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Government Lawyering

Jessica Tillipman
George Washington University Law School, jtillipman@law.gwu.edu

Robert B. Mahini
George Washington University

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PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

GOVERNMENT LAWYERING

By Jessica Tillipman and Robert B. Mahini

The legal profession is regulated with numerous ethical rules designed to ensure that practitioners comply with its high standards of professional conduct. Federal Government attorneys, while generally held to the same ethical standards as other attorneys, are subject to an additional set of requirements mandated by federal laws and regulations. Given the considerable authority federal attorneys possess as representatives of the U.S. Government, it is not surprising that there are complex rules and regulations specifically designed to ensure Government attorneys' power is not without limit, is used properly, and is exercised in accordance with the expectations of the general public.

This Briefing Paper focuses on the laws most crucial to the protection of the public welfare—and, incidentally, those most likely to frame the day-to-day activities of the Federal Government lawyer—(1) the ethical obligations of the Government attorney, and (2) the Government attorney's duty to properly maintain information. In addition, although attorneys play a prominent role throughout the Federal Government, the discussion will be limited to several of the most prominent laws affecting Executive Branch Government attorneys.

The first part of this Briefing Paper discusses fundamental ethical obligations that are applicable to nearly all attorneys in the Executive Branch of Government. In particular, this part discusses the various statutes and regulations designed

IN BRIEF

Jessica Tillipman is the Assistant Dean for Outside Placement and a Professorial Lecturer in Law at The George Washington University Law School. Robert B. Mahini is an Attorney in the Federal Trade Commission's Office of the General Counsel and a Professorial Lecturer in Law at The George Washington University Law School.

to ensure Government attorneys perform their duties impartially and with the public welfare in mind. In addition, the laws discussed ensure that the power and authority vested in Government attorneys is used for neither private nor political gain.

The second part of this PAPER covers the topics of information control and confidentiality. Though generally subject to the same confidentiality rules that should be familiar to any attorney, Government attorneys are privy to nonpublic and sometimes even classified information,[1] the confidentiality of which is crucial for the proper functioning of the Federal Government. This places Government attorneys in a unique position with regard to the information in their possession as compared to their private sector counterparts. Moreover, this part of the PAPER explains the tension between these confidentiality requirements and the Freedom of Information Act[2]—a law intended to ensure transparency in the operation of the Federal Government. Finally, this part provides a brief discussion of the Whistleblower Protection Act,[3] which is designed to protect federal employees who disclose information relating to Government wrongdoing from adverse employment actions made in response to the whistleblowing.

Ethical Obligations

Attorneys are no stranger to ethical rules—they are the underpinning of the profession. Government attorneys, however, must comply not only with ethical rules imposed by the state bar in which the attorney is licensed, but with rules unique to Government employment. Specifically, one of the primary duties of a Government attorney is to uphold the ethical standards required of the position. Because these public servants are expected to hold their positions as a "public trust," they are required to comply with a multitude of regulations designed to ensure they place "loyalty to the Constitution, laws and ethical principles above private gain."[4]

The ethical regime governing attorneys who are Executive Branch employees, the focus of this BRIEFING PAPER, is found in Part 2635 of Title 5 of the *Code of Federal Regulations*. These regulations were created by the U.S. Office of Government Ethics, which has been charged with "[p]romulgating…regulations that establish a single, comprehensive, and clear set of executive-branch standards of conduct."[5] These "Standards of Ethical Conduct for Employees of the Executive Branch" provide countless rules, exceptions, and exclusions that assist the attorneys of the Executive Branch in making ethical decisions as stewards of the Federal Government.

In 5 C.F.R. § 2635.101, the regulations describe the general ethical principles applicable to all Executive Branch employees, including Government attorneys. The principles have been separated into 14 different categories,[6] but they share the same two underlying tenets:[7]

(1) Employees "shall not use public office for private gain."

(2) Employees "shall act impartially and not give preferential treatment to any private organization or individual."

In addition to these regulations, attorneys are subject to various criminal conflict-of-interest

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statutes, which are discussed in detail below.[8] Government attorneys must also comply with any supplemental ethics regulations issued by their employing agency.[9]

While Government attorneys must act in accordance with all 14 general principles, this BRIEFING PAPER focuses on those that are most relevant to their daily practice. These particular principles prohibit attorneys from engaging in the following conduct:[10]

(1) Holding a financial interest that conflicts with the performance of the attorney's duties.

(2) Engaging in a financial transaction or furthering a financial interest by using nonpublic Government information.

(3) Soliciting or accepting a gift or other item of monetary value from a person seeking to obtain an official action from, doing business with, or conducting an activity regulated by the employee's agency.

(4) Using public office for private gain.

(5) Giving preferential treatment to an organization or individual.

(6) Failing to protect and conserve federal property and using it for other than authorized activities.

(7) Engaging in outside employment activities, including seeking or negotiating employment, that conflict with official duties.

In addition to these specific obligations, Government attorneys should not take action or engage in activities that may create the *appearance* that they violate ethical standards.[11] The rules' prohibition of even the appearance of unethical behavior demonstrates that the rules were written not only to hold Government employees to the highest ethical standards, but also to ensure the public has confidence in their ethical behavior.

Although the rules discussed below apply in general to all Executive Branch employees, the discussion in this BRIEFING PAPER is framed in terms of compliance with their requirements by Government attorneys.

■ Gifts From Outside Sources

The rules governing gifts to Government attorneys fall under three different regimes: the civil gift statute, located at 5 U.S.C.A. § 7353, the OGE gift regulations, located at 5 C.F.R. Part 2635, and the criminal bribery and illegal gratuities statute, located at 18 U.S.C.A. § 201. The three regimes govern related conduct and are relevant depending on the intent behind the gift and the nature of the item.

The civil gift statute, applicable to Government employees, including attorneys, in all three branches of Government, prohibits them from soliciting or accepting of value from a person either "(1) seeking official action from, doing business with, or (in the case of executive branch officers and employees) conducting activities regulated by, the individual's employing entity; or (2) whose interests may be substantially affected by the performance or nonperformance of the individual's official duties."[12] The statute also requires supervising ethics offices, such as the OGE, to issue rules or regulations implementing the statute.[13] The OGE has done so at 5 C.F.R. §§ 2635.201–.205. The OGE's gift regulations prohibit similar activity and apply only to Executive Branch employees. Under these rules, Government attorneys are generally prohibited from (directly or indirectly) soliciting or accepting "gifts" either (1) from a prohibited source, or (2) given because of the attorney's official position.[14] These regulations have strong similarities to the illegal gratuities statute,[15] though the OGE gift rules make clear that unless the gifts are accepted in return for being influenced in the performance of an official act, the acceptance does not constitute an illegal gratuity.[16]

To determine whether it is permissible to accept a gift, the Government attorney must first determine whether the item actually constitutes a "gift" under the regulations. A "gift" is defined broadly and includes many items often provided in the commercial marketplace, such as gratuities, discounts, hospitality, loans, forbearance, or other items "having monetary value."[17] This expansive definition includes free services, special discounts, and training (including typical expenses associated with training activities, such as travel, food, and lodging).[18] Attorneys must

be cautious whenever a gift is offered because the broad definition is likely to cover the item in question.

Under certain limited circumstances, items are excluded from the broad "gift" definition. Items excluded from this definition include, but are not limited to, the following: [19]

(a) Modest items of food and refreshments, such as a cup of coffee or doughnut, so long as they are not part of a meal.

(b) Items with "little intrinsic value," such as greeting cards or plaques.

(c) Loans from banks or financial institutions at favorable rates or commercial discounts, as long as they are offered on the same or similar terms offered to the general public.

(d) An item purchased at market value[20] by the employee.

Assuming the item is a "gift" under the regulations, the Government attorney must then determine whether the item was impermissibly provided (1) by a prohibited source or (2) because of the Government attorney's official position.[21] The regulations define a "prohibited source" as a person or organization who (a) seeks official action or to do business with the Government employee's agency, (b) conducts business or activities with or is regulated by the employee's agency, or (c) has interests that may be affected by performance or nonperformance of the employee's official duties.[22] For example, a 2009 investigation by the Department of Justice Office of Inspector General found that Robert Flores, the former Administrator of the DOJ Office of Juvenile Justice and Delinquency Prevention, violated the ethics regulations by accepting a free round of golf from the World Golf Foundation and not repaying $159 in golf fees until two years later on the day before he testified at a congressional hearing on his office's procurement practices. The OIG determined that the World Golf Foundation was a prohibited source because at the time Flores accepted the free golf game, the foundation's First Tee program, a program designed to teach golf to inner city children, was a grantee of the OJJDP and it later also received a $500,000 grant from Flores's office based on his recommendation, despite its low ranking as compared to other applicants.[23]

A gift is "improperly solicited or accepted because of the employee's official position" under the regulations if it would not have been solicited, offered, or given if the attorney had not been working for the Government.[24] In addition, the prohibition applies to circumstances under which the gift is either solicited or accepted *indirectly*, which includes (1) gifts given with the attorney's knowledge and consent to a member of his immediate family (or dependent relative) because of the family member's relationship to the attorney, or (2) given to any other person or organization (including charities) "on the basis of designation, recommendation, or other specification by the employee."[25] This rule is designed to prevent Government employees from sidestepping the gift ban by either funneling gifts through an intermediary or seeking the enrichment of a family member or any other designated person or entity. If a Government attorney cannot accept the gift directly, the attorney should not attempt to do so through or for another person.

There are several exceptions to the general prohibition against the receipt of gifts by Government employees which, if applicable, allow the acceptance of a gift by an attorney without violating these rules.[26] These include, but are not limited to the following:

(a) *Gifts of $20 or less*—A Government attorney may accept unsolicited gifts with an aggregate market value of $20 or less *per source per occasion*, so long as the aggregate market value of individual gifts received from a single person does not exceed $50 in a calendar year.[27] The $20 cap is a limit on the value of the entire item, not a credit that can be applied in paying for the gift. Thus, for example, if an attorney is offered lunch, valued at $40, the attorney may not accept the offer even if the attorney pays the $20 difference. On the other hand, if the attorney is given several segregable items, such as a $15 mug and $10 pen, while attending a conference, he may accept one of the items, but not both.[28] The exception is *inapplicable* to gifts of cash or investment interests, such as stocks or bonds.[29]

(b) *Gifts based on a personal relationship*—A Government attorney may accept gifts given because of a family or personal relationship and *not* because of the attorney's position.[30] Gifts are permitted under this exception where it is clear that the gift is "motivated by a family relationship or personal friendship rather than the position of the employee."[31]

(c) *Discounts and similar benefits*—The exception for discounts and similar benefits includes both items exempt from the definition of gift[32] and other reduced rates, reduced membership fees, and favorable rates/commercial discounts offered because of the attorney's status in a particular group or professional qualifications but unrelated to the attorney's position with the Government.[33]

(d) *Awards and honorary degrees*—A Government attorney may accept a gift, other than cash or investment interests, with a market value of $200 or less, as long as it is a "bona fide award" (or incident to) that is given for meritorious public service or achievement by a person or organization without interests that may be substantially affected by the performance or nonperformance of the attorney's official duties.[34] If the gift has an aggregate market value in excess of $200 and otherwise qualifies under this exception, it "may be accepted upon a written determination by an agency ethics official that the award is made as part of an established program of recognition."[35]

(e) *Gifts based on outside business or employment relationship*—A Government attorney may accept gifts, including meals, lodgings, and transportation, as long as they are provided because of the business or employment activities of the attorney's spouse or the outside employment/business activities of the attorney and not because of the attorney's official position.[36]

(f) *Widely attended gatherings*—A Government attorney may accept free attendance at an event of more than 100 persons, so long as the value of the gift of attendance is no more than $335 and received from a person other than a sponsor of the event.[37] "Free attendance" is defined as including a waiver of all or part of the fees associated with the conference, including "food, refreshments, entertainment, instruction and materials furnished to all attendees as an integral part of the event."[38] It does not include expenses for transportation and lodging or for "entertainment collateral to the event, or meals taken other than in a group setting with all other attendees."[39] This exemption applies when, among numerous other requirements, it has been determined that the employee's attendance is in the interest of the agency.[40] This is an extraordinarily complicated exception to the gift rules. Attorneys are, therefore, urged (and, under certain circumstances, required) to obtain agency advice and/or permission to attend the event.

While an item may appear to qualify under one of these exceptions, attorneys still need to be careful. The OGE warns that even if an employee *may* accept a gift under its rules, it "is never wrong and is often wise to decline a gift offered by a person or organization whose interests could be affected by actions of the agency where you work or a gift offered because of your official position."[41]

More importantly, under certain circumstances, a "gift" that falls under one of the exceptions must be rejected if one of the following three circumstances is present:[42]

(1) The gift has been given to influence the employee to perform an official act.

(2) The employee has solicited or coerced the offering of the gift.

(3) The employee accepts gifts so frequently (from a same or different source) "that a reasonable person would be led to believe the employee is using his public office for private gain."

Acceptance of gifts under these three circumstances could land a Government attorney in hot water. Moreover, a violation of the first circumstance may even run afoul of the criminal bribery and illegal gratuities statute, 18 U.S.C.A. § 201.[43] Note that unlike the ethics regulations, the criminal statute's prohibitions are not limited to the recipient; offenses under the statute may be committed by both the recipient and the provider of the gift.[44] The statute's prohibition against *bribery*, as applicable to Government attorneys, "requires a showing that something of value was…

corruptly demanded, sought, received, accepted, or agreed to be received or accepted by a public official" in return for "being influenced in the performance of any official act."[45] To establish an offense of bribery, a *quid pro quo* is required—or a specific intent to "receive something of value *in exchange* for an official act."[46]

The prohibition against gratuities, as applicable to Government attorneys, "requires a showing that something of value was…demanded, sought, received, accepted, or agreed to be received or accepted by a public official…'for or because of any official act performed or to be performed by such public official.'" [47] Unlike bribery, a quid pro quo is not required, and a violation may be established by demonstrating that the "thing of value" is "merely a reward for some future act that the public official will take…or for a past act that he has already taken."[48] In other words, there is no requirement to establish corrupt intent.

All Government attorneys must keep the criminal bribery and illegal gratuities statute in mind when they are offered a "thing of value" or "gift" from an outside source. If an attorney decides to accept such an item, criminal violations are always a risk, as evidenced by the April 2010 conviction of Constantine Peter Kallas, the former Assistant Chief Counsel with U.S. Immigration and Customs Enforcement for, among 36 criminal charges, accepting bribes as high as $20,000 from illegal aliens and green card holders in exchange for promising to use his official position to provide them with immigration benefits. Kallas faces a maximum sentence of up to 256 years in prison for his crimes.[49]

Even if acceptance of a particular item does not rise to the level of criminality, exemptions from the gift rules are extremely narrow and complicated, and a violation could still result in severe disciplinary action, including the loss of a job.[50] For this reason, it is imperative that attorneys take care when accepting gifts from outside sources. As another BRIEFING PAPERS author has recommended, "unless a gift falls neatly within an exclusion or exception, the safest course of action is to assume the gift is prohibited."[51] Before accepting a gift, Government attorneys faced with ethical issues relating to the gift rules are strongly advised to obtain guidance from an agency ethics official and to consult the regulations directly.[52] If a Government attorney has received a gift that cannot be accepted, the attorney must "promptly" "on his own initiative" comply with the regulations' requirements regarding "proper disposition of prohibited gifts" to avoid being deemed to have improperly accepted an unsolicited gift.[53] "Proper disposition" includes returning the item to the donor, paying the donor the market value of the gift, or, if the item is perishable, donating the gift to charity, sharing it with the attorney's colleagues, or destroying it.[54] With respect to entertainment, services, or other intangible gifts, the attorney may "reimburse the donor the market value."[55] "Subsequent reciprocation by the employee does not constitute reimbursement."[56]

■ Gifts Between Government Employees

In addition to gifts from outside sources, gift giving between Government employees, including attorneys, is regulated. [57] These rules are particularly relevant in Government offices during the holidays and when celebrating employee birthdays. Generally, the regulations prohibit Government attorneys from directly or indirectly giving or soliciting contributions for gifts to an "official superior.[58] An "official superior" is defined as "including but not limited to an immediate supervisor, whose official responsibilities include directing or evaluating the performance of the employee's official duties or those of any other official superior of the employee."[59] For purposes of these gift rules, an employee is considered to be the subordinate of any of his official superiors.[60] Government attorneys are also prohibited from accepting gifts from Government employees receiving less pay.[61] The latter rule does not apply when (a) Government attorneys are not in a subordinate-official superior relationship, or (b) a personal relationship exists between the two Government employees.[62] In addition, the regulations make clear that "official superior" Government attorneys are prohibited from coercing the offering of a gift from a subordinate.[63] In other words, Government attorneys in positions of power and authority should not demand gifts from the individuals they supervise.

When compared to private sector gift-giving practices, the Government prohibition appears

far more restrictive. This blanket prohibition is somewhat softened by several exceptions to the general prohibition. Specifically, the rules permit on an "occasional basis," during celebrations or occasions in which "gifts are traditionally given or exchanged," the following gifts to a superior employee or from an employee receiving less pay:[64]

(1) Noncash gifts, with an aggregate market value of $10 or less per occasion.

(2) Food and refreshments if shared in the office among several employees.

(3) Personal hospitality provided at a residence (only if of a type and value customarily provided by the attorney to personal friends).

(4) Items given in connection with the receipt of personal hospitality if of a type and value customarily given on such occasions.

(5) Under certain circumstance, the transfer of employee "leave," so long as it is not to an immediate supervisor.

In addition to these exceptions, the regulations allow gifts for "special, infrequent occasions" (e.g., important events such as marriage, illness, retirement, or resignation)[65] and for "voluntary contributions of nominal amounts" for a gift, if given infrequently, for a special occasion, or for food and refreshments to be shared among office employees.[66]

■ Conflicting Financial Interests/Impartiality In Performing Duties

Similar to the gift restrictions, the statute and implementing regulations regarding conflicting financial interests and impartiality are designed to prevent favorable treatment and impropriety in Government actions. In particular, these regulations prohibit a Government attorney from engaging in conflicting activities involving actual bias by the Government attorney and in those that merely give the appearance of such biased conflict.

With respect to conflicting financial interests, 18 U.S.C.A. § 208 prohibits a covered Government attorney from participating "personally and substantially" in an official Government action or other "particular matter," in which "he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest."[67] A "financial interest" exists when, as the result of developments in a matter, there is a very real, as opposed to speculative, possibility of gain or loss.[68]

The prohibitions in this statute are clarified in the implementing regulations.[69] "Particular matters" are defined by the regulations as those "that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons."[70] In other words, the definition does not encompass broad policy matters designed to affect the interests of large, diverse groups of individuals.[71] Examples of "particular matters" include judicial (or other) proceedings, requests for a ruling or other determination, contracts, applications, claims, or controversies.[72] In addition, the Government attorney's participation must be both personal *and* substantial, involving the direct participation of the attorney or the attorney's supervision of a subordinate's direct participation in a matter.[73] If a Government attorney is faced with a situation prohibited by these regulations, absent a waiver, the attorney must either divest the interest or disqualify himself or herself from the matter.[74]

The purpose of the statute and its implementing regulations is to prevent Government attorneys from advancing their personal interests at the expense of the public welfare.[75] DOJ attorney Robert Coughlin did just that when he violated, among other statutes, 18 U.S.C.A. § 208. While working at the DOJ, Coughlin accepted over $4,000 worth of meals and sports tickets from lobbyist Kevin Ring, who worked for then-lobbyist and now-convicted felon, Jack Abramoff.[76] Coughlin accepted these gifts in exchange for, among many other things, leaking internal information, setting up meetings, and lobbying his colleagues at the DOJ on behalf of Abramoff's clients.[77] In addition, Coughlin helped waive a competitive bidding requirement and secure a $16.3 million grant for one of Abramoff's clients—a feat that involved persuading other DOJ officials to reverse an original award of $9 million.[78] Following Coughlin's guilty plea, the judge sentenced

Coughlin to 30 days in a halfway house and three years supervised release and ordered him to pay a $2,000 fine.[79]

In addition to prohibiting conflicting financial interests, the regulations regarding impartiality prohibit Government attorneys from engaging in activities that merely give the appearance of bias in the performance of official duties. Two circumstances are covered under this prohibition. First, a Government attorney is prohibited from participating in matters that are likely to affect the financial interests of a member of the attorney's household or a person with whom the attorney has a "covered relationship" where these circumstances would cause a "reasonable person with knowledge of the relevant facts to question [the attorney's] impartiality in the matter."[80] A "covered relationship" is one in which the employee has a very close personal or business relationship with an individual.[81] For example, a DOJ attorney may not participate in a matter in which he is responsible for investigating and potentially prosecuting a company that employs his spouse. Under these circumstances, the attorney is prohibited from participating in the matter unless authorized after disclosure to an agency designee.[82]

The second type of impartial activity covered by the regulations relates to Government attorneys who have received extraordinary severance (or other) payments from former employers before employment with the Government.[83] If such payment is received, the attorney is disqualified for two years from participating in particular matters in which the former employer is a party (or represents a party).[84] An "extraordinary payment" includes cash or other investment interests valued greater than $10,000 and paid after it has been made known to the former employer that the attorney is under consideration for or has accepted a Government position and is unrelated to the former employer's "established compensation, partnership, or benefits program."[85] "A compensation, partnership, or benefits program will be deemed an established program if it is contained in bylaws, a contract or other written form, or if there is a history of similar payments made to others not entering into Federal service."[86] The disqualification may be waived by the attorney's agency if it is determined that the payment is "not so substantial as to cause a reasonable person to question the [attorney's] ability to act impartially in a matter in which the former employer is or represents a party."[87]

■ Seeking Other Employment

Ethical restrictions applicable to Government attorneys are not limited to their employment with the Government. An attorney seeking employment outside the Government is also subject to a complex set of regulations designed to prevent conflicts of interest, bias, and other ethical quandaries that may give outsiders the impression that the attorney lacks the necessary impartiality.

Similar to the conflict-of-interest regulations,[88] the OGE regulations regarding seeking employment outside the Government are designed to ensure compliance with the authorizing statute, 18 U.S.C.A. § 208(a), which requires "an employee [to] disqualify himself from participation in any particular matter that will have a direct and predictable effect on the financial interests of a person 'with whom he is negotiating or has any arrangement concerning prospective employment.'"[89] The regulations broadly define "employment" as "any form of non-Federal employment or business relationship involving the provision of personal services by the employee, whether to be undertaken at the same time as or subsequent to Federal employment."[90] A Government attorney is deemed to be "seeking employment" when, either directly or indirectly:[91]

(a) The attorney is engaged in actual negotiations for employment;

(b) A prospective employer has contacted the attorney about possible employment and the attorney makes a response other than rejection; or

(c) The attorney has contacted a prospective employer about possible employment, unless the sole purpose of the contact is to request a job application or if the person contacted is affected by the performance of the attorney's duties only as part of an industry.

The regulations define "negotiations" for employment broadly as any "discussion or communication with another person, or such person's agent or intermediary, mutually conducted with a view toward reaching an agreement regarding possible employment with that person" and "not limited to discussions of specific terms and conditions of employment in a specific position."[92] While general or exploratory discussions do not constitute negotiations, when a "potential employer and potential employee engage in discussions with a specific position in mind, they are negotiating, even if all the details are not discussed."[93]

A Government attorney is no longer seeking employment under the regulations if (1) either party rejects the possibility of employment and all discussions of possible employment cease, or (2) two months have elapsed since the attorney's submission of an unsolicited resume and the attorney has received no expression of interest from the prospective employer.[94] To be clear, a rejection must be overt and obvious—a deferral of employment discussions until sometime in the near future is not considered a "rejection" of prospective employment.[95]

To prevent a violation of the relevant statutory and regulatory authority, an attorney must either (a) terminate employment discussions or (b) voluntarily cease the personal and substantial participation in the particular matter that will have a "direct and predictable effect on the financial interests of a prospective employer with whom [the attorney] is seeking employment."[96]

■ Misuse Of Position

In addition to improper influence from outside sources, the ethics rules also heavily regulate a Government attorney's use of official time and position.[97] These rules include four different prohibitions: (1) use of public office for private gain, (2) use of nonpublic information, (3) use of Government property, and (4) use of official property.[98]

The first prohibition bars Government attorneys from using their public office for their own (or another's) private gain.[99] Specifically, the regulations prohibit a Government attorney from using the attorney's official position to induce or coerce other persons "to provide any benefit, financial or otherwise, to [the attorney] or to friends, relatives, or persons with whom the [attorney] is affiliated in a nongovernmental capacity."[100] The rule is straightforward: Government attorneys may not use their official title and office to scare or threaten another person into giving them something for private gain. A correlating provision prohibits a Government attorney from using the attorney's title or "authority" to imply that the Government has sanctioned or endorsed the attorney's personal activities.[101] Similarly, Government attorneys are prohibited from using their position and the Government's authority to endorse products, services, or enterprises, unless statutory authority or agency standards exist to do so or "as the result of recognition for achievement given under an agency program of recognition for accomplishment in support of the agency's mission."[102] While these prohibitions prevent clearly egregious abuses of power, they also ensure that Government attorneys are properly representing themselves when engaged in outside activities. If, for example, a Government attorney wishes to represent a pro bono client, the attorney must make clear that the legal advice is not coming from the Government and that the attorney is acting in his or her individual capacity.[103]

The second prohibition forbids a Government attorney from engaging in a financial transaction, or otherwise seeking to further a private interest, using nonpublic information.[104] "Nonpublic information" is defined as "information that the employee gains by reason of Federal employment and that [the employee] knows or reasonably should know has not been made available to the general public," including information deemed confidential by law (or designated as such by an agency official) or otherwise not made available to the public.[105]

The third and fourth prohibitions on the "misuse" of an attorney's position deal with the use of Government property and "official time." Specifically, unless otherwise authorized to do so, an attorney may not use Government property (e.g., Government computers, phones, and office supplies) for unauthorized purposes.[106] Similarly, unless authorized to spend "official time" for unofficial purposes, an attorney's

"official time" must be used "in an honest effort to perform official duties."[107] The regulations also prohibit an attorney from ordering a subordinate to use official time to perform unofficial or unauthorized activities.[108] These prohibitions are no different than the rules found in private offices across the country that ban an employee's use of an employer's computer to send messages to friends on Facebook or the employer's phone to make lengthy, long-distance personal calls or prohibit the employee from spending time "on the clock" running personal errands. While the OGE regulations generally prohibit the use of office materials and official time for unofficial purposes, many agencies have promulgated regulations that permit such activity as long as the cost to the Government is negligible.[109] For example, if a Government attorney wants to represent a pro bono client, the attorney may use small amounts of paper, use a Government computer in a limited manner, and make a limited number of local phone calls to handle the matter.[110] While this is permitted under certain circumstances, attorneys must be careful as the line between what is considered negligible and what is deemed a misuse of Government property is not always clear. Thus, as with the other ethics regulations, Government attorneys should seek the opinion of an agency ethic's official before seeking to use Government property or time for personal reasons.

■ Outside Or Unofficial Activities

In addition to an attorney's official actions, the ethics regulations apply to a Government attorney's unofficial activities outside the office. For example, many Government attorneys teach classes at local law schools, while others may hold leadership positions in professional organizations. These activities are not only permitted under the regulations, they are also often encouraged by high-ranking agency officials seeking to increase the prominence of their agency's attorneys.

The rules relating to outside activities apply regardless of whether the attorney receives compensation.[111] Moreover, while generally permitted, attorneys must be certain that the activities comply with a host of additional requirements and limitations.[112] These include, but are not limited to, the prohibition on outside employment or any other outside activity that conflicts with the employee's official duties, any agency-specific requirement for prior approval of outside employment or activities, and limitations on outside earned income, participation in professional organizations, or paid/unpaid teaching, speaking, and writing opportunities.[113] Activities must also comply with the various statutes and regulations that prohibit, in general, the use of public office for private gain and providing preferential treatment to any particular private organization or individual.[114]

For example, an attorney may not disclose nonpublic information while teaching class at a law school.[115] Although disclosing nonpublic anecdotes about an agency matter would undoubtedly maintain students' level of interest, such behavior would violate the law. The regulations covering outside activities are lengthy and complex, so again attorneys are encouraged, and often required, to speak to their agency ethics officials before engaging in or accepting an outside opportunity.

■ Hatch Act

Government attorneys must also be aware of the legal constraints on their political activity. The "Hatch Act" regulates the political activities of Executive Branch attorneys.[116] The level and type of restrictions on political activity are directly correlated to an attorney's position. Specifically, Government attorneys are generally divided into two categories: "Less Restricted Government employees" and "Further Restricted Government employees."[117] Special, unrestricted rules govern a third and less common group of Government employees. This group includes Government attorneys appointed by the President by and with the advice and consent of the Senate and those paid from an appropriation for the Executive Office of the President.[118] The political activities of these Government attorneys are fairly unrestricted, so long as the activities are not paid for by money from the U.S. Treasury.[119]

Most Executive Branch attorneys fall under the "Less Restricted Government employees" category, allowing them to engage in common political activities.[120] In contrast, attorneys categorized

as "Further Restricted Government employees" are typically employed by agencies devoted to intelligence, law enforcement, and elections and are prohibited from engaging in most partisan political activity.[121]

"Less Restricted" Government attorneys may engage in a wide variety of political activities, including, but not limited to, running for office in nonpartisan elections, campaigning for or against candidates in partisan elections, assisting in voter registration drives, contributing to political organizations, attending political fundraisers, rallies, or meetings, or actively participating or holding office in a political party or club.[122] They are still, however, prohibited from engaging in certain political activities as representatives of the Federal Government, such as the following:[123]

(1) Improperly using official authority to influence an election.

(2) Soliciting or discouraging the political activity of a person with business before the attorney's agency.

(3) Running for office in a partisan political election.

(4) Engaging in political activity while on duty, in a Government office, wearing an official uniform, using a Government vehicle, or using an official title or position.

(5) Hosting political fundraisers.

(6) Accepting donations for a partisan political group, party or candidate for partisan political office.

In addition, "Less Restricted" supervisory attorneys are prohibited from inviting subordinate Government attorneys to political events or activities or suggesting "that they attend the political event or undertake any partisan political activity."[124] Moreover, while either on duty or in a federal building, they may not, for example, wear partisan items of clothing or accessories, distribute or display campaign materials, post partisan statements (including blog postings) on the internet, or send emails advocating for or against "a partisan political party, candidate for partisan political office, or partisan political group."[125]

The last restriction tends to cause the most problems for Government attorneys, as evidenced by the U.S. Office of Special Counsel's charges filed against Bruce Buchanan, an attorney for the National Labor Relations Board.[126] The OSC alleged, among other charges, that while on duty and in his NLRB office, Buchanan prepared two briefing memoranda for a candidate for U.S. Senate in which he used his official Government title.[127] Moreover, while on duty, Buchanan also allegedly "solicited the assistance of a subordinate employee" to prepare memoranda for the campaign (including one which sought campaign contributions), and made a telephone call on behalf of the candidate to an organization with business before the NLRB.[128] The OSC charged Buchanan with five different Hatch Act violations, and in a consent judgment, Buchanan admitted to violating the law and agreed to be removed from federal employment.[129] While this case involved a significant number of Hatch Act violations, lesser activity may still run afoul of the law.

Unlike "Less Restricted Government attorneys," "Further Restricted Government attorneys," as the name indicates, have far less freedom to engage in political activities due to the nature of work conducted at their agencies. These Government attorneys are permitted to engage in certain activities such as assisting in nonpartisan voting registration drives or campaigns in which none of the candidates represents a political party, contributing money to political organizations or attending political events, or being a candidate for public office in a nonpartisan election.[130] "Further Restricted Government attorneys," however, are prohibited from engaging in the same activities as "Less Restricted Government attorneys," plus many others relating to partisan political activity.[131] The OSC provides a lengthy list of prohibited activities on its website.[132]

In recent years, the most common violations of the Hatch Act have resulted from an employee's political activities on the internet. Sending political emails or posting political messages on websites during the work day may result in a violation of the law. For example, the OSC filed a complaint charging an Internal Revenue Service agent with violating the Hatch Act when he forwarded an email to numerous individuals

(including co-workers) from then-presidential candidate Barack Obama soliciting online campaign contributions.[133] The agent sent the email while on duty from his Government office, "and the e-mail included his name, title, group, duty location, and telephone number."[134] Although the Merit Systems Protection Board determined the violation did not warrant removal in this matter, it found otherwise in a similar case involving an Assistant U.S. Trustee employed at the DOJ. The MSPB ordered the removal of the attorney for her violations of the Hatch Act because, unlike the IRS agent, she solicited contributions from subordinate Government attorneys.[135] In this matter, the attorney violated the Hatch Act by "using her official authority or influence to coerce a subordinate employee" to make a political contribution to a gubernatorial candidate.[136] She also admitted that she was aware of the Hatch Act and knew the solicitation "was a little outside the rules." [137] While both cases involved a single solicitation without followup action, the MSPB opinion ordering removal appears to rely heavily on the fact that the matter involved the coercion of a subordinate.[138]

The decision to remove an employee from office for violating the Hatch Act turns on numerous factors. As explained by the MSPB, "[g]enerally, a Hatch Act violation warrants removal if it occurred under circumstances demonstrating a deliberate disregard of the Act."[139] For Government attorneys, removal is a serious risk, especially for those who are aware of the Hatch Act and should know better than to engage in such activity. For example, a staff attorney at the Small Business Administration lost his job at the agency because, even though he was aware of the Hatch Act and its prohibitions, he "received, read, drafted or sent more than 100 emails" using his Government computer to engage in prohibited political activity.[140] Even if a matter does not result in such a severe penalty, violations of the Hatch Act may warrant suspension from work without pay.[141] Likewise, given the high ethical standards to which Government attorneys are held, ethical violations of this nature are likely to result in a significant black mark on an attorney's career. Thus, attorneys are encouraged to check the OSC's Hatch Act website for information,[142] request an advisory opinion from the OSC Hatch Act Unit,[143] or seek counsel from their agency ethics advisors before engaging in *any* partisan political activities.

Obligations To Control Information

Similar to the rules regarding ethics, all attorneys, whether or not they work for the Government, must take care of the information entrusted with them. Every state's ethical rules require attorneys to maintain the confidentiality of information provided to them by clients. For example, the District of Columbia's Rules of Professional Conduct provide, with very limited exceptions, that a lawyer cannot knowingly "reveal a confidence or secret of the lawyer's client," an obligation that "continues after termination of the lawyer's employment."[144] Such duties of confidentiality certainly apply to Government attorneys. Indeed, the District of Columbia's ethical rules make this clear for its attorneys by providing that, for purposes of its confidentiality requirements, the "client of the government lawyer is the agency that employs the lawyer" unless otherwise provided in the law.[145]

However, Government attorneys face a unique tension with their handling of nonpublic information. On one hand, many statutes and regulations require Government attorneys to protect and withhold information from third parties, augmenting the ethical rules' requirement for confidential treatment of client information. On the other hand, ethical rules often allow Government attorneys to disclose confidential information where "permitted or authorized by law"[146]—an important exception given that federal law requires agencies to disseminate information requested by the public, and even provides many Government attorneys and other Government employees with protections to encourage "whistleblowing" about agency misconduct. In light of this tension, Government attorneys should be cognizant of how they create, share, and otherwise handle the large amounts of information available to them as Executive Branch employees. The choices that these attorneys make often affect their competing responsibilities and could even eliminate options for what can be done with the materials in question.

Government attorneys must comply with an overarching ethical requirement that all attorneys face: keeping the confidences of their clients, i.e., "the agency that employs the lawyer."[147] In addition, Government attorneys are prohibited by law from releasing certain information, as seen with the criminal code's prohibition against the disclosure of certain information "relating to the national defense" by any person authorized to possess such information to any person not authorized to possess such information—for example, the disclosure of top secret military information to the media.[148] Government attorneys also may be required to protect certain information under statutes or rules that apply only to their agency. For example, the Federal Trade Commission Act makes clear that the Federal Trade Commission "shall not have the authority to make public any trade secret or any commercial of financial information which is obtained for any person and which is privileged or confidential," with limited exceptions.[149]

As a result, Government attorneys should be cognizant of how their work might be affected by such statutes and fiercely guard against releasing any materials that fall under the ambit of specifically prescribed law or rules prohibiting the disclosure of such information. In addition, given the general duty of confidentiality to their "client," Government attorneys generally should be careful to keep the confidences of the information entrusted to them by their agencies and not reveal any information unless required or permitted to do so by law.

At the same time, the information that Government attorneys obtain and possess is quite frequently released to individuals and organizations outside their agencies. This BRIEFING PAPER focuses on the two primary avenues for such release: the Freedom of Information Act[150] and the Whistleblower Protection Act.[151]

■ Freedom Of Information Act

The Freedom of Information Act, 5 U.S.C.A. § 552, is the primary vehicle for the public to request and obtain materials possessed by Government attorneys. First, FOIA requires agencies to automatically disclose certain types of agency information, such as final rules or adjudicative records.[152] For any other information not affirmatively disclosed, FOIA also generally requires agencies to "make…promptly available to any person" such records upon a request that reasonably describes the materials sought.[153]

However, this requirement to disclose information to a requester is subject to a number of provisions in FOIA that exempt certain materials from release. By creating these exemptions, Congress acknowledged that, despite the importance of encouraging Government transparency and an informed citizenry, agencies also need to protect some types of information.[154] Thus, FOIA specifically prohibits "intelligence community" agencies from making available any records to any foreign Government entity or representative.[155] These agencies include, among others, the Office of the Director of National Intelligence, the Central Intelligence Agency, the National Security Agency, and various intelligence elements of the Department of State, the Department of Homeland Security, the Department of Defense, and the branches of the military.[156] In addition, Congress allows agencies, in their discretion, to withhold any materials that fall under one of the nine exemptions listed at 5 U.S.C.A. § 552(b). The exemptions that are particularly relevant to the practice of most Government attorneys include:

(a) Materials that are exempted from release by another statute, such as the provision prohibiting the FTC from sharing trade secrets and other confidential business information described above (Exemption 3).[157]

(b) Materials that are either trade secrets or privileged or confidential commercial or financial information obtained from a person (Exemption 4).[158]

(c) Inter- or intra-agency materials that "would not be available by law to a party…in litigation with the agency," including privileged attorney-client communications, attorney work product, or materials used in the agency's internal deliberative process (Exemption 5).[159]

(d) Materials "disclosure of which would constitute a clearly unwarranted invasion of personal privacy" (Exemption 6).[160]

Thus, if one of the FOIA exemptions applies to the requested information, an agency can choose to withhold the materials. Given that the agency may have the discretion to release the materials even if an exemption applies, assuming no other statute prohibits disclosure, Government attorneys should be aware that even exempt materials might end up in the hands of the public should the agency's FOIA official choose to release them.[161] In addition, because FOIA requires the release of any segregable portions of a document, materials must be released if the exempt portions can be redacted and if no other exemption applies to the remaining information.[162]

This BRIEFING PAPER focuses on the four FOIA exemptions described above that are relevant to the information handling of most Government attorneys: Exemptions 3, 4, 5, and 6. For specific guidance regarding FOIA, Government attorneys should contact their agencies' designated FOIA officer.[163]

■ FOIA Exemption 3

Exemption 3 is FOIA's "cross-referencing" exemption, as it authorizes agencies to withhold materials if another statute either "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue" or "establishes particular criteria for withholding or refers to particular types of matters to be withheld."[164] Statutes enacted after the enactment of the OPEN FOIA Act of 2009, i.e., after October 29, 2009, would also trigger Exemption 3 by specifically referring to its section in FOIA.[165]

While not all Government attorneys can look to other statutes outside of FOIA to protect their records, such a statute, when one is available, provides a significant method of protecting materials from FOIA release. A statute that prohibits sharing, such as the FTC Act's prohibition on sharing certain business materials described above,[166] is likely to trigger Exemption 3 as a statute that "leaves no discretion on the issue," and thereby excuses—indeed, prohibits—an agency disclosing such information under FOIA. In addition to statutes that outright prohibit certain disclosures, a statute may simply exempt from FOIA disclosure certain materials, as the FTC Act does with any materials the FTC receives in law enforcement investigations "pursuant to any compulsory process…or which is provided voluntarily in place of such compulsory process."[167]

This exemption is particularly important to Government attorneys because it provides a categorical exemption for materials that many Government attorneys possess, such as the law enforcement materials that many FTC attorneys typically seek and obtain from investigative targets. Accordingly, in addition to learning about the specific prohibitions against disclosing certain information, Government attorneys should be well aware of statutes that exempt certain materials from FOIA when they assess whether to request, obtain, or compile information. Given that courts must determine whether a statute meets the specific requirements in Exemption 3 necessary to trigger the exemption, Government attorneys should check with their agencies' designated FOIA officers to learn about the existence and scope of any such statutes that have been found to meet the requirements of Exemption 3.[168]

■ FOIA Exemption 4

The work of Government attorneys frequently requires them to obtain, review, and otherwise possess sensitive business information. For instance, Government attorneys often seek and obtain confidential business information in the course of a law enforcement investigation to assist in determining whether any wrongdoing occurred. Another example is the confidential business materials typically submitted to support grant applications or bids or proposals that attorneys often review.[169] In addition, companies may provide confidential information to educate Government attorneys who are creating rules, drafting reports, or advising Congress on proposed legislation.

Exemption 4 of FOIA exempts from release "trade secrets" and any "privileged or confidential" commercial or financial information received from parties—in other words, certain confidential business materials.[170] This exemption protects both the interests of those submitting confidential business documents, as well as the Government's interest in obtaining cooperation from parties who might otherwise resist submitting confidential business information

for fear that it might end up in the hands of competitors.[171] Thus, to further these interests as related to their work, Government attorneys seeking and possessing such confidential business materials should be aware of the extent to which such materials are protected from FOIA's disclosure requirements.[172]

To understand what Exemption 4 protects, Government attorneys should recognize that the generally accepted definition of a "trade secret" for FOIA purposes is a "secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort" and that is directly related to the productive process.[173] Thus, a "trade secret" is not just any secretive business information—the term only encompasses information about a secretive way of creating a product.

Broader protection for commercial business information comes from Exemption 4's reference to "commercial or financial" information that is either "privileged or confidential." Attorneys should be aware that, while courts often construe this phrase broadly to encompass most information that relates to commerce,[174] whether the material is confidential so that it is exempt from FOIA depends on the circumstances. Under the test adopted by the U.S. Supreme Court in *National Parks & Conservation Ass'n v. Morton*, materials that the submitter was *compelled* to provide to the Government are deemed "confidential" if their release would either "impair the government's ability to obtain necessary information in the future" or "cause substantial harm to the competitive position of the person from whom the information was obtained."[175] Subsequently, in *Critical Mass Energy Project v. Nuclear Regulatory Commission*, the Supreme Court determined that materials that were *voluntarily* submitted to the Government are deemed "confidential" if the submitter does not "customarily" disclose the information to the public.[176] Courts objectively determine which test to apply based on whether a legal requirement exists for submitting the information at issue and not based on the subjective beliefs of the submitter.[177] Thus, even if the agency incorrectly tells the third party that providing materials is voluntary or mistakenly refers to the submission as mandatory, a court would not be swayed by the agency's mistaken representations and will instead focus on whether the submission truly was mandatory.[178]

Based on these differing tests, an agency can more easily justify withholding voluntary submissions because it need only show that the submitter treats the material as confidential. The task of explaining how the release might affect the agency's information-gathering purposes or the submitter's competitive position as required for withholding compelled information is decidedly more difficult. Thus, a court's decision on which standard to apply is critical to its assessment of the withholding, as it was in *Finkel v. U.S. Department of Labor.*[179] In that case, the agency argued that certain withheld materials had been voluntarily submitted because the submitters did not insist on compulsory process, which would have allowed the agency to argue under the more lenient *Critical Mass* standard that the materials were confidential.[180] The court, however, found that the agency collected the data pursuant to regulations that gave it the authority to "inspect and investigate" any workplace, in other words, "pursuant to regulatory compulsion."[181] As a result, the court employed the stricter *National Parks* test and found that the agency failed that test and that Exemption 4 did not apply.[182] In light of this important difference between the *National Parks* and *Critical Mass* standards, where the manner of requesting the information could affect whether the materials are exempt under FOIA, Government attorneys should be cognizant of this distinction when obtaining commercial or financial information from third parties.

■ FOIA Exemption 5

Nearly all Government attorneys participate in the planning process at their agencies. Whether consulting with a client, preparing for litigation, or determining an agency's course of action, Government attorneys create, share, and possess information that reveals the internal given-and-take typical inside the Executive Branch. FOIA Exemption 5 protects such materials from public disclosure. This exemption states that an agency may withhold from release any "inter-agency or

intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."[183] Courts have interpreted this language as exempting from FOIA those agency materials that are privileged from discovery in federal civil litigation,[184] and the three key privileges invoked by Exemption 5 are those protecting attorney-client communications, attorney work product, and materials created as part of an agency's deliberative process.[185]

As a threshold matter, because of its "inter-agency" and "intra-agency" qualifiers, Exemption 5 typically protects only those materials that are not shared outside of the Executive Branch. Thus, once materials that would have otherwise qualified for Exemption 5 are shared outside of the Executive Branch family—even, in some occasions, with state law enforcement or with Congress—those materials may no longer be exempt under Exemption 5.[186] When assessing whether an outside entity communicating with the agency qualifies as an agency consultant or some other "intra-agency" body, courts look to see whether the outside person or group was acting only in the agency's interest, rather than in the person or group's own private interests.[187] In addition, courts are unlikely to find that an outside entity meets the "intra/inter-agency" requirement if the person or group is applying for a benefit in competition with other applicants.[188]

Thus, a Government attorney should keep in mind that sharing internal materials with outsiders might vitiate the applicability of Exemption 5. For example, an attorney might rightly believe that plea discussions with a defendant would be aided by sharing certain attorney work product with the target's counsel, such as drafts of the settlement proposal or internal views regarding the litigation. However, as seen in *Center for Auto Safety v. Department of Justice*, if an attorney decides to share materials externally in such a manner, even if the documents appear at first to involve the agency's deliberative process with "personal predecisional views of subordinate agency officials," a court could determine that, although the documents "may at one time have been used for internal advisory purposes and would therefore be protected," sharing the documents outside the Executive Branch family caused the documents to lose their status as an internal documents and their qualification under Exemption 5.[189] If a Government attorney fails to consider the ramification of sharing internal information on the agency's ability to withhold the materials from a FOIA requester, an agency might find that otherwise privileged materials must be released to the public.

As noted above, Exemption 5 is most typically invoked to protect attorney-client communications, work product, or deliberative materials. FOIA's protection of materials under Exemption 5 is "coextensive with the scope of the discovery privileges it incorporates," meaning that Exemption 5 protects attorney-client and work-product materials in a manner that tracks how the privileges are treated in federal courts.[190] Thus, this Briefing Paper focuses on Exemption 5's protection of deliberative materials that uniquely applies to the Government and leaves the other privileges to the many publications that focus on these common civil litigation privileges.[191]

To protect an agency's deliberative process from public exposure, Exemption 5 exempts from disclosure "predecisional" materials that are part of the process of making recommendations or expressing opinions on legal or policy matters.[192] To qualify for the exemption, the materials need not lead to an actual agency decision. Rather, the materials can be part of a decisionmaking process regardless of the eventual outcome, such as part of an agency's continuing need to assess policies to determine whether and what changes might be needed.[193] As a result, Exemption 5 protects a broad universe of documents and often protects documents with recommendations or advisory guidance, internal communications deliberating on agency action or policy, and most draft documents. However, Exemption 5 generally does not protect "postdecisional" documents that provide final policy statements and implementations, legal opinions, or explanations of agency decisions.[194] Thus, this distinction between predecisional and postdecisional materials is critical to a court's determination of whether Exemption 5 applies to the withheld documents.

Of course, courts have found gray areas between the pre- and post-decisional categories of

materials. As the Supreme Court has noted, "the line between predecisional documents and postdecisional documents may not always be a bright one."[195] As one court has found, even materials created *after* the agency's final decision could be protected if they reveal deliberations from before the decision was made, such as an email "where an agency employee reiterated his own recommendations shortly after the decision was made."[196] Nevertheless, Government attorneys generally should be aware of the difference between these two categories when they create and manage information regarding agency actions. Broadly speaking, a document created to assist the agency in making a decision is more likely exempt from FOIA, while a document created to provide, implement, or otherwise describe a final decision is likely outside the scope of the exemption. For example, a memorandum by an IRS field officer analyzing whether to take certain actions against an individual taxpayer would be predecisional, i.e., antecedent of the decision regarding the taxpayer, while documents containing legal advice to field offices for drafting such memoranda would be postdecisional because even though the legal advice documents "may precede the field office's decision in a particular taxpayer's case, they do not precede the decision regarding the agency's legal position."[197]

In addition, Government attorneys should be aware that the deliberative process privilege generally does not extend to factual information, such as a segregable factual background section of a deliberative memorandum. While agencies have successfully withheld factual materials that would expose the agency's deliberative process, such as factual summaries of nonfinal recommendations[198] or deliberatively chosen selections of facts presented to a decisionmaker,[199] courts often find that factual descriptions are not exempt despite being part of a deliberative document.[200] Thus, attorneys should be mindful that any presentation of facts, even embedded in clearly deliberative materials, could be segregated from the document and disclosed to the FOIA requester.

■ FOIA Exemption 6

Government attorneys frequently obtain information about individuals regardless of the attorneys' type of work. For example, people submit personal information, such as their name, address, social security number, and financial data on tax forms that may be reviewed by Government attorneys. Similar information is typically required on requests for financial benefits that may need attorney review, such as student loan documents. In addition, Government attorneys' law enforcement investigations are a magnet for personal information, whether received pursuant to subpoenas or similar informational demands, collected surreptitiously through wiretaps or informants, or provided voluntarily through consumer complaint databases or other such reporting mechanisms.

Regardless of the method of collection, FOIA seeks to protect the privacy of ordinary citizens, including Government employees, by exempting from disclosure private information about individuals.[201] Exemption 6, which is applicable to all agency materials, allows the withholding of personal information if an agency shows that disclosure "*would* constitute a clearly unwarranted invasion of personal privacy."[202] There is greater protection under another exemption for private information in law enforcement records, which is briefly mentioned below.

As a threshold matter, application of FOIA Exemption 6 requires that the information implicate an "individual's control of information concerning his or her person,"[203] which must amount to "a substantial privacy interest"[204] (i.e., more than *de minimis*). Thus, if a court finds that the withheld materials do not possess identifying information, Exemption 6 will not apply. For example, if a FOIA requester seeking certain agency performance reviews makes clear that the requester is "not seeking personal identifiers of any of the records and anticipate[s] that [the agency] will redact these identifiers," a court could find that Exemption 6 does not apply given that the redacted performance reviews themselves do not identify anyone.[205] In addition, courts have required agencies to disclose materials if the person had somehow provided the personal information in a manner that did not evince an expectation of privacy. For example, in one such case, where an agency possessed statements provided by a person "on the record" to a reporter, the court found

that a person would have no privacy expectation in such statements.[206] In another example, a court determined that Guantanamo Bay detainees did not have a privacy interest in statements made in a *nonpublic* legal proceeding because they lacked an expectation of privacy given that they were not explicitly told that the proceedings would be confidential.[207]

Other situations are not as clear cut for the Government attorney. For example, courts have differed on protecting the identity of people petitioning the Government to take certain action, with some courts finding a lack of a privacy interest in their identity,[208] while others have found that Exemption 6 applies to such information.[209] In addition, although many courts have found that "the privacy interest of an individual in avoiding the unlimited disclosure of his or her name and address is significant,"[210] a few have found only a minimal privacy interest in such information.[211]

Should the agency identify a "substantial privacy interest," the courts determine whether revealing that information "would constitute a clearly unwarranted invasion of personal privacy" by balancing the privacy interest in the withheld information against the public interest in disclosure. The "public interest" inquiry must focus on the core purpose of FOIA—"to shed light on an agency's performance."[212] Thus, if the information does not reveal anything about agency conduct, any non-*de minimis* privacy interest, however small, will justify the withholding of the materials under Exemption 6.[213] In addition, a court is not likely to order the disclosure of information with only an "attenuated" public interest in the release of the materials, as seen with the courts' recurring protection for names and addresses of individuals where the only possible public interest would be to allow the requester to interview those people about possible Government misconduct.[214]

In light of the difficulty predicting the existence of a privacy interest and the fact-based nature of the balancing test, Government attorneys should be aware that their agencies may be required to reveal private information that the attorneys possess. Courts do routinely protect some types of personal data under Exemption 6, and so there is typically little doubt that Exemption 6 protects a person's social security number, birth date, family status, religious affiliation, and other purely personal information that sheds little light on agency conduct. However, for other materials containing personal information, including the inclusion of person's name and address in a document, Government attorneys should consult with their designated FOIA official regarding a potential requirement to disclose such information to a requester. Given that some agencies routinely receive the same requests for certain personal information, the official may have some specific guidance—supported by case law—regarding the information at issue.

Finally, for personal information obtained as part of a law enforcement investigation, Exemption 7(C) provides stronger, and in some cases, categorical, protection from FOIA disclosure. This exemption looks to whether disclosure of records or information compiled for law enforcement purposes "*could reasonably be expected* to constitute an unwarranted invasion of personal privacy,"[215] a standard that has allowed courts to more broadly protect private information in law enforcement records when balancing against the public interest in disclosure. Thus, this sort of information is likely to be protected from FOIA, meaning that Government attorneys need not pay the same level of concern to the potential disclosure faced by all other private information described above in connection with Exemption 6.

■ Whistleblower Protection Act

In addition to the required disclosure that agencies must make under FOIA, federal law encourages certain Government employees, including many Government attorneys, to disclose certain information that reveals Government wrongdoing through the aptly named Whistleblower Protection Act.[216] This act does not provide a mechanism for blowing the whistle or even provide federal employees with guidance on how to do so.

Rather, the WPA protects certain federal employees—after the fact—by prohibiting their managers from taking or failing to take a "personnel action" (or threatening such action) as a result of a whistleblowing disclosure.[217] The WPA defines "personnel action" as, for example, including an appointment, a promotion, a disciplinary or corrective action, a detail, transfer, or reassignment, a decision concerning pay, benefits, awards, or education or

training, or any other significant change in duties, responsibilities, or working conditions.[218] Thus, the WPA prevents retaliatory personnel actions against certain federal employees who reveal evidence of illegal or improper Government activity.[219] While, at first glance, the WPA appears straightforward, the language of the statute and interpretive case law make clear that the WPA's provisions are restrictive and narrowly construed.

Specifically, there are significant exceptions to the WPA, some of which are described below, and Government attorneys should be aware of the limits to the WPA's protection when considering whether to "blow the whistle." The high profile case of Coleen Rowley provides an example. The former FBI attorney wrote a memorandum to then-FBI Director Robert Mueller, which she also provided to two members of the Senate Committee on Intelligence, about what she described as her agency's mishandling of 9/11 terrorist Zacarais Moussaoui.[220] At the end of her memorandum, she stated without elaboration that she "wish[ed] to take advantage of the federal 'Whistleblower Protection' provisions" in making her remarks.[221] However, "[a]t the time, she did not know exactly what [the Act] was—nor that the legislation offered FBI employees a weak shield."[222] Thus, before blowing the whistle, all Government attorneys should be clear about the extent that the WPA may protect them in light of where they work and the potential revelation.

As a starting point, a Government attorney should determine whether his or her particular position is under the protective umbrella of the WPA. The protections broadly apply to those in "covered positions"—current, former, and even prospective executive employees in the competitive and the excepted service, as well as Senior Executive Service personnel.[223] The WPA, however, carves out positions that are "excepted from the competitive service" because their "confidential, policy-determining, policy-making, or policy-advocating character" are not eligible for the WPA's protection.[224] In addition, the President may specifically exclude positions from the WPA's coverage.[225] The WPA also excludes the employees of certain agencies, including the Government Accountability Office (a Legislative Branch agency) and many of the intelligence-gathering agencies, such as the Federal Bureau of Investigation, the Central Intelligence Agency, and the National Security Agency, in light of the classified or otherwise sensitive information in their possession.[226] Many of these agencies have their own whistleblower statutes or otherwise provide protection similar to that afforded by the WPA.[227]

Next, Government attorneys should determine if the disclosure itself would trigger the protections of the WPA. The subject matter of the disclosure must be information that the Government attorney "reasonably believes" is evidence of "a violation of any law, rule, or regulation…gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety."[228] Thus, the disclosure must be about a legal violation or a nontrivial mismanagement, waste, or threat to the public, such as the allegation in Coons v. Secretary of the U.S. Department of the Treasury, in which the whistleblower alleged that the IRS processed a large, fraudulent refund for a wealthy taxpayer.[229] As explained in the WPA's legislative history, the act is "a means to protect the Pentagon employee who discloses billions of dollars in cost overruns, the [General Services Administration] employee who discloses widespread fraud, and the nuclear engineer who questions the safety of certain nuclear plants."[230] The WPA does not cover mere "disagreement" over policy choices[231] or "arguably minor and inadvertent miscues occurring in the conscientious carrying out of one's assigned duties."[232]

In addition, an attorney may not be protected if the disclosure of information is expressly prohibited by law or by Executive Order.[233] If such a disclosure is prohibited by law or Executive Order, then the protections only apply if the disclosure is made to the OSC or to an agency's Inspector General or designated recipient of such disclosures.[234] Consequently, under most circumstances, if such a disclosure is made to another individual or organization, the protections are unlikely to be available to the attorney. Thus, a Government attorney who wants to disclose information with the expectation of whistleblower protection to the media, for example, should first determine whether the disclosure would otherwise violate the law.[235]

Government attorneys who believe that they need the protection of the WPA have a number of options. Depending on their particular circumstances, they may seek redress in one of several different forums, including, seeking an individual right of action before the MSPB, pursuing corrective action from the OSC, or by filing a grievance under their agency's negotiated grievance procedures.[236]

While the WPA encourages Government attorneys to reveal certain information about their clients, attorneys should fully understand the protections available to them before actually blowing the whistle. Thus, as other areas of the law discussed in this BRIEFING PAPER, attorneys are encouraged to seek the advice of an agency ethics official or a representative from the Whistleblowing unit of the OSC before taking further action.

GUIDELINES

These *Guidelines* are intended to assist you in understanding the ethical standards to which Government attorneys must adhere in conducting Government business. They are not, however, a substitute for professional representation in any specific situation.

1. Government attorneys should be cautious when offered an item from a person doing business before the attorney's employing agency. Although there are numerous exceptions to the rule prohibiting gifts from these individuals, there is fine line between acceptable items and those that violate the law.

2. If an attorney is prohibited from directly accepting a gift, indirect receipt through an intermediary (such as a spouse or minor child) is also prohibited.

3. Government attorneys must be cautious before using Government property or spending official time on a personal matter. While many agencies allow *de minimis* use, the exception is narrowly construed.

4. Government attorneys must be very careful before discussing prospective employment opportunities with persons doing business with the attorney's employing agency. It is always advisable to consult with an agency ethics official to determine whether disqualification from a particular matter is necessary.

5. Government attorneys should avoid engaging in activities or taking an action that raises concerns regarding an appearance of the loss of impartiality. Although the activity or action may not be expressly prohibited under the law, if it merely "looks bad," the activity or action should be avoided.

6. Government attorneys generally have a duty of confidentiality to their client agencies, as defined and regulated by their specific state bar rules.

7. Government attorneys should be aware that the Freedom of Information Act allows members of the general public to request any documents from the attorneys' agency, unless a specific FOIA exemption applies to the document in question that exempts it from disclosure.

8. Government attorneys should remember that even exempt materials might end up in the hands of the public should the agency's FOIA official choose to release them. In addition, if a requested document is exempt from FOIA disclosure but has segregable portions that are not exempt, those portions must be released to the requester.

9. Government attorneys who possess or seek confidential business information should be aware that FOIA's Exemption 4 specifically exempts from disclosure trade secrets and commercial or financial information obtained from a person that are privileged or confidential.

10. Government attorneys should keep in mind that FOIA Exemption 5 exempts from disclosure certain internal privileged attorney-client communications and attorney work product, as well as any predecisional deliberative materials, but that sharing such materials outside of the Executive Branch family could cause Exemption 5 to no longer apply to otherwise exempted materials.

11. Government attorneys should be aware that FOIA Exemption 6 also exempts from disclosure certain private personal information, but that

private information that bears on the agency's conduct could trigger its disclosure.

12. The Whistleblower Protection Act only provides certain Government attorneys with after-the-fact protection against retaliatory personnel actions, and these protections apply to only certain disclosures. Government attorneys should consult with their agencies' Inspector General or with the Office of Special Counsel to determine whether their positions qualify for the WPA's protection.

13. Government attorneys are only protected under the WPA if disclosure involves information that the employee "reasonably believes" is evidence of a legal violation or a nontrivial mismanagement, waste, or threat to the public.

★ REFERENCES ★

1/ The term "classified" here is used to describe all sensitive government materials—from "Top Secret" documents to those deemed to be "Confidential." See Exec. Order No. 13526, "Classified National Security Information," 75 Fed. Reg. 707 (Dec. 29, 2009); 6 C.F.R. § 7.21 .

2/ 5 U.S.C.A. § 552.

3/ 5 U.S.C.A. § 2302.

4/ 5 C.F.R. § 2635.101(a); Office of Government Ethics, Do it Right: An Ethics Handbook for Executive Branch Employees 7 (Jan. 1995), available at http://www.usoge.gov/training/training_materials/booklets/bkdoitright_95.pdf.

5/ Exec. Order No. 12674, "Principles of Ethical Conduct for Government Officers and Employees," 54 Fed. Reg. 15159 (1989), as modified by Executive Order 12731, 55 Fed. Reg. 42547 (1990).

6/ 5 C.F.R. § 2635.101(b).

7/ See Office of Government Ethics, "General Principles," http://www.usoge.gov/common_ethics_issues/general_principles.aspx.

8/ See 18 U.S.C.A. §§ 201, 203, 205, 208, 209.

9/ 5 C.F.R. §§ 2635.101(c), 2635.105.

10/ See 5 C.F.R. § 2635.101(b).

11/ 5 C.F.R. § 2635.101(b)(14).

12/ 5 U.S.C.A. § 7353(a).

13/ 5 U.S.C.A. § 7353(b).

14/ 5 C.F.R. § 2635.202(b).

15/ See 18 U.S.C.A. § 201(c)(1)(B).

16/ 5 C.F.R. § 2635.202(b).

17/ 5 C.F.R. § 2635.203(b).

18/ 5 C.F.R. § 2635.203(b).

19/ 5 C.F.R. § 2635.203(b).

20/ "Market value" is defined as "the retail cost the employee would incur to purchase the gift. An employee who cannot ascertain the market value of a gift may estimate its market value by reference to the retail cost of similar items of like quality. The market value of a gift of a ticket entitling the holder to food, refreshments, entertainment, or any other benefit shall be the face value of the ticket." 5 C.F.R. § 2635.203(c).

21/ 5 C.F.R. § 2635.202(b).

22/ 5 C.F.R. § 2635.203(d).

23/ Dep't of Justice Office of Inspector General, Report of Investigation Relating to J. Robert Flores, Former Administrator of OJJDP (Redacted for Public Release) 4, 15–16 (Apr. 27, 2009), available at http://www.justice.gov/oig/reports/OJP/index.htm; Dep't of Justice Office of Inspector General Audit Division, "Procedures Used by the Office of Juvenile Justice and Delinquency Prevention To Award Discretionary Grants in Fiscal Year 2007," Audit Report 09-24, at xvii n.13, 46 (Apr. 2009), available at http://www.justice.gov/

oig/reports/OJP/index.htm; see also Ross, Schecter & Wass, "Justice Department Official Awards $500,000 Grant to Golf Group," ABC News, The Blotter, June 9, 2008, http://abcnews.go.com/Blotter/story?id=5033256&page=1; Schecter & Waas, "DOJ Official Breached Ethics Rules Playing Golf," ABC News, The Blotter, May 1, 2009, http://abcnews.go.com/Blotter/story?id=7473879&page=1.

24/ 5 C.F.R. § 2635.203(e).

25/ 5 C.F.R. § 2365.203(f).

26/ See 5 C.F.R. § 2635.204.

27/ 5 C.F.R. § 2635.204(a).

28/ 5 C.F.R. § 2635.204(a).

29/ 5 C.F.R. § 2635.204(a).

30/ 5 C.F.R. § 2635.204(b).

31/ 5 C.F.R. § 2635.204(b).

32/ See 5 C.F.R. § 2635.203(b)(4).

33/ 5 C.F.R. § 2635.204(c).

34/ 5 C.F.R. § 2635.204(d).

35/ 5 C.F.R. § 2635.204(d).

36/ 5 C.F.R. § 2635.204(e).

37/ 5 C.F.R. § 2635.204(g)(2).

38/ 5 C.F.R. § 2635.204(g)(4).

39/ 5 C.F.R. § 2635.204(g)(4).

40/ 5 C.F.R. § 2635.204(g)(2), (3).

41/ See Office of Government Ethics, Do it Right: An Ethics Handbook for Executive Branch Employees 13 (Jan. 1995), available at http://www.usoge.gov/training/training_materials/booklets/bkdoitright_95.pdf.

42/ 5 C.F.R. § 2635.202(c)(1)–(3).

43/ See 5 C.F.R. § 2635.202(b) (explaining that gifts accepted in violation of 5 C.F.R. § 2635(c)(1) may constitute an illegal gratuity prohibited by 18 U.S.C.A. § 201(c)(1)(B)).

44/ 18 U.S.C.A. § 201.

45/ United States v. Sun-Diamond Growers, 526 U.S. 398, 404 (1999) (describing 18 U.S.C.A. § 201(b)(2)).

46/ Sun-Diamond Growers, 526 U.S. at 404–05.

47/ Sun-Diamond Growers, 526 U.S. at 404 (describing 18 U.S.C.A. § 201(c)(1)(B)).

48/ Sun-Diamond Growers, 526 U.S. at 405.

49/ See Press Release No. 10-071, U.S. Attorney's Office, Central District of California, Immigration Agency Attorney Convicted of Federal Corruption Charges for Taking Thousands of Dollars in Bribes From Immigrants Seeking Status in U.S. (Apr. 20, 2010), available at http://www.justice.gov/usao/cac/pressroom/pr2010/071.html.

50/ See 5 C.F.R. § 2635.106.

51/ Irwin, "Ethics in Government Procurement/Edition III," Briefing Papers No. 99-8, at 5 (July 1999).

52/ See Office of Government Ethics, Do it Right: An Ethics Handbook for Executive Branch Employees 12 (Jan. 1995), available at http://www.usoge.gov/training/training_materials/booklets/bkdoitright_95.pdf.

53/ 5 C.F.R. § 2635.205(c).

54/ 5 C.F.R. § 2635.205.

55/ 5 C.F.R. § 2635.205(a)(3).

56/ 5 C.F.R. § 2635.205(a)(3).

57/ 5 C.F.R. §§ 2635.301–.304.

58/ 5 C.F.R. § 2635.303(a).

59/ 5 C.F.R. § 2635.303(d).

60/ 5 C.F.R. § 2635.303(d).

61/ 5 C.F.R. § 2635.301(b).

62/ 5 C.F.R. § 2635.302(b).

63/ 5 C.F.R. § 2635.302(c).

64/ 5 C.F.R. § 2635.304(a).

65/ 5 C.F.R. § 2635.304(b).

66/ 5 C.F.R. § 2635.304(c).

67/ 18 U.S.C.A. § 208(a).

68/ See United States v. Gorman, 807 F.2d 1299, 1303 (6th Cir. 1986) ("Gain or loss need not be probable for the prohibition against official action to apply. All that is required is that there be a real, as opposed to a speculative, possibility of benefit or detriment.").

69/ 5 C.F.R. § 2635.402(a) (summarizing 18 U.S.C.A. § 208(a)).

70/ 5 C.F.R. § 2635.402(b)(3).

71/ 5 C.F.R. § 2635.402(b)(3); see Van Ee v. Environmental Protection Agency, 202 F.3d 296, 304 (D.C. Cir. 2000).

72/ 5 C.F.R. § 2635.402(b)(3).

73/ 5 C.F.R. § 2635.402(b)(4).

74/ C.F.R. § 2635.402(c).

75/ Goddard, "Business Ethics in Government Contracting—Part I," Briefing Papers No. 03-6, at 5 (May 2003) (citing United States v. Mississippi Valley Generating Co., 364 U.S. 520, 548–49 (1961)).

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77/ United States v. Robert E. Coughlin II, Statement of the Offense, Criminal No. 08-111(April 22, 2008), available at http://64.38.12.138/docs/abramoff/coughlinstatement042208.pdf.

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81/ 5 C.F.R. § 2635.502(b)(1) (providing a detailed definition of the term).

82/ 5 C.F.R. § 2635.502(a).

83/ 5 C.F.R. § 2635.503(a).

84/ 5 C.F.R. § 2635.503.

85/ 5 C.F.R. § 2635.503(b)(1).

86/ 5 C.F.R. § 2635.503(b)(1)(ii).

87/ 5 C.F.R. § 2635.503(c).

88/ See 5 C.F.R. § 2635.402(a) (summarizing 18 U.S.C.A. § 208(a)).

89/ 5 C.F.R. § 2635.601.

90/ 5 C.F.R. § 2635.603(a).

91/ 5 C.F.R. § 2635.603(b)(1).

92/ 5 C.F.R. § 2635.603(b)(1)(i).

93/ Goddard, Jr, "Business Ethics in Government Contracting—Part I," Briefing Papers No. 03-6, at 7 (May 2003) (citing United States v. Schaltenbrand, 930 F.2d 1554, 1558–60 (11th Cir. 1991); United States v. Hedges, 912 F.2d 1397, 1403 (11th Cir. 1990).

94/ 5 C.F.R. § 2635.603(b)(2).

95/ 5 C.F.R. § 2635.603(b)(3).

96/ 5 C.F.R. § 2635.604(a).

97/ 5 C.F.R. § 2635.605.

98/ See 5 C.F.R. § 2635.701.

99/ 5 C.F.R. § 2635.702.

100/ 5 C.F.R. § 2635.702(a).

101/ 5 C.F.R. § 2635.702(b).

102/ 5 C.F.R. § 2635.702(c).

103/ Cruden, "Promoting Pro Bono Service by Government Attorneys," 53 Fed. Law. 30, 32 (Nov./Dec. 2006) ("government attorneys may not use their official business cards, agency letterhead, fax cover sheets, or any other official paperwork that could give the appearance that the government is involved in the case.").

104/ 5 C.F.R. § 2635.703(a).

105/ 5 C.F.R. § 2635.703(b).

106/ 5 C.F.R. § 2635.704.

107/ 5 C.F.R. § 2635.705(a).

108/ 5 C.F.R. § 2635.705(b).

109/ See, e.g., 28 C.F.R. § 45.4 (authorizing DOJ employees to use Government property for personal reasons so long as the use is de minimis).

110/ See, e.g., 28 C.F.R. § 45.4. But see Bledsoe v. Dep't of Justice, 91 M.S.P.R. 93 (Mar. 11, 2002) (finding that a Drug Enforcement Administration special agent's use of her Government-issued cell phone was not de minimis when she used the phone to make over 100 personal calls).

111/ See 5 C.F.R. § 2635.801(a).

112/ 5 C.F.R. § 2635.801(b)–(d).

113/ 5 C.F.R. § 2635.801(b).

114/ See 5 C.F.R. § 2635.801(d)(1)–(8).

115/ See 5 C.F.R. § 2635.807.

116/ 5 U.S.C.A. §§ 7321–7326; see 5 C.F.R. pt.734.

117/ U.S. Office of Special Counsel, Hatch Act: Who Is Covered?, http://www.osc.gov/haFederalwhoiscovered.htm.

118/ See 5 C.F.R. § 734.501.

119/ 5 C.F.R. §§ 734.502–.503.

120/ See U.S. Office of Special Counsel, Hatch Act: Less Restricted Employees, http://www.osc.gov/haFederalLessRestricted.htm.

121/ See 5 U.S.C.A. § 7323(b); U.S. Office of Special Counsel, Hatch Act: Further Restricted Employees, Who are you?, http://www.osc.gov/haFederalFurtherRestricted.htm (containing a list of the agencies employing "Further Restricted Employees").

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123/ U.S. Office of Special Counsel, Hatch Act: Less Restricted Employees—Political Restrictions, http://www.osc.gov/haFederalLessRestrisctionandActivities.htm.

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Act Violations (May 21, 2002), http://www.osc.gov/documents/press/2002/pr02_10.htm.

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130/ U.S. Office of Special Counsel, Hatch Act: Further Restricted Employees—Examples of Permitted Activities, http://www.osc.gov/haFederalFurtherPermittedActivities.htm.

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132/ U.S. Office of Special Counsel, Hatch Act: Further Restricted Employees—Political Restrictions, http://www.osc.gov/haFederalFurtherRestrisctionandActivities.htm.

133/ Special Counsel v. Phillip Mark, 2010 M.S.P.B. 159, ¶ 2 (2010).

134/ Special Counsel v. Phillip Mark, 2010 M.S.P.B. 159, ¶ 2 (2010).

135/ Special Counsel v. Acconcia, 107 M.S.P.R. 60, ¶¶ 4–5, 11 (2007).

136/ Special Counsel v. Acconcia, 107 M.S.P.R. 60, ¶ 2 (2007).

137/ Special Counsel v. Acconcia, 107 M.S.P.R. 60, ¶ 2 (2007).

138/ Special Counsel v. Acconcia, 107 M.S.P.R. 60, ¶ 5 (2007) ("[T]he nature of the offense, the coercion of political contributions from a subordinate employee, is a significant aggravating factor.").

139/ Special Counsel v. Acconcia, 107 M.S.P.R. 60, ¶ 4 (2007) (citing Special Counsel v. Malone, 84 M.S.P.R. 342, ¶ 39 (1999)).

140/ Press Release, U.S. Office of Special Counsel, OSC Wins Removal Order in Hatch Act Case: SBA Lawyer Engaged in Partisan Activity in Government Offices (Aug. 14, 2006), http://www.osc.gov/documents/press/2006/pr06_13.htm.

141/ 5 U.S.C.A. § 7326.

142/ See http://www.osc.gov/hatchact.htm.

143/ See http://www.osc.gov/haRequestingAdvOpinion.htm.

144/ D.C. Rules of Prof'l Conduct R. 1.6(a)(1), (g).

145/ D.C. Rules of Prof'l Conduct R. 1.6(k).

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147/ D.C. Rules of Prof'l Conduct R. 1.6(k).

148/ 18 U.S.C.A. § 793(e).

149/ 15 U.S.C.A. § 46(f).

150/ 5 U.S.C.A. § 552.

151/ 5 U.S.C.A. § 2302.

152/ 5 U.S.C.A. § 552(a)(1)–(2).

153/ 5 U.S.C.A. § 552(a)(3)(A).

154/ John Doe Agency v. John Doe Corp., 493 U.S. 146, 151–53 (1989); see also Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978).

155/ 5 U.S.C.A. § 552(a)(3)(E) (defining "intelligence community" as the term is defined in the National Security Act, 50 U.S.C.A. § 401a(4)).

156/ See 50 U.S.C.A. § 401a(4).

157/ 5 U.S.C.A. § 552(b)(3); see 15 U.S.C.A. § 46(f).

158/ 5 U.S.C.A. § 552(b)(4).

159/ 5 U.S.C.A. § 552(b)(5).

160/ 5 U.S.C.A. § 552(b)(6).

161/ Acumenics Research & Tech. v. U.S. Dep't of Justice, 843 F.2d 800, 806 (4th Cir. 1988).

162/ 5 U.S.C.A. § 552(b); see also Oglesby v. Dep't of the Army, 79 F.3d 1172, 1176 (D.C. Cir. 1996).

163/ For considerably more detail about these and the other FOIA exemptions, the DOJ's frequently updated guide to FOIA is a useful resource. See http://www.justice.gov/oip/foia_guide09.htm. See generally Meagher & Bareis, "The Freedom of Information Act," Briefing Papers No. 10-12 (Nov. 2010) (focusing on Exemptions 4 and 5, from the perspective of procurement attorneys).

164/ 5 U.S.C.A. § 552(b)(3).

165/ 5 U.S.C.A. § 552(b)(3) (referring to statutes "enacted after the date of enactment of the OPEN FOIA Act of 2009 [that] specifically cites to this paragraph").

166/ 15 U.S.C.A. § 46(f).

167/ 15 U.S.C.A. § 57b-2(f).

168/ The DOJ has compiled a list of many statutes that trigger Exemption 3 at http://www.justice.gov/oip/exemption3-october-2010.pdf.

169/ In addition to FOIA, Government attorneys are subject to legal restrictions under the Procurement Integrity Act. Although beyond the scope of this Briefing Paper, Government attorneys with access to Government procurement bid or proposal information are subject to that act's nondisclosure provisions. See 41 U.S.C.A. § 423(a)(2). See generally Briggerman & Bateman, "Handling Procurement Information," Briefing Papers No. 05-9 (Aug. 2005); Goddard, "Business Ethics in Government Contracting—Part II," Briefing Papers No. 03-7 (June 2003); Goddard, "Business Ethics in Government Contracting—Part I," Briefing Papers No. 03-6 (May 2003); Irwin, "Ethics in Government Procurement/Edition III," Briefing Papers No. 99-8 (July 1999).

170/ 5 U.S.C.A. § 552(b)(4).

171/ Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 768 (D.C. Cir. 1974).

172/ For more information on the interplay between Exemption 4 and the Trade Secrets Act, which among other things, prohibits the release of trade secrets, see Meagher & Bareis, "The Freedom of Information Act," Briefing Papers No. 10-12 (Nov. 2010).

173/ Public Citizen Health Research Group v. Food & Drug Admin., 704 F.2d 1280, 1288 (D.C. Cir. 1983).

174/ American Airlines, Inc. v. Nat'l Mediation Bd., 588 F.2d 863, 870 (2d Cir. 1978).

175/ Nat'l Parks & Conservation Ass'n, 498 F.2d at 770.

176/ Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 884–85 (D.C. Cir. 1992).

177/ Center for Auto Safety v. Nat'l Highway Traffic Safety Admin., 244 F.3d 144, 149 (D.C. Cir. 2001).

178/ Center for Auto Safety, 244 F.3d at 148–49 (finding submission was voluntary despite agency representation to submitter to the contrary); In Def. of Animals v. Dep't of Health & Human Servs., No. 99-3024, 2001 WL 34871354, at *9 (D.D.C. Sept. 28, 2001) (finding submission was mandatory despite agency representation to submitter to the contrary).

179/ Finkel v. U.S. Dep't of Labor, No. 05-5525, 2007 WL 1963163 (D.N.J. June 29, 2007).

180/ Finkel, 2007 WL 1963163, at *6.

181/ Finkel, 2007 WL 1963163, at *6.

182/ Finkel, 2007 WL 1963163, at *7.

183/ 5 U.S.C.A. § 552(b)(5).

184/ See, e.g., Nat'l Labor Relations Bd. v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975).

185/ Hunton & Williams v. U.S. Dep't of Justice, 590 F.3d 272, 276 (4th Cir. 2010).

186/ E.g., Dow Jones & Co. v. Dep't of Justice, 917 F.2d 571, 574–75 (D.C. Cir. 1990) (sharing with Congress).

187/ E.g., Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 11 (2001).

188/ E.g., Klamath Water Users Protective Ass'n, 532 U.S. at 12.

189/ Center for Auto Safety v. Dep't of Justice, 576 F. Supp. 739, 747 (D.D.C. 1983), order vacated in part on other grounds, No. 82-0714, 1983 WL 1955 (D.D.C. July 7, 1983); see also Judicial Watch, Inc. v. Dep't of the Army, 435 F. Supp. 2d 81, 91 (finding that correspondence between the Army and defense contractor did not qualify as "inter-agency or intra-agency" for purposes of Exemption 5).

190/ Fed. Trade Comm'n v. Grolier Inc., 462 U.S. 19, 32 (1983).

191/ See, e.g., Rice, Attorney-Client Privilege in the United States (2d ed. 2010).

192/ Vaughn v. Rosen, 523 F.2d 1136, 1143–44 (D.C. Cir. 1975).

193/ Nat'l Labor Relations Bd. v. Sears, Roebuck & Co., 421 U.S. 132, 151 n.18 (1975).

194/ Sears, Roebuck & Co., 421 U.S. at 151–52.

195/ Sears, Roebuck & Co., 421 U.S. at 151 n.19.

196/ North Dartmouth Props., Inc. v. U.S. Dep't of Housing & Urban Dev., 984 F. Supp. 65, 69 (D. Mass. 1997).

197/ Tax Analysts v. Internal Revenue Serv., 117 F.3d 607, 617 (D.C.Cir.1997).

198/ Mead Data Central, Inc. v. U.S. Dep't of Air Force, 566 F.2d 242, 256 (D.C. Cir. 1977).

199/ Mapother v. Dep't of Justice, 3 F.3d 1533, 1538–40 (D.C. Cir. 1993); Montrose Chem. Corp. v. Train, 491 F.2d 63, 71 (D.C. Cir. 1974).

200/ Trentadue v. Integrity Comm., 501 F.3d 1215 (10th Cir. 2007).

201/ Associated Press v. U.S. Dep't of Justice, 549 F.3d 62, 65 (2d Cir. 2008); see also U.S. Dep't of Def. v. Fed. Labor Relations Auth., 510 U.S. 487 (1994) (Government employees).

202/ 5 U.S.C.A. § 552(b)(6) (emphasis added).

203/ Fed. Labor Relations Auth., 510 U.S. at 500.

204/ McGrady v. Mabus, 635 F. Supp. 2d 6, 20 (D.D.C. 2009).

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206/ Billington v. U.S. Dep't of Justice, 245 F. Supp. 2d 79, 85–86 (D.D.C. 2003).

207/ Associated Press v. U.S. Dep't of Def., 410 F. Supp. 2d 147, 150 (S.D.N.Y. 2006).

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209/ Lakin Law Firm, P.C. v. Fed. Trade Comm'n, 352 F.3d 1122, 1125 (7th Cir. 2003) (protecting names and addresses of those who submitted consumer complaints).

210/ National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 875 (D.C. Cir. 1989) (citing Dep't of Agriculture v. Fed. Labor Relations Auth., 836 F.2d 1139, 1143 (8th Cir. 1988); Minnis v. Dep't of Agriculture, 737 F.2d 784, 787 (9th Cir. 1984); Heights Cmty. Congress v. Veterans Admin., 732 F.2d 526, 529 (6th Cir. 1984); Am. Fed'n of Gov't Employees v. United States, 712 F.2d 931, 932 (4th Cir. 1983); Wine Hobby USA, Inc. v. Internal Revenue Serv., 502 F.2d 133, 136–37 (3d Cir. 1974)).

211/ Washington Post Co. v. U.S. Dep't of Agriculture, 943 F. Supp. 31, 34–36 (D.D.C. 1996) (finding little privacy interest in the "relatively generic information" identifying "that a particular individual grows cotton, the address of the farm where the cotton is grown and where the [Department of Agriculture] subsidy is received, and how much of a subsidy that cotton farmer received in 1993").

212/ Showing Animals Respect & Kindness v. U.S. Dep't of the Interior, 730 F. Supp. 2d 180, 194–95 (D.D.C. 2010) (citing U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773(1989)).

213/ Horowitz v. Peace Corps, 428 F.3d 271, 278 (D.C. Cir. 2005).

214/ E.g., Sheet Metal Workers Int'l Ass'n, Local No. 9 v. U.S. Air Force, 63 F.3d 994, 998 (10th Cir.1995).

215/ 5 U.S.C.A. § 552(b)(7)(C) (emphasis added).

216/ 5 U.S.C.A. § 2302.

217/ 5 U.S.C.A. § 2302(b)(8).

218/ 5 U.S.C.A. § 2302(a)(2).

219/ S. Rep. No. 95-969, at 8 (1978), as reprinted in 1978 U.S.C.C.A.N. 2730–31 (explaining that the WPA is designed to protect "employees who disclose government illegality, waste, and corruption…[and] assure them that they will not suffer if they help uncover and correct administrative abuses.").

220/ Ripley & Sieger, The Special Agent, Time, Dec. 22, 2002, available at http://www.time.com/time/subscriber/personoftheyear/2002/poyrowley.html.

221/ Memorandum from Coleen Rowley, Special Agent and Minneapolis Chief Division Counsel, Federal Bureau of Investigation, to Robert Mueller, Director, Federal Bureau of Investigation (May 21, 2002), available at http://www.time.com/time/covers/1101020603/memo.html.

222/ Ripley & Sieger, The Special Agent, Time, Dec. 22, 2002, available at http://www.time.com/time/subscriber/personoftheyear/2002/poyrowley.html.

223/ 5 U.S.C.A. § 2302(a)(2)(B).

224/ 5 U.S.C.A. § 2302(a)(2)(B)(i).

225/ 5 U.S.C.A. § 2302(a)(2)(B)(ii).

226/ 5 U.S.C.A. § 2302(a)(2)(C); see also Weber v. Dep't of the Army, No. 96-3315, 1996 WL 679329, at *1 (Fed. Cir. Nov. 25, 1996) ("[T]he FBI is not an agency covered by the restriction on prohibited personnel practices under [the WPA]").

227/ See, e.g., 5 U.S.C.A. § 2303 (FBI); 5 U.S.C.A. app. 3, § 7 (Inspector General Act); 10 U.S.C.A. § 1034 (Military Whistleblower Protection Act).

228/ 5 U.S.C.A. § 2302(b)(8)(A).

229/ Coons v. Sec'y of the U.S. Dep't of the Treasury, 383 F.3d 879, 890 (9th Cir. 2004) ("Coons's disclosure cannot reasonably be characterized as a 'normal disagreement between managers over a debatable matter of internal policy.' A 'disinterested observer with knowledge of the essential facts…reasonably [would] conclude' that a disclosure alleging that the IRS, whose mission is to collect taxes, improperly processed a large, fraudulent refund for a wealthy taxpayer is an allegation of 'gross mismanagement, a gross waste of funds, [or] an abuse of authority.'").

230/ Frederick v. Dep't of Justice, 73 F.3d 349, 353 (Fed. Cir. 1996) (citing S. Rep. No. 95-969, at 8 (1978), as reprinted in 1978 U.S.C.C.A.N. 2730–31).

231/ Coons, 383 F.3d at 890.

232/ Frederick, 73 F.3d at 353.

233/ 5 U.S.C.A. § 2302(b)(8)(A).

234/ 5 U.S.C.A. § 2302(b)(8)(B).

235/ See Coons, 383 F.3d at 890 (noting that the employee's disclosure of information to two newspapers was not protected under the WPA because, among other reasons, the employee did not meet his burden under 5 U.S.C. § 2302(b)(8) of providing that these disclosures were not specifically prohibited by law).

236/ 5 U.S.C.A. § 7121(g)(2).