

Office of Government Ethics

85 x 2 -- 01/07/85

Letter to an Employee dated January 7, 1985

This responds to your letter of December 11, 1984 requesting this Office's opinion on several issues arising from the off-duty activities of two Inspector General agents.

Your submission relates that the matter arises from a successful criminal racketeering prosecution in [a city] which received widespread media publicity. Thereafter, the Inspector General's Office (IG's Office) was approached by [a magazine] which was interested in writing a feature story on the case. The IG Office asked two agents who were involved in the investigation to cooperate. Without prior approval of the Department, the two agents entered into contracts giving [the magazine], in exchange for monetary payments, production rights to the agents' "Story": the "life story [of each agent], including all portions thereof pertaining to [their] . . . investigation of racketeering in [a section of the city]."

Further, you advised that after the Department of Justice declined criminal prosecution, your office began its own internal investigation which resulted in a directive to the agents to return the money received and to divest their interests by rescinding the contract.

First, you ask whether the agents have any private rights (e.g., the right to assign exclusive movie and television rights to their life stories, the right to assign the use of their names, or the right to waive legal claims for invasion of privacy) in this case with which the Department cannot interfere? If they do, can the Department, nevertheless, forbid the agents from receiving any compensation whatsoever from [the magazine] arising from their involvement in [this specific] investigation? Second, you express a concern with how active a role the Department can play in challenging the contracts in question.

While normally this Office is not in a position to advise on the validity of agency contracting practices or the resulting challenges which may ensue, we offer the following observations which affect both questions you have posed.

Executive Order 11222, 30 Fed. Reg. 6460 (1965), sets forth the basic framework for standards of conduct regulations, and grants authority to the Civil Service Commission (now the Office of Personnel Management, of which this Office is a part), to issue appropriate regulations implementing the Order. Those implementing regulations are Governmentwide and appear at 5 C.F.R. Part 735. In addition, section 201 of the Executive Order directs each agency head to supplement the Order and implementing regulations with regulations of special applicability to the particular functions and activities of his agency.

With regard to proscribed actions, 5 C.F.R. § 735.201a provides, in pertinent part:

An employee shall avoid any action . . . which might result in, or create the appearance of:

- (a) Using public office for private gain;

. . . .

- (f) Affecting adversely the confidence of the public in the integrity of the Government.

Further, 5 C.F.R. § 735.203, Outside employment and other activity, provides, in pertinent part:

- (a) An employee shall not engage in outside employment or other outside activity not compatible with the full and proper discharge of the duties and responsibilities of his Government employment. Incompatible activities include . . .

- (1) Acceptance of a fee, compensation, gift, payment of expense, or any other thing of monetary value in circumstances in which acceptance may result in, or create the appearance of, conflicts of interest;

. . . .

- (b) An employee shall not receive any salary or anything of monetary value from a private source as compensation for his services to the Government (18 U.S.C. 209).

Also applicable is 5 C.F.R. § 735.206 which provides, in pertinent part: "For the purpose of furthering a private interest, an employee shall not . . . directly or indirectly use, or allow the use of, official information obtained through or in connection with his Government employment which has not been made available to the general public." Equivalent language appears in the regulations of the [employee's] Department.

The "Story" is the rendition of what transpired in the course of the agents' official duties -- personal aspects of the agents' lives are merely an augmentation. "The Story" was first related to [the magazine] at the Department's request as part of the agents' official duties. Paying the agents, essentially for a report of their investigation, will result in private gain to the agents for what they were required to do in the course of their official duties and responsibilities: to make a report of what transpired during their investigation (but to the Government). (Note that the contract would purport to give [the magazine] sole rights to such a report.)

To permit such a result would be contrary to the public policy expressed in Executive Order 11222.

In situations of this nature, divestiture or adverse personnel action is an appropriate remedy for bringing the employees into proper compliance with existing regulations. See, for instance, the statutory scheme set forth in section 206(b)(3) of the Ethics in Government Act of 1978.

Please feel free to contact me or my staff for further assistance in this matter.

Sincerely,

David H. Martin
Director