the point of contact for any feedback on the performance of trainers, and this can be conveyed to students and other [Office] officials who may have contact with the trainer. The former employees should not suggest that they are seeking to justify their own performance or that of their employer, such as by overtly soliciting favorable ratings or performance reviews from students and other [Office] employees. However, we do not mean to suggest that trainers would have to refrain from the routine question and answer process associated with effective teaching, even if such colloquies involved clarifying the substance of the trainer's presentation; without more, this kind of standard pedagogical dialogue does not rise to the level of a contract performance dispute sufficient to implicate section 207(c).

In addition, the potential for violating the law may be reduced if the former employee has no involvement in meetings

³ Another example of possibly problematic communications, described more fully below, involves the participation of a former employee in meetings with the agency to settle on the presentation methods, materials or scope.

with the agency to develop the training materials or otherwise determine the methods and scope of the training. Such discussions could involve disputes about the adequacy of the materials and any options for carrying out the contractual requirements. For example, the discussions could lead to the advocacy of options for performing the contract that are more in line with the contractor's own interests, such as training methods and materials that are easier or more economical for the contractor to use, whereas the Government may be interested in pursuing other alternatives that could be more burdensome for the contractor. See OGE 03 x 6 (potential for "disputes about the adequacy of any options presented or differing interests with respect to the difficulty or feasibility of developing certain options for the Government").⁴ By contrast, a former senior employee who simply conducts training sessions is less likely to become involved in potential controversy about the scope and methods of performance. In this regard, we note that your letter states that the [Office] itself provides the curriculum and teaching materials, and you make no reference to the participation of the former senior employees in meetings with the [Office] to develop these materials or settle on the curriculum and methods of any presentations.⁵

We also recommend that former employees be cautioned about the unexpected. Certain communications and appearances may commence without any intent to influence the agency, but may take on a different character if unforeseen disputes or other changed circumstances arise. In such cases, the former employee

⁴ For similar reasons, we sometimes have advised that the likelihood of a dispute may be diminished if a trainer follows a more or less pre-approved script, agenda, or some other format that circumscribes the discretion of the individual trainer. Following a protocol that has already been approved by others further distances the former employee from decisions about the scope and methods of performance that could engender controversy.

⁵ Another factor that we have considered in the past, but which does not appear relevant in this case, is the connection between the training services and any products the contractor may be providing to the Government. Where a former employee is training Government employees on the use of a product provided by the same contractor, the training services often will be intended to influence the Government with respect to the adequacy and suitability of the products.

should refrain from further communication or appearance if it becomes apparent that such further contact would be made with the intent to influence. See 5 C.F.R. § 2637.201(b)(5) (example 1). We acknowledge that "[t]he line is difficult to draw as to when the former employee would transcend the level of purely informational discussion to controversial presentation from which he would be barred." OGE Informal Advisory Letter 81 x 35. Therefore, we recommend that you advise any former employees who engage in these training activities to be alert to situations where they may have to refer [Office] employees to another contractor employee to discuss certain matters.

In sum, while we cannot completely rule out the possibility that some communications and appearances would involve the intent to influence the [Office], we also envision a range of permissible training activities, depending on an evaluation of the particular facts of a given situation.

We note that you cite the rule of lenity in support of your argument that no communications by former senior employees under this contract would violate section 207(c). However, we do not believe this canon of construction is relevant here. Certainly, we do not think the rule applies merely because the statutory phrase "intent to influence" may require a fact-sensitive evaluation of all the circumstances surrounding a given communication or appearance. The rule of lenity requires that statutory ambiguities be resolved in favor of a criminal defendant, but it applies only if there is a "grievous ambiguity or uncertainty in the language and structure of the Act." 16 O.L.C. 59, 64 (1992)(citation omitted). Because we agree with you that section 207(c) clearly requires the intent to influence some kind of official action, we find no ambiguity in the statute as to the necessity of establishing this element. The real question is not whether the statute is ambiguous but whether, under the totality of the circumstances, a given communication or appearance is intended to influence the [Office] to accept that the contractor is satisfying its obligations, if there is an appreciable element of actual or potential dispute about the scope or adequacy of performance. It has been said that the rule of lenity "is not a catch-all maxim that resolves all disputes in a defendant's favor," and the rule does not require that "factual ambiguities" be resolved in favor of a criminal defendant. *U.S. v. Gonzalez*, 407 F.3d 118, 124-25 (2d Cir. 2005).

Finally, a footnote in your letter mentions that you may have related concerns about the participation of a former senior

employee in another contract, although you do not pose a specific question. Under this contract, the contractor provides individuals to answer telephone inquiries from the public about the application process. You state that a senior [Office] employee would like to work on this contract after his retirement, in which case he would need to have "limited communications" with [Office] employees. You do not indicate the substance of these communications or provide other details sufficient for us to analyze any issues that might arise under section 207(c). You may derive relevant general guidance from the opinions discussed above, but we also are available to discuss any specific questions you may have.

If you have any further questions, please contact my Office.

Sincerely,

Robert I. Cusick
Director