United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

July 27, 2010

Tracking No.: OGE FOIA FY 10/59 (admin. appeal of FY 10/52)

The Office of Government Ethics (OGE) has reviewed its initial determination in response to your July 9, 2010 administrative appeal under the Freedom of Information Act (FOIA).

Upon review, OGE is providing an unredacted copy of the record you requested, specifically the Letter for Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, from Marilyn L. Glynn, General Counsel, OGE (February 9, 2006).

The official responsible for this FOIA determination is the undersigned. This constitutes the final OGE action on your July 12, 2010 FOIA request as administratively appealed.

Sincerely,

Don W. Fox
General Counsel

Enclosure

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

February 9, 2006

Steven G. Bradbury
Acting Assistant Attorney General
Office of Legal Counsel
Department of Justice
Washington, DC 20530

Dear Mr. Bradbury:

This is in response to the request of your office for the views of the Office of Government Ethics (OGE) with respect to a recent letter from the Central Intelligence Agency (CIA) seeking a legal opinion. The CIA letter, dated February 2, 2006, disagrees with an interpretation of 18 U.S.C. § 207(c) that is reflected in OGE Informal Advisory Letter 03 x 9 as well as in oral advice that OGE provided to the CIA last year.

Specifically, OGE has advised that 18 U.S.C. § 207(c) applies to representational contacts with employees of an individual's former agency, even if those employees are serving on a detail to another agency in which the individual did not serve. The CIA argues that section 207(c) applies only to contacts with an individual's own former agency, which does not include contacts by a former CIA employee with current CIA employees who are serving on detail to another agency in the Intelligence Community. In our view, this conclusion would be inconsistent with the plain meaning of the statute.

In the first place, section 207(c) is not written in terms of a bar on contacts with the individual's former "agency." Rather, the statute covers contacts with "any officer or employee" of the individual's former agency, in connection with any matter in which the individual seeks official action by "any officer or employee" of the former agency. The CIA does not dispute that its detailees remain CIA employees. Therefore, as long as a former senior CIA employee is contacting a current CIA employee and is seeking official action from a current CIA employee, it does not appear relevant, under the terms of the statute, whether the current CIA employee is serving on a detail to another agency. This conclusion follows from the unambiguous

language of section 207(c) itself, even apart from the special provision on detailees found in 18 U.S.C. § 207(g).[1]

Section 207(g) confirms this conclusion. This provision states that detailees from one agency to another agency are deemed employees of both for the duration of the detail. Thus, applying the plain meaning of this provision, a contact with a current CIA employee on detail to another agency would be deemed a contact with an employee of both the CIA and the other agency at the same time.

The CIA argues that section 207(g) should be read as being applicable only for the purpose of determining what is a former senior employee's former agency. However, section 207(g) begins "[f]or purposes of this section," i.e., for purposes of section 207 generally, not just for one limited purpose. The CIA also points to another provision, section 207(i)(1), which defines "officer or employee" for the specific purpose of specifying when the President, Vice President and Members of Congress may not be contacted, under various provisions of section 207; the CIA suggests that if Congress had intended to include detailees among those who could not be contacted in certain circumstances, Congress would have addressed the subject likewise in section 207(i). Apart from the fact that section 207(i)(1) addresses a very specific and unique issue that is irrelevant to the subject of detailees -- i.e., the coverage of contacts with elected officials who generally are not treated as officers or employees under the conflict of interest laws, pursuant to 18 U.S.C. § 202(c) -- it also is significant that the provision uses the phrase "shall include," which usually is not a term of limitation. See Singer, Sutherland on Statutory Construction 231 (2000). Moreover, Congress would have had no reason to include the detailee language in a provision, such as section 207(i)(1), that is limited to the meaning of officer or

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[1] We note the CIA's secondary argument that its details are so unique that they do not really constitute details within the meaning of 18 U.S.C. § 207(g). Even if this argument were correct (which is by no means apparent to OGE), it would not change the fact that the CIA detailees remain CIA employees. The plain meaning of section 207(c), therefore, still would prohibit a former senior employee of the CIA from contacting these current CIA employees in connection with a matter in which the former employee seeks official action from a current CIA employee, without regard to the operation of section 207(g).

employee for the sole purpose of specifying who may not be contacted, if it were Congress' intent to address the status of detailees for all purposes under section 207.

The CIA also argues that its interpretation is supported by the legislative history and purposes of section 207. In our view, however, the statutory language is plain and unambiguous, as described above. There is, therefore, no need either to resort to the legislative history or to engage in the exercise of discerning which interpretation best serves the various purposes that have been ascribed to section 207 by various sources over the years. See, e.g., United States v. Medico Indus., Inc., 784 F.2d 840, 844 (1986) (section 207 grew out of certain legislative concerns "but is not limited to them").

Nevertheless, we do believe that OGE's view is more consistent with the legislative history of the statute. Prior to 1989, the CIA's arguments would have had more force. The statute then applied only to particular matters that were "pending" before the individual's former "department or agency" or in which the former "department or agency" at least had "a direct and substantial interest." However, section 207(c) was amended by the Ethics Reform Act of 1989, largely in response to the Nofziger case, in which the defendant argued that he lacked knowledge that his former agency had a direct and substantial interest in a particular matter at the time when he contacted an employee of the agency. See United States v. Nofziger, 878 F.2d 442 (D.C. Cir. 1989). As Senator Levin explained, "[w]e correct that misinterpretation in this bill by including a knowing standard only for the act of making the communication with the intent to influence and state that the offense is committed if the former employee seeks official action by an agency or department employee." 135 Congressional Record S15954 (November 17, 1989)(emphasis added). The CIA's interpretation would come close to reinstating the requirement that the matter be pending before the individual's former agency (or at least be one in which the former agency has an interest), rather than merely a matter in which the individual is seeking action from an employee of the former agency.

We also believe that OGE's interpretation serves the general legislative purpose, identified by the CIA, of preventing misuse of influence or the appearance thereof. One certainly could envision circumstances in which a former senior CIA employee might have the opportunity to use his or her former

position to influence a current CIA employee on detail to another agency in the Intelligence Community. A former CIA official undoubtedly is more likely than a member of the general public to know current CIA employees on detail, or at least to have a common network of CIA associates.[2] Moreover, one could anticipate situations in which a current CIA detailee would be inclined, consciously or unconsciously, to accord greater weight or attention to the views of someone whose credentials include recent service in a senior CIA position.

The CIA cites also the rule of lenity in support of a narrower reading of the statute. However, it does not appear to us that the rule of lenity is applicable here. As described above, we believe OGE's view is compelled by the unambiguous language of the statute, and is consistent with the history and purposes of the statute. Consequently, there is "no 'grievous ambiguity or uncertainty in the language and structure' of the statute" sufficient to invoke the rule of lenity. 16 Op. O.L.C. 59, 64 (1992) (quoting Chapman v. United States, 500 U.S. 453, 463 (1991)).

Finally, the CIA argues that the lack of express OGE guidance on this subject in the past supports the CIA's

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[2] CIA states that it is "unlikely" that former senior CIA employees would know whether an employee at another agency happens to be a CIA detailee. We are in no position to guess how likely it is that a former senior CIA employee would know whether a particular official at another agency in the Intelligence Community is a CIA detailee. When the CIA first consulted with OGE about this question, we were advised that CIA detailees wore badges clearly identifying them as CIA employees, even while they were on detail; more recently, however, we were advised that the Intelligence Community is moving to a single badge system for employees of various agencies, so it will no longer be possible to distinguish CIA detailees by their badges. Apart from any such factual circumstances, however, it is not clear that section 207(c) even would apply to situations in which the former CIA senior employee does not know that the person he or she is contacting at another agency is actually a CIA detailee. Despite the post-Nofziger amendments, section 207(c) still reads, "any person who . . . knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of the department or agency in which such person served" (emphasis added).

interpretation. The simple answer is that OGE did not find it necessary to address this subject in writing until we were presented with the question, posed by a private attorney, in 03 x 9. Until contacted by the CIA concerning this question in the Fall of 2005, we were not aware that any agency was advising former senior employees that they could contact agency employees on detail to another agency.

In conclusion, we commend the CIA for promptly disseminating new guidance to its employees once the agency determined that prior guidance was inconsistent with 03 x 9. We also appreciate the difficulties faced by the agency, especially given its extensive use of details. Nevertheless, we are convinced that the plain meaning of section 207(c) and (g) cannot support the CIA's preferred interpretation.

If you have any questions concerning this matter, feel free to contact me, at 202-482-9292, or Rick Thomas of my staff, at 202-482-9278.

Sincerely,

Marilyn L. Glynn
General Counsel

RThomas/RT(fw)
CN 4-4
AG 1-42
AG 1-29
Read File
Doug Chapman
Patricia Franklin
Marilyn Bennett