

Office of Government Ethics

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**Letter to the General Counsel of a Federal
Agency dated September 6, 2002**

This is in response to your letter of August 14, 2002, concerning a proposed waiver, pursuant to 18 U.S.C. § 207(j)(5), of the post-employment restriction at 18 U.S.C. § 207(c). The waiver would be granted by the [head] of the [agency], to [a former employee] at [the agency].

[The former employee] has been hired by [a] Corporation. [The Corporation] would like [the former employee] to serve as Program Manager under a ten-year safety contract with [the agency]. The safety contract pertains to [an agency program]. Although [the former employee] is already employed by [the Corporation], we understand that he will not assume the position of Program Manager unless and until he is granted a waiver under section 207(j)(5).

As explained below, the Office of Government Ethics (OGE) agrees that the [head] of [the agency] may grant a waiver to [the former employee]. In addition, we provide guidance on the permissible scope of such a waiver.

JUSTIFICATION FOR WAIVER

Section 207(c) prohibits a former senior employee from communicating to or appearing before his former agency for one year, on behalf of another person, with the intent to influence official action. The bar applies to representational activity concerning virtually any matter, including matters in which the former employee had no involvement for the Government. Because [the former employee] retired in August 2002, his one-year "cooling-off" period will expire in August 2003. Absent a waiver, section 207(c) would significantly restrict the nature of [the former employee's] interactions with [the agency] concerning the safety contract for the duration of the cooling-off period.

A waiver under section 207(j)(5) would permit [the former employee] to communicate with [agency] officials on behalf of [the Corporation] for the purpose of furnishing scientific or technological information concerning the matter or matters specified in the waiver. Section 207(j)(5) provides that --

The restrictions contained in subsection (a), (c) and (d) shall not apply . . . if the head of the department or agency concerned with the particular matter, in consultation with the Director of the Office of Government Ethics, makes a certification, published in the *Federal Register*, that the former officer or employee has outstanding qualifications in a scientific, technological, or other technical discipline, and is acting with respect to a particular matter which requires such qualifications, and that the national interest would be served by the participation of the former officer or employee.

Such a waiver takes effect "upon the execution of the certification, provided that it is transmitted to the Federal Register." 5 C.F.R. § 2637.207(c).¹ Notably, [the agency] is proposing to waive the application of section 207(c) only. Your letter specifically indicates that [the agency] is not contemplating a waiver of 18 U.S.C. § 207(a) because [the former employee] did not participate personally and substantially or have official responsibility with respect to the [Corporation] safety contract.

The information in your letter supports your conclusion that [the former employee] has outstanding qualifications in scientific, technological, or other technical disciplines. Among other things listed in your letter, his qualifications include: serving as [Government position] for 18 years; serving as Program Manager of the [Government] Program, [director] of the [Government Program], and Deputy Program Manager for Operations of [Government Program]; four [Government activities]; service as [Government position]; key roles in the [Government] investigation, the development of [scientific systems]. Not only does he "possess the highest levels of knowledge of the [Government operation] possible," he also has been intimately involved in the design and development of the [Government operation].

¹ Although 5 C.F.R. part 2637 relates to 18 U.S.C. § 207 as in effect prior to its substantial revision by the Ethics Reform Act of 1989, section 2637.207 continues to provide useful guidance, to the extent that the relevant statutory language remains the same. The 1989 amendments did affect the scientific and technological information provision, as discussed in more detail below, but nothing in the 1989 amendments affected the guidance in section 2637.207(c) concerning the effective date of waivers.

Your letter also explains that [the former employee] would be acting with respect to a matter that requires such qualifications. The safety contract involves advising [the agency] about safety, reliability and quality assurance with respect to the many technical facets of a highly complex [Government] project. According to your letter, the [Corporation] safety contract requires detailed knowledge of [the project's] development, operations, hardware and systems, as well as [specific] systems development and operations. In your view, all of these qualifications, as well as others set out in more detail in your letter, are satisfied by [the former employee's] technical expertise and experience.

According to your letter, [the agency] requires full access to [the former employee's] technical expertise in all the above areas of [certain] operations in order to ensure the safety of an unprecedented [specific] program.

In view of the information you have provided, we concur that the proposed waiver by the [head] of [the agency] is appropriate. Although we have not reviewed a draft of the proposed *Federal Register* certification, we suggest that the certification include, at a minimum: the name of the former employee; the Government position he last held; a brief summary of his outstanding qualifications in a scientific, technological, or other technical discipline; the identity of the employer on whose behalf he would be utilizing those qualifications; a general description of the matter or matters concerning which he would be communicating with his former agency; and the statement that the national interest would be served by his participation in those matters.

SCOPE OF WAIVER

Based on conversations with your staff, we thought it would be appropriate to set out some guidance here concerning the scope of section 207(j)(5) generally. Furthermore, we thought it might be useful to provide more specific guidance concerning the scope of the proposed waiver for [the former employee].

As you know, section 207(j)(5) has two separate mechanisms for permitting communications for the purpose of furnishing scientific and technological information. First, a former employee may receive a certification, which is the path your agency is pursuing with respect to [the former employee]. Some version of this provision has been included in section 207 ever since the enactment of the statute in 1962. See S. Rep. 2213, 87th Cong., 2d Sess., 1962 U.S. Code Cong. & Admin. News 3861 ("in order to make sure that a scientific agency is not cut off from the benefits which may

accrue in an important situation from permitting the appearance of a former employee with outstanding scientific qualifications, the committee has added a proviso permitting such appearance, despite the provisions of subsection (a) or (b), upon an agency certification, published in the Federal Register, that the national interest would be served thereby"). Second, a former employee may communicate scientific and technological information "under procedures acceptable to the department or agency concerned." 18 U.S.C. § 207(j)(5).² The latter mechanism was added to the statute in 1978, out of a concern that the existing certification mechanism alone was not sufficient because "it is discretionary with the head of the agency, and the scientist will not know whether the exemption is to be granted until after completion of his Government employment." 124 Cong. Rec. 31983 (September 27, 1978)(statement of Rep. Stratton).

Between 1978 and 1989, the language of the scientific and technological exemption permitted a broader latitude of communications under the certification mechanism than under the agency procedures mechanism. As the statute then read, the phrase "solely for the purpose of furnishing scientific or technological information" modified only the agency procedures provision, not the certification provision.³ Compare 5 C.F.R. § 2637.206 (regulation implementing agency procedures mechanism limited to "communications solely for the purpose of furnishing scientific or technological information"); with section 2637.207 (regulation implementing certification mechanism contains no such limitation).

² Although your agency has promulgated such procedures, you have determined that compliance with those procedures would be impracticable in [the former employee's] case.

³ As amended by section 501(a) of the Ethics in Government Act of 1978, Pub. L. No. 95-521, the scientific and technological exemption of 18 U.S.C. § 207 reads as follows: "The prohibitions of subsections (a), (b), and (c) shall not apply with respect to the making of communications solely for the purpose of furnishing scientific or technological information under procedures acceptable to the department or agency concerned, or if the head of the department or agency concerned with the particular matter, in consultation with the Director of the Office of Government Ethics, makes a certification, published in the Federal Register, that the former officer or employee has outstanding qualifications in a scientific, technological, or other technical discipline, and is acting with respect to a particular matter which requires such qualifications, and that the national interest would be served by the participation of the former officer or employee."

Consequently, employees who received a certification could make communications and appearances beyond those solely for the purpose of furnishing scientific and technological information. It is our understanding that some agencies, pursuant to their certification authority under this prior version of the statute, permitted former employees to make communications concerning a wide range of non-technical subjects -- including the "business" aspects of certain Government contracts -- once the agency certified that the individual possessed outstanding technical qualifications for the particular matter.

The scientific and technological exemption provision was amended again, however, by the Ethics Reform Act of 1989. See Pub. L. No. 101-194, § 101(a). The 1989 amendments made clear that both the agency procedures and the certification mechanisms are equally limited to "the making of communications solely for the purpose of furnishing scientific or technological information." 18 U.S.C. § 207(j)(5).⁴ Therefore, as the law stands now, agencies do not have authority to grant waivers permitting communications other than those solely for the purpose of furnishing scientific or technological information.⁵

⁴ Section 207(j)(5) now reads, in its entirety: "The restrictions contained in subsections (a), (c), and (d) shall not apply with respect to the making of communications solely for the purpose of furnishing scientific or technological information, if such communications are made under procedures acceptable to the department or agency concerned or if the head of the department or agency concerned with the particular matter, in consultation with the Director of the Office of Government Ethics, makes a certification, published in the Federal Register, that the former officer or employee has outstanding qualifications in a scientific, technological, or other technical discipline, and is acting with respect to a particular matter which requires such qualifications, and that the national interest would be served by the participation of the former officer or employee."

⁵ Agencies are advised that OGE's post-employment regulation at 5 C.F.R. § 2637.207 does not reflect the current language in 18 U.S.C. § 207(j)(5) in this regard; as stated in the "Note" at the beginning of 5 C.F.R. part 2637, the regulations contained therein are published to provide guidance concerning the application of the pre-1989 statute. OGE expects to publish new regulatory guidance concerning 18 U.S.C. § 207(j)(5) in 5 C.F.R. part 2641 in the near future.

That is not to say that section 207(j)(5) limits former employees exclusively to scientific and technological statements per se. The statute states that former employees may make communications "for the purpose of furnishing scientific or technological information." Section 207(j)(5)(emphasis added). OGE believes that a communication is made "for the purpose of" furnishing scientific or technological information if it includes incidental non-technical statements that are necessary for appreciating the significance of the scientific or technological information. The exemption would not serve the purpose intended by Congress if it did not permit the Government to be "fully informed of the significance of scientific and technological alternatives." 5 C.F.R. § 2637.206(b). As long as the former employee's communication primarily conveys information of a scientific or technological character, the entirety of the communication will be permissible, notwithstanding an incidental reference or remark concerning feasibility, risk, cost, speed of implementation, or other considerations when necessary to appreciate the practical significance of the scientific or technological information provided. See *id.* Similarly, incidental communications intended to facilitate the furnishing of scientific or technological information are permissible, such as those necessary to determine the kind and form of information required or the adequacy of information already provided.

In light of the above, we can at least provide an outline of the kinds of communications that [the former employee] could be permitted to make under a waiver. On the one hand, [the former employee] clearly could address any scientific or technological issue covered by the safety contract, regardless of the fact that his advice on such subjects might have financial implications for [the Corporation], [the agency], or other contractors working on the [specific] program. Moreover, during the course of a discussion in which he focused on the scientific or technological aspects of a safety issue, [the former employee] could make incidental reference to the cost, feasibility, risk, or timing of measures to address such issues. Likewise, he could request clarifications from [the agency] with respect to any scientific and technological questions that the agency needs him to resolve.

On the other hand, [the former employee] must avoid discussions primarily of a "business" nature. For example, he should not argue for acceptance of a proposal [of the Corporation] with respect to any prospective contract or any new funding, modification or dispute under the existing safety contract. See 5 C.F.R. § 2637.206(a). Moreover, where his contribution of scientific or technological information is not the focus of his communications, he should not participate in discussions about

contract modifications, performance disputes, equitable adjustments, negotiations for new or follow-on contracts, or similar contracting issues. We understand from discussions with [the agency] staff that such limitations are feasible in [the former employee's] case, because [the Corporation] has other personnel who can manage the business aspects of the contract, and [the agency] does not foresee the involvement of the Program Manager in any potential negotiations concerning new contracts during [the former employee's] one-year cooling-off period.

Ultimately, of course, [agency] officials are in a better position than OGE to tailor this advice to the specific conditions of the [Corporation] contract and [the former employee's] proposed position. We remain available to consult with [agency] officials, as needed, about the application of section 207(j)(5) to any specific activity under the contract.

POSITION EXEMPTION

Your letter also requests that OGE exempt [a specific agency] position from the one-year cooling-off requirement, pursuant to 18 U.S.C. § 207(c)(2)(C). We understand from discussions with [agency] officials, however, that this request was a secondary alternative in the event that OGE advised against a certification for [the former employee] under section 207(j)(5). Please let us know if you still would like to pursue a position exemption, as your letter does not include all the information that would be necessary to support such an exemption. You should be aware that exemptions under section 207(c)(2)(C) are not specific to a given employee but run with the position. Furthermore, in view of the fact that [the former employee] already has terminated his senior employee position, he would not benefit from any position exemption granted after his termination. See 5 C.F.R. § 2641.201(d)(4).

If you have any further questions about this matter, please contact my Office.

Sincerely,

Amy L. Comstock
Director