



March 16, 2004

Wayne E. Costa  
Acting Designated Agency Ethics Official  
National Capital Planning Commission  
401 Ninth Street, NW, Suite 500  
Washington, DC 20576

Dear Mr. Costa

The Office of Government Ethics (OGE) has completed a review of the National Capital Planning Commission's (Commission) ethics program. The review was conducted pursuant to section 402 of the Ethics in Government Act of 1978, as amended (the Ethics Act). Our objective was to determine the effectiveness of the ethics program, largely measured by its compliance with applicable statutes and regulations. The review was conducted during October 2003.

#### HIGHLIGHTS

The Commission's program needs several improvements to comply with applicable ethics laws and regulations. We are concerned that the Alternate Designated Agency Ethics Official (DAEO) has received limited training to review and certify financial disclosure reports, that the Director, Urban Design and Plan Review Division (UDPR Director) may not be receiving proper advice to participate in particular matters before the Commission, that employees assuming a covered position are not filing a timely new entrant confidential financial disclosure report as required by 5 C.F.R. § 2634.903(b), that the Commission's requirement for employees to obtain prior approval for outside activities is unenforceable, and that you are not providing annual ethics training that covers specific issues that come before the Commission. While this report primarily addresses OGE's concerns, it also recognizes the effective elements of the Commission's ethics program.

#### PROGRAM STRUCTURE

You, as acting DAEO, are responsible for coordinating and managing the ethics program in accordance with 5 C.F.R. § 2638.203. Your duties include interpreting laws, regulations, and Executive orders, formulating oral and written opinions relating specific facts to applicable law, and briefing employees on the Federal ethics regulations. The Alternate DAEO, who is an Executive Assistant, is responsible for the administration of the financial disclosure systems, including distributing blank forms and tracking the receipt of and certifying the completed reports. Additionally,

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the Alternate DAEO ensures that employees complete the ethics training requirement by monitoring employees' attendance at ethics training sessions and/or the receipt of ethics materials

According to the Alternate DAEO, she received a limited amount of training when she assumed her ethics responsibilities. The DAEO provided her with an overview of potential conflicts of interest, and the OGE Desk Officer provided an overview of managing the ethics program, including the review of confidential financial disclosure reports. However, more training is needed to aid the Alternate DAEO in reviewing and certifying financial disclosure reports. We recommend that the Alternate DAEO attend the SF 278 and OGE Form 450 training offered by OGE.

**COMMISSION SHOULD HEED OGE ADVICE  
TO AVOID APPEARANCES OF CONFLICT**

After seeking OGE advice concerning the application of 5 C F R § 2635 502, the Commission appears to have not followed the advice provided by OGE on September 18, 2002. As a result, we are concerned whether the UDPR Director is receiving proper advice to participate in particular matters before the Commission.

In a letter to the DAEO, dated September 18, 2002, OGE noted that the Commission's UDPR Director has a covered relationship with the District of Columbia (DC) because her spouse is an employee of the District. Furthermore, the DC Office of Planning (DCOP), which employs the spouse as its Director, has a direct interest in certain specific party matters brought before the Commission. We advised that when DCOP has a direct interest in the matters brought before the Commission, it would seem very likely that a reasonable person might question the impartiality of the UDPR Director's participation. We also stated that it would be extremely difficult to make or defend a determination that the UDPR Director's participation would outweigh the concern that a reasonable person would question her impartiality.

On February 10, 2003, the UDPR Director was notified that she may be required to recuse herself if the Commission's Deputy Executive Director determines that DCOP's interest in a matter is substantial enough to warrant recusal. In a letter to the Commission dated September 5, 2003, the U S General Services Administration (GSA) requested that the Commission exclude the UDPR Director from participating in matters involving a U S Department of Transportation (Transportation) headquarters project since DCOP had a continuing substantial interest in the proposed zoning for the Transportation project. Nonetheless, in the Commission's response to GSA, the Commission replied that the UDPR Director's recusal from the Transportation project was not warranted based upon its determination that the interest of DCOP was not direct and substantial. We found it particularly disturbing that in its response, the Commission used OGE's advice as a defense to conclude that the UDPR Director's recusal from the Transportation project was not warranted, since we clearly advised that DCOP's direct interest in a particular matter would make such a determination extremely difficult.

Notwithstanding the above events, on October 7, 2003, the Deputy Executive Director instructed that the UDPR Director be recused from participating in future matters involving the

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Transportation project, as well as GSA and the JBG Companies. This recusal was prompted by a September 25, 2003 e-mail message from the UDPR Director to the Deputy Executive Director, evidencing the UDPR Director's continuing involvement in the Transportation project. We are concerned that the UDPR Director did not recuse herself immediately once she was aware of DCOP's direct involvement in the project.

Under 5 C F R § 2635 502(a), where an employee knows that a person with whom he has a covered relationship is or represents a party to a particular matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and receives from the agency designee authorization to participate in accordance with section 2635 502(d). Accordingly, the Deputy Executive Director, as agency designee, may authorize the UDPR Director to participate in such matters in which her spouse's employer, the DC government, is a party based on a determination, made in light of all relevant circumstances, that the interest of the Government in the UDPR Director's participation outweighs the concern that a reasonable person may question the integrity of the Commission's programs and operations. Although not required by section 2635 502(d), you are advised to have the Deputy Executive Director consult with you in making a determination to ensure that all factors under section 2635 502(d) have been considered. Moreover, the Deputy Executive Director should exercise his discretion under this provision by documenting in writing any such authorization.

**ATTENDEES AT COMMISSION MEETINGS  
FILE FINANCIAL DISCLOSURE REPORTS  
AS REQUIRED**

All members of the Commission (or their alternates) who are considered executive branch employees and who attended Commission meetings in 2003 filed financial disclosure reports.

The Commission has 12 commissioners, 5 of whom are citizen members and 7 of whom are ex officio members. Of the five citizen commissioners, three are appointed by the President and two are appointed by DC's Mayor. The seven ex officio commissioners include three executive branch officials, two Federal legislative branch officials, and two officials of the DC government. Each ex officio commissioner, in turn, has identified from 1 to 5 alternates, 1 of whom the commissioner can delegate to attend the Commission's monthly meeting in the commissioner's absence (currently there are 17 such alternates).

The five citizen members are considered to be special Government employees and are required to file new entrant confidential financial disclosure reports each year during their terms. The three ex officio executive branch members and their alternates (currently there are nine such alternates) are also required to file financial disclosure reports. However, the DAEO does not require reports from the other four ex officio members (the two Federal legislative branch officials and two officials of the DC government) and their alternates because they are not executive branch employees. We noted that at

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the September and October 2003 Commission meetings, all five of the citizen members and the three alternates who attended in the absence of their respective executive branch ex officio commissioners, filed a confidential report

#### **PROCESS IS NEEDED FOR CAPTURING NEW ENTRANT CONFIDENTIAL FILERS**

Our review of the confidential financial disclosure system identified 6 of 8 regular employees, who should have filed new entrant reports within 30 days of assuming their positions in 2003 but who did not file until the 2003 annual filing cycle. The Alternate DAEO explained to us that she was not notified at the time the employees assumed their covered positions in 2003 and, therefore, the reports they filed during the 2003 annual filing cycle were considered their new entrant reports. However, at the exit conference, ethics officials informed us that a policy was initiated after our fieldwork to ensure future new entrants file a timely financial disclosure report.

Our review of six annual confidential financial disclosure reports filed for FY 2002 disclosed that they were filed timely. Additionally, all 14 reports (annual and new entrant) were reviewed and certified timely. Moreover, we were unable to ascertain any potential conflicts of interest.

#### **SUPPLEMENTAL REGULATION IS REQUIRED TO ENFORCE APPROVAL OF OUTSIDE ACTIVITIES**

Our previous program review report of 1997 recommended that, if the Commission desired to enforce its approval of outside activities by the Executive Director, it would have to do so through the issuance of a supplemental standard of conduct regulation, in accordance with 5 C.F.R. § 2635.105. Section 2635.803 provides that where it is determined to be necessary or desirable for the purpose of administering its ethics program, an agency shall, by supplemental regulation, require employees to obtain prior approval before engaging in specific types of outside activities. On December 8, 1998, we were informed that the Commission determined that it would no longer require approval, therefore, no supplemental standard of conduct regulation was needed.

On May 1, 2002, the DAEO decided to reestablish the policy requiring approval for certain outside activities. However, the Commission still has not issued a supplemental regulation. We reiterate that the Commission needs a supplemental regulation to enforce its policy. Until the supplemental regulation is issued, the Commission must cease and desist enforcing this policy. Nonetheless, the DAEO may continue to render advice to employees who inquire as to whether any proposed outside activities or employment would conflict with their official duties.

## **DAEO NEEDS TO CONDUCT ANNUAL ETHICS TRAINING**

Initial ethics orientation requirements are met by distributing ethics materials during the general in-processing of all employees. However, we are concerned that employees are not receiving annual ethics training geared specifically for issues before the Commission.

The Commission has relied upon OGE staff to conduct both the 2002 and 2003 annual ethics training sessions for the commissioners and the Commission staff. However, it is the DAEO's duty to initiate and maintain the Commission's ethics education and training program as required by 5 C F R §§ 2638.203(b)(6) and 2638.701 and to ensure that the training is geared specifically to issues that would come before the Commission. Although OGE is willing to assist agencies with their training requirements, the Commission needs to develop a plan for annual ethics training that covers specific issues coming before the Commission, using its available resources and including resources available from other agencies and the Internet.

We reviewed the Commission's system for tracking employees' attendance at annual ethics training and found it to be effective. Ethics officials planned to have six of the Commission staff, including three covered employees who were unable to attend the October 2, 2003 annual ethics training session, view an ethics videotape by the end of 2003.

## **UPDATES TO PROCEDURES FOR FINANCIAL DISCLOSURE ARE NEEDED**

The Commission has detailed written procedures for financial disclosure that should be updated to reflect changes in 5 C F R part 2634 that have transpired since 1997. For example, the reviewing official, for good cause shown, has always been authorized to grant to any public filer or class thereof an extension of time for filing which shall not exceed 45 days. Now the reviewing official, for good cause shown, may grant an additional extension of time which shall not exceed 45 days. The employee shall set forth in writing specific reasons why such additional extension of time is necessary. The reviewing official must approve or deny such requests in writing, and such records shall be maintained as part of the official report file. Previously, only OGE could authorize the second 45-day extension.

## **PUBLIC FINANCIAL DISCLOSURE SYSTEM IS ADMINISTERED EFFECTIVELY**

The public financial disclosure system seems to be effectively administered. We found that, considering one 45-day extension granted for good cause shown, the public reports required to be filed in 2003 by all of the four regular employees were filed, reviewed, and certified timely. We discussed

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a few technical issues concerning the review process with the Alternate DAEO. Moreover, she would benefit from attending SF 278 review training offered by OGE.<sup>1</sup>

#### ADVICE AND COUNSELING IS NOT TO BE CONSIDERED PRIVILEGED

The DAEO provides both oral and written ethics advice in response to employees' questions, including post-employment advice, as required by 5 C F R § 2638 203(b)(7). However, according to the DAEO, employees have not requested post-employment advice.

Our examination of the three examples of written ethics advice, regarding appearance issues (except for those discussed previously) appeared to be complete and consistent with the ethics laws and regulations. However, the advice was marked as privileged and confidential attorney-client communication. According to 5 C F R § 2635 107, disclosures made by an employee to an agency ethics official are not protected by an attorney-client privilege. Additionally, agencies are required by 28 U S C § 535 to report to the Attorney General any information, allegation, or complaint received relating to a violation of title 18 of the United States Code.

#### ENFORCEMENT ACTIONS HAVE BEEN LIMITED

The Commission does not have an inspector general. The DAEO advised us that when an investigation is needed, the Commission requests the services from another agency. The Commission had one case in the last year, involving the misuse of Government resources, that resulted in administrative action being taken against the employee. The 15-day suspension taken against the employee appeared to be prompt and effective, in accordance with 5 C F R § 2638 203(b)(9). The Commission has not made any criminal conflict of interest referrals to the Department of Justice.

#### TRAVEL PAYMENTS ARE ACCEPTED FROM NON-FEDERAL SOURCES

Travel payments from non-Federal sources appeared to be appropriately accepted under 31 U S C § 1353. We examined the two payments reported in the semiannual report to OGE of payments of more than \$250 per event covering the period from April through September 2003. We found that the report was forwarded to OGE timely and that the payments appeared to be properly accepted for a seminar and a workshop. A negative report covering the period from October 2002 through March 2003 was forwarded immediately once we informed ethics officials that OGE had not received it.

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<sup>1</sup>The Alternate DAEO was unable to register for 2003 training because all seats were filled.

## RECOMMENDATIONS

To more fully comply with ethics regulatory requirements, we recommend that you

- 1 Ensure that the Alternate DAEO has sufficient training to review and certify financial disclosure reports
- 2 Ensure that the Deputy Executive Director consults with you in making any determination under 5 C F R § 2635 502(d) to authorize participation by the UDPR Director in matters in which her spouse's employer, the DC government, is a party, and have the Deputy Executive Director document any such authorization in writing
- 3 Ensure that covered employees file a new entrant report within 30 days of assuming their position as required by 5 C F R § 2634 903(b)
- 4 Ensure the Commission ceases and desists enforcing the policy requiring employees to request approval for outside activities, until an agency supplemental regulation is issued in accordance with 5 C F R § 2635 105
- 5 Develop a plan for providing annual ethics training that covers specific issues coming before the Commission, using its available resources and including resources available from other agencies and the Internet

In closing, I would like to thank everyone involved in this review for their cooperation and their efforts on behalf of the ethics program. Please advise me within 60 days of the specific actions the agency plans to take on our recommendations. A brief follow-up review will be scheduled within six months from the date of this report. In view of the corrective action authority vested with the Director of OGE under subsection 402(b)(9) of the Ethics Act, as implemented in subpart D of 5 C F R part 2638, it is important that our recommendations be implemented in a timely manner. Please contact Jean Hoff at 202-482-9246, if we may be of further assistance.

Sincerely,



Jack Covaleski  
Deputy Director  
Office of Agency Programs