



United States  
**Office of Government Ethics**

1201 New York Avenue, NW., Suite 500  
Washington, DC 20005-3917

UNITED STATES OFFICE OF GOVERNMENT ETHICS

020930 August 15, 2002 AUG 19 P 3:40

Edgar M. Swindell  
Associate General Counsel for Ethics  
Designated Agency Ethics Official  
Department of Health and Human Services  
Washington, DC 20201

Dear Mr. Swindell:

This is in response to your letter dated June 17, 2002, requesting advice about the application of financial disclosure requirements to detailees under the Intergovernmental Personnel Act (IPA). Specifically, you ask: which Ethics in Government Act (EIGA) provision determines whether IPA detailees should file Public Financial Disclosure Reports (SF 278s), and how do the filing criteria apply to various pay mechanisms; whether a position comparability determination may be requested if a detailee does not qualify as a public filer; and, if a detailee can be designated a Confidential Financial Disclosure Report (OGE 450) filer if he does not meet the criteria for public filing.

In December 2001, 5 U.S.C. § 3374(c)(2) of the IPA was amended to make State and local government employees, who are detailed to Federal agencies, "employees" of the Federal agency for purposes of the EIGA.<sup>1</sup> As you know, § 101 of the EIGA requires certain Federal government employees to file public financial disclosure forms, including:

- (1) those whose positions are classified above GS-15 under the General Schedule;
- (2) those in positions outside the General Schedule, for which the rate of basic pay is equal to or greater than 120% of the minimum rate of basic pay payable for GS-15; and
- (3) those in any other position determined by the Director of OGE to be of equal classification.

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<sup>1</sup>The National Defense Authorization Act for FY 2002, Pub. L. No. 107-107 was signed into law on December 28, 2001. Section 1117 of the Act amended 5 U.S.C. § 3374(c)(2).

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5 U.S.C. app. § 101(f)(3). Because IPA detailees are now considered Federal employees under the EIGA, those who occupy positions that fit one of the above categories are required to file public financial disclosure reports.

We have reviewed the Office of Personnel Management (OPM) handbook on the IPA Mobility Program and have been in contact with OPM's Office of Merit Systems Oversight and Effectiveness. According to OPM, agencies have a great deal of discretion with respect to the assignment of persons on detail under the IPA. A detailed employee "may be assigned to an established, classified position in the Federal agency, or may be given a set of ad hoc, unclassified duties, relevant only to the specific assignment project."<sup>2</sup> The following responses are provided in light of this information.

**Which EIGA provision determines whether IPA detailees should file Public Financial Disclosure Reports (SF 278s)?**

If an IPA detailee is assigned to an "established, classified position," with a rate of basic pay equal to or greater than 120% of the minimum rate of basic pay for a GS-15, and the detailee is reasonably expected to perform the duties of his position for more than 60 days in a calendar year, then under section 101(f)(3), the detailee is required to file a Public Financial Disclosure Report. As we have stated in prior OGE opinions, it is the position that controls the public financial disclosure reporting requirement.<sup>3</sup> In OGE 98 x 2, we cited a 1977 Senate Governmental Affairs Committee report which noted that determining who should file a public report is based on the level of responsibility, which is indicated by the lowest level of pay for the position.

For example, your agency may enter into an agreement with a State agency that will provide for the detail of a scientist to work on a research project involving an experimental drug. The scientist is detailed to an SES position. Even though, as a detailee, the scientist will remain an employee of the State, he has been assigned to a classified position for which "the rate of basic pay is equal to or greater than 120% of the minimum rate of

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<sup>2</sup>Office of Merit Systems Oversight and Effectiveness, U.S. Office of Personnel Management, A Handbook on the Intergovernmental Personnel Act Mobility Program, 14 (1998).

<sup>3</sup>In the Office of Government Ethics (OGE) Informal Advisory Letters 81 x 3 and 98 x 2, OGE looked at both the wording of the Ethics in Government Act and its legislative history, which states that "it is the position and not the individual which controls the public financial disclosure reporting requirements."

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basic pay payable for GS-15," so the scientist must file a public report.

According to the OPM Handbook, IPA detailees who are given a set of ad hoc, unclassified duties continue to be paid directly by their non-Federal organization at a rate of pay based on their non-Federal job. In addition, a Federal agency may reimburse the non-Federal organization for all or part of the costs of the assignment.<sup>4</sup> These elements of the IPA program pose unique problems when determining an employee's filing status for financial disclosure purposes. Therefore, we are seeking additional information from OPM concerning detailees in unclassified positions under the IPA, and will advise you on how the filing requirements apply in this situation after we have completed our consultation with OPM.

**Whether a position comparability determination may be requested if a detailee does not qualify as a public filer.**

Yes. If the individual is detailed to a classified position that is not among those listed in the EIGA as requiring the submission of the SF 278, an agency may request under section 101(f)(3) a determination by OGE that the detailee's position is of equal classification to those required to file SF 278s. If you decide to seek an equal classification determination from OGE, to the extent possible, please address the criteria set forth in our letter to you dated October 30, 1998, on this topic. We would apply those criteria in determining whether an IPA detailee's position warrants equal classification under section 101(f)(3).

**Can a detailee be designated a Confidential Financial Disclosure Report (OGE 450) filer if he does not meet the criteria for public filing?**

Yes. The EIGA authorizes each branch of the Government to collect confidential financial disclosure reports from its employees. See 5 U.S.C. app. § 107. Subpart I of 5 C.F.R. part 2634, the regulations setting forth the confidential disclosure system for the executive branch, offers guidance to agencies about which positions should be designated for confidential reporting. See 5 C.F.R. § 2634.904. An IPA detailee who is not required to file an SF 278 may be required to file a confidential report if his duties and responsibilities meet the criteria at 5 C.F.R. § 2634.904(a)(1). For example, if the scientist described above is detailed to a GS-15 position and given the duty of overseeing a grant to a private university that is

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<sup>4</sup>Office of Merit Systems Oversight and Effectiveness, U.S. Office of Personnel Management, supra note 2.

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studying the experimental drug, the agency's ethics official may determine that the assigned duties and responsibilities require the scientist to file a confidential report.<sup>5</sup>

I hope this information is of assistance to you. We will be able to provide you with additional advice concerning the filing requirements applicable to detailees who are not assigned to any classified position, after we receive additional guidance from OPM. In the meantime, if you have any additional questions, please do not hesitate to contact me, or a member of your staff may contact Elaine Newton, Attorney-Advisor, at 202-208-8000, ext. 1137.

Sincerely,

A handwritten signature in cursive script, appearing to read "Marilyn L. Glynn", with a long horizontal flourish extending to the right.

Marilyn L. Glynn  
General Counsel

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<sup>5</sup>The agency should notify a detailee required to file a new entrant (public or confidential) report that he has 30 days from the date of notification to file the report.