

Office of Government Ethics

99 x 19

Letter to a Designated Agency Ethics Official  
dated October 29, 1999

This responds to your letter dated August 30, 1999, requesting our advice on a matter affecting the post-Government employment of a former employee of [your agency]. This matter was discussed with a member of my staff during several telephone conversations with your office in May 1999. In our previous oral advice, we advised your office that [the former employee] may be precluded from making certain communications relating [a specific] contract. You are now requesting a formal response from the Office of Government Ethics (OGE). After careful review, we have determined that an informal rather than a formal opinion is appropriate in this case. As discussed below, [the former employee] is prohibited by 18 U.S.C. § 207(a)(1) from engaging in certain post-employment activities involving the contract.

**BACKGROUND**

On January 2, 1999, [the former employee] retired from Federal service under [an agency/bureau] FY99 Buy Out Plan.<sup>1</sup> Prior to retiring, [the former employee] served as the lead contract specialist in [the bureau] Procurement Office's Support Office. She was also the Contracting Officer for [a] \$70 million contract. [Company A] substantially completed the construction project in 1994. As the Contracting Officer for the contract, [the former employee] was personally and substantially involved in administering the contract, including the resolution of [Company A's] requests for equitable adjustment, its certified claims, and related litigation. However, the contract generated a large volume of claims whose resolution has become a [bureau] management priority.

After retiring, [the former employee] requested post-employment advice from [the bureau's] Office of Chief Counsel regarding her proposed employment with [Company B]. [Company B] is [an agency] contractor providing [the bureau] with "on-call" [technical] support. Subsequently, we understand that [the bureau] referred this matter to

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<sup>1</sup> We do not address in this letter any post-employment restrictions imposed by the terms of [the former employee's] buy-out arrangement with [the agency].

your office. In your request letter, you have asked OGE's advice on whether [the former employee's] employment by [Company B], in support of the contract claims litigation arising from the contract, would violate section 207(a)(1).

#### DISCUSSION

Briefly stated, section 207(a)(1) prohibits former Government employees from communicating or appearing in certain matters before a current employee of a department, agency or Federal court, with the intent to influence, on behalf of any another person (except the United States).<sup>2</sup> For this section to apply, [the former employee's] communications or appearances must be made on behalf of another person, assuming that each of the other elements of the statute has otherwise been satisfied. You suggest that because [the agency] is hiring [Company B] to provide direct litigation support, the communications and appearances of [Company B's] employees would not be made on behalf of anyone else but rather on behalf of the United States. Moreover, you imply that [the former employee] has no interest in the contract claims other than supporting [the agency's] interest in the favorable settlement or defense of those claims.

As a general matter, a former employee makes a communication on behalf of another if, judging by all the circumstances, the former employee is engaging in the activity as a formal or informal representative for the other person.<sup>3</sup> Your facts clearly contemplate that [the former employee] would be acting as an employee of [Company B] in her communications with [the agency]. As [Company B's] employee, [the former employee] would be acting on behalf of or representing her employer while accomplishing her assigned duties. Her assigned duties would include supporting [Company B's] contractual obligations to provide [the agency] with consulting services. Accordingly, any communications and appearances she would be required to make to the Government would also be made to advance her employer's business interests arising from its consulting contract with [the agency]. For

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<sup>2</sup> This section does not reach so-called "behind-the-scenes" assistance in connection with the representation of another person. See 5 C.F.R. § 2637.201(b)(6). We note that while 5 C.F.R. § 2637.201 technically relates to the predecessor to current section 207(a)(1), we are continuing to rely on its guidance pending the promulgation of a new regulation, except in cases where the underlying statutory provision has changed.

<sup>3</sup> See OGE Informal Advisory Letter 97 x 9.

this reason, we cannot say that [the former employee] shares an identity of interests with [the agency] or that her "sole function" as an employee of [Company B] would be to support [the agency's] interest in the contract claims.

Additionally, your letter seems to suggest that because [the agency] will benefit from [the former employee's] involvement and because her objectives are the same as [the agency's] (i.e., the resolution of the contract claims), her communications are therefore made on behalf of the United States. Specifically, you stated that her involvement would "materially aid" [the agency] in resolving "technically challenging and complex" claims generated by the contract. Your letter stressed her factual knowledge regarding the contract's performance and administration. However, the mere fact that the Government would benefit from a former employee's communications or appearances or because a person may share the same objectives as the Government in a particular matter does not make that person's communications on behalf of the United States.<sup>4</sup>

Moreover, your letter cites to an Office of Legal Counsel opinion (OLC opinion)<sup>5</sup> that you claim showed that some communications by former employees to the Government may be permitted where there is no "divergence of interest" or "no adversarial aspect," even when made on behalf of a contractor and relating to a contract in which a former employee was personally and substantially involved as a Government employee.<sup>6</sup> For example, the OLC opinion noted that a person:

. . . who delivered finished material in a truck to the Government on behalf of a contractor was not acting as an 'agent' in a representational capacity, as contemplated by § 207. A similarly ministerial delivery or furnishing of scientific data to a Government agency on behalf of a

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<sup>4</sup> See OGE Informal Advisory Letters 97 x 9, 91 x 29 & 89 x 5 and Office of Government Ethics, *Summary of Post-Employment Restrictions of 18 U.S.C. § 207* at 4 (Nov. 4, 1992).

<sup>5</sup> See 2 Op. O.L.C. 313 (1978).

<sup>6</sup> Your letter also maintained that contracts are "different" from other types of particular matters involving specific parties listed in section 207. We do not view communications relating to contracts differently from those of other particular matters involving specific parties enumerated in section 207.

contractor is likewise outside the scope of § 207.<sup>7</sup>

This Office has recognized that there are circumstances where particular communications made by a former Government employee relating to a particular matter involving specific parties (such as a Government contract) could fall outside the purview of section 207.<sup>8</sup> OGE's post-employment regulation itself provides several examples of these types of communications that, in effect, lack the requisite "intent to influence"<sup>9</sup> element. However, the difficulty in these circumstances (as implicitly recognized by the OLC opinion above) arises in drawing the line between so-called "ministerial" communications that may be permitted from those communications having "at least some divergence or potential divergence of views" that may be prohibited under section 207(a)(1). In this regard, the OLC opinion cited above cautioned that even essentially routine or ministerial communications may involve the potential for improper influence prohibited by section 207 and noted that certain communications:

may be instinct with the more *subtle type of influence* that in our view, the statute proscribes, equally with representations made in more obvious adversarial situations (emphasis added).<sup>10</sup>

Without more specific information about the communications that [the former employee] would be expected to make regarding the contract, we cannot speculate on whether a particular communication of [the former employee] could be considered "ministerial." Given the nature of the reason for her involvement (i.e., advising [the agency] on the resolution of claims and litigation arising from the contract with [Company A]), it seems highly unlikely that any of her communications would be of a non-substantive nature.

#### CONCLUSION

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<sup>7</sup> See 2 Op. O.L.C. 313, 317 (1978)

<sup>8</sup> See OGE Informal Advisory Letters 81 x 35 & 82 x 1.

<sup>9</sup> See 5 C.F.R. § 2637.201(b)(5).

<sup>10</sup> See 2 Op. O.L.C. at 318.

For the reasons stated above, it is our opinion that [the former employee's] communications would not be made on behalf of the United States. Accordingly, she would be prohibited from participating as an employee of [Company B] in resolving disputes arising under the contract in accordance with the guidance provided above.

Should you need any additional information, do not hesitate to call my Office.

Sincerely,

Stephen D. Potts  
Director