

Office of Government Ethics

03 x 6

**Letter to a Former Federal Employee
dated August 28, 2003**

This is in response to your electronic mail message to the Director of the Office of Government Ethics (OGE), which was dated August 15, 2003, but received at OGE on August 25, 2003. Your message is styled as an "Appeal of Decision," and you "request an appeal" of post-employment ethics advice provided to you by an ethics counselor at [an agency within a Department]. Specifically, you request that OGE determine, counter to the advice that you received from the [Department's] ethics counselor, that your proposed contacts with the [Department] regarding a particular contract would not be made "with the intent to influence" the Government, under 18 U.S.C. § 207(a)(1).

At the outset, we must emphasize that OGE does not serve as an appellate body. We note also that none of the materials you submitted to OGE, including your request to the [Department] for ethics advice and the [Department's] response, contains sufficient facts about your proposed post-employment activity for us to determine whether your communications or appearances would be made with the intent to influence. As discussed below, any communications or appearances would have to be evaluated in light of the specific circumstances surrounding that particular contact. Nevertheless, we can provide you with general guidance relevant to your question about intent to influence.

By way of background, your materials indicate that you were the [Department's] Procuring Contracting Officer, and later the Lead Administrative Contracting Officer, for [a specific] contract with a company called [Company A]. You do not dispute that you participated personally and substantially in the [specific] contract, within the meaning of 18 U.S.C. § 207(a)(1). After you left the [Department], you went to work for [Company B], a company that has a contract with the [Department] to provide support services in administering the [specific] contract. You indicate that your proposed duties for [Company B] would involve "providing advice to the Government with respect to its administration of the [specific] contract."

You contend that the [Department] incorrectly determined that communications and appearances you would make in the course of advising the [Department] about administration of the [specific] contract would involve intent to influence the Government. Your view is that you primarily would be imparting "factual information" in your capacity as an "objective, technical subject matter expert" and that such contacts do not involve any intent to influence the Government.

We agree with the [Department's] ethics counselor who concluded, based on OGE Informal Advisory Opinion 99 x 19, that the performance of a support services contract could involve the intent to influence the Government.¹ Depending on the circumstances, the provision of advice concerning contract administration could raise the potential for differing interests as between the Government and the support contractor, such as disputes about the adequacy of any options presented or differing interests with respect to the difficulty or feasibility of developing certain options for the Government.² One could envision, for example, that an insider's knowledge of the contract might present opportunities for cutting corners in the kind of contract administration advice that is provided, which might be more efficient for the support contractor but not necessarily in the interest of the Government. As in OGE 99 x 19, we cannot speculate in advance, in the absence of specific

¹We note that you acknowledge receiving and reviewing a copy of 99 x 19.

²The proposition that contractors may have their own interests in recommending certain courses of action as opposed to others to the Government should not be surprising. This concern is even illustrated by recent headlines. See Ariana Eunjung Cha, "Shuttle Safety v. Profit: Contractors Had 'Potential' Conflict," *The Washington Post*, August 27, 2003, at A13.

facts, that all of your proposed duties would be free from intent to influence.

At the same time, we also recognize that certain routine or ministerial communications, including certain routine factual statements, may not involve any intent to influence. See, e.g., 5 C.F.R. § 2637.201(b)(5). The materials you provided to us do not indicate whether the [Department's] ethics counselor considered the possibility that at least some of your proposed communications might be permissible. We suggest that you seek further guidance from [the Department's] ethics officials if you believe that certain specific communications or discrete types of communications might fall within this category. However, we would caution, as we did in OGE 99 x 19, that it is not always easy to draw a clear line, especially in advance, between routine or ministerial communications and those that involve at least a subtle form of influence.

Finally, we note that the [Department's] ethics counselor concluded that certain appearances by you before Government employees could involve the intent to influence even in the absence of any communication by you. We agree that section 207(a)(1) expressly covers *both* communications and appearances with the intent to influence, so it is clear that the statute can be violated by an employee's mere appearance even without speaking. See *United States v. Coleman*, 805 F.2d 474, 480 (3d Cir. 1986)(former employee prohibited from appearing "with or without speaking for the client"). However, OGE does not take the position that all appearances are necessarily made with the intent to influence. See *United States v. Schaltenbrand*, 930 F.2d 1554 (11th Cir. 1991)(no violation where former employee attended meeting with Government "in order to listen," with understanding that other individual was to be spokesperson for private contractor). Over the years, OGE has relied on a number of factors to determine whether a silent appearance is made with intent to influence, and a nonexclusive list of such factors may be found in

OGE's proposed revised post-employment regulations. See 68 *Fed. Reg.* 7844, 7874 (February 18, 2003)(proposed 5 C.F.R. § 2641.201(e)(4)).³

It is not clear from the materials that you submitted to us whether the [Department's] ethics counselor specifically considered any proposed appearances in light of these kinds of factors. Nor are we aware of whether you explained any specific circumstances surrounding a particular proposed appearance. We suggest that you seek further guidance from [the Department's] ethics officials if you have specific questions about whether any particular proposed appearance may be permissible. As the above discussion underscores, the determination of whether a particular appearance (or communication) involves the intent to influence can be quite fact specific, and OGE is not in a position to say, in the abstract, that your proposed activities are either all permissible or all prohibited.

I hope this has been helpful.

Sincerely,

Marilyn L. Glynn
General Counsel

³OGE does not mean to suggest that the proposed rule is in any sense binding, but only that it may be a convenient collection of factors on which OGE has relied in the past. As we explain in the preamble to the proposed rule, the factors themselves are largely derived from past judicial and administrative precedents. 68 *Fed. Reg.* at 7851.