

From: [REDACTED]
To: [Fugh, Justina \(she/her/hers\)](mailto:Fugh,Justina@epa.gov)
Subject: RE: CORRECTION to Formal reply to your request from April 24, 2023
Date: Monday, August 14, 2023 7:05:15 AM

Justina,
Good Morning.
Thank you for the clarification.
Have a great day!

[REDACTED]
Investigator
U.S. EPA Office of Inspector General – Office of Investigations
1200 Pennsylvania Avenue NW (MC 2431T)
Washington, DC 20460

[REDACTED] (W)



To report fraud, waste or abuse impacting EPA, please contact the EPA OIG Hotline via telephone numbers 202-566-2476 or 888-546-8740, fax 202-566-2599, or email at oig_hotline@epa.gov

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From: Fugh, Justina (she/her/hers) <Fugh.Justina@epa.gov>
Sent: Saturday, August 12, 2023 3:25 PM
To: [REDACTED]
Subject: CORRECTION to Formal reply to your request from April 24, 2023

Hi [REDACTED],

I heard from the Region that I made an apparent error in my earlier message to you. I had typed that the “contract through which costs are being considered for allocation was let in 2019” but I should have typed 2017. The Region kindly pointed out that the contract with Techlaw/AlterEcho ran from **2017 – 2020**. They note that the Techlaw/AlterEcho was contracted first as a subcontractor to CSRA and then as a subcontractor to ERG. That typo does not alter the conclusion that this contract was let after Mr. Batson had retired from federal service in 2015, so he could not have worked on that specific party matter at all.

Here is the corrected text, in full, which also includes a specific reference to the date that Mr. Batson retired:

Hi [REDACTED],

My apologies for the delay in formally responding to you. My colleagues in other parts of EPA responded with impressive alacrity to my requests for factual information in order to answer your question, but I allowed the crush of other duties to impede my response to you.

That I “ignored” you has nothing at all to do with the high esteem in which I hold you as an OIG investigator and fellow Frankfurt American High School eagle! I appreciate your continuing patience with me.

In April 2023, the nonprofit Protect the Public Trust (PPT) sent the attached letter to the EPA Inspector General, DOJ and the Office of Government Ethics. In it, they raised allegations that a former EPA employee, DAVID BATSON, had violated the post-employment statute at 18 U.S.C. § 207. I contacted your office to indicate that I would be available to you as the agency’s subject matter expert on ethics. When we discussed this issue initially, I explained that the post-employment statute is a representational ban only. It does not prevent former employees from ever working after they leave EPA, even on those same specific party matters that they worked on personally and substantially. Rather, the law places certain restrictions on their ability to *represent* someone else back to the United States or to EPA on that same matter. In determining how the statute applies to a former employee, we need to ascertain their status at the time they left the Agency. At the time of his retirement **in 2015**, Mr. Batson was non-supervisory (and had not been a supervisor in the preceding year) and was not a “senior official” subject to 18 U.S.C. § 207(c). Therefore, the only provision of the post-employment statute that applies to him is the permanent restriction at 18 U.S.C. § 207(a)(1).

Under this provision, Mr. Batson is prohibited from representing another entity or person back to the United States on the same specific party matter that he worked on personally and substantially. He cannot make any appearance or communication with the intent to influence a federal official on that same matter. But in order for the prohibition to apply, all of the elements must be present: there must be a specific party matter, he must have participated in that same specific party matter personally and substantially, and he must now be making an appearance or communication back to the United States with the intent to influence on that same specific party matter. To be clear, if a former employee is representing himself, then he does not trigger the statute. Similarly, if the specific party matter at issue is not the same one that he worked on while at EPA, then he will not be violating the statute. We must ascertain that *all* of the elements are present in order to determine if there is a possible violation.

The complaint suggests that Mr. Batson’s current work under a contract to apply cost allocation principles to the Diamond Alkali Superfund site constitutes a post-employment violation simply because of his prior involvement at this site, but I cannot agree. In determining whether the post-employment statute has been triggered, I have to identify what the specific party matter at issue really is and that it is the same specific party matter that the former employee participated in personally and substantially. PPT appears to believe that the Diamond Alkali Superfund site itself, but the actual facts don’t support that a Mr. Batson violated the post-employment statute.

A Superfund site can take years to resolve and often involves multiple phases and potentially responsible parties. In determining whether the situation involves the “same particular matter,” the federal ethics rules advise that “all relevant factors should be considered, including the extent to which the matters involve the same basic facts, the same or related parties, related issues, the same confidential information, and the amount of time elapsed.” See 5 C.F.R. § 2641.201(h)(5). It is not necessarily true that any given Superfund site will

always be only one specific party matter. There may be different phases to the remediation, different feasibility studies, and even different remedial actions.

With respect to the Diamond Alkali remediation, time has moved on inexorably. The remedy is in an entirely different phase than when Mr. Batson worked at EPA. The Record of Decision announcing the Agency's remedy selection for which cost allocation is being determined now was issued on March 3, 2016, after Mr. Batson had retired. See [the Final Allocation Recommendation Report](#). And the contract through which costs are being considered for allocation was let **in 2017** – after Mr. Batson retired -- and there was no previous such contract. Even if there had been a contract, it would not necessarily be considered the same specific party matter itself. The applicable post-employment regulation states that, “[g]enerally, successive or otherwise separate contracts ... will be viewed as different matters from each other, absent some indication that one contract ... contemplated the other or that both are in support of the same specific proceeding.” See 5 C.F.R. § 2641.201(h)(5)(ii)(C).

That Mr. Batson is applying *cost allocation principles* at the same site does not lead to an automatic conclusion that he has violated the post-employment statute. Cost allocation principles do not fit the definition of a “specific party matter.” They are not a “specific proceeding affecting the legal rights of parties or related set of transactions between identified parties, such as a contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case.” See 5 C.F.R. § 2641.201(h)(1). Instead, they are a rubric applied to a certain set of facts. It's the set of facts that might be a “specific party matter” but in considering the factors at 5 C.F.R. § 2641.201(h)(5), we have identified distinct differences. Applying cost allocation at the Diamond Alkali site now involves a different ROD and a different set of potentially responsible parties.

After discussion with the Region 2 and OECA/Office of Site Remediation Staff and careful review of the relevant facts, I am writing to confirm that all of the post-employment elements *are not present* in this situation. Therefore, on these facts, I conclude that Mr. Batson has not violated the post-employment statute. Again, my apologies for the delay in responding to you formally. If you have any questions, then please feel free to contact me.

Sorry for the error!

Cheers,

Justina

Justina Fugh (she/her) | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 | phone 202-564-1786

Send general ethics questions to ethics@epa.gov and we will get back to you.

From: [REDACTED]
To: [Fugh, Justina \(she/her/hers\)](#)
Subject: RE: Formal reply to your request from April 24, 2023
Date: Tuesday, August 8, 2023 10:12:51 AM

Justina,

Good Morning.

Thank you.

You are the best.

As an fyi, there is a reunion in Las Vegas next September for FAHS folks. I plan on attending. Can get you the details if you want.

Have a great day!

[REDACTED]
Investigator

U.S. EPA Office of Inspector General – Office of Investigations

1200 Pennsylvania Avenue NW (MC 2431T)

Washington, DC 20460

[REDACTED] (W)



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From: Fugh, Justina (she/her/hers) <Fugh.Justina@epa.gov>

Sent: Friday, August 4, 2023 7:41 PM

To: [REDACTED]

Subject: Formal reply to your request from April 24, 2023

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they leave EPA, even on those same specific party matters that they worked on personally and substantially. Rather, the law places certain restrictions on their ability to *represent* someone else back to the United States or to EPA on that same matter. In determining how the statute applies to a former employee, we need to ascertain their status at the time they left the Agency. At the time of his retirement, Mr. Batson was non-supervisory (and had not been a supervisor in the preceding year) and was not a “senior official” subject to 18 U.S.C. § 207(c). Therefore, the only provision of the post-employment statute that applies to him is the permanent restriction at 18 U.S.C. § 207(a) (1).

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With best regards,

Justina

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