

Letter to a Designated Agency Ethics Official
dated March 27, 2008

This responds to your letter of January 29, 2008, which seeks an opinion of the Office of Government Ethics (OGE) on the application of 18 U.S.C. § 207(a) to certain [agency] "reviews" of prior [agency] orders.¹ Your request requires OGE to revisit a subject addressed in a previous OGE advisory letter, which was issued to a former employee of your agency in 1999. See Informal Advisory Letter 99 x 14(2)(1999 opinion). From your letter, as well as a meeting and several telephone and electronic mail exchanges with your staff, we understand that the [agency] does not view a "second review" of an [agency] order as being the same particular matter involving specific parties as the original investigation that produced such order. See 5 C.F.R. § 2637.201(c)(4). Your office reaches this conclusion notwithstanding OGE's 1999 opinion, which concluded that a "first review" of such an order does constitute the same particular matter as the original investigation, for [agency] employees.

As explained below, OGE agrees with your conclusion concerning second reviews. Moreover, because the statutory standards for conducting first and second [agency] reviews are identical--and because the 1999 opinion itself reflected a disparity in the treatment of first reviews by your agency and by another agency that is also involved in the review process--OGE now believes that first reviews should not be viewed as being the same particular matters as original investigations.

THE 1999 OPINION

The discussion in this letter assumes familiarity with the 1999 opinion. Nevertheless, a brief summary of the conclusions

¹ Your letter requests that OGE issue a "formal" opinion. While OGE does have the authority to issue formal advisory opinions, 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.

and the bases for those conclusions is helpful in framing the issues before us now.

The 1999 opinion concurred in the conclusion of your agency, at that time, that first or "sunset" reviews of [agency] orders constitute the same particular matters involving specific parties as the original investigations that produced those orders. However, the 1999 opinion also concurred in the conclusion of another agency, [a] Department, that the reviews are not the same particular matter as the original investigations with respect to employees and former employees of [the Department]. The disparate treatment by the two agencies was deemed justified because of the different statutory roles of the two agencies in the review process, as interpreted by the respective agencies.

Specifically, the 1999 opinion noted that the statutory scheme provides that [the Department] is limited to an exclusively prospective review, in order to determine whether revocation or termination of an existing order would likely lead to the continuation or recurrence of [an activity]. [The Department] is not required by law to reexamine the records pertaining to the original order, which reflect [historic conditions] as of that time, but rather is to "focus solely on the new time period." OGE 99 x 14(2). Based on these facts, [the Department] concluded that the first review was a different particular matter than the original investigation, inasmuch as the review involves a different set of facts, including different confidential information, than the original investigation. OGE found this conclusion to be reasonable and, therefore, deferred to the judgment of [the Department]. *Id.* (OGE "generally defers to the cognizant agency ethics official when the issue is whether two particular matters are the same".)

However, the 1999 opinion also deferred to the determination of [the agency] that the first review is the same matter as the original investigation, for [agency] employees. [The agency's] conclusion was based on its view, at the time, that the agency's substantive statutory role in reviews is not exclusively limited to a prospective evaluation, unlike the role of [the Department]. [The agency] pointed out that the statutory scheme required it to consult a number of factors bearing on the potential for [the occurrence of a certain condition], including the record of the original order and the facts as they existed prior to the order. Given this statutory scheme, [the agency] determined that there was sufficient overlap in the facts between the original investigation and the

first review to constitute a single particular matter involving specific parties. As OGE explained the seeming anomaly, "[t]he differing substantive responsibilities of the two agencies under the statutory framework for conducting sunset reviews, *particularly the differences in the scope of their review of the underlying investigation*, support the differing conclusions reached by the agencies as to whether the sunset reviews performed by each agency should generally be treated as part of the same particular matter for purposes of section 207 as the original underlying investigations." *Id.* (emphasis added).

[THE AGENCY'S] POST-1999 EXPERIENCE WITH THE STATUTORY SCHEME FOR REVIEWS

Your letter states that, "[s]ince 1999, when the original consultation with OGE occurred, the [agency] has gained significantly more experience with reviews, conducting more than 175 during this period." In a meeting with OGE, you noted that [the agency] actually had had little experience with these reviews when it made the determination that the reviews would be treated as the same particular matter as the original investigation. Your office now has suggested, in various communications with us, that [the agency's] subsequent experience has shown that reviews really are much more prospective in focus, and the information from the original investigation is less important, than was reflected in the 1999 opinion.

First, you have indicated to us that, in performing both first and second reviews, [the agency] in fact gives more weight to the most contemporary information about the particular [situation] that is the subject of the order. [The agency] has found that [certain] conditions tend to be dynamic, with frequent changes in the [activities] that have a bearing on the potential for [the occurrence of a certain injury]. Sometimes, this even means that the actual parties to the reviews are different than the parties to the original investigation, as a consequence of such [variables] as the entrance and exit of certain firms into particular [situations]. Consequently, [the agency] typically gives greater weight to the most contemporary economic information available. The record of the original investigation and order, while relevant under the statute, is not the focus.

Second, you have pointed to case law from your reviewing [authority] that emphasizes that [the agency] must focus on "information concerning [the industry] in as contemporaneous a

time frame as possible." [Citations deleted.]² Despite the continuing statutory relevance of the original injury determination, the Court has accorded great deference to [the agency's] decisions to give greater weight to more [recent information]. [Citation deleted.]

Third, your office maintains, with greater emphasis today than in OGE's 1999 discussions, that the analysis performed in [agency] reviews is fundamentally different from the analysis in original investigations. You draw OGE's attention to a 2003 case that discusses the legislative history of the current review scheme, as follows:

Moreover, the [Statement of Administrative Action] explains that the standard applied to determine whether it is 'likely' that material injury will continue or recur, applicable to sunset reviews, is different from the standards applied in material injury or threat of material injury determinations, applicable in original investigations. In a five-year review, the Commission 'engages in a counter-factual analysis' to determine the likely impact of revocation 'in the reasonably foreseeable future of an important change in the status-quo.'

[Citation deleted] (citations omitted). Essentially, the original investigation involves an historical analysis of any evidence of actual injury, whereas the reviews involve what is called a "counter-factual" analysis, which you describe as follows:

It is counter-factual in the sense that it posits a situation that does not currently exist because at the time that the [agency] makes its determination in the review the [agency] order is still in place. Thus, while the [agency] collects information for a five-year period in its reviews, it analyzes that information not to determine what has happened but what is likely to happen if the order is revoked . . . In its five-year review, the Commission must assess inter alia whether the subject imports would remain at

² Although some of the cases you presented to us pre-date [a certain Act], which amended the order review scheme, your office has advised that the general standard favoring current information remains the same.

such low levels or are likely to increase to higher pre-order levels. This is described as counter-factual analysis as it involves the [agency] making projections about the likely effects of revocation of the order on the condition of [the industry] and the behavior of [certain] participants.

Electronic Mail Message from [agency's Alternate Designated Agency Ethics Official] to OGE, February 12, 2008 (forwarding message from [agency's] General Counsel.

Finally, you have presented other evidence that original investigations and subsequent reviews are viewed as being distinct from each other. One recent case that you provided puts it succinctly: "it is well established that each injury investigation is sui generis, involving a unique combination and interaction of many economic variables, and consequently, a particular circumstance in a prior investigation cannot be regarded as dispositive of the determination in a later investigation." [Citation deleted.] As explained in another case, the [agency] "was not obligated to explain in any particular manner the change in its views on [its findings] from prior determinations, as its analysis was clearly based on a different set of facts." [Citation deleted.] You also noted, in a meeting with my office, that the judicial review of an original order and the judicial review of a subsequent [agency] review are treated as different cases. See [citation deleted] (separate review provisions).

CONCLUSION

As we have made clear, the primary basis for OGE's 1999 decision was OGE's deference to [the agency's] own judgment about the significance of the fact that the statutory scheme for conducting reviews includes the record of an original investigation as one of the factors for consideration by [the agency]. It should be apparent, from the discussion above, that this basis has eroded significantly in light of [the agency's] own experience in administering the review program.

A second set of considerations reinforces OGE's concern about the continuing vitality of the 1999 opinion as it applies to [the agency]. As noted above, the 1999 opinion reaches differing results for employees of the two different agencies involved in these matters. Even though there is no question that [Department] and [agency] employees participate in the same process for issuing and revoking orders, the 1999 opinion

concluded that a review and an original investigation were separate particular matters for [Department] employees but the same particular matter for [agency] employees. This was no doubt an unusual result, but OGE reconciled the views of the two agencies based on their differing statutory roles, as understood by the agencies themselves.

Nevertheless, OGE continues to have concerns about this kind of disparate application of section 207. A 2000 case, which interpreted a related conflict of interest statute, criticized the Government for taking an "elastic approach" in determining the scope of a "particular matter" in a way that "fails to provide employees with fair warning of the scope of permissible representational activities." *Van Ee v. EPA*, 202 F.3d 296, 309 (D.C. Cir. 2000)(interpreting 18 U.S.C. § 205). More recently, OGE, interpreting yet another conflict of interest statute, noted that it is problematic to identify a "particular matter" in a way that is "contingent on the part of the overall matter in which the particular individual happened to be involved." OGE Informal Advisory Letter 05 x 1. Of course, OGE recognizes that "the same particular matter may continue *in another form or in part*." 5 C.F.R. § 2637.201(c)(4)(emphasis added); see also *EEOC v. Exxon Corp.*, 202 F.3d 755, 757 (5th Cir. 2000). However, OGE would need a particularly compelling reason to interpret 18 U.S.C. § 207(a) in a way that treats two matters as the same for employees of one agency but different for employees of another agency, simply because the agencies have different duties in those matters. Especially given [your agency's] post-1999 experience and views, we find no such compelling reason.

Finally, we are aware that your letter asks OGE's opinion only with respect to the so-called "second" five-year reviews, whereas the 1999 opinion dealt with the "first" or initial sunset reviews. Nevertheless, we see little basis to distinguish the treatment of first and second reviews. As you confirmed in your meeting with us, the same statutory standard governs first, second and even later reviews. Everything said above about the relative weight of contemporary evidence, as opposed to the record of the original investigation, applies with equal force to both first and second reviews. The same is true with respect to the fundamental difference between historical and counter-factual analysis. Moreover, the Court cases you provided, in support of your views on second reviews,

do not distinguish between first and second reviews.³ And, of course, OGE's concerns about the disparate treatment of [agency] and [Department] employees can be addressed only by eliminating the disparity with respect to first reviews that was reflected in the 1999 opinion.⁴

Therefore, we conclude that first, second and subsequent reviews are not the same particular matter involving specific parties as the investigation leading to the original order. This conclusion applies equally to [agency] and [Department] employees, and that portion of OGE's 1999 opinion to the contrary is superseded.

If you have any questions regarding this matter, please contact my Office.

Sincerely,

Robert I. Cusick
Director

³ The only relevant factor that would appear to distinguish first reviews from second reviews is the passage of an additional five years of time between the review and the original order. See 5 C.F.R. § 2637.201(c)(time elapsed). However, this distinction is less significant than it might appear, because many of the initial sunset reviews--those that were based on pre-[Act] orders--themselves were conducted more than five years after the original orders were entered. Essentially, the first round of sunset reviews, which were the focus of the 1999 opinion, already included reviews in which the time elapsed since the original order was at least as great as in some of the second reviews being conducted now.

⁴ We note that a footnote in the 1999 opinion mentioned that [Department] officials at that time did "review each order and review separately, and that in unusual cases they may find that the sunset review of a particular investigation and order should be considered to be the same particular matter involving specific parties for purposes of 18 U.S.C. § 207(a)(1)." OGE 99 x 14(2), n. 2. However, OGE was recently advised by a [Department] ethics official that his office has found no cases in which an original investigation and a review have been deemed to be the same particular matter and that his office has consistently said that these are separate matters.