

Office of Government Ethics

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Letter to a Government Official dated June 30, 1982

This letter is in response to your March 2, 1982 request for an interpretation of the notice requirements of 25 U.S.C. § 450i(f) which must be met by Government employees and former Government employees who wish to represent Indian tribes on matters in which they would otherwise be barred by 18 U.S.C. §§ 205 and 207. 25 U.S.C. § 450i(f) requires that any individual who wishes to so represent an Indian tribe must first:

advise in writing the head of the department, agency, court, or commission with which he is dealing or appearing on behalf of the tribe of any personal and substantial involvement he may have had as an officer or employee of the United States in connection with the matter involved.

In your letter you enclosed a notice submitted by a former Government employee to the Commission pursuant to this provision. The notice was a statement of what the employee's position was before leaving the Government and a blanket statement of what he had been involved in while holding that position. Your request then not only asked for an interpretation of this above-quoted statute, but also a determination of whether this specific notice fulfilled the requirements of that statute.

In reviewing the legislative history of this exception, we note that it was added as part of section 105 of the Indian Self Determination Act, Pub. L. No. 93-638, 88 Stat. 2203. The Report of the Interior and Insular Affairs Committee indicates that the purpose of section 105 was to allow:

transfer to Civil Service employees of the BIA and Indian Health Service to tribal employment under contracts entered into pursuant to the provisions of the title. The Committee adopted amendments which (1) permits tribes and tribal contractors to be eligible for grants from the Civil Service Commission under the Intergovernmental Personnel Act to strengthen personnel administration of the contractors; (2) permit Federal employees transferring to tribal employment under such

contracts to retain the various fringe benefits of Federal employment; and (3) exempt such transferring employees from the conflict-of-interest provisions of section 205 and 207 of title 18 U.S.C. which would be inappropriate to the circumstances of such contracts. H.R. Rep. No. 93-1600, reprinted in [1974] U.S. Code Cong. & Ad. News 7783.

While the intent of the exception was to assist in allowing I.P.A. [Intergovernmental Personnel Act] assignments to Indian tribes and to allow former civil service employees to act as agents or attorneys for the tribes on the types of contracts the law was trying to promote, the exceptions clearly cover more matters than these. Indeed, because the exception is unqualified, the new more restrictive provisions of section 207 still fall within its terms.

The basic question here then is not the type of conduct which may be prohibited but only the type of notice required. (It is important to note, however, that the exception applies only to the representation of "Indian tribes" as that term is defined in the statute and not to representation of individual Indians.)

The statute requires that before an employee or former Government employee undertakes the type of representation involved in a matter, he or she must advise the head of the appropriate governmental body of any "personal and substantial" involvement he or she may have had in the matter while an employee of the Federal Government. If the individual has had no such involvement in the matter, no notice is required.

In issuing regulations on the provisions of 18 U.S.C. § 207, the Office of Government Ethics at 5 C.F.R. § 737.5(d) has interpreted the terms "personally" and "substantially" in the following manner:

To participate "personally" means directly, and includes the participation of a subordinate when actually directed by the former Government employee in the matter. "Substantially," means that the employee's involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue.

A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participation in a critical step may be substantial.

Therefore, a present or former employee need only submit notification on these types of matters. He or she is not required, for instance, to notify the governmental body before which he or she may wish to appear that the matter in question was one which was under his or her official responsibility but was one in which he or she did not personally and substantially participate. The statute seems to require only that the Government have clear notice of an individual's prior personal involvement in a matter in order that it can consider that factor in any ultimate decision.

With regard to the specific notice you included with your request, it is at the same time overinclusive and underinclusive. The notice shows official responsibility but it does not show those matters in which the individual was personally and substantially involved. Therefore, in order to comply fully with the requirements of 25 U.S.C. § 450i(f), this individual may have to submit a series of notices, one for each new matter in which he had been personally and substantially involved. The notice should include a description of the extent of that personal and substantial involvement and should be submitted before representation on a covered matter begins.

It is understandable why the individual attempted to submit one notice instead of a number. As the length of time away from the Government increases, however, he should find that the number of instances in which notice is required should decrease significantly. This will naturally happen as new matters arise in which he had no participation and older matters are resolved.

Because this statute would normally be interpreted by the Office of the Solicitor of the Department of the Interior, we submitted this letter to them for their review. They have concurred in our conclusions and have suggested that you provide the former employee involved with the copy of this letter along with your request for more specific notices.

Sincerely,

J. Jackson Walter
Director