Office of Government Ethics
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Letter to a United States Senator
dated February 8, 1996

Your correspondence of October 13, 1995, to the Department of Justice, was forwarded to the Office of Government Ethics (OGE) on January 26, 1996. Your inquiry requested comments on the concerns of [Employee A] and [Employee B] about the executive branch confidential financial disclosure system. We did not receive a copy of [Employee B's] letter, but we have [Employee A's] letter and can discuss the matters that he raises.

[Employee A] makes the following assertions:

- that agency designations of who must file confidential financial disclosure reports are "arbitrary, capricious, and inconsistent";

- that the confidential financial disclosure form (SF 450) and the information that it collects, which he describes as "dangerous and insidious," do not require enough detail "to make any determination whatsoever" about conflicts;

- that the requirement to disclose financial interests of a spouse and dependent children is "a clear violation of the constitutional right to freedom from unreasonable search and a blatant invasion of privacy";

- that the disclosure form is reviewed by officials who may not be competent to detect potential conflicts, and that there are no rules for them to use in determining what constitutes a conflict;

- that any judgment by a reviewer is "purely subjective," and that these decisions can "cloud the reputation of a perfectly innocent employee, subjecting him or her to further scrutiny, continued harassment and intimidation, and further investigation."

Because of the complexity and criminal nature of the conflict of interest restrictions, it has long been executive branch practice, under Executive orders and statutes, to require affirmative disclosures of

financial information from employees whose positions are determined by their agency to present potential conflicts. The confidential disclosure system was most recently reauthorized by the Ethics Reform Act of 1989, Executive Order 12674, and regulations in subpart I of 5 C.F.R. part 2634. As required by Executive Order 12674, the regulations offer guidance about which positions should be designated for confidential reporting, but leave the actual designation to each agency. The criteria for designation are intended to provide agencies with the flexibility necessary because of significant differences in the nature and sensitivity of their programs and operations. Similar guidelines and agency flexibility have been part of this system since its inception in 1965.

If a filer believes that his position should not have been designated for filing, the regulation at 5 C.F.R. § 2634.906 allows him to seek review of that determination by the agency head or a designee. [Employee A] has apparently exhausted this option already. The regulation provides that a decision on that matter by the agency head or designee is final. While OGE advises and monitors agency ethics officials generally on implementing the criteria for determining who should file, each agency must make the actual case-by-case decisions. Over the past two years, OGE has examined this process closely through surveys and discussion groups, and we have provided written guidance to all agencies on reducing the number of filers.

The complaint that the confidential disclosure form does not require enough detail to be useful in testing for conflicts with official duties demonstrates the difficulty of designing any financial disclosure system. Decisions on what to include or exclude from the system must carefully weigh the competing factors of privacy versus conflict prevention. The rules are intended to require disclosure of information only if its utility in preventing conflicts outweighs privacy concerns. For example, confidential filers are not required to disclose dollar values for any of their financial interests. Also, they need not disclose certain assets at all, such as deposit accounts in banks and credit unions, money market funds and accounts, and U.S. Treasury bills, notes and bonds. To require these details about one's financial interests would not significantly further the purpose of disclosure and could be viewed as an unwarranted invasion of privacy.

While information disclosed on the SF 450 should be limited to matters that might present conflicts of interest with official responsibilities, this will include interests of a spouse or dependent children. A primary justification for disclosure of the information required by the confidential system is the criminal conflict of interest statute, 18 U.S.C. § 208. That law prohibits executive branch employees from participating in

Government matters where they have a financial interest or where others such as their spouse or dependent children have a financial interest. In addition, the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct), at 5 C.F.R. part 2635, apply the rules on gift restrictions and conflicts of interest to a spouse and dependent children of executive branch employees. Both the Office of Legal Counsel at the Department of Justice and a Federal Circuit Court of Appeals have found constitutional the requirement to disclose these imputed interests in the context of the public disclosure system, which is closely related to the confidential system. See 4 Op. O.L.C. 340 (1980) and DuPlantier v. United States, 606 F.2d 654, 669 (5th Cir. 1979).

Regarding the review of completed disclosure forms, the thoroughness and competence of those involved in this process will, of course, vary. A supervisor or someone in a position to know the filer's duties and to assess the potential for conflict will often be assigned to conduct an initial review. This will ordinarily be followed by a trained ethics official's final review. The Standards of Conduct, at 5 C.F.R. part 2635, provide extensive guidance on what could constitute a conflict of interest. While reviewers' judgments will entail some subjectivity, this is a necessary aspect of enforcing the criminal statute and standards of conduct regulations, which restrict both actual and apparent conflicts.

We view the role of agency ethics officials in reviewing financial disclosure forms to be primarily one of prevention, as they assist employees in avoiding Government actions where they have a potential conflict of interest. The confidential financial disclosure system is not meant to question the assumption that employees are basically honest, but simply to assist them and to help promote public confidence in Government integrity. All information elicited under the confidential system is strictly protected by executive branch principles of confidentiality under the Ethics Reform Act of 1989, Executive Order 12674 and the Federal Privacy Act [5 U.S.C. § 552a]. See 5 C.F.R. §§ 2634.604(b) and 2634.901(d).

We will continue to monitor the confidential disclosure system in order to help ensure that it serves a legitimate purpose, does not unnecessarily invade the private affairs of Government employees and their families, and is administered fairly. If additional questions remain, please contact this Office directly, and we will be happy to discuss these matters further.

Sincerely,

Stephen D. Potts

Director