



DEPARTMENT OF VETERANS AFFAIRS
Designated Agency Ethics Official

David W. Waltman
Puget Sound HCS
1660 S. Columbian Way
Seattle, WA 98108

Dear Mr. Waltman:

This is in response to your request for post-Government employment ethics advice. Our advice is based on the following background information, which you provided.

You currently serve as a GS-15 Senior Supervisory Program Officer within the VHA Office of Information and Analytics. In this role, you provide technical recommendations and advice to senior employees regarding strategies and courses of action for acquisition and delivery of the VA/DoD integrated Electronic Health Record (iEHR). In June 2013, you provided technical advice to the program manager developing the performance work statement (PWS) for the VistA 4 User Experience (VistA 4 UX) contract. This advice included recommendations on the type and scope of deliverables that should be included in the PWS. This was your only involvement with the VistA 4 UX contract. On September 30, 2013, VA awarded this contract to ASM Research, Inc. (ASMR). ASMR then offered you a position as a technical lead, which would require you to interact with Government project managers, engineers, and clinical subject matter experts for execution on the VistA 4 UX contract. Regarding your current supervisory responsibilities, you are not responsible for the VistA4 UX contract and none of your subordinates have participated in the VistA4 UX contract or are assigned to that contract.

As explained below, the ethics laws do not prevent your seeking employment with, or being employed by, ASMR. Further, the procurement integrity restrictions prohibiting the acceptance of compensation from entities with whom you had certain involvement in a procurement in excess of \$10 million do not apply.

SEEKING EMPLOYMENT WHILE A VA EMPLOYEE

While you remain a VA employee you may not participate personally and substantially as part of your VA duties in a particular matter that will have a direct and predictable effect on your financial interests or those of a prospective employer with whom you are seeking or negotiating for employment, or with whom you have an arrangement for future employment. 18 U.S.C. § 208; 5 C.F.R. § 2635.604(a). Thus, because you are considering an employment offer from ASMR, in the event that you are asked to participate personally and substantially in a VA-ASMR matter, you must recuse yourself. I note that you have already informed your supervisors of this recusal requirement regarding ASMR.

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CRIMINAL POST-GOVERNMENT EMPLOYMENT RESTRICTIONS APPLICABLE TO ALL FEDERAL EMPLOYEES

Section 207(a) of title 18, United States Code, prohibits a former Federal employee from knowingly, with the intent to influence, making any communication to or appearance before an employee of the Executive branch or a Federal court in connection with a particular matter involving specific parties, in which the United States is a party or has a direct and substantial interest and either (a) the former Federal employee participated personally and substantially in the matter during his Federal employment or (b) he reasonably should have known the matter was pending under his official responsibility within one year prior to termination of Federal employment. In essence, these two restrictions prohibit a former employee who participated in a matter while employed by the Government from "side-switching" by representing an entity other than the Government before the United States on the same matter. Representation of another before the U.S. Congress is not subject to this ban and is thus permitted.

The term "**particular matter involving specific parties**" means a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving specific parties in which the United States is a party or has a direct and substantial interest. 5 C.F.R. § 2641.201(h). A "particular matter involving specific parties" usually does not encompass general rule-making because rule-making seldom involves specific parties. The particular matter must involve specific parties both at the time the employee participated in the particular matter as part of official duty and at the time the former employee represents another back to a Federal agency, although the parties need not be the same. In the case of contracts, a new matter typically does not arise simply because there are amendments, modifications, or extensions of a contract. *Id.* § 2641.201(g)(5)(ii)(A). Successive or otherwise separate contracts or other agreements will be viewed as different matters from each other, absent some indication that one contract contemplated the other or that both are in support of the same specific proceeding.

To "**participate personally and substantially**" means to participate directly and significantly through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise. Personal participation includes the direct and active supervision of the participation of any person you supervise, including a subordinate. *Id.* § 2641.201(i). For your participation to be "personal and substantial" there must be more than "knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue." *Id.* § 2641.201(i)(3). The "single act of approving or participating in a critical step may be substantial." *Id.* "Official responsibility" means "direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove or to otherwise direct Government actions." 18 U.S.C. § 202(b).

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"Appearance" and **"communication"** are the terms contemplated by the act of representation, which should not be confused with the more formal representation of a client by an attorney. A communication occurs when you impart or transmit information of any kind, including facts, opinions, ideas, questions or direction, to an employee of the United States, whether orally, in writing, electronically, or by any other means. This includes communication intended to be attributed to you, regardless of whether the Federal employee actually recognizes you as the source of the information. An appearance occurs when you physically present yourself before an employee of the Federal Government, formally or informally. An appearance need not involve any communication – sometimes mere presence at a meeting may be considered an appearance.

The restrictions apply only to those communications and appearances made to a Federal employee with the **"intent to influence."** This may include any representations that may be interpreted as an attempt to persuade the employee to take action. The appearance or communication must be made **on behalf of someone else**. You may always represent yourself, including your sole proprietorship (should you ever have one).

The prohibition on representing someone in the same matter in which you participated personally and substantially during your Federal employment is a lifetime ban that lasts for the lifetime of the particular matter. 18 U.S.C. § 207(a)(1). The prohibition on representing someone in the same matter that was under your official responsibility in the last year of Government service (where your participation was not personal and substantial) lasts for two years commencing on the date you leave Government service.

Applicability of the Lifetime Ban. In your situation, the VistA 4 UX contract became a "particular matter involving specific parties" after your participation in the matter, as your assistance with the PWS occurred before ASMR or any other party expressed interest in the contract. (see 5 C.F.R. § 2641.201(4) ("ordinarily specific parties are first identified when initial proposals or indications of interest, such as responses to requests for proposals (RFP) or earlier expressions of interest, are received by the Government"). Accordingly, because the VistA 4 UX contract was not a "particular matter involving specific parties" at the time of your participation, the lifetime ban does not apply, meaning that you are permitted to make communications or appearances to the Federal Government, with the intent to influence, on behalf of ASMR regarding the VistA 4 UX contract.

Testifying as an Expert Witness. Additionally, you should be aware that 18 U.S.C § 207(a)(1) generally bars a former employee from testifying as an expert witness on the same official matter in which the former employee participated for the Government. This ban is applicable regardless of whether the former employee is compensated. Should you be asked to testify as an expert witness on behalf of any

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non-Federal entity in a matter that you know of from your Federal employment, we recommend that you seek additional ethics advice.

Applicability of the Two-Year Ban. The two-year prohibition on representing a non-Federal party back to the Government in a particular matter under your official responsibility during your last year of Government service applies to you only when you did not participate personally and substantially in a matter, but the matter was under your official responsibility. "Official responsibility" means the direct administrative or operating authority whether intermediate or final, exercisable alone or with others, and either personally or through subordinates, to approve, disapprove or to otherwise direct Government actions. 5 C.F.R. § 2641.202(j). A matter was "actually pending" under a former employee's official responsibility if the matter was referred to or under consideration by persons within the employee's area of responsibility. Please note that this restriction is triggered simply by virtue of the fact that the particular matter was pending under your official responsibility. This ban applies even if you had no actual knowledge of the particular matter, but reasonably should have known, nonetheless, that it was actually pending under your official responsibility during your last year with the Government. *Id.* § 2641.202(a). The side-switching ban for covered particular matters under your official responsibility in the last year of Federal service lasts for two years from the date you leave Government service. 18 U.S.C § 207(a)(2). Although you supervise VA employees, you have stated that none of them participated, or were assigned to participate, in the Vista 4 UX contract. Accordingly, the two-year ban would not apply to the Vista 4 UX contract.

Communications to the Legislative Branch are not affected by these representational bans. 5 C.F.R. §§ 2641.201(f) and 202(f); see 18 U.S.C. § 207. Neither the lifetime nor two-year bans apply to communications you may make (1) as an officer or employee of the Federal Government (including the Legislative Branch) or (2) as an elected official of a state or local government. 18 U.S.C § 207(j)(1); 5 C.F.R. §§ 2641.201(b), 202(b) and 301. Further, the two-year ban does not apply to communications you make (1) on behalf of a political candidate or party or (2) as an employee of (i) an agency or instrumentality of a State or local government, (ii) an accredited degree-granting institution of higher education as defined in 20 U.S.C. § 1001, or (iii) a hospital or research organization which is tax-exempt under section 501(c)(3) of the IRS Code. 18 U.S.C § 207(j)(2), (7); 5 C.F.R. §§ 2641.202(b) and 301.

Applicability of Compensation Restriction – 18 U.S.C. § 203. There is a prohibition against sharing in any compensation for representational services before the Government, rendered personally or by another, which was earned at a time when the former employee was still employed by the Government. Accordingly, after you leave Government service, you may not share in compensation for representational services before a Federal agency or court regarding particular matters in which the Government was a party or had a substantial interest, which were provided while you were still a Federal employee. This prohibition may affect you after you leave the Government if you share in the proceeds of a partnership or business that includes earnings for

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representational services that occurred before you terminated Federal service. (Examples of such representational activities include lobbying, consulting, and work done by law firms.)

If you find in the future that your non-Federal employer represented third parties before the Federal Government while you were a Federal employee, ensure that your compensation is structured in a way that does not involve your sharing in profits derived from those representational services. Additionally, where an organization does not provide representational services to third parties, but simply deals with the Government in order to obtain Federal funding or approval for its own business purposes, section 203 does not prohibit a former Government employee from participating in any resulting compensation.

PROCUREMENT INTEGRITY ACT & NON-PUBLIC INFORMATION

The Procurement Integrity Act places restrictions on the acceptance of compensation from a contractor. It specifically provides that a former Federal employee may not accept compensation from a contractor within a one-year period if the former Federal employee (1) served, when the contractor was selected or awarded a contract, as the procuring contracting officer, source selection authority, member of the source selection evaluation board, or chief of a financial or technical evaluation team in a procurement in excess of \$10 million; (2) served as a program manager, deputy program manager, or administrative contracting officer for a contract in excess of \$10 million awarded to that contractor; or (3) personally made a decision to award a contract, subcontract, modification of a contract or subcontract, or task order or delivery order in excess of \$10 million to that contractor, to establish rates applicable to a contract or contracts for that contractor that are valued in excess of \$10 million, approve issuance of one or more contract payments in excess of \$10 million to that contractor, or pay or settle a claim in excess of \$10 million with that contractor. A former Federal employee who fits within one of these categories may, nonetheless, accept compensation from a different division or affiliate of that contractor, if that division or affiliate does not produce the same or similar products or services. Based on the information you provided these restrictions are not applicable to you.

Use of Non-Public Information. You are reminded that you are prohibited from using information gained while employed by VA or any other Federal agency that is generally not available to the public (for example, proprietary or source selection information) if the use of that "inside" information would give you or anyone else an unfair financial or commercial advantage. Additionally, 18 U.S.C. §§ 793, 794, 1831, 1832 and 1905 protect and prohibit the use or disclosure of trade secrets, confidential business information, and classified information.

Also, if you participate in preparing a competitive proposal on behalf of your employer, and the participation requires that you share information gained during your

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employment as a Federal employee, you should inform your employer of this fact and encourage your employer to communicate with the Contracting Officer in accordance with FAR parts 3.104 and 9.505.

ACTIVITIES UNAFFECTED BY POST-EMPLOYMENT LAWS

None of the above restrictions prohibits you from accepting employment with any particular person or organization. In addition, as noted, none of these restrictions prohibits a former Executive Branch employee from representing others before Congress. Self-representation and the expression of personal views that are not made as agent or representative of another are not affected by these rules. Communications that are not made with intent to influence the Government, such as requests for the status of a matter or for publicly-available information, are also allowed. It is important to remember that these bans are representational—nothing prohibits your behind-the-scenes participation in any matter including those matters in which you personally participated while at VA.

SUMMARY

For two years following your last day at VA, you may not represent any person, with an intent to influence, before any Federal agency or court in connection with particular VA matters involving specific parties which were pending under your official responsibility during your final year at VA. You may never represent a non-Government party, with an intent to influence, back to the Executive Branch or before a Federal court in connection with any particular matter involving specific parties in which you participated personally and substantially as a Government employee. You may, however, provide background or "behind-the-scenes" assistance on such matters, because these bans relate only to representational activities. Regarding the VistA 4 UX contract, neither the lifetime ban nor the two-year ban applies.

Please note that my opinion as an agency ethics official concerning 18 U.S.C. § 207 does not have the same weight as an opinion authorized by a specific statute, such as the Procurement Integrity Act. See 41 U.S.C. § 2104. My opinion on this statute does not bind the Department of Justice. 5 C.F.R. § 2641.105. This letter, issued under the authority of 41 U.S.C. § 2104(c) and 5 C.F.R. § 2635.107, is an advisory opinion of an agency ethics official based on factual information that you have provided.

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Finally, please note that my office remains available to advise you regarding the legal restrictions on your post-Government employment activities after you leave VA. If you have any questions or concerns about the guidance in this letter, please contact me at [REDACTED]

Sincerely yours,

A handwritten signature in black ink, appearing to read 'C. Britt', with a long horizontal flourish extending to the right.

Christopher A. Britt
Deputy Ethics Official