

Office of Government Ethics

85 x 8 -- 05/20/85

Letter to an Inspector General dated May 20, 1985

This is in response to your letter of May 1, 1985, in which you recommended that OGE amend 5 C.F.R. § 734.603(c) to exempt Office of Inspector General employees from the application procedures for public financial disclosure reports. In describing your proposal, you refer to a comparable exception in the regulations for Special Agents of the Federal Bureau of Investigation, which grants them access to public financial disclosure statements without a written application when they are conducting criminal conflict of interest investigations.

In reviewing your recommendation, we have examined the Ethics in Government Act and its legislative history, as well as the regulations and the comments that generated the exception for FBI agents. Based upon the drafters' apparent intent not to create a sweeping exception for all Government law enforcement personnel, we are reluctant to expand the exception contained in the regulations. A brief summary of our findings follows.

In its discussion of public access to financial disclosure reports, section 205 of the Ethics in Government Act does not single out any categories of persons for an exemption from the requirement of a written application. While the use of the reports by law enforcement agents is lawful, under the terms of the Act, everyone seeking the reports must file written applications.

In its regulations at 5 C.F.R. § 734.603, the Office of Personnel Management has three exceptions to the requirement of a written application, one of which applies to Special Agents of the Federal Bureau of Investigation who are conducting criminal inquiries into possible conflict of interest violations. In example two, appearing after section 734.603(e), the drafters considered the application of section 734.603 to other law enforcement personnel. According to the example, if a state law enforcement agent is conducting an investigation involving the financial dealings of an individual who has filed a public disclosure statement, he or she must complete a written application in order to see the statement. By using that example, the drafters appear to reveal an intention not to

provide a sweeping exception for all governmental law enforcement personnel.

A review of the legislative history of the Act fails to uncover any discussion of access to the reports by law enforcement personnel. The debates on the proposed Act indicate congressional concern for protecting against the misuse of the public financial disclosure reports. Congress included the provision for public availability of the applications "in the spirit of recent legislation which seeks to let individuals know who is inspecting the information they are required to provide to the government."¹ Through the limitations contained in the Act, the committee intended to prohibit the use of the information contained in the reports for any function unrelated to the dissemination of a reporting individual's report where his status or responsibilities as a public official make his personal financial status a valid issue.² However, none of the discussions centered on the legitimate use of such information by law enforcement personnel. As a result, it is unclear whether Congress meant for them to be subject to the same restrictions as the "public."

The first discussion of the exception for Special Agents of the FBI occurred in the comments to OPM's draft of the Title II regulations. The Department of Justice presented its views on proposed section 734.603, which required Government agents to complete written applications in order to obtain public financial disclosure reports. In a series of letters from its various divisions, the Department of Justice argued that, although it believed its officers had a duty to file an application to obtain the records, it did not believe that the applications of law enforcement personnel should be made public. The Department of Justice proposed two alternatives in this area. The first alternative would have set up a separate confidential filing system for the access requests of Federal law enforcement personnel. The second alternative, ultimately incorporated into the regulations, was to confine the scope of the proposed exception to a narrow category of Federal criminal law enforcement agents. In that regard, Justice proposed that confidential law enforcement access to OGE files be limited to Special Agents of the FBI conducting criminal conflict of interest investigations.

The Department found this limitation organizationally justified by the fact that all Federal prosecutive authority is

centralized in the Department of Justice, and by the fact that the Bureau is the Department of Justice's in-house investigative agency. Although other agencies may investigate criminal matters, the Department noted that those agencies are required to report such matters to the Justice Department for prosecution. Furthermore, under 28 U.S.C. § 535(a), the Attorney General and the FBI have primary jurisdiction over investigations of potential violations of Title 18, including the conflict of interest provisions, by Government officers and employees. Any information received by an executive branch Department or agency related to violations of the conflict of interest laws must be reported to the Attorney General unless the responsibility for an investigation is specifically assigned elsewhere by law or the Attorney General directs otherwise in specific instances.

Based upon the Department's representations concerning the need for this exception, this Office incorporated the Department of Justice's second alternative into 5 C.F.R. § 734.603(c). Although it could have incorporated a much broader exception into the regulations at that time, this Office apparently did not believe it was necessary or appropriate in light of the comments it had received on the proposed regulations.

To our knowledge, investigators from the Inspector General's Staff are not hampered significantly by the requirement that they file a written application to obtain a copy of an employee's public financial disclosure report. Although these applications are also available to the public, few persons ever request to see them. A few agencies automatically notify an employee when someone requests his or her public financial disclosure report, but this practice is not widespread. Where this occurs, it is generally a policy within the agency and not a regulatory requirement.

If the basis for the proposed amendment is a concern that an employee will become aware of an investigation before you would like him or her to, we suggest that you attempt to get the agency involved to grant your investigators access in the usual manner but without notifying the employee of your request. However, if your investigators are hampered in their conflict of interest investigations by the application requirement and you can provide us with documentation on investigations which have been compromised by this requirement, this Office would be willing to reconsider your proposal.

If you have any questions, please do not hesitate to contact this Office.

Sincerely,

David H. Martin
Director

1 S. Rep. No. 170, 95th Cong., 1st Sess. 133 (1977).

2 H.R. Rep. No. 800, 95th Cong., 1st Sess. 26 (1977).