

NOTE: The guidance in this advisory was reconsidered by OGE in 2008 in OGE Informal Advisory Opinion 08 x 6.

Office of Government Ethics

99 x 14(2)

**Letter to a Federal Employee
dated July 7, 1999**

This supplements our response to your letters of February 3 and March 3, 1999, concerning your questions about the application of 18 U.S.C. § 207(a)(1) to "sunset reviews" of [agency] orders. In your initial letter to this Office you requested that we concur with three arguments that you advanced concerning the application of 18 U.S.C. § 207 to former employees of the [agency]. As we indicated to you in our letter of March 1, 1999, we found that two of these three arguments were without merit. The remaining argument, having to do with whether the sunset reviews should be treated as the same "particular matters involving specific parties" as the underlying original investigations, would have required us to contact the [agency] and to coordinate with the Department, which also has a role in [certain relevant Federal] statutes. Because we could not agree to keep your identity "in strict confidence" as you requested, we asked that you renew your request for advice on this point in writing. Your letter of March 3 renewed your request for an opinion on the remaining argument even if our inquiry would require the disclosure of your identity. We therefore initiated discussions with the [agency] and [the Department] concerning this final issue.

Your remaining argument is that, for former employees of the [agency], a sunset review of an [agency] order should not be considered to be the same particular matter involving specific parties as the original investigation. According to the information that you provided, the [agency] has previously determined that, for purposes of 18 U.S.C. § 207, a sunset review is the same particular matter involving specific parties as the original investigation for former employees of the [agency]. As we indicated to you in our letter of March 1, the Office of Government Ethics (OGE) "generally defers to the cognizant agency ethics official when the issue is whether two particular matters are the same for purposes of the permanent bar." OGE Informal Advisory Letter 93 x 17. We were concerned, however, when your letter reported what could appear to be inconsistent treatment of this issue by [the Department] and the [agency]. This appearance arose because your letter indicated that [the Department] has determined that for its current and former employees the sunset review and the original

investigation are different particular matters for purposes of 18 U.S.C. § 207.

Accordingly, after receiving your renewed request, we contacted the two agencies informally and verified that the two agencies have reached different conclusions concerning the treatment of sunset reviews under section 207(a)(1). Subsequently, representatives from all three agencies ([the agency, the Department], and OGE) met to discuss the application of section 207(a)(1) to former employees of the [agency] and [the Department] who were involved in investigations, and to fully explore the reasons for the differing treatment. This consultation has led us to conclude that the differing roles of each agency in the sunset review process provides a rational basis for their respective determinations.

SUNSET REVIEWS

[Subsequently, Congress amended the relevant Federal statutes] in several respects. One of the most significant changes was the requirement that [the Department] and the [agency] revoke [the] orders, and terminate suspended investigations, after five years unless revocation or termination would be likely to lead to [certain conditions]. In keeping with the general statutory mechanism for the administration of the [relevant] statutes, the first determination is to be made by [the Department], the second by the [agency]. Both determinations must be affirmative for the original order to remain in place.

This requirement will result in "sunset reviews" of all outstanding orders in existence as of [a certain date], over a three-year "transition period." Reviews of orders issued after [the certain date] will be conducted five years after they become effective. It is the application of the post-employment statutes to the "sunset reviews" of the [agency] orders that generated your initial inquiry and our response.

SAME PARTICULAR MATTER DETERMINATION

Even if the other statutory criteria of 18 U.S.C. § 207(a)(1) are met, a communication to or appearance before the United States is not prohibited unless it concerns the same particular matter involving specific parties in which the former employee participated personally and substantially while employed by the Government. When determining whether two particular matters are the same, the cognizant agency should consider the extent to which the matters involve the same basic

facts, related issues, the same or related parties, time elapsed, the same confidential information, and the continuing existence of an important Federal interest. 5 C.F.R. § 2637.201(c)(4).¹ In general, new particular matters have been found where there are fundamental changes or differences between related matters. *United States v. Medico Industries, Inc.*, 784 F.2d 840 (7th Cir. 1986). It is because this determination is of necessity a fact-based one that OGE generally defers to the cognizant agency in this area. We therefore turn to the analysis employed by [the agency] and [the Department] in making their determinations under section 207.

[AGENCY] ANALYSIS

In looking at the factors enumerated in 5 C.F.R. § 2637.201(c)(4), the [agency] acknowledged that the sunset reviews may (in some cases) involve different parties than the original order. It is also true that the sunset reviews are, in part, a prospective determination, requiring a finding of potential future material injury. As you acknowledged in your original letter to us, however, the statutory structure explicitly directs the [agency] to take into account its prior injury determination, whether any improvement in the industry is related to the order under review, and whether the industry is vulnerable to material injury if the order is revoked. [Citation deleted.] According to information provided to us by the [agency], this requires a full review of the record of the original order. Thus, there is an inherent overlap in the basic facts and issues, and the same confidential information is involved at least in part in both the original order and the sunset review of that order. There is clearly a continued Federal interest in the administration of the [relevant] statutes and the health of the relevant industry. Given these facts, it appears that the [agency] could properly find that the sunset review of a specific injury determination is the same particular matter involving specific parties as the [agency's] original injury determination.

DEPARTMENT ANALYSIS

¹ Section 207 was amended by the Ethics Reform Act of 1989, Pub. L. No. 101-194 (November 30, 1989). These amendments became effective on January 1, 1991, and apply to all employees retiring from Government on or after that date. The regulations at 5 C.F.R. part 2637 predate these amendments. However, part 2637 still pro-vides useful guidance concerning the elements of section 207 that remained essentially unchanged from the prior version of the statute.

According to [the Department], their role in the sunset review process is to determine whether the [activity] that triggered the initial order is likely to recur if the order is removed. While the [particular determination] imposed in the original order is considered in the sunset review, the [particular determination] is a matter of public record and does not require [the Department] to reexamine the records relating to that earlier determination. The substantive aspects of the sunset review thus focus solely on the new time period. This contrasts with the review process conducted by the [agency], which (as noted earlier) is statutorily required to conduct a full review of the record of the original order, including the confidential information supplied therein. It is this key difference which has led [the Department] to conclude, as a general matter, that sunset reviews are not the same particular matter involving specific parties as the original investigation and order.²

CONCLUSION

After a careful review of the reasons provided by each agency for its determination concerning the relationship between a sunset review and the original investigation for the purposes of 18 U.S.C. § 207, we are satisfied that each agency reached the correct conclusion. The differing substantive responsibilities of the two agencies under the statutory framework for conducting sunset reviews, particularly the differences in the scope of their review of the original underlying investigation, support the differing conclusions reached by the agencies as to whether the sunset reviews performed by each agency should generally be treated as part of the same particular matter for the purposes of section 207 as the original underlying investigations.

Our conclusion that the [agency] reached the correct conclusion concerning the analysis of these sunset reviews necessarily leads us to disagree with your argument that sunset reviews should not be treated as the same particular matter as the original underlying investigation for former [agency] employees. Since that was the sole remaining argument that had not been resolved, we are therefore closing our inquiry.

² [The Department] did note, however, that they review each order and review separately, and that in unusual cases they may find that the sunset review of a particular investigation and order should be considered to be the same particular matter involving specific parties for purposes of 18 U.S.C. § 207(a)(1).

We appreciate your bringing these matters to our attention so that they could be resolved, and hope that this information is helpful to you. If you have any questions concerning the issues discussed in this letter, you may contact my Office.

Sincerely,

Stephen D. Potts
Director