

Office of Government Ethics

99 x 22

Letter to an Individual dated December 1, 1999

The Office of Government Ethics (OGE) has received an unsigned letter, without a return address, dated November 17, 1999, which was originally received by telefacsimile on November 18, 1999, and later by mail on November 22, 1999. We are responding to you specifically because the telefacsimile cover sheet has your name on it, and you are also listed as one of the five persons on behalf of whom the letter was sent. Ordinarily, OGE would not hazard a response to an unsigned or otherwise unauthenticated communication. However, because the existence of this letter has been reported in the news media, with attribution to you by name, we thought it appropriate to address a response to you.

The letter alleges certain facts with respect to the post-Federal employment activities of [a] former [head] of [a Department]. The letter requests that OGE undertake an investigation of these alleged activities. Moreover, in the event that OGE does not conclude that [the former Department head] breached "existing ethics statutes and rules," the letter suggests that we "recommend changes that should be made to cover these post-employment contacts by Government officials, particularly in such important jobs as [a Department head]."

At the outset, we must clarify an apparent misunderstanding about the appropriate role of OGE. The letter requests an investigation and a determination as to whether [the former Department head] violated any post-employment statutes. OGE provides overall direction and leadership concerning policies relating to the prevention of conflict of interest among officers and employees of the executive branch. However, as we have noted on many occasions, "OGE is not an investigatory agency." OGE Informal Advisory Letter 96 x 19. Rather, investigations of possible misconduct by current and former employees of the executive branch are conducted by the Inspector General of the agency involved and/or the Department of Justice. Furthermore, the Ethics in Government Act of 1978 expressly prohibits OGE from making "any finding that a provision of title 18, United States Code, or any criminal law of the

United States outside of such title, has been or is being violated." 5 U.S.C. app. § 402(f)(5).

Nevertheless, we can provide you with a description of the statutes and regulations pertaining to seeking non-Federal employment, negotiating for such employment, and post-employment activities. Although the sketchy facts provided in your letter do not clearly implicate any of the restrictions described below, you may provide any facts which you believe indicate a possible violation to the Office of the Inspector General [of the] Department.

Prior to leaving Government, all Federal employees are subject to certain important restrictions applicable while they are seeking or negotiating for non-Federal employment. A criminal statute, 18 U.S.C. § 208, prohibits Federal employees from participating personally and substantially in any particular matter that has a direct and predictable effect on the financial interest of a person or organization with which they are negotiating or have an arrangement concerning prospective employment. A related set of regulations, 5 C.F.R. part 2635, Subpart F, imposes a similar disqualification requirement on Federal employees even when they are not yet engaged in bilateral negotiations with a prospective employer but have merely begun seeking non-Federal employment. Furthermore, a provision in the Procurement Integrity Act imposes certain disqualification and reporting requirements on employees who participate in certain agency procurements and who receive employment contacts from bidders or offerors in those procurements. See 41 U.S.C. § 423(c). In view of some of the facts alleged in your letter, we would note that none of these restrictions applies to negotiations or employment contacts occurring *after* an individual has terminated Government service.

Once an individual has left Government, there is a wide array of post-employment restrictions:

- (1) There is a lifetime prohibition on representing others before the Government in connection with the same particular matter involving specific parties in which the former employee participated personally and substantially for the Government. See 18 U.S.C. § 207(a)(1).

(2) There is a two-year prohibition on representing others before the Government in connection with the same particular matter involving specific parties that was pending under the employee's official responsibility during the last year of Government employment. See 18 U.S.C. § 207(a)(2).

(3) There is a one-year prohibition on representing, aiding, or advising others about certain ongoing trade or treaty negotiations on the basis of certain nonpublic information. See 18 U.S.C. § 207(b).

(4) There is a one-year prohibition, applicable to former "very senior employees" (such as [the former Department head]), against representing another person before their former agency or before any official appointed to an executive schedule position, in connection with any matter on which the person seeks official action by the executive branch. See 18 U.S.C. § 207(d). (A similar, but slightly more limited, restriction applies to "senior employees." See 18 U.S.C. § 207(c).)

(5) There is a one-year prohibition, applicable to former "senior" and "very senior" employees, against representing, aiding, or advising certain covered foreign entities in connection with any official decision of an officer or employee of the United States. See 18 U.S.C. § 207(f).

(6) There is a five-year prohibition, applicable to former "senior appointees" (such as [the former Department head]), against lobbying their former agency. See Executive Order 12834, § 1(a)(1) (1993).

(7) There is a lifetime prohibition, applicable to former "senior appointees" (such as [the former Department head]), against engaging in certain activities as a foreign agent on behalf of a foreign government or foreign political party. See Executive Order 12834, § 1(a)(3).

(8) There is a five-year prohibition, applicable to former "senior appointees" (such as [the former

Department head]), against representing, aiding, or advising others in connection with a trade negotiation in which the former employee participated personally and substantially. See Executive Order 12834, § 1(a)(4).

(9) There is a prohibition against sharing in any compensation for representational services before the Government, rendered personally or by another at a time when the former employee was still employed by the Government. See 18 U.S.C. § 203(a)(1).

(10) There is a one-year prohibition, applicable to former employees who participated in certain procurement matters, against accepting compensation as an employee, officer, director, or consultant of certain Government contractors. See 41 U.S.C. § 423(d).

In view of some of the facts alleged in the letter, we would note particularly that none of the above restrictions, except the last, prohibits a former Government employee from accepting any employment with any person or organization. Other than 41 U.S.C. § 423(d), the restrictions described herein apply only to specific post-employment activities--such as representing, aiding, or advising another in connection with certain official matters--not to the mere fact of being employed by any particular entity. Furthermore, we want to emphasize that none of the restrictions outlined above prohibits a former executive branch employee from representing others before Congress.

We also want to point out that the above restrictions, with the exception of 41 U.S.C. § 423(d), apply to activities on behalf of another person. These restrictions do not prohibit self-representation or the expression of personal views that are not advanced as agent or representative of another person, whether or not those views are specifically solicited by the Government. Nor do the restrictions outlined above prohibit communications or contacts that are not made with the intent to influence the Government, such as requests for the status of a matter or for publicly available information. See 5 C.F.R. § 2637.201(b)(5).

Finally, we would like to address your suggestion that OGE recommend changes to the post-employment restrictions in order

to prevent certain "appearance[s] of impropriety" in the future. As you can see from the above list of restrictions concerning seeking employment and post-employment activities, this area already has been addressed extensively by Congress, as well as the executive branch. In this connection, we would note that Congress has recognized that post-employment restrictions, in particular, must be crafted with care to accommodate two important, but competing, Government interests. On the one hand, of course, there is the interest in protecting Governmental processes from undue and inappropriate influence on the part of former employees acting on behalf of others. On the other hand, "[t]here can be no doubt that overly stringent restrictions have a decidedly adverse impact on the Government's ability to attract and retain able and experienced persons in Federal office." S. Rep. No. 170, 95th Cong., 1st Sess. 32, *reprinted in* 1978 U.S. Code Cong. & Admin. News 4216, 4248 (discussing post-employment provisions of Ethics in Government Act of 1978). In light of the scope and number of post-employment restrictions already in place, we do not believe that any further legislative or regulatory restrictions are needed at this time. In our view, the current system of restrictions adequately protects the Government from improper influence, and any further proscriptions would produce an unnecessary chilling effect on Government recruitment and retention efforts.

Sincerely,

Stephen D. Potts
Director