

Office of Government Ethics

92 x 2 -- 01/30/92

Letter to an Employee dated January 30, 1992

This is in response to your letter dated January 11, 1992, requesting an opinion concerning your proposal to publish a booklet dealing with an application process of [an agency]. You seek advice as to whether this proposed project is permissible under Federal ethics laws and regulations.

You indicate that you are currently an attorney with [a hearings office] of [an agency]. You state that your official duties include writing decisions for administrative law judges in your agency. You also state that on your own time you have written a booklet intended to be a guide for the general public on the subject of how to apply for and receive [certain agency-provided] benefits. It is your intention to publish the booklet under a pseudonym and to make no reference to your position as a Federal employee.

You indicate further that the subject matter of the booklet is directly related to your official duties and acknowledge that your experience with the agency has greatly facilitated the writing of the booklet. However, you state that the booklet consists entirely of public information and does not embody any internal policies, practices or procedures of the agency. You believe that a studious researcher could have written the booklet based on published materials and information gained during the course of public hearings held by administrative law judges. Finally, you note that the booklet does contain comment that is critical of the [particular administrative] process.

Your initial question is whether the rule which prohibits use of public office for private gain may be implicated by the proposed project. You ask whether this prohibition is not limited to the use of non-public information. Federal ethics regulations specifically prohibit the use of non-public information to further a private interest. 5 C.F.R. § 735.206. Section 735.206 states that an employee shall not use official information obtained through, or in connection with, his Government employment which has not been made available to the general public. Also relevant to this question is the Federal regulation which states that a Federal employee may not engage in any outside activity, including

writing, that depends upon non-public information obtained as a result of Government employment. See 5 C.F.R. § 735.203(c). Thus, your understanding is correct that you could not use non-public information, obtained through your Federal employment, in the booklet.

We are unable to make the determination as to whether non-public information is used in the booklet. The material which you cite such as the Code of Federal Regulations, reports to Congress and Government publications are all public information. However, you also state that the book is based in part on information imparted during hearings before administrative law judges that are open to the public. While it may be true that any interested person could attend such hearings, this information is less readily available to the public. Moreover, we cannot determine whether the booklet includes information, knowledge and expertise that may be gained only by an employee. Your agency would be in the best position to make the determination that no non-public information is used in the booklet.

Nevertheless, even assuming that all of the information in the booklet were determined to be public, there remains a question, under the general standards of conduct, of whether public office would be used for private gain. See 5 C.F.R. § 735.201a(a). Reference is again made to the applicable regulation in 5 C.F.R. § 735.203(c) which governs outside teaching, lecturing and writing. Section 735.203(c) generally permits an employee to engage in teaching, lecturing, and writing based on the employee's inherent expertise or educational background or experience even where the subject matter relates to the activities of the employee's agency. The test, as enunciated in informal advisory letters issued by this Office, is ". . . whether 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." See OGE Informal Advisory Letter 85 x 18 issued October 28, 1985. The question then is whether the publication of the booklet would trigger any one of the three separate components of this test so as to prohibit receipt of compensation.

Again your agency would be in a better position to determine whether your proposed project would have such a specific focus, convey agency policy, or interfere with your duties, so as to prompt the prohibition on compensation. Clearly the agency would

have the better understanding of its own programs and policies, of the information in the booklet, and of your official duties. However, you express concern over "likely adverse consequences" should your agency review the booklet because of its critical comment. We are not aware of any procedure within your agency for a confidential review and clearance of your booklet.

Nevertheless, without having reviewed the booklet or your agency's programs, it would appear, based on the information which you have provided, that the proposed booklet would focus specifically on the agency's responsibilities, policies, and programs as noted in the above test. You state that "[the] booklet is directly related to my work." Moreover, it concerns the application process and contains comment on the agency's program. Accordingly, there is a likelihood that the prohibition on receipt of compensation would apply.

Moreover, there is a question as to whether the publication of the booklet may interfere with your official duties. You note that portions of the booklet contain criticism of the [particular administrative] process. This criticism might undercut your ability to carry out your official duties. The fact that the booklet would be published under a pseudonym and would not identify you as a Federal employee would not necessarily remove this concern.

You should also be aware of Federal regulations which restrict the acceptance of honoraria for publications. Section 501[(b)] of the Ethics Reform Act of 1989 states that "[a]n individual may not receive any honorarium while that individual is a Member, officer or employee." On January 17, 1991, this Office issued regulations implementing the statutory ban on honoraria. See 5 C.F.R. Part 2636. Section 2636.203(a) defines an "honorarium" as "a payment of money or anything of value for an appearance, speech or article." Thus, if the booklet which you have written were to be published as an article, it would be subject to the ban on honoraria.

Moreover, although the statute was recently amended to permit receipt of compensation for a series of three or more different but related articles, this exception would not apply in your case since it is subject to the proviso that the subject matter is not directly related to the employees's official duties and that the payment is not made because of the employee's status with the Government. As described in your letter, the booklet would not appear to pass the test of this proviso.

You ask further whether transfer to another Federal agency might cure any ethical concerns. Although it is difficult to provide advice in the abstract without knowing the identity of such agency, this could resolve the ethical concerns described above, provided that the booklet does not deal with the responsibilities, policies and programs of your new employing agency. Moreover, it would presumably resolve any conflict with the duties of your new position. The use of a pseudonym could avoid any perception that you were conveying Government policy. Moreover, if the booklet were published as a series of three or more separate but related articles, if it did not directly relate to the official duties of your new position, and if the payment were not made because of your status with the Government, then it would not be subject to the ban on compensation under the honorarium rule.

Finally, you should also be aware of Federal regulations which prohibit the use of Government property for any purpose other than official activities. See 5 C.F.R. § 735.205. Thus, not only your time during work hours, but the time of other Federal employees, as well as any Government equipment, supplies or facilities, could not be used for this proposed project.

I hope that this is responsive to your inquiry. If you have any questions concerning this letter or the regulations, please feel free to contact my Office.

Sincerely,

Stephen D. Potts
Director