

United States Office of Government Ethics

Program Review Division

Ethics Program Review

Advisory Council on Historic Preservation

Results in Brief

The United States Office of Government Ethics (OGE) conducted a review of the Advisory Council on Historic Preservation's (ACHP) ethics program in May 2012. The results of the review indicated that ACHP's ethics program generally appears to be effectively administered and in compliance with applicable laws, regulations, and policies except in the area of ethics training. The Designated Agency Ethics Official (DAEO) promptly corrected matters addressed during our examination in the areas of financial disclosure, ethics training, and 1353 travel acceptances.

Highlights

- The DAEO maintains a financial disclosure spreadsheet to help identify potential areas of concern regarding filers' holdings and outside positions.
- The DAEO provides an in-person introduction to the Ethics Office to new employees.

Concerns

- The DAEO has not provided ethics training to special Government employees (SGEs) during the last two calendar years.
- Two Council members did not file their financial disclosure reports for the year under review, including the ACHP Vice-Chair, until after the on-site portion of the review.
- The Vice-Chair attended a Council meeting on May 9-10, 2012 without having filed his financial disclosure report covering calendar year 2011 before that meeting. His latest filing at the time of that meeting was his new entrant report dated July 20, 2011.

Objectives, Scope, and Methodology

OGE provides leadership for the purpose of promoting an ethical workforce, preventing conflicts of interest, and supporting good governance. The purpose of a review is to identify and report on the strengths and weaknesses of an ethics program by evaluating (1) agency compliance with ethics requirements as set forth in relevant laws, regulations, and policies and (2) ethics-related systems, processes, and procedures for administering the program. OGE has the authority to evaluate the effectiveness of executive agency ethics programs. See Title IV of the Ethics in Government Act and 5 CFR part 2638.

To assess ACHP's ethics program, OGE examined a variety of documents provided by the DAEO; other documents that ACHP submitted to OGE, including the annual questionnaire, prior program review reports, a review of ACHP's public and confidential financial disclosure reports and the advice and counseling rendered to ACHP employees. In addition, members of OGE's Program Review Division met with the DAEO to obtain additional information about the strengths and weaknesses of ACHP's ethics program, seek clarification on issues that arose through the documentation analysis, and verify data collected.

Program Administration

ACHP is a small, independent agency whose mission is to promote the preservation, enhancement, and productive use of our Nation's historic resources. ACHP has 40 full-time Government employees. ACHP's 23 statutorily designated Council members, including the Chairman who heads the agency, address policy issues, direct program initiatives, and make recommendations regarding historic preservation to the President, Congress, and heads of other Federal agencies. Council members meet four times per year to conduct business.

The ethics program at ACHP is organizationally located within the Office of the General Counsel. The Associate General Counsel serves as DAEO and a Training Specialist serves as Alternate DAEO. Although at one time the Associate General Counsel was the sole legal staff member at ACHP, there is now an attorney that spends part of her time assisting the Associate General Counsel in non-ethics related areas. The DAEO is the primary ethics program administrator while the role of the Alternate DAEO is simply to review the DAEO's public financial disclosure report and assist with ethics training. Administering the ethics program is a collateral duty for both officials.

Suggestions

- Increase the involvement of the Alternate DAEO in all aspects of the ethics program so that in the absence of the DAEO, the Alternate DAEO would be able to provide the mandated ethics-related services provided by the DAEO.
- In order to strengthen succession planning efforts, the DAEO and Alternate DAEO should take advantage of classes provided at OGE, especially classes that focus on program management.

Financial Disclosure

Title I of the Ethics in Government Act requires that agencies ensure confidence in the integrity of the Federal Government by demonstrating that officials are able to carry out their duties without compromising the public trust. High-level Federal officials demonstrate that they are able to carry out their duties without compromising the public trust by disclosing publicly their personal financial interests (SF 278). Title I also authorizes OGE to establish a confidential financial disclosure system for less senior executive branch personnel in certain designated positions to facilitate internal agency conflict of interest review (OGE Form 450).

Financial disclosure serves to prevent conflicts of interest and to identify potential conflicts by providing for a systematic review of the financial interests of both current and prospective officers and employees. The financial disclosure reports also assist agencies in administering their ethics programs in providing counseling to employees. *See* 5 CFR § 2634.104(b).

The DAEO maintains a financial disclosure spreadsheet which lists all financial disclosure filers at ACHP. In that spreadsheet, the DAEO identifies potential areas of concern with filers'

holdings and outside positions. The DAEO told the review team that he uses this spreadsheet to facilitate the recusal and screening process.

Written Procedures

ACHP has written procedures for the administration of its financial disclosure system as required by Section 402(d)(1) of the Ethics in Government Act. The written procedures had not been updated since 2004. The review team suggested that ACHP update the written procedures to reflect the current OGE Form 450 filing deadline and any procedural changes. Prior to the on-site portion of the review, the DAEO provided an updated version of the written procedures.

Public Financial Disclosure

ACHP has two public financial disclosure filers, which include the agency's Executive Director and DAEO. To evaluate the effectiveness of ACHP's public system, OGE examined the two public financial disclosure reports that were required to be filed in 2011. The Executive Director's report is maintained at ACHP while the DAEO's public report is forwarded to OGE for final review and certification. OGE confirmed that the DAEO's public report for the year under review was forwarded to OGE timely in accordance with 5 CFR § 2634.602. Overall, OGE found both reports comply with statutory and regulatory requirements in terms of timeliness of filing, review, and certification. However, the review team identified a few technical reporting issues such as over-reporting of assets and misuse of the *Date of Appointment* box. The review team brought the technical errors to the DAEO's attention. The DAEO noted the technical errors and indicated that he would be more vigilant when conducting his technical review.

Confidential Financial Disclosure

To evaluate the effectiveness of ACHP's confidential system, OGE examined the two confidential financial disclosure reports that were required to be filed in 2012. Both reports were OGE Form 450-As. The OGE Form 450-A may be used by incumbent filers in lieu of the OGE Form 450 if the filers can certify that neither they nor their spouses or dependent children have acquired new reportable interests and that the filers have not had a significant change in duties or change of position description assignment in accordance with 5 CFR § 2634.905(b). The OGE review team reminded the DAEO that the OGE Form 450-A may be used for a maximum of three consecutive years. Accordingly, confidential filers can use the OGE Form 450-A in 2013, 2014, and 2015, but must file an OGE Form 450 in 2016.

For 2012, confidential disclosure filers should have filed the OGE Form 450. However, due to the small number of reports, the availability of the supporting OGE Form 450, and the length of time elapsed since the submission of these reports, the OGE review team did not require that ACHP have its two filers file the OGE Form 450 for 2012. The OGE review team examined the OGE Form 450-A reports along with the supporting OGE Form 450 and found that both reports comply with statutory and regulatory requirements in terms of timeliness of filing.¹

¹ OGE Form 450-A reports do not have to be reviewed or certified by the agency.

Education & Training

An ethics training program is essential to raising awareness among employees about ethics laws and rules and informing them that an agency ethics official is available to provide ethics counseling. Each agency's ethics training program must include at least an initial ethics orientation (IEO) for all employees and annual ethics training for covered employees. ACHP's training program appears to meet all relevant requirements.²

Annual Training Plan

The review team noted that ACHP's annual training plan had not been updated since 2004. The review team reminded the DAEO that the annual training plan should be developed at the beginning of each calendar year. In accordance with 5 CFR § 2638.706, the ethics training plan must contain a brief description of the agency's annual ethics training and estimates of the number of employees who will receive verbal and written training, classified as public filers and non-public filers. The ethics training plan must also include estimates of the number of employees who will receive written training instead of verbal training, classified according to the various exceptions to the verbal training requirements for public filers and non-public filers. Prior to the on-site portion of the review, the DAEO provided the review team an updated 2012 version of the annual training plan. Therefore, OGE is making no formal recommendation regarding this matter.

Initial Ethics Orientation

OGE examined ACHP's IEO packet and found it to be in compliance with 5 CFR § 2638.703. The DAEO stated that he personally introduces himself to each new employee and provides them with a copy of OGE's "Do It Right" ethics handbook. In addition, he explains to new employees that they can use an hour of official time to review the packet. The DAEO confirmed that there were no new employees hired in 2011.

Annual Ethics Training

In 2011, the DAEO provided verbal training to all covered full-time employees. OGE examined ACHP's annual training material and found it to be in compliance with 5 CFR § 2638.704 and 705.

Advice & Counsel

The DAEO is required to ensure that a counseling program for agency employees concerning ethics and standards of conduct matters, including post-employment matters, is developed and conducted. See 5 CFR § 2638.203. The DAEO may delegate to one or more deputy ethics officials the responsibility for developing and conducting the counseling program. See 5 CFR § 2638.204.

² SGE training will be addressed in the SGE section of report.

OGE's review of the advice and counseling services found that ACHP is complying with 5 CFR § 2638.203(b)(7) and (8). The DAEO renders all ethics-related advice and counseling. The DAEO stated that he provides advice and counseling by phone, in person, e-mail and, occasionally, via formal memoranda. Any memorialized advice is maintained in the DAEO's office in a locked file cabinet. OGE reviewed a sample of the ACHP's written advice and counsel issued to agency employees and found that it was rendered timely and appeared to be accurate.

Conflict Remedies

ACHP's Chairman is California's State Historic Preservation Officer (SHPO). In his role as California's SHPO, he administers the national historic preservation program at the State level, reviews National Register of Historic Places nominations, maintains data on historic properties that have been identified but not yet nominated, and consults with Federal agencies. SHPOs are designated by the governor of their respective State or territory. Currently, the Chairman maintains the SHPO position and is designated an SGE.³ According to the DAEO, the Chairman works approximately 20 days as ACHP Chairman per year.⁴ The DAEO told the review team that there is an oral ethics agreement that the Chairman will recuse himself from any matters issuing from or affecting California.

The review team examined supporting documentation that suggests the DAEO is vigilant about recusals. ACHP has two mechanisms to ensure that the Chairman recuses himself from all matters affecting California. As previously mentioned, the DAEO maintains a financial disclosure spreadsheet which he uses to identify matters that could pose a conflict not just for the Chairman but for all financial disclosure filers. The review team also examined advice and counsel memoranda that showed the DAEO addresses inquiries relating to California and informs the parties that the Chairman is recused from such matters.

Suggestion

- In order to ensure that the oral ethics agreement is consistently followed in the absence of the DAEO, OGE suggests ACHP memorialize the Chairman's oral ethics agreement and implement a formal screening arrangement.

³ The review team recognizes that criminal conflicts of interest statutes 18 U.S.C. §§ 203 and 205 concerning the representation of others before the Government are limited, however, in their application to SGEs. See OGE Advisory opinion 00 X 1.

⁴ The DAEO noted that he uses OGE guidance for SGE day-counting; in particular, the DAEO explained that ACHP counts any day on which an SGE performs work for which he or she is compensated as a working day. See DO-07-002.

Enforcement

ACHP reported no disciplinary actions based wholly or in part upon violations of the criminal conflict of interest statutes (18 U.S.C §§ 203, 205, 207, 208, and 209) or the standards of conduct provisions (5 CFR part 2635).

ACHP does not have its own Office of Inspector General nor does the agency utilize the services of an outside investigative body to help ensure that certain program elements described at 5 CFR § 2638.203(b)(11) and (12) are carried out. The DAEO has the responsibility for investigating misconduct and alleged ethics violations. In the event ACHP is required to make a criminal referral to the Department of Justice, the DAEO has the responsibility of concurrently notifying OGE of the referral. The DAEO explained the relevant leadership would consult with him prior to considering appropriate disciplinary or corrective action against an employee.

Suggestion

- OGE suggests ACHP enter into a memorandum of understanding with an investigative organization that can investigate violations of ethics laws and regulations to ensure program elements described at 5 C.F.R. § 2638.203(b)(11) and (12) are carried out. The review team provided the DAEO a sample memorandum of understanding shortly after the on-site portion of the review.

Special Government Employees

A SGE is defined in 18 U.S.C. § 202(a) as “an *officer or employee*... who is retained, designated, appointed, or employed” by the Government to perform temporary duties, with or without compensation, for not more than 130 days during any period of 365 consecutive days.

Accordingly, SGEs are Government employees for purposes of certain conflict of interest laws. See *DAEOgram DO-00-003A* and OGE’s informal Advisory Memoranda 82 x 21, 82 x 22, and 00x 1, and *DAEOgram DO-04-022*.

As previously mentioned, ACHP is directed by 23 statutorily designated Council members. As outlined in 16 U.S.C. 470, the Council is comprised of the following members:

- a Chairman appointed by the President selected from the general public;
- the Secretary of the Interior;
- the Architect of the Capitol;
- the Secretary of Agriculture and the heads of seven other agencies of the United States (other than the Department of the Interior), the activities of which affect historic preservation, appointed by the President;
- one Governor appointed by the President;
- one mayor appointed by the President;
- the President of the National Conference of State Historic Preservation Officers;
- the Chairman of the National Trust for Historic Preservation;

- four experts in the field of historic preservation appointed by the President from the disciplines of architecture, history, archaeology, and other appropriate disciplines;
- three at-large members from the general public, appointed by the President; and
- one member of an Indian tribe or Native Hawaiian organization who represents the interests of the tribe or organization of which he or she is a member, appointed by the President.

Of the 23 Council members, only 11 meet the SGE definition.⁵ The ex officio members file financial disclosure reports with their home agency.

Confidential Financial Disclosure for SGEs

ACHP has established February 15th of each year as the date of collection for SGE confidential financial disclosure reports. SGEs are required to file their financial disclosure reports before attending a board meeting or rendering any advice. Because ethics laws prohibit Government employees from having financial conflicts of interest, it is essential that ethics officials identify and resolve all real or potential conflicts of interest or other violations in a timely manner. *See* 5 CFR § 2634.903 (b)(3) and OGE Advisory opinion 00 X 1.

The OGE review team examined all available confidential financial disclosure reports required to be filed by SGEs in 2012.⁶ Seven of the eight reports the review team examined were submitted timely. Two of the required reports were not available for our examination. One of the missing reports belongs to Council's Vice-Chair while the other is for a member who has not attended Council meetings. The matter of the Vice-Chair's outstanding report was raised to the Executive Director level. The DAEO expected the report would be submitted soon after our fieldwork was completed. Unfortunately, the Vice-Chair recently attended a meeting of the Council without having provided his latest financial disclosure report for review.⁷ The Vice-Chair's financial disclosure report has since been submitted. We remind ACHP that SGEs are required to file their financial disclosure reports before attending a board meeting or rendering any advice. Because ethics laws prohibit Government employees from having financial conflicts of interest, it is essential that ethics officials identify and resolve all real or potential conflicts of interest or other violations in a timely manner. *See* 5 CFR § 2634.903 (b)(3) and OGE Advisory opinion 00 X 1. The DAEO notified the review team that the other Council member who has not attended meetings submitted his financial disclosure report after the on-site portion of our review.

The review team identified a few technical reporting issues such as over-reporting of assets and home and rental home addresses. The review team brought the technical errors to the DAEO's attention. The DAEO noted the technical errors and indicated that he would be more vigilant when conducting his technical review.

⁵ One of the SGE positions is vacant.

⁶ Two reports were not submitted.

⁷ The Vice-Chair attended the May 9-10, 2012 quarterly meeting which occurred shortly after the on-site portion of our review.

Ethics Training for SGEs

The DAEO explained to the OGE review team that SGEs have not received ethics training the last two calendar years as required due to time constraints.

Recommendations

- Develop a process to ensure that SGEs file their confidential financial disclosure reports before attending a Council meeting or rendering any advice.
- Develop an action plan to provide all SGEs with annual ethics training containing the Standards, the Principles, and the criminal conflict of interest statutes, in accordance with 5 CFR § 2638.705. Because training for SGEs has not occurred in the last two years, SGE training should occur immediately in addition to training planned for the current year.

1353 Travel Acceptances

ACHP permits its employees to accept payments from non-Federal sources for travel, subsistence, and related expenses incurred on official travel under the authority of the General Services Administration (GSA) regulation at 41 CFR chapter 304, implementing 31 U.S.C. § 1353. ACHP has written procedures to implement 31 U.S.C. § 1353 which clearly delineate all roles and responsibilities in the process. The written procedures mandate a conflict of interest review be conducted by the DAEO on all requests prior to any actual travel. However, since ACHP usually submits reports with no reportable activity, the review team was not able to inspect instances of travel acceptances to verify adherence with written procedures. To meet the semiannual reporting requirement, the Budget Analyst is responsible for collecting the information to be reported, drafting the agency's semiannual report of payments of more than \$250 per event, and forwarding the semiannual report to OGE.

At the time we commenced this review, the semiannual reports on payments covering the period from April 1, 2011 – September 30, 2011 and October 1, 2011 – March 31, 2012 had not been sent to OGE. The review team requested the reports and prior to the on-site portion of the review ACHP submitted the outstanding semiannual reports to OGE using the appropriate GSA Standard Form 326. OGE reminds the Ethics Office that ACHP's semiannual travel reports, even when there is no reportable activity, are now posted on our website in accordance with federal efforts to make information available to the public. See OGE Program Management Advisory PA-11-02 issued on March 30, 2011, "Procedural Update for Reporting Payments Accepted Under 31 U.S.C. § 1353."

Agency Comments

A draft of this report was provided to the DAEO for review and comment. The DAEO offered several minor technical corrections which OGE incorporated into the final report.