

## **Office of Government Ethics**

**93 x 34 -- 11/16/93**

### **Letter to a Designated Agency Ethics Official dated November 16, 1993**

This is in response to your letter of July 12, 1993, regarding availability to the public, pursuant to the special access provision of the Ethics in Government Act, of waivers issued to advisory committee members under 18 U.S.C. § 208(b)(3) in light of the confidentiality generally to be accorded to SF 450 Executive Branch Personnel Confidential Financial Disclosure Reports which underlie many of the waivers. My Office has now carefully considered the points you raised in your July 12 letter and has consulted informally with the Department of Justice Freedom of Information Act specialists, but not the Office of Legal Counsel.

As referenced in your letter, the disclosure mandate as to agency section 208 waiver determinations, as set forth in 18 U.S.C. § 208(d)(1), must be balanced against the nondisclosure mandate as to SF 450 information, as set forth in section 107(a)(2) of the Ethics in Government Act, 5 U.S.C. appendix. Section 208(d)(1), which generally provides for release to the public upon receipt of a request pursuant to the special disclosure provisions of section 105 of the Ethics Act, is limited by its terms to the agency waiver determination itself. Thus, back-up materials that an agency prepares, as well as the underlying confidential SF 450 reports in the case of such form filers granted waivers, are not covered by the special access provision.

Moreover, section 208(d)(1) continues in the second sentence to state that agencies may withhold from their waiver determinations any portions entitled to exemption from required release pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The impact of this sentence must be assessed in light of the recent memoranda of President Clinton and Attorney General Reno, requesting agencies to make "discretionary" releases of information technically entitled to exemption from mandatory release under FOIA, but where no foreseeable Governmental or private interest would be harmed, provided disclosure is not prohibited by law. In the case of the SF 450 report form and the information contained thereon, section 107(a)(2) of the Ethics Act does statutorily prohibit release.

The third sentence of section 208(d)(1) gives guidance as to this since it states that, in the case of waivers granted to advisory committee members pursuant to section 208(b)(3), the information in the waiver determination regarding the financial interest at issue cannot be more extensive than that required on the financial disclosure report required under the Ethics Act (be that a confidential SF 450 or a publicly available SF 278). This limits the degree of information about the financial interests that agencies can include in the waiver determinations as a matter of law. Provided that the requirement of the third sentence of section 208(d)(1) is complied with, the information about the financial interest in the waiver determination can be released by the agencies in accordance with the first sentence in section 208(d)(1).

Agencies could withhold that information in accordance with the second sentence of section 208(d)(1) pursuant to FOIA exemptions (b)(4) and (b)(6) (regarding sensitive commercial or financial information and personal privacy materials), unless they were to determine that the information concerned does not fit within the criteria for withholding under those exemptions. But in light of the pro-disclosure thrust of section 208(d)(1), the desire to make a released waiver determination intelligible and the Administration's recent increased FOIA disclosure initiatives, it seems that the third sentence-type financial information should be released absent a foreseeable harm to be caused by disclosure.

However, any additional information about a financial interest, beyond that set forth in any Ethics Act report concerned, cannot be included in the (b)(3) waiver determination itself because of the constraint of the third sentence of section 208(d)(1). Rather, any such additional information would have to be set forth in the agency back-up materials, as to which traditional Freedom of Information Act determinations should be applied if a request for access therefor under FOIA is received (SF 450 information is exempt from release thereunder pursuant to FOIA exemption 3 since it is subject to protection of a nondisclosure statute -- section 107(a)(2) of the Ethics Act). This situation of limited releasability under the special section 208(d)(1) provisions does not represent a conflict, nor is it an attempt to defeat "sunlight" in Government or "hide" anything. Instead, as the Office of Government Ethics (OGE) sees it, Congress has struck a statutory balance between the public interest in disclosure of section 208 waivers granted by agencies and certain private financial/privacy interests of the Government officials

accorded those waivers. Although some private groups may not be pleased with that balance, the agencies while seeking to provide maximum permitted disclosure should uphold the Congressional mandate. Indeed, you indicate that [your agency] itself screens waivers prior to any public release to remove sensitive information, including confidential commercial information and trade secrets.

Other parts of the waiver determinations which are exempt from required disclosure under the FOIA can be disclosed at the agency's discretion. This includes, in particular, staff deliberative process materials. Further, the rationale for the granting of the waiver, constituting the final agency decision in the matter, would not normally be exempt from disclosure under the FOIA and hence would be subject to required release upon a proper section 105 Ethics Act request pursuant to the disclosure mechanism set forth in 18 U.S.C. § 208(d)(1). Along with the identity of the financial interest, the agency analysis of the reasons for granting the waiver (with the exception of any discussion of the size or nature of the holding that would go beyond what is on the Ethics Act report concerned) would provide the public requesters the kind of sunlight of [your agency's] Governmental processes involved that you point out is beneficial. Thus, you could decide to release the discussion in a waiver determination of a particular advisory committee's mandate, the part-time adviser's official duties thereon, and the potential effect in general of those duties on the adviser and the adviser's employer as well as the agency analysis of the impact of 18 U.S.C. § 208 and the Federal Advisory Committee Act.

I also want to respond to two comments you made on page 3 of your letter. First, the written consent to release of the individual SF 450 filer concerned, though relevant for certain Privacy Act purposes, does not overcome the separate constraint in section 107(a)(2) of the Ethics Act barring the agency from releasing information on an SF 450. The statute prohibits the agency from publicly releasing the SF 450 information, with or without the consent of an individual filer. Thus, the SF 450 report form itself should never be attached to or released with a waiver determination. Only the latter should be disclosed upon request, after deletion of any portion properly determined to be exempt under the FOIA. As to another point on page 3 of your letter, it is our view that the Ethics Act section 107(a)(2) statutory bar also precludes a "public domain" waiver of confidentiality for SF 450 information. The agency must observe

the constraint against release of the information on the form, even if the individual filer has discussed the same or similar information in another forum or the nature of certain of the filer's holdings may be known in his or her industry or community.

With respect to the point on page 4 of your letter regarding OGE's executive branch-wide Privacy Act systems of records, system OGE/GOVT-2 covers only the SF 450 reports themselves (as the successor forms to the old "Confidential Statements of Employment and Financial Interests"). Thus, when the two systems OGE/GOVT-1 and OGE/GOVT-2 were separately published by OGE in February 1990, after its separation from the Office of Personnel Management, the "new" routine use adopted for public release of section 208 waivers was only added to OGE/GOVT-1. That system covers not only SF 278 Public Financial Disclosure Reports, but also all other executive department/agency ethics program records except the SF 450 (or similar agency forms) which are covered in OGE/GOVT-2. This partition serves to illustrate the special protection against release provided for SF 450 Confidential Financial Disclosure Reports. Waiver determinations, however, are within the OGE/GOVT-1 system and the special section 208(d)(1) disclosure "routine use" applies.

I want to thank you for writing me with your concerns and for your patience. I hope this response will assist your Department as you work with the tough issues your letter highlights. Please call if you have any further questions about these matters.

Sincerely,

Stephen D. Potts  
Director