

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY



Office of Government Ethics

January 11, 2013

VIA EMAIL TO:

XXXXXXXX XX XXXXXXXX
XXXXXXXXXXXX XX XXX XXXXXXXX XX XXXXXXXX
XXXXXXXX@XXX.XXX

Dear xx. xxxxxxx:

This responds to your request for advice concerning whether a proposed outside activity for pay would be consistent with your ethical obligations as a government employee. Based upon the information you provide in your memorandum to me of December 4, 2012, and your several corresponding email messages, as long as you ensure that you meet the requirements set forth below, your proposed outside activity is permissible.

You state that you are the xxxxxxx xxxxxxx xxxxxxx for the xxxxxxx xxxxxxx xxxxxxx at xxx xxxxxxxxxxx xx xxx xxxxxxx xx xxxxxxx (xxxxx). From xxxx through xxxxxxx 2012, you worked on a special project pursuant to a xxxxxxx xxxxx xxxxxxx to xxx to develop and implement x xxxxxxx xxxxxxx xx xxxxx xxxxxx involving xxxxx xxxxxxxxxxxxxx xx xxxxx, xxxxx, and xxxxxx xxxxxxxxxxxxxxx. As the xxxxxxx xxxxxxx for the xxxxx, you xxxxxxxxxxxxxx the xxxxxxx xxxxxxx, and delivered xxxxxxx to xxxxxxx xxxxxxxxxxxxxxx throughout the xxxxxx xxxxxx. That xxxxxxx was free to the xxxxx xxxxxxxxxxxxxxx until the xxxxx expired on xxxxxxx x, 2012. Despite the cessation of xxxxx xxxxxxx and the project essentially having concluded, you state that you continue to receive requests from xxxxx xxxxxx to provide xxxxxxx and that these xxxxxxxxxxxxxxx are willing to pay for these services. You query whether you can accept these xxxxxxx offers and be paid personally for appearing while on unpaid leave from xxx.

There are essentially three applicable provisions of the Code of Conduct that inform my decision, each of which are found in Chapter 18, Title 6B of the D.C. Municipal Regulations.¹ Noting specifically that your proposed activity is to engage in teaching, DPM §§ 1804.3 through 1804.5 provides guidance. The DPM states:

¹ Hereinafter, Title 6b of the D.C. Municipal Regulations will be referred to as the District Personnel Manual or DPM.

1804.3 An employee may engage in teaching activities, writing for publication, consultative activities, and speaking engagements that are not prohibited by law, regulation, or agency standards, only if such activities are conducted outside of regular working hours, or while the employee is on annual leave or leave without pay.

The second provision states:

1804.4 The information used by an employee engaging in an activity under § 1804.3 shall not draw on official data or ideas which have not become part of the body of public information, except nonpublic information that has been made available on request for use in such capacity, or unless the agency head gives written authorization for use on the basis that its use is in the public interest.

And finally:

1804.5 If the employee receives anything of monetary value for engaging in an activity under §1804.3, the subject matter shall not be devoted substantially to the responsibilities, programs, or operations of his or her agency, to his or her official duties or responsibilities or to information obtained from his or her government employment.

Here, you confirm that this is indeed a teaching activity and that the activities would be performed outside of work hours, so DPM § 1804.3 is satisfied. You also confirm that the information you will use for teaching is entirely in the public domain, including the application of certain federal and state laws to various xxxxxxxxx, so DPM § 1804.4 is satisfied as well.

It is the restrictions contained in § 1804.5, however, that give me some pause. You state that you will be paid for these teaching activities, and that this payment will be aside from and in addition to your salary as a xxx xxxxxxx xxxxxx. The question then becomes whether “the subject matter” of the activity is “devoted substantially” to your “official duties” as a xxx xxxxxxx xxxxxx. You deny that this is the case and explain that your xxxxxxxx duties at xxx, while they sometimes include aspects of xxxxxxxxx xxxxxxxxx, do not include teaching the subject matter of the proposed presentations, which would be entitled xxxxxx xxxxxxx xx xxxxxxxxxx xxxxxx xxx xxxxxx xxxxxx

This is a close question. On the one hand, the expertise that makes your skills marketable to other xxxxxxxxxxxxxx (and perhaps to private entities as well) was acquired almost exclusively from the xxxx xxxx xxxxx, which funded your xxxxxx while you were working then as a xxx xxxxxxx xxxxxx. On the other hand, that program ended in xxxxxxxxx xx 2012 and so it is no longer a part of your current duties at xxx. The prohibition in DPM § 1804.5 is worded in the present tense, not in the past, so it would appear not to reach prior duties but only to those that currently are part of your official government duties.

Moreover, the type of information you would be relying upon in these trainings, as you state, is entirely public (i.e., xxxxxxxx and their xxxxxxxxxxxxxx), so I am not concerned that confidential information you obtained from your government employment would now be inappropriately revealed or used for your private gain or to the detriment of the District. As prior duties, I believe these circumstances may be analogized to the Post-employment restrictions contained in the DPM. Those restrictions would prohibit you

from working on a particular matter concerning specific parties that came before you while in the District's employ.² Obviously there are no specific parties or matters involved here in that this is training, so you would not be prohibited from engaging in this activity post-employment.³

The fact that the proposed activity is teaching, rather than some other activity such as advising or consulting, is an important distinction which I believe is the difference here. As demonstrated by the separate provisions for teaching in the DPM, I believe these restrictions were intended to be viewed somewhat more loosely than the restrictions on other types of outside activity.

With respect to the specific materials you will use in the proposed teaching activity, you may not use the actual materials that you obtained and/or created as part of your official government duties at xxx. You may, however, create new materials, as long as those materials do not draw on official data or ideas which have not become part of the body of public information. *See* DPM § 1804.4.⁴

As we discussed, you must also be careful not to use government time or resources in this endeavor. That includes having your name listed on any D.C. Government website as the point-of-contact for these presentations. If xxx decides instead that it wishes you to continue as you did while you were being xxxx xxxxx xxx xxxxx, you may of course provide other xxxxxxxxxxxx with these trainings free of charge without having to take leave. *See* § 1804.1(b). But then those duties would become part of your official duties once again and you would not be able to charge personally for conducting the trainings.

I also note that although the DPM permits you to be on annual leave while engaging in this proposed teaching activity, such use must not interfere with your ability to perform your official government duties for xxx. DPM 1804.1(a).

Finally, you must be certain that there is no confusion that you are, in fact, acting in your private capacity when you conduct these trainings. A government employee may not capitalize on his or her official title or position for private gain.⁵ In other words, you must be assured that the reason for which your training expertise is sought is not based upon your status as a xxxxxxxx xxxxxxx xx xxx.

Assuming your representations to be complete as to pertinent facts and entirely accurate, and further assuming that you would abide by the restrictions outlined above, I find that the restrictions on outside employment would not prevent you from pursuing this proposed outside activity. Your role as xxxxxxxx xxxxxxxx xxx xxx xxxxxxxx xxxxxxxx xxxxxxxx, according to you, does not overlap with the trainings you intend to provide to other xxxxx xxxxxxxxxxxx.

² DPM § 1814.

³ The intent of the post-employment rules is not to disqualify former employees from using their expertise in future employment, but to prevent the use of District confidential information and undue influence for the gain of future employers.

⁴ The head of your agency may, however, approve such use of non-public information (in writing) where there would be a benefit to the public interest.

⁵ DPM § 1803.1(a)(1).

Please be advised that this advice is provided to you pursuant to section 219 of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011 (“Ethics Act”), effective April 27, 2012, D.C. Law 19-124, D.C. Official Code § 1-1161.01 *et seq.*, which empowers me to provide such guidance. As a result, no enforcement action for violation of the District’s Code of Conduct may be taken against you in this context, provided that you have made full and accurate disclosure of all relevant circumstances and information in seeking this advisory opinion.

Finally, you are advised that the Ethics Act requires this opinion to be published in the District of Columbia Register within 30 days of its issuance, but that identifying information will not be disclosed unless and until you consent to such disclosure in writing, should you wish to do so.

Please let me know if you have any questions or wish to discuss this matter further. I may be reached at 202-481-3411, or by email at darrin.sobin@dc.gov.

Sincerely,

/s/

DARRIN P. SOBIN
Director of Government Ethics
Board of Ethics and Government Accountability