

SOCO ADVISORY

**Department of Defense
Office of the General Counsel
Standards of Conduct Office**

**December 8, 2020
Number 20-06
OSD.SOCO@MAIL.MIL**

The purpose of this advisory is to ensure consistency across DoD in responding to Freedom of Information Act (FOIA) requests under 5 U.S.C. § 552 for financial disclosure reports, post-Government employment (PGE) opinions, and related ethics materials.¹ This Advisory has been coordinated with FOIA and Privacy Act experts within the DoD Office of General Counsel.

1. Release of Financial Disclosure Reports.

Public Financial Disclosure Reports – OGE 278.

- a. **Release Required:** The Ethics in Government Act (EIGA) and implementing regulations require agencies to provide a copy of an OGE 278 report to the public upon written request, beginning 30 days after submission by the filer, regardless of whether the report has been reviewed or certified by ethics counsel. Records are to be retained for six years and then purged. Requests for release must be submitted to the cognizant ethics office using a properly completed OGE Form 201, which is available on the OGE web site at <http://www.oge.gov>.
- b. **FOIA Treatment:** FOIA requests for OGE 278 reports should be denied using FOIA Exemption (b)(3), with citation to Section 105 of the EIGA, requiring that requestors make certain statements as part of the application process. The denial should advise requestors of the requirement to submit the OGE Form 201 to the cognizant ethics office.

Confidential Financial Disclosure Reports – OGE 450.

- a. **Release Prohibited:** The Ethics in Government Act, and implementing regulations, prohibit release of any information provided on the OGE 450 report. *See* 5 U.S.C. App. § 107 and 5 C.F.R. § 2634.901(d). Note that the Privacy Act statement on the OGE Form 450 sets forth a very narrow set of circumstances in which the reports may be shared outside of DoD in the absence of the written consent of the filer.² Any disclosures of these documents outside of DoD, including to other Government personnel/organizations, must fit within those parameters when the filer has not provided written consent.

¹ Because most of the reports discussed in this guidance concern individuals and are maintained in systems of records—that is, groups of records about individuals from which information is retrieved by a personal identifier—they are protected by the Privacy Act of 1974 (5 U.S.C. § 552a). Privacy Act-protected records may not be disclosed except pursuant to the written consent of the individual about whom the record pertains, unless an authorized exception applies. 5 U.S.C. § 552a(b). One such exception permitting disclosure is when FOIA requires disclosure of the record—i.e., no FOIA exemptions apply. 5 U.S.C. § 552a(b)(2). Consequently, when evaluating a FOIA request for the records addressed in this guidance, the analysis will typically require an assessment of whether any FOIA exemptions apply—most notably Exemption 6, which protects information that if disclosed would constitute a clearly unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6).

² 5 U.S.C. § 552a(b)(3), (e)(3)(C). A comprehensive list of these “routine uses” must be published in the applicable Privacy Act system of records notice pursuant to 5 U.S.C. § 552a(e)(4)(D).

- b. FOIA Treatment: FOIA requests for OGE 450 reports should be denied using FOIA Exemption (b)(3), with citation to Section 107 of the EIGA.

2. Release of Ethics Opinions Generally

Government attorneys represent the Government, not individual employees. However, the provision of ethics advice to agency personnel primarily serves to protect the Government from the potential negative repercussions associated with ethical violations by individual employees. Therefore, ethics advice provided by agency counsel to current employees is typically protected by the attorney-client privilege. Legal opinions and advice provided by ethics counsel may be withheld from release under FOIA Exemption (b)(5) as “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.” 5 U.S.C. § 552(b)(5). Note that attorney-client privilege can only be waived by the appropriate authority for the issuing Department or Agency.

3. Release of PGE Opinions & Related Documents

PGE Opinions & DD2945 Data. Requests for the disclosure of PGE opinions and related documents, such as the DD2945, warrant special consideration. PGE letters specifically disclaim any attorney-client relationship and are specifically intended for use by outside persons (e.g., prospective employers). Therefore, attorney-client privilege will generally not apply to the PGE opinions or to any information provided to ethics counsel in order to obtain such opinions.

However, other FOIA exemptions may apply. PGE documents will likely contain non-public information about the employee, such as personally identifiable information (PII) and information concerning non-Federal employment. Exemption 6 of the FOIA permits the Government to withhold all information about individuals in “personnel and medical files and similar files” when the disclosure of such information “would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6).

PGE opinions and related documents often contain PII and other private information about the departing employee, including the fact that he or she is seeking, has sought, or is considering non-Federal employment. Additionally, PGE documents sometimes contain non-public and sensitive information concerning prospective employment. Consequently, the disclosure of PGE documents could implicate substantial privacy interests. Disclosure is especially problematic because PGE documents discuss situations outside of government employment and therefore typically do not advance the FOIA’s purpose of providing an understanding of the operations or activities of the government.

Ethics counselors should carefully review PGE documents and coordinate closely with FOIA counsel to ensure that any information implicating a privacy interest under Exemption 6 is withheld from public disclosure. In some instances, merely confirming the existence of PGE opinions and related documents might implicate a privacy interest by confirming that an employee has sought or is in the process of seeking outside employment. In those instances,

absent an official announcement that the employee is preparing to leave the Department for outside employment, ethics counselors and FOIA professionals should neither confirm nor deny the existence of PGE opinions and related documents (i.e., provide a “*Glomar*” response). After the employee departs, the privacy interest related to seeking non-Federal employment dissipates, but again, absent an official statement confirming such things as the departing employee’s new employer or position, Exemption 6 may require redaction of the employee’s name, the name of any outside employer, any details of the outside employment arrangement, any salary information, and any other facts that would enable someone to identify such information from the documents.

STOCK Act Notifications. The analysis applicable to requests for PGE opinions will similarly apply to requests for the disclosure of the “employment negotiations” notifications required of OGE 278 filers under Section 17 of the STOCK Act. Employees likely have substantial privacy interests in the identities of prospective employers, especially if the employee is negotiating for numerous positions or has not yet left the Government. Consequently, information exempt from disclosure under FOIA, most notably Exemption 6, should be withheld or redacted.

4. Special Considerations for Responding to Requests from Congress and Inspectors General.

The DoD has issued specific guidance on responding to requests for information from Congressional sources. DoD Manual 5400.07 identifies the process for responding to these types of inquiries, clarifying how to respond to inquiries both from individual members of Congress and from Congressional committees or subcommittees. DoD Manual 5400.07, “DoD Freedom of Information Act (FOIA) Program,” para. 6.1(b) (Jan. 15, 2017).³

Section 6 of the Inspector General Act of 1978 (IG Act), as amended, authorizes statutory Inspectors General (OIG) access to all information necessary to perform its functions under the IG Act with limited exceptions. Privileged attorney-client information is not included among the exceptions to the broad access granted by § 6 of the IG Act. Accordingly, relevant attorney-client privileged information must be provided to OIG upon request to facilitate OIG’s investigatory, auditing, oversight or other inspector general functions, including those related to alleged violations of Federal ethics rules. However, in responding to such requests, ethics counselors must specifically identify any privileged information, such as attorney communications with employees made for providing legal advice or work-product. This is best accomplished by highlighting text in documents and verbally identifying privileged communications when responding to requests for documents or information. Providing privileged material to the OIG pursuant to the IG Act does not waive the privilege. IG investigators may use privileged information while conducting their investigations, but generally are not allowed to use or reference such information in public reports unless the appropriate official has affirmatively waived a claim of privilege. As noted above, there are specific limitations described in the applicable Privacy Act statements (and the associated systems of

³ Privacy Act-protected records may be disclosed to either chamber of Congress or to the chairs of congressional committees or subcommittees to the extent of matters within such committee or subcommittee jurisdiction. 5 U.S.C. 552a(b)(9).

records notices) concerning when release of financial disclosure reports outside of DoD is authorized. DoD investigative offices requesting financial disclosures or related ethics documents also should be requested to use the attached request template created jointly by DoD IG and SOCO, or similar format tailored to the requesting office.

DISCLAIMER: The purpose of this advisory is to disseminate relevant information and sources of general guidance, policy and law on Government Ethics issues to the Department of Defense ethics community. Advisories are not intended to be and should not be cited as authoritative guidance, DoD policy, or law.

DoD Standards of Conduct Office
<https://dodsoco.ogc.osd.mil/>



INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
4800 MARK CENTER DRIVE
ALEXANDRIA, VIRGINIA 22350-1500

[Date]

MEMORANDUM FOR DESIGNATED AGENCY ETHICS OFFICIAL OR DESIGNEE
[NAME OF DEPARTMENT, AGENCY, e.g. DEFENSE LOGISTICS AGENCY]

SUBJECT: Ethics Record Request

The Department of Defense, Office of the Inspector General, Defense Criminal Investigative Service (DCIS), is requesting ethics records pursuant to an official matter. This request concerns the following person (for departed personnel, most recent official contact information is provided):

Full Name:

Official e-mail:

Official phone number:

Official Position & Title:

Dates of Employment:

Rank or Grade:

Agency/Organization Name:

Please provide the following records concerning the person named above [*Agent to mark requested documents as appropriate*]:

- OGE Form 450, *Confidential Financial Disclosure Report*;
- OGE Form 278e, *Public Financial Disclosure Report*;
- OGE Form 278-T, *Public Financial Disclosure Report: Periodic Transaction Report*;
- Any disqualifications, recusals and/or screening arrangements;
- Any requests, disapprovals, or approvals for 18 U.S.C. §208 waivers;
- Any requests, disapprovals, or approvals for 5 C.F.R. §2635.502 authorizations;
- Any Ethics Counselor guidance provided relating to the requested documents;
- Any Ethics Counselor conflicts analysis related to the requested documents;
- Any Ethics Counselor guidance relating to the Procurement Integrity Act (41 USC §2104);
- Any Ethics Counselor guidance relating to post-government employment restrictions;
- Any Supervisor communications to ethics counsel relating to the requested documents;
- Any explanatory e-mails, comments or other documents regarding the requested records; or
- Other [Describe other specific documents or records.]

This request is made pursuant to the Office of Government Ethics government-wide System of Record Notices (SORNs): OGE/GOVT-1, *Executive Branch Personnel Public Financial Disclosure Reports and Other Name-Retrieved Ethics Program Records*; and OGE/GOVT-2, *Executive Branch Confidential Financial Disclosure Reports*. Both SORNS authorize a routine use disclosure of pertinent information to the appropriate Federal, State, or local agency responsible for investigating, prosecuting, enforcing, or implementing a statute, rule, regulation, or order, where the disclosing agency becomes aware of an indication of a violation or potential violation of civil or criminal law or regulation. The DCIS is a DoD law enforcement

organization responsible for investigating and enforcing ethics laws and regulations within the Department. DCIS will ensure any substantiated violation of an ethics criminal statute is referred to the Department of Justice (DOJ) pursuant to 28 U.S.C. § 535 and will report such information to the Office of Government Ethics (OGE) using the OGE Form 202, "Notice of Conflict of Interest Referral Form."

The point of contact (POC) of this request is [Full name and title]. Please provide the requested materials to the POC via email at [XXXXXXXXXX@dodig.mil].

Sincerely,

Assistant Special Agent in Charge/Resident
Agent in Charge
Defense Criminal Investigative Service
Department of Defense, Office of the Inspector
General