Office of Government Ethics

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Letter to an Agency Head and a Designated Agency Ethics Official dated March 21, 2000

This is to acknowledge receipt of your letters, both dated February 29, 2000, in response to our letters to you, dated November 17, 1999, which transmitted the findings, conclusions and recommendations resulting from the recently completed review of the ethics program at [your agency]. We believe that your letters have satisfactorily addressed a number of the concerns identified by the Office of Government Ethics (OGE). We do think it necessary, however, to clarify and emphasize certain points, which are particularly important to the maintenance of an effective agency ethics program at [the agency].

1. Timely Provision of Information Requested by OGE

[The agency head's] letter states that OGE had requested an "early" release of a financial disclosure statement filed by [a] former [Presidential appointee]. By way of further explanation, [the] letter [from] the Designated Agency Ethics Official (DAEO) specifically cites the SF 278 review and certification scheme, which permits [the DAEO] sixty days in which to review the report before transmitting it to OGE for final certification. [The DAEO] states that he refused to provide a copy of [the Presidential appointee's] report to the Office of the Inspector General (OIG) because he had not yet had occasion to review it. He relates that he explained his refusal at the time on the ground that "an unreviewed report would be of little value except to someone who was straining to catch the filer in some sort of inadvertent inconsistency." Shortly thereafter, [the DAEO] likewise refused to provide a copy of the report to OGE at the time he was requested to do so.

The first point to remember is that every executive agency has a statutory obligation to furnish OGE with "all information and records in its possession which the Director may determine to be necessary for the performance of his duties." 5 U.S.C. app. § 403(a). This statutory obligation is independent of, and serves many purposes in addition to, the scheme for agency review and OGE certification of certain financial disclosure statements. *See* 5 U.S.C. app. § 402 (listing broad range of statutory authorities and functions). OGE's authority to request information and an

agency's obligation to comply are not, therefore, limited by any time frames peculiar to the SF 278 review and certification system.

Furthermore, as [the DAEO] acknowledges, OGE's implementing regulations provide that the DAEO "shall ensure" that information requested by OGE "is provided in a complete and timely manner." 5 C.F.R. § 2638.203(a)(14). [The DAEO] argues, however, that "it is the DAEO's agency head and employer who will decide what 'timely' is under the circumstances and not, absent a statute to the contrary, OGE or any other sister agency." It is not correct, as a matter of law, that agencies other than OGE have been granted the authority to decide what is timely under a given set of circumstances. Such determinations require the interpretation and application of a regulation promulgated by OGE, pursuant to its own statutory authorities. It is a matter of black letter law that, in construing an agency regulation, the "ultimate criterion" is the interpretation of the agency. *United States v. Larionoff,* 431 U.S. 864, 872 (1977). It would be strange indeed if another agency had the final authority to determine what constitutes compliance with an OGE regulation, absent some commitment of such authority to the agency by OGE. In support of this common sense proposition, the Ethics in Government Act (Act) expressly states that OGE has the responsibility for "interpreting rules and regulations issued by . . . the Director governing conflict of interest and ethical problems and the filing of financial statements." 5 U.S.C. app. § 402(b)(6).

That being said, OGE certainly recognizes the need to be reasonable in applying the timeliness requirement of section 2638.203(a)(14). We note that the Act requires agencies to make their services, personnel and facilities available to OGE "to the greatest practicable extent," 5 U.S.C. app. § 403(a)(1), and we do in fact make allowances for agencies who face unique practical difficulties in locating or producing certain information. In the case of our request for [the Presidential appointee's] report, however, [the agency] does not allege any circumstances that would have made prompt compliance impracticable. Indeed, all that would have been required was the relatively brief ministerial task of photocopying the report and providing it to the messenger sent by OGE at its own expense. Even more troubling, [the DAEO's] own letter suggests that the withholding of the report--first from OIG and then from OGE--may have had less to do with administrative burden and more to do with a desire to protect the filer from an investigation that was perceived by the DAEO to be unfair. [The DAEO's] belief that "an unreviewed report would be of little value except to someone who was straining to catch the filer in some sort of inadvertent inconsistency" was not a justification for refusing to provide the requested information in a timely manner.

2. Confidentiality of Information

We are pleased that [the DAEO] has receded from the position that his communications with agency employees are protected from complete and unredacted disclosure to OGE. Even apart from 5 C.F.R. § 2635.107(b), the application of any privilege to requests by one Federal agency for information from another Federal agency is extremely problematic. *See In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir.), *cert. denied*, 521 U.S. 1105 (1997). The latter case also notes, as do we, the importance of 28 U.S.C. § 535(b), which requires agencies expeditiously to report information concerning criminal violations involving Federal employees to the Attorney General. *Id.* at 920. In a similar vein, all agency employees, including DAEOs, have an obligation to report "waste, fraud, and corruption to appropriate authorities," such as agency Inspectors General. 5 C.F.R. § 2635.102(b)(11). In view of the matters discussed in section 1 above, it bears emphasizing that the role of the DAEO is not to protect agency employees from inquiries and investigations by duly authorized executive agencies and offices.

3. OGE's Authority to Direct Executive Branch Policy

[The DAEO's] letter discusses some of the circumstances surrounding the failure of [the Presidential appointee] to report certain information concerning his spouse's financial interests. Among other things, [the DAEO] takes exception to the conclusion in our November 17, 1999, letter to the effect that he advised [the Presidential appointee] that he could exclude certain spousal information, "[c]ontrary to the advice given by OGE." [The DAEO] contends that he merely presented [the Presidential appointee] with "options based on an exacting and honest rendering of the law." The [DAEO's] argument, apparently, is that he was only being intellectually honest in his communications with [the Presidential appointee] by expressing disagreement with the legal conclusion of OGE, not that he was defying OGE or advising the filer to disregard OGE's views.

OGE appreciates that reasonable minds can differ on certain matters of law. Moreover, we recognize that there is a legitimate place for the expression of dissenting views by DAEOs concerning the meaning of the ethics laws. It is not appropriate, however, for DAEOs to provide counseling that reasonably could mislead employees into believing that compliance with OGE's interpretation of the ethics laws is optional.

By statute, OGE is charged with providing "overall direction of executive branch policies related to preventing conflicts of

interest." 5 U.S.C. app. § 402(a). Among other things, OGE is given specific statutory authority to promulgate rules, interpret those rules, and monitor compliance with financial disclosure requirements. 5 U.S.C. app. § 402(b). Congress has charged OGE with the implementation and interpretation of the financial disclosure laws, and ultimately OGE's interpretation of those laws must govern within the executive branch, even as it is entitled to considerable deference outside the executive branch. *See Chevron, USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

[The DAEO's] letter to [the Presidential appointee] would appear to suggest that the filer had the option to comply with either OGE's interpretation of the financial disclosure law or the DAEO's contrary interpretation. He advised [the Presidential appointee] that "you have two options with respect to the issue of your wife's assets: (1) learn the specifics from your wife if you can, and report them in the form; or (2) recertify that those of her assets which you do not otherwise report in the 278 (e.g., [specific asset omitted]) meet the three-prong test of the statute and the regulation." Unless and until OGE's interpretation had been overruled by a judicial opinion or otherwise modified by OGE through the usual process of executive branch deliberations, the DAEO had no ground to hold out a contrary interpretation as a lawful option for the filer. Should any future disagreements arise between the DAEO and OGE as to legal issues within OGE's primary jurisdiction, we expect that the DAEO will be careful not to make any statements that might reasonably be construed by [agency] employees as giving them the option to disregard the interpretation of OGE in favor of a contrary interpretation rendered by the DAEO.

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5. Termination Report

At OGE's prompting, [the DAEO] sent a letter to [the Presidential appointee] dated November 9, 1999, reminding him of his obligation to file a termination financial disclosure report. On January 5, 2000, [the DAEO] sent a follow-up letter, in which he again requested that [the Presidential appointee] file a termination report and also described the procedures for late filing and failure to file.

It is now over four months since [the DAEO's] November 9 letter and over two months since his January 5 letter. [The agency] has not indicated to us what response, if any, [the Presidential appointee] has made to these entreaties. Moreover, if

[the Presidential appointee] has not yet submitted his report, then he has been a delinquent filer for over a year.

In light of these facts, please advise us of how [the agency] intends to fulfil its responsibility under 5 U.S.C. app. § 104(b). Section 104(b) requires "the head of each agency" to "refer to the Attorney General the name of any individual which such official . . . has reasonable cause to believe has wilfully failed to file a report." 5 U.S.C. app. § 104(b). The purpose of such referral is to notify the Attorney General of cases in which a civil action may be brought, pursuant to section 104(a) of the Act, to assess a civil monetary penalty of $10,000 (as adjusted for inflation by OGE regulation). We note that OGE has its own statutory authority to make referrals under section 104(b), when the Director has reasonable cause to believe that any individual has wilfully failed to file a report. At this point, however, we believe that [the agency] is closer to the facts surrounding [the Presidential appointee's] failure to file, and we ordinarily give notice to the agency involved so that it can make an initial determination.

As we indicated previously, a follow-up review will be scheduled within six months of November 17, 1999. At that time, we will review any matters related to the recommendations in our November 17, 1999, letter to [the DAEO], as amplified herein.

Sincerely,

Stephen D. Potts
Director