

MEMORANDUM

April 24, 1997

To: T. Jeremy Gunn
General Counsel

From: Brian E. Rosen
Designated Agency Ethics Officer

Subject: Ethics Issues Raised By Prospective Outside Employment

You recently asked me to research the ethics issues raised by the possibility of a Review Board staff member accepting outside employment with a government contractor that is seeking a government contract to declassify records for a U.S. intelligence agency. The proposed employment might involve both instructing employees of the government contractor on public speaking and providing advice and information to employees of the government contractor on methods and procedures for declassifying records. The Review Board staff member would be compensated by the government contractor for any work performed.

The first proposed task to be performed by the Review Board staff member, instruction in public speaking, probably presents no direct ethical concerns. However, the second proposed function, offering advice and information on methods and procedures of declassification of records, might create a conflict with Office of Government Ethics regulations governing teaching, speaking and writing by Government employees. Specifically, 5 CFR § 2635.807(a) states that a Government employee "shall not receive compensation from any source other than the Government for teaching, speaking or writing that relates to the employee's official duties." Teaching, speaking or writing relate to the employee's official duties if "the subject of the activity deals in significant part with: (1) Any matter to which the employee presently is assigned or to which the employee had been assigned during the previous one-year period; [or] (2) Any ongoing or announced policy, program or operation of the agency" 5 CFR 2635.807(a)(2)(i)(E)(1)&(2).

This regulation raises significant questions regarding the Review Board staff member's prospective outside employment. The first and most prominent question is whether the activities to be performed for the government contractor fall within the meaning of "teaching, speaking and writing" in the regulation. These terms are not defined in the regulation and the Office of Government Ethics has not published any guidance on this question. However, if a proposed primary function of the staff member is to instruct employees of the government contractor in declassification of records, that activity would probably fall within the meaning of "teaching" for purposes of this regulation.

Moreover, even if the relationship between the Review Board employee and the government contractor is structured to resemble a consulting activity rather than “teaching, speaking or writing,” the relationship would likely be prohibited. The Office of Government Ethics addressed this issue in its comments to § 2635.807.

Because consulting was not treated the same as teaching, speaking and writing in the proposed rule, we have not expanded § 2635.807 to covering [sic] consulting. . . . Nevertheless, we believe it is appropriate to note that many of the same considerations applicable to teaching, speaking and writing apply as well to consulting activities. . . . [C]onsulting activities that involve use of public office for private gain or that otherwise violate part 2635 are improper even though not covered by § 2635.807.

57 Fed. Reg. 35006, 35040 (August 7, 1992). Thus, regardless of whether the outside employment is classified as “consulting” or “teaching, speaking or writing,” an ethical conflict may exist.

A second significant question is whether the prospective employment “relates to the official duties” of the Review Board staff member. This question requires a determination of whether the activities to be performed for the government contractor deal in significant part with a matter in which the Review Board employee currently works or has worked in the previous year or with any ongoing program or operation of the Review Board. *See* 5 CFR § 2635.807(a)(2)(i)(E)(1)&(2). It is likely that any outside work related to declassification of records done by a member of the staff would fall within this regulation. However, this regulation is not intended to preclude “an employee . . . from receiving compensation for teaching, speaking or writing on a subject within the employee’s discipline or inherent area of expertise based on his educational background or experience even though the teaching, speaking or writing deals generally with a subject within the agency’s area of responsibility.” 5 CFR § 2635.807(a)(2)(i)(Note). For this reason, I would require a more detailed description of the proposed activity before I could offer a complete analysis of whether it “relates to the official duties” of the staff member.

Furthermore, the Review Board employee should be aware of additional ethical concerns. For example, the Review Board employee may not act as an agent, either directly or indirectly, for the government contractor before any Federal agency. *See* 18 U.S.C. § 205. The Review Board employee also may be disqualified from participating in particular Review Board matters that could have a direct and predictable effect on his or her financial interests or the financial interests of the government contractor. *See* 5 CFR §§ 2635.402 & 2635.502. Finally, the Review Board staff member may not use his or her position at the Review Board to influence Government policy in a manner that benefits the government contractor, and the staff member may not be associated with the government contractor in a manner that gives the appearance of government sanction or endorsement of his or her activities or the services of the government contractor. *See* 5 CFR § 2635.702.

In order to ensure that no ethical regulations are violated, I would advise the Review Board staff member to request a formal ethics opinion on this issue before entering into any contract with or performing any work for the government contractor. To facilitate a formal opinion, the staff member should seek information from the government contractor that is responsive to the concerns outlined above. I cannot make a complete evaluation of potential ethical conflicts without this information.