



NATIONAL SCIENCE FOUNDATION
OFFICE OF INSPECTOR GENERAL
OFFICE OF INVESTIGATIONS

CLOSEOUT MEMORANDUM

Case Number: A11060042

Page 1 of 1

We investigated a new NSF program officer¹ for reviewing of a proposal² for which she appeared to have a conflict of interests. The program officer at the time she arrived at NSF had been engaged in several concrete steps to move forward in a collaboration with the PI³ on the proposal. These steps continued after the program officer was assigned responsibility for the review of the proposal. The program officer did not notify NSF management of the appearance of the conflict. Based on the facts developed during our investigation, we referred the matter to NSF (attached) for appropriate action with respect to the program officer and NSF's review of its policies and procedures. NSF responded (attached) noting that the program officer had left NSF, and that it would consider our recommendation for modifying its conflicts of interest training for new program officers.

This case is closed.

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NATIONAL SCIENCE FOUNDATION

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August 6, 2012

TO: Alan F. Boehm, Assistant Inspector General for Investigations

FROM: Karen Santoro Designated Agency Ethics Official 

SUBJECT: Report of Investigation (OIG Case No. A 11060042)

The attached Investigation Report concerned a new program officer who was found to have failed to disclose an appearance of a conflict of interest (COI). The report recommended administrative actions be taken with respect to her. I have been advised that the program officer (who was the subject of the report) is no longer with NSF, so the recommendation regarding her conduct is moot.ⁱ

However, the Report made two additional recommendations aimed at the NSF's COI training program in general. These recommendations are addressed below:

Recommendation # 1: Ensure new employees complete their annual COI training requirement prior to conducting proposal review activities or at a minimum within 3 months of their start date.

The requirement to receive annual COI training on a calendar year basis is contained in U.S. Office of Government Ethics (OGE) Government-wide Standards of Ethical Conduct for Employees of the Executive Branch at 5 CFR 2638, Subpart G. OGE only requires that the training be completed by the end of the calendar year.

Nonetheless, OGC is scheduled to provide the annual COI training to new program officers as part of the NSF Academy's planned Core Course entitled "Merit Review Basics" in August, September, and October of 2012. NSF is considering whether this Core Course should be required for all new program officers within three months of their NSF start date.

Recommendation #2: Review Manual 15 and division level guidance for consistency with the controlling regulations regarding the appropriate handling of appearances of COIs.

Manual 15 is consistent with the OGE regulations and consistent with the NSF supplemental regulations approved by OGE in 1966. A recent audit by OGE, including a review of Manual 15, did not note any discrepancies between Manual 15 and OGE's regulations, and we agree with OGE.

OGC concurs with the recommendation to review division level guidance for consistency with OGE's regulations. We recently met with our divisional conflicts officials on June 28, 2012. At that meeting, OGC specifically requested that any divisional documents on appearances of COI be sent to us for review. Only DEB responded. OGC has reviewed their guidance and it now has been revised to reflect [REDACTED]'s longstanding practices. OGC will follow-up with the divisional conflicts officials to ensure no other divisional level guidance exists.

Attachment

cc: Cora Marrett, Deputy Director

Allison Lerner, Inspector General

[REDACTED] Division Director, [REDACTED]

[REDACTED] Office of the Director's Liaison to OIG

Lawrence Rudolph, General Counsel

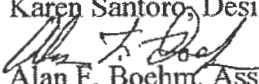
ⁱ It is important to note that the OIG recommendation regarding the program officer was based on the impartiality regulations in Government-wide Standards of Ethical Conduct for Employees of the Executive Branch. 5 CFR 2635.502(b)(1). OIG found that the program officer failed to disclose a collaborator relationship with a PI who submitted a proposal she was asked to review. The program officer and the PI had exchanged e mails about a joint project. That finding failed to consider the NSF Supplemental Standards of Ethical Conduct, which state that "An employee has a covered relationship, within the meaning of 5 CFR 2635.502(b)(1), with ... [a] person who is an investigator ...and with whom the employee has ... [c]ollaborated on a project, book, article, report, or paper within the last 48 months." 5 CFR 5301.102(a)(3)(ii)(C). "Collaborated" is past tense, and there must be or have been a project, book, article, report, or paper on which the two individuals collaborated. OGC's longstanding interpretation is that plans to collaborate do not fall within this regulatory restriction. Thus, the program officer was not required to disclose mere plans to collaborate in the future which may or may not come to fruition.



National Science Foundation • Office of the Inspector General
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MAY 22 2012

Confidential

To: Karen Santoro, Designated Agency Ethics Official
From:  Alan F. Boehm, Assistant Inspector General for Investigations
Subject: Report of Investigation (OIG Case No. A11060042)

Please note: The attached report contains confidential personal information and it should be disclosed only to individuals who must have knowledge of its contents to facilitate NSF's assessment and resolution of this matter. Unauthorized disclosure may result in personal criminal liability under the Privacy Act, 5 U.S.C. § 552a(i)(1). This cover memorandum does not contain confidential personal information and may be disclosed (separated from the attached report) as needed to address its recommendations.

The attached Investigation Report concerns a new NSF program officer who failed to disclose the reasonable appearance of a conflict of interests (COI) when recommending the disposition of a colleague's pending NSF proposal. Our report contains a recommendation with respect to the program officer's conduct with respect to handling her colleague's proposal.

In addition to the recommendation directly related to the program officer's conduct, we also recommend that the Foundation take additional actions to strengthen its COI training program. Currently a new employee may take up to one year to complete an initial full COI training session, while having substantial involvement in the award making process. Also, NSF internal guidance on COIs, such as Manual 15 or division level guidance such as the document used by the program officer's division, do not appear to address adequately the intention of the regulations with respect to appearances of COIs. We therefore recommend that the Foundation: (1) ensure new employees complete their annual COI training requirement prior to conducting proposal review activities or at a minimum within 3 months of their start date; and (2) review Manual 15 and division level guidance for consistency with the controlling regulations regarding the appropriate handling of appearances of COIs.

National Science Foundation Office of Inspector General



Confidential Report of Investigation Case Number A11060042 May 22, 2012

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FOR OFFICIAL USE ONLY.**

It contains protected personal information, the unauthorized disclosure of which may result in personal criminal liability under the Privacy Act, 5 U.S.C. § 552a. This report may be further disclosed within NSF *only* to individuals who *must* have knowledge of its contents to facilitate NSF's assessment and resolution of this matter. This report may be disclosed outside NSF *only* under the Freedom of Information and Privacy Acts, 5 U.S.C. §§ 552 & 552a. Please take appropriate precautions handling this confidential report of investigation.

Executive Summary

We reviewed an allegation that a new NSF Program Officer (the Subject)¹ handled the review of a proposal (the Proposal)² from a PI³ with whom she had ongoing collaborative activities and therefore an actual or apparent conflict of interests (COI). After interviewing the Subject and reviewing email correspondence, we conclude that the preponderance of the evidence shows that the Subject took several concrete and substantive steps to collaborate with the PI, which created an appearance of a COI that she knowingly failed to disclose to NSF. We recommend NSF take appropriate steps to counsel the Subject and review her proposal assignments for possible undisclosed COIs.

Background

Federal employees, including NSF rotators, have a basic obligation of public trust that is enunciated in Executive Order 12731 and codified in 5 C.F.R. part 2635. In particular, § 2635.101(b)(14):

Employees shall endeavor to avoid **any actions creating the appearance** that they are violating the law or the ethical standards set forth in this part. Whether particular circumstances create an appearance that the law or these standards have been violated shall be **determined from the perspective of a reasonable person** with knowledge of the relevant facts. [Emphasis added.]

The regulation discusses in more detail impartiality in official duties in § 2635.501 - .503 (Subpart E). Although much of the analysis described in Subpart E involves covered relationships premised on financial benefits, the regulation encompasses more broadly those situations that would cause a reasonable person to question impartiality.⁴ The Office of Government Ethics' (OGE) comments in promulgating part 2635 provide additional guidance in evaluating appearances:

Section 2635.502(a)(2) is intended to alert employees to the fact that covered relationships described in §2635.502(b)(1) are not the only relationships that can raise appearance issues and to encourage employees to use the process set forth in §2635.502 to address **any circumstances that would raise a question regarding their impartiality**. These could well include an employee's assignment to a particular matter to which a boyfriend, girlfriend, or other close friend is a party.⁵ [Emphasis added.]

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⁴ § 2635.502(a)(1-2).

⁵ 57 Fed. Reg. 57 35006 (07/23/92) at 35027.

On arrival at NSF, permanent and temporary staff members attend a New Employee Orientation (NEO), which customarily includes a briefing by the Office of General Counsel (OGC)⁶ alerting them of their responsibilities to declare actual and apparent COIs. OGC generally informs the NEO attendees that each division has an appointed, experienced conflicts official to address COI issues at the division level.⁷ A hardcopy of NSF Manual 15 "Conflicts of Interest and Standards of Ethical Conduct"⁸ is included in the materials OGC provides to new staff at this briefing. Manual 15 is a compilation of statutory and regulatory language applicable to NSF staff. All new NSF staff members are automatically granted 1 hour of official duty time to read Manual 15, which provides NSF-specific guidance in the application of the government-wide ethics rules. The OGC briefing is customarily followed by an OIG briefing in which the new employees are reminded of the importance of consulting with the NSF Designated Agency Ethics Official (DAEO) about possible COIs. Furthermore, each new employee must complete a full COI training session administered by the DAEO before the end of the calendar year of their start date. Thus, new employees entering early in the calendar year (e.g., January) may take up to almost one year to complete that training.

The Subject's division⁹ provides its program staff with a four-page document entitled "A rough guide to avoiding conflicts of interest when selecting panelists and *ad hoc* reviewers" (The Rough Guide).¹⁰ This document is of analogous use in this case because, although it is intended for application to panelists, the COI principles are the same.¹¹ It is primarily a highly condensed version of NSF Manual 15, but it is more detailed than the NSF Form 1230P¹² used during panel review. The Rough Guide includes explanatory material to assist program officers in evaluating apparent and actual COIs of the reviewers they select, which provides more detail on some matters than does Manual 15. Of analogous relevance to the present case, The Rough Guide states that an "intellectual COI" involves:

an intellectual relationship with the PI, co-PI, or other named person; such a relationship is defined as having co-authored any publication in the last 48 months, having co-edited a book or co-organized a symposium within the past 24 months, or having an active research collaboration.^[13]

This is a restatement of the guidance in Manual 15. The Rough Guide further describes examples of situations of *appearances of* COIs that are not deemed actual COIs, including:

⁶ We note that such a briefing does not always occur; for example, no OGC staff presented at the 9 April 2012 NEO.

⁷ Specific guidance for the Divisional COI officials is found in NSF Manual 20, Tab 1 at 44-55.

⁸ Tab 1 at 1-43, NSF Manual 15 "Conflicts of Interest and Standards of Ethical Conduct." NSF conflicts officials have additional guidance for assessing COIs in NSF Manual 20 (Tab 1 at 44-55). Throughout this report we refer to the OIG-generated page numbers which appear in the lower right corner preceded by the case number. The page numbering is sequential from Tab 1 through Tab 6.

⁹ [REDACTED]

¹⁰ Tab 3.

¹¹ It was the Subject who brought this document to our attention to support her assertion that an intent to collaborate is not a conflict.

¹² Tab 2, NSF Form 1230P.

¹³ Tab 3 at 60.

a potential collaboration between the panelist/reviewer and the PI was discussed but never established in any concrete way.^[14]

OIG Investigation

The Subject entered NSF as a rotator on 28 February 2011 and attended the NEO. When we interviewed her on 4 November 2011, she recalled attending the OGC portion of the NEO on that day and stated that she had read NSF Manual 15 within her first 2 months of service at NSF. She also stated she had a COI discussion with her division director. According to OGC, the Subject was scheduled for her first annual full COI training on 28 June 2011, but she did not attend that session. The Subject completed the COI training on 13 December 2011, over 9 months after her entry date.

In the months leading up to and following her arrival at NSF, the Subject was engaged in email correspondence with two researchers, each at a different institution in different Western states.¹⁵ One of these researchers was the PI on the Proposal. These emails discuss their plans for preparing a joint proposal for submission to either the National Institutes of Health (NIH) or NSF. These emails demonstrate the Subject:

- contacted her division about submission of the planned proposal and had been referred to her division conflicts official (email dated 14-18 January 2011);¹⁶
- contacted an NIH program office, including a project summary with the other two researchers identified by name, to assess whether the planned proposal would fit within the NIH program's next funding cycle (email dated 18-20 January 2011);¹⁷ and
- told the two researchers she would soon be a rotator at NSF (email dated 20 January 2011).¹⁸

An email the Subject sent to the two researchers on 2 March 2011—her 3rd day at NSF—contained the subject line “Arizona grant proposal trip” and discusses how best to structure her travel to discuss the work on a joint proposal.^{19,20} The following day her division assigned the Proposal to her.²¹

¹⁴ Tab 3 at 61.

¹⁵ Tab 6.

¹⁶ Tab 6 at 139-141.

¹⁷ Tab 6 at 72-74 and 142.

¹⁸ Tab 6 at 72.

¹⁹ Tab 6 at 88.

²⁰ Our review of NSF travel records for the PO identified only one NSF-funded IR/D trip to the PI's state. The trip appeared reasonably related to the PO's ongoing NSF award for which an appropriate substitute negotiator had been approved by NSF. There is no indication IR/D or other NSF funds were used solely for a proposal preparation trip.

²¹ Tab 5 at 69.

On 7 March 2011, the other researcher²² declined to participate further in the planned proposal.²³ The Subject's response described her intentions to move forward with the PI in finding a substitute third partner, noting that she was "still keen on the [proposal] idea" and "still very interested in developing a proposal sooner rather than later, even if we want to return to [another] idea next year if NSF" has an applicable program.²⁴ This other idea involved changing the species to be studied to the one which the PI proposed to study in the Proposal.

After receiving notification that NSF had declined the Proposal, the PI learned that the Subject served as the cognizant program officer. He emailed the Division Director,²⁵ stating "the program officer to whom this proposal was ultimately assigned had a clear conflict of interest with it"²⁶ We note the PI did not identify the Subject as a collaborator on his biographical sketch²⁷ in the Proposal, although he provided an extensive list of collaborators. In his email to the Division Director, the PI explained that he had not previously collaborated with the Subject, who did not initiate the collaboration with him until after the Proposal was submitted.²⁸ The Proposal has a submission date of 10 January 2011,²⁹ ten days before the Subject's email alerting the PI to her pending arrival at NSF.

Although the Subject was the "Managing Program Officer" for the Proposal,³⁰ she told us that she did not influence the Proposal's rating with the review panel. The panel ranked the Proposal in the "Do Not Fund" group, the lowest of the three groups. She also stated that the recommendation to decline was a group decision between her and the other three program officers in her division. There are no indications that the panelists' written reviews or the panel summary had been improperly influenced.

The Subject asserted her understanding that the COI rules and specific guidance within her division did not treat an "intent to collaborate" as a COI. The Subject stated her belief that collaboration does not exist until there is a *submitted* proposal or an exchange of lab personnel. The Subject provided a highlighted copy of The Rough Guide to support this assertion. Specifically under the heading "Cases where there is an apparent conflict of interest," she highlighted in support of her assertion the following example "where there appeared to be a conflict but in fact there was not":

If a potential collaboration between the panelist/reviewer and the PI was discussed but never established in any concrete way.

We identified no evidence of direct and predictable financial relationships as defined in § 2635.502 that would create an actual COI.

²² [REDACTED]

²³ Tab 6 at 83.

²⁴ Tab 6 at 83.

²⁵ [REDACTED]

²⁶ Tab 7 at 143.

²⁷ Tab 4 at 68.

²⁸ Tab 7 at 143.

²⁹ Tab 4 at 65.

³⁰ As indicated on the declination letter and the proposal assignment log in eJacket.

Conclusion

From the perspective of a reasonable person with knowledge of the relevant facts, we conclude that the evidence supports finding the Subject had an appearance of a COI that she knowingly failed to disclose to NSF. Despite her assertion that an intention to collaborate is not a COI, the highlighted text in The Rough Guide the Subject offered in her defense in fact undermines her defense. While not an authoritative source of the ethics rules, the highlighted text in The Rough Guide as quoted above describes a set of circumstances that create an appearance of a COI. Furthermore, the specific language of § 2635.101(b)(14) directs federal employees to “endeavor to avoid any actions creating the appearance” of a COI as “determined from the perspective of a reasonable person with knowledge of the relevant facts.” OGE’s comments in promulgating part 2635 note OGE’s position that relationships other than those described in the regulation “can raise appearance issues” that may “raise a question regarding their impartiality.”

In her reliance on The Rough Guide, the Subject asserted that no collaboration had formed because she and the PI did not submit a proposal jointly, and no joint work had commenced in each other’s lab. The Subject maintains that absent either of these events, no collaboration formed, and therefore her intent to collaborate was not a COI. However, the evidence demonstrates that the Subject went beyond an abstract intention to collaborate and carried out significant, concrete steps to move the effort forward. These steps included scheduling a meeting necessitating travel, inquiring about funding opportunities under all three names, and crafting a project summary that she included in her inquiries about suitable programs at NIH and NSF.

It is unlikely under the present facts that the Subject had sufficient sway over both the panel and the other program officers to demote the Proposal out of consideration for funding. Further, given the Subject’s interest in pursuing the collaboration with the PI, including a possible change in the collaboration project to the same species involved in the Proposal, would just as likely have resulted in her promoting the Proposal toward a recommendation for funding.

Regardless, the Subject’s failure to disclose the relationship prevented NSF conflicts officials from properly managing the appearance of a COI. The 9-month period of time the Subject was given under NSF’s current policy for full COI training for new employees somewhat mitigates the Subject’s culpability in this matter but does not absolve her of her failure to disclose.

Recommendation

We recommend that NSF take appropriate administrative action with respect to the Subject including additional counseling and a complete COI review of the proposal portfolio assigned to her.³¹

³¹ 5 C.F.R. § 2635.106 authorizes disciplinary and corrective action.