

Office of Government Ethics

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Letter to a Designated Agency Ethics Official dated July 22, 1991

This responds to your request for an opinion whether an employee of [an agency] may sell a computer software package of [the agency] advisory opinions he created on his own time. You previously advised the employee that this activity would constitute an appearance of a conflict of interest.

The employee is a Senior Analyst in [an] Analysis Division of the [agency]. In this capacity, he assists [non-governmental groups] in complying with the reporting requirements of [an] Act. He also examines the reports filed by these [groups]. He is not involved with computer programming for the [agency].

In his off-duty hours, the employee has created a computer software package which contains a data base of summaries of advisory opinions issued by the [agency.] These summaries were obtained from [an agency] publication. The employee created the software package; his wife provided the data entry services. The employee and his wife would now like to form a corporation and sell the software through the corporation. The employee would be the corporation's majority shareholder and his wife and two other individuals would serve on the Board of Directors and manage the company. Alternatively, the employee would give all his interest in the software to his wife who would then own, as well as manage, the company. In either case, the employee's name and position with the [agency] would not be used in marketing the software. Two other companies have already expressed interest in marketing the software.

In support of his request for approval to sell the software, the employee has stated that the software package was created entirely on his own time and without the use of [agency] resources. You also state that the employee is not involved in any way in writing advisory opinions for the [agency] and that no confidential information has been used in producing the software.

The Government-wide Standards of Conduct rule published by this Office contains certain restrictions on outside employment and activities. See 5 C.F.R. § 735.203. These restrictions are

supplemented by the [agency's] Standards of Conduct which generally prohibit [an agency] employee from engaging in outside employment or other activities incompatible with Government employment. Examples of incompatible activities include:

--Outside employment or other activities which would give rise to a real or apparent conflict of interest situation even though no violation of a specific statutory provision was involved;

--Acceptance of a fee, compensation, gift, payment of expense, or any other thing of monetary value in circumstances where acceptance may result in, or create the appearance of, a conflict of interest;

--Outside employment or other activities which would involve any contractor or subcontractor connected with any work performed for the [agency] or would involve any person or organization in a position to gain advantage in its dealing with the Government through the employee's exercise of his or her official duties; and

--Outside employment or other activities that may be construed by the public to be the official acts of the [agency].

The overall purpose of these restrictions is to prevent an employee from engaging in activities which create an actual, or apparent, conflict of interest. Activities that amount to an appearance of a conflict of interest are sometimes difficult to identify definitively. However, an appearance of a conflict is present if a reasonable member of the public would believe that the employee benefitted from access to official information or otherwise from his official position. Moreover, the appearance of a conflict may be heightened by the perception that the activities could have been undertaken while on official duty, using Government resources. Even though public perception may be inconsistent with the facts of a particular case, Standards of Conduct are designed to prevent such appearances of conflict.

In the particular case you describe, we cannot discern any actual conflict of interest between the employee's position with the [agency] and the sale of a computerized version of [agency] advisory opinions. However, we have no reason to disagree with your previous advice to the affected employee that sale of this computer software by him would amount to an appearance of a

conflict of interest.

In our view, it would not be unreasonable for you to find that any of the provisions cited above might bar the employee from selling computerized summaries of the [agency's] advisory opinions. Receipt of compensation for the sale of a product which specifically discusses, or is related to agency operations, programs or policies could create the appearance that the employee is trading on his Government position for personal financial gain. Moreover, since the likely purchasers of this software are persons and organizations subject to [agency] regulations and policies, it is reasonable to assume that the [groups] with which the employee deals in his official capacity will buy the software. For these reasons, you could properly advise the employee to refrain from selling this software package through the corporation he intends to establish, or otherwise.

This approach would be consistent with earlier opinions of this Office and the Office of Legal Counsel. See 2 Op. Off. Legal Counsel 231 (1978); 2 Op. Off. Legal Counsel 361 (1977); OGE Informal Advisory Letters 86 x 14, 85 x 18. In those cases, the Department of Justice and this Office advised that certain high-level officials may not receive compensation for any speech or writing which is in any way related to the area in which their agencies work. Lower-level officials may not accept compensation for speaking or writing which is specifically focused on the employing agency's programs and responsibilities. In our opinion, the same standards could apply to the sale of computer software which specifically and directly concerns agency programs.

The question of whether the employee in this case may simply transfer his interest in this software to his wife raises additional issues. Although the [agency's] Standards of Conduct do not govern the activities of an employee's spouse, an employee must avoid all activities which could create the appearance of using public office for private gain or which would adversely affect the confidence of the public in the integrity of the Government. In our view, the transfer of a financial interest to a spouse as a means of circumventing Standards of Conduct restrictions could violate both of these provisions. Under the circumstances described by the employee in this case, the transfer of his interest in the software would not cure an appearance of a conflict, but would create the impression that the employee was attempting to hide his true interest.

We hope the comments we have made on the issues you have raised will assist you in advising your employee. Please do not hesitate to contact this Office for further advice on this matter as the occasion arises.

Sincerely,

Stephen D. Potts
Director