

Office of Government Ethics

02 x 10

Letter to a General Counsel
dated October 16, 2002

This is in response to your letter (including numerous enclosures) of September 23, 2002, in which you request our opinion concerning the application of 18 U.S.C. § 207(a)(2) to [a former employee], the former General Counsel of [your agency]. In addition to your letter, your staff subsequently provided copies of declarations from two [agency] employees, as well as other information in electronic mail correspondence and telephone conversations with a member of my staff. Moreover, [the former employee] himself submitted a letter to the Office of Government Ethics (OGE), dated October 1, 2002, in which he provides his analysis of the issues. You have asked for "expeditious consideration" of your request, in view of imminent mediation and trial proceedings in which [the former employee] proposes to represent a private party. Consequently, our response below is relatively brief and will not recapitulate all of the facts and arguments that your office and [the former employee] provided, familiarity with which is assumed.¹

[The former employee] proposes to represent a private contractor, [a] Company, in litigation against your agency concerning the scope of [agency] reimbursement for certain services provided by [the Company] to certain units of local government.²

¹ Your letter also requests that OGE issue a formal opinion under 5 C.F.R. § 2638.302. Although OGE does have the authority to issue formal advisory opinions, we have considered the criteria set forth in subpart C of 5 C.F.R. part 2638 and have determined that a formal opinion is not appropriate in this case.

² The materials submitted to OGE by your office and [the former employee] indicate that two units of local government, [a] County and [a] City, contracted for work from [the Company]. However, most of the discussion in those materials refers only to the County contract, and it is not clear to us what the relationship was between [the] County and [the City] with respect to the [Company] work. [The former employee] seems to be of the opinion that only a County contract is at issue. In the absence of any significant factual development of the [City] circumstances, we will assume that your question pertains only to the County contract and will confine our response to that question. However, if you
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As your letter indicates, the crucial issue under section 207(a)(2) is whether this [Company] reimbursement controversy was actually pending as a particular matter involving specific parties under [the former employee's] official responsibility before he terminated his position.

We do not agree with [the former employee's] that the [Company] matter could not have been a particular matter involving specific parties pending under his official responsibilities until the local government actually filed an application for reimbursement with [the agency] . In OGE Informal Advisory Letter 99 x 23, we were asked to resolve the question, "[d]oes an application have to have been received in order for a particular matter involving specific parties to be pending at the agency?" We answered that a particular matter involving specific parties may be pending in an agency prior to the filing of an actual application for some kind of Federal action. In that case, we deemed that specific parties had been identified by the Government even prior to any contact between the Government and the potential applicant. The agency had learned through media reports of a proposed merger between two companies and then began a preliminary internal review to identify and address certain substantive issues that would have to be resolved once a merger application was received. OGE's general approach in this area is succinctly stated in the advisory letter: "The fact that an application has yet not been received by the agency does not mean that the matter is not before the agency. When the agency elects to consider a matter and that consideration concerns 'the legal rights of the parties or an isolatable transaction or related set of transactions between identifiable parties,' the matter is a particular matter involving specific parties." 99 x 23 (quoting 5 C.F.R. § 2637.201(c)(1)); see also OGE Informal Advisory Letter 90 x 3 (date that claim filed with agency not determinative, where agency provided prior advice or assistance to potential claimant).

There still remains the question whether the facts of this case demonstrate that the [Company] matter was actually pending under [the former employee's] official responsibility prior to his resignation as General Counsel. In order for section 207(a)(2) to apply, the [Company] reimbursement controversy must have been referred to or considered by an attorney under [the former employee's] official responsibility. See 5 C.F.R.

²(...continued)

would like specific guidance with respect to a [City] matter, we would be happy to address any such question, provided we are given the relevant information.

§ 2637.202(c) (" 'Actually pending' means that the matter was in fact referred to or under consideration by persons within the employee's area of responsibility").³ We agree with [the former employee] that section 207(a)(2) would not be implicated if his office had simply considered a generic question about agency policy concerning the status of sole source contracts generally. See *Shakeproof Indus. Prods. Div. of Ill. Tool Works Inc. v. United States*, 104 F.3d 1309, 1313-14 (Fed. Cir. 1997)(document was "policy matter of general applicability" rather than decision specific to particular case, even though document referenced case as illustration of general policy).⁴ Nor would it be sufficient that his office considered contracts, other than [the Company], that posed the same issue. See 5 C.F.R. § 2637.202(c) (example 1).

We are satisfied, however, that the information provided by your office indicates that the [Company] matter actually had been referred to the General Counsel's office before [the former employee's] retirement. Your enclosure number 2, a "Case Management Detail Report" dated ten days prior to [the former employee's] resignation, specifically refers to the [Company] contract and indicates that a[n] [agency] employee named [Employee A] "PROVIDED A COPY TO LEGAL." Your office also provided an affidavit from [Employee A] in which he indicates that he gave a copy of the [Company] contract to a[n] [agency] field attorney "to ask her opinion as to what she thought about the County contract because it was for \$20/cy and was a sole source contract." Furthermore, an electronic mail message from [Employee B] of your office to my staff states that [Employee A] confirmed that he provided the County contract to the field attorney "on or shortly after January 8" and that he "specifically asked for guidance on the allowability of reimbursement at the contracted-for rate as the contract was awarded without competition, i.e., was sole-sourced." Based on these facts, we believe that you are justified in concluding that the [Company] controversy was actually pending

³ Although 5 C.F.R. part 2637 relates to 18 U.S.C. § 207 as in effect prior to its revision by the Ethics Reform Act of 1989, section 2637.202 continues to provide useful guidance, to the extent that the relevant statutory language remains the same.

⁴ We want to emphasize that [the agency's] "policy with regard to costs incurred under a noncompetitively awarded contract" was not itself a particular matter involving specific parties. See 5 C.F.R. § 2637.201(c)(1). The matter must have involved the application of this policy to the [Company] contract, by [the former employee's] office, for section 207(a)(2) to bar [the former employee's] proposed representation in this case.

under [the former employee's] official responsibility prior to his resignation as General Counsel.

We hope this has been helpful. If you have any further questions about the application of section 207(a)(2) to the facts of this case, please contact my Office.

Sincerely,

Marilyn L. Glynn
General Counsel