

## **Office of Government Ethics**

**95 x 2 -- 03/13/95**

### **Letter to a Designated Agency Ethics Official dated March 13, 1995**

This responds to your letter dated January 13, 1995, in which you requested written advice from this Office on whether you and a member of your staff could continue your representation of a former [agency] employee in a security access eligibility proceeding before [a] Department. We understand that the former employee was notified by [the Department] of an adverse determination concerning her initial request for security access eligibility. During your subsequent representation of the former employee, this determination was submitted for review to three Personnel Security Review Examiners pursuant to [the Department's] security clearance regulations. We note that the Chairman of the [agency] authorized the representation of the former employee, prior to the employee's resignation in August 1994, because he determined it was in the best interest of the [agency].

The former employee resigned from Federal service prior to a final determination by [the Department] in the access determination matter. You have informed us that the [agency], as an official matter, informed [the Department] in August of the employee's resignation and submitted a written request to have certain material expunged from the employee's administrative hearing record. However, after the former employee's resignation, we understand that the representation of the former employee was continued, in a personal capacity, by you and members of your staff and not as a [an agency] matter. Further, one of the staff attorneys from your office involved in the unofficial representation stated, in a telephone conversation with a member of my staff, that the August request for expungement was based initially upon authority contained in the Privacy Act. We understand that two [agency] attorneys met in December with [Departmental] representatives to discuss the August request. During that meeting, we understand that both parties agreed to treat the August request as a matter arising out of the security clearance administrative process and not as a Privacy Act request. We further note that we have learned that there have been other meetings with [Departmental] representatives on the expungement matter since the initial December meeting.

#### **18 U.S.C. § 205**

Because your request for written advice comes after the occurrence of

the noted representations before [the Department], this Office is not in a position to comment on the application of the statute to your specific case. We can, however, provide you with some general principles regarding the application of 18 U.S.C. § 205. As you are aware, this statute prohibits officers and employees of the executive branch, except in the proper discharge of their official duties, from acting, with or without compensation, as an agent or attorney for anyone in covered matters before a department or agency of the United States where the United States is a party or has a direct and substantial interest. As you know, the statute has several exceptions. The relevant exception here is section 205(d) which permits an employee, "if not inconsistent with the faithful performance of his duties," to act without compensation as an agent or attorney for or otherwise represent "any person who is the subject of disciplinary, loyalty, or other personnel administration proceedings in connection with those proceedings."

Two conditions must be met for a Government employee to use the exception provided for at section 205(d). First, the matter must involve a disciplinary, loyalty, or other personnel administration proceeding. Second, the uncompensated representation must not be inconsistent with the faithful performance of the employee's duties. With respect to the first condition, we have noted, in prior guidance, Department of Justice rulings that have stated that the purpose of this exception is to permit the representation of Federal employees only in matters directly connected to their treatment as employees by their Federal employers. See OGE Informal Advisory Letters 85 x 1 and 88 x 3. For example, we said in 85 x 1 that appearances before the Military Discharge Review Boards and the Boards for the Correction of Military Records in proceedings which involve the discharge status of members of the military services are covered by the exception in section 205(d) because they involve the treatment of a Federal employee with regard to his or her employment. Conversely, we have found the exception not to apply in a case in which an Internal Revenue Service (IRS) employee wanted to represent another IRS employee in a tax audit (OGE 81 x 12) or in the proposed representation of veterans before the Board of Veterans Appeals by Government attorneys where that representation involved entitlement to various benefits (OGE 85 x 1). In both those cases, we viewed the proceedings as not within the limited area relating to personnel administration.

With respect to the second condition, we have noted that section 205(d) does not permit a Federal employee to decide for himself whether he may represent another person in a personnel administration matter. Rather, section 205(d) requires a factual determination by the employee's

superior, that such representation is "not inconsistent with the faithful performance of his duties." See OGE Informal Advisory Letters 82 x 19 and 88 x 3. A representational activity would be inconsistent with the "faithful performance" of an employee's duties if it conflicted with the employee's official duties or if it otherwise interfered with the employee's ability to carry out his official duties.

### **Security Clearance Proceeding**

From the facts that you have presented to this Office, we believe that the former employee's request for access eligibility and [the Department's] processing of that request may be a "loyalty" or personnel administration proceeding within the meaning of section 205(d). The former employee who requested the security clearance would be a person who is the subject of the proceeding. Therefore, it would follow that any representation that takes place concerning this proceeding could be covered by this exception. Accordingly, you and other [agency] attorneys could continue, on your own time and without compensation, to represent the former employee in the access eligibility determination proceeding and in the continuation of this personnel matter provided the representation is not otherwise inconsistent with the performance of your official duties. The critical question of whether your request, to have certain information expunged from the hearing record, is a continuation of the security access eligibility proceeding or a part of an altogether separate agency matter is a determination that [the Department] would have made in the administration of its security regulations. With regard to satisfying the second condition for continued representation, we note that your letter does indicate that the Chairman and you have determined that any representation of the former employee would not be inconsistent with the official duties of the General Counsel's staff.

### **Privacy Act Request**

While we understand that this matter was initiated both under the provisions of the Privacy Act and as a continuation of the security clearance proceeding, the circumstances of your request do require us to caution you that an action that is commenced under [the Department's] access eligibility procedures may not be the same matter, for purposes of section 205(d), as a subsequent action to expunge an administrative hearing record based solely upon the amendment provisions of the Privacy Act. The Privacy Act is a statute which is supposed to ensure fair information practices within Federal agencies by regulating the

collection, maintenance, use and dissemination of personal information. Individuals have a right under the Privacy Act to seek amendment of records about themselves upon a showing that the records are not accurate, relevant, timely or complete. See 5 U.S.C. § 552a (d)(2) and (e)(1), (5), and (7).

Agencies have promulgated their own independent regulations to process Privacy Act requests, consistent with the guidelines and regulations provided by the Office of Management and Budget. In many cases, the party that is requesting a particular amendment under the Privacy Act is not and has never been a Government employee. Additionally, while the Privacy Act does provide some judicial remedies, the Privacy Act is not itself a mechanism for individuals to challenge the outcome of adjudicatory-type proceedings of Federal agencies. *Leib v. VA*, 546 F. Supp. 758, 761-762 (D.D.C. 1982); *R.R. v. Department of the Army*, 482 F. Supp. 770, 775-776 (D.D.C. 1980). The fact that a current or former Government employee is requesting to amend records, that are maintained in a system of records by a Federal agency, does not by itself make the matter a personnel administration proceeding within the meaning of the exception at section 205(d). See OGE Informal Advisory Letter 81 x 12.

Further, even if the Privacy Act request here could in some way be characterized as a personnel administration proceeding, a Privacy Act request which concerns a former Government employee who is no longer the subject of a security clearance proceeding does not appear to be the type of matter that would be covered by the section 205(d) exception. We note that the section 205(d) exception permits the representation of a person who is "the subject" of a personnel administration proceeding in connection with that proceeding. Thus, the exception is intended to permit, as was noted previously, representation only in matters directly connected to their treatment as employees by their Federal employers. OGE Informal Advisory Letter 85 x 1. A Privacy Act request in this case would not have any effect on the underlying treatment of the employee with respect to the personnel administration decision to grant or deny a security clearance and does not change the matter into a personnel administration proceeding merely because of its previous relationship to the security clearance proceeding.

We trust that this response has in some way clarified, to the extent that we can in this case, the application of 18 U.S.C. § 205 to employees of the [agency]. This response has not been discussed with the Department of Justice or [the Department]. Should you have any additional questions,

please contact my staff.

Sincerely,

Stephen D. Potts  
Director