

## Office of Government Ethics

89 x 14 -- 09/12/89

### Letter to an Agency General Counsel dated September 12, 1989

Your letter of August 16, 1989, requested a formal opinion as to whether a former Senior Employee could serve as a member of an advisory committee of the [agency] or participate in its activities, without violating the one-year "cooling off" period on representational appearances before or communications with his former agency, which is imposed by 18 U.S.C. § 207(c). We assume that the additional "switching sides" prohibitions of 18 U.S.C. §§ 207(a) and 207(b) are not applicable or that the former employee is aware of those prohibitions. Having reviewed the issues presented in your letter, we have determined that the request is appropriate for resolution by an informal rather than a formal opinion.

According to the facts which you have presented, the [advisory committee in question] (hereinafter, "Committee") was chartered by [the agency] in 1987, pursuant to the Federal Advisory Committee Act (FACA) at 5 U.S.C. App. 2, to advise it on facts and circumstances regarding [a certain developing technology] and to recommend policies, standards and regulations that would [facilitate the general use of such technology]. This Committee is composed of a parent committee appointed by [the agency], with members chosen to obtain diverse and representative industry viewpoints; three subcommittees, led by appointees of the parent committee's chairman, with general membership open to all interested persons; and a steering committee made up of the subcommittee chairmen and vice-chairmen.

You further indicate that all salaries and expenditures of the Committee are paid by private industry, not [the agency]. While no [agency] employees are Committee members, all meetings of the parent, the steering committee, and the subcommittees are attended by an [agency] employee who is designated pursuant to the FACA. Substantive output of the subcommittees is accomplished by working parties, made up of any interested persons, which are not considered part of the Committee. No [agency] employee is designated to attend meetings of the working parties, although interested [agency] staff members occasionally do attend for informational purposes.

We understand that a former "Senior Employee" of [the agency], as that term is used in 18 U.S.C. § 207(c), is an authority on [this particular technology] and could bring to the Committee important expertise. However, you are concerned that his membership on the Committee, or even participation in its activities or those of its subcommittee working parties, might violate 18 U.S.C § 207(c). Section 207(c) bars a former Senior Employee for a period of one year from representing anyone other than the United States in an appearance before his former agency or its employees, or from making, with the intent to influence, any communication to them, in connection with any particular matter pending before that agency or in which it has a direct and substantial interest. Regulations at 5 C.F.R. § 737.11 implement this statute.

Your analysis suggests that this former Senior Employee should be permitted to make representations before the Committee, which you believe is, in effect, a separate entity from [the agency], similar to a private contractor. You cite OGE informal advisory letter 81 x 5 of February 17, 1981, as authority to conclude that the presence of [the agency] official as a designated attendee at Committee meetings does not transform the former Senior Employee's participation into a representational appearance before an agency employee, unless there is a direct communication between the two on a particular matter. You opine that the designated [agency] employee's presence is no different than if he heard the former Senior Employee's remarks on C-Span or read them in a book or magazine.

We do not view representations to or communications with the Committee as being analogous to the situation in OGE informal advisory letter 81 x 5 to which you allude. The question posed therein was whether a former Senior Employee must screen his audience to determine if employees of his former agency were incidentally present, prior to appearing before forums organized by a third party, such as another agency, the Congress, or a public conference. The Committee, however, is a forum organized by [the agency] and for its benefit, not by or for a third party. Furthermore [the agency] official who is designated to be present at all meetings is not a casual or passive attendee; rather, the FACA and implementing regulations at 41 C.F.R. Part 101-6 require his presence, and he attends in an official capacity. According to those regulations, this person is referred to as the Designated Federal Officer, and an advisory committee is not empowered to meet without his call or approval. Additionally,

the regulations specify that this designee must approve the agenda and be present at all meetings, shall adjourn meetings when in the public interest, and may chair meetings when directed by the agency.

As the cited OGE opinion notes, a former employee at third party forums need only insure that he avoids discussion or debate, designed to influence, with employees of his former agency; however, where the agency helps organize the forum, such as is the case with advisory committees, with at least one agency employee required to be present and functioning as a critical element in its structure, a former Senior Employee's participation must be viewed as a representational appearance before an agency employee, regardless of whether there is a direct exchange of communications. Accordingly, a former Senior Employee would run afoul of 18 U.S.C. § 207(c) if he were to represent private industry (or anyone else other than the United States) as a member of the Committee, or to otherwise participate as an interested person.<sup>1</sup>

You also inquired whether, in the event we found that 18 U.S.C. § 207(c) does bar participation, sections 207(f) or 207(i) might offer exceptions. The first portion of section 207(f) permits lifting the post-employment ban with respect to communications made solely for the purpose of furnishing scientific or technological information, to permit free exchange of information not involving advocacy. Each agency is responsible for implementing that provision, utilizing the regulations at 5 C.F.R. § 737.15. If the former Senior Employee's furnishing of scientific and technological information can be structured to fit the limiting criteria in that regulation and your own procedures, then you may exempt him for that purpose.

Section 207(f) also permits exempting a former employee on a more continuous and comprehensive basis, when the agency certifies in the Federal Register, after consultation with OGE, that the former employee has outstanding scientific or technological qualifications, that such qualifications are needed by the agency in a matter, and that the national interest would be served by the former employee's participation. Implementing regulations are found at 5 C.F.R. § 737.17. In the event that you propose to utilize this broader exemption, you should submit a written request to this Office, discussing in greater detail the individual's special qualifications, justifying the

particular need for those qualifications in terms of the criteria stated in the regulations, and certifying that this exemption would serve the national interest.

With regard to whether a former Senior Employee might also be exempt from the section 207(c) post-employment ban by reason of section 207(i), we assume you are referring to that portion which states that section 207(c) does not prevent the uncompensated making or providing of a statement which is based on the former Senior Employee's special knowledge in a particular area. Examples are found in the regulations at 5 C.F.R. § 737.11(i). This Office has provided additional guidance in its informal advisory letter 81 x 9 of February 25, 1981. The thrust of that opinion is that special knowledge in the particular area must be demonstrated, not just special interest, and the assistance should, therefore, relate to matters more specific than broad policy issues. We do not have enough information from which to ascertain whether the former senior employee about whom you are inquiring would fit the requirements for a section 207(i) exception.

You also inquired whether, even if we determined that a former Senior Employee could not participate with the Committee, he might still serve with the working parties of the subcommittees. In our opinion he could, as these working groups are distinguishable from the Committee. They are organized less formally, not chartered under the FACA, apparently composed exclusively of "all interested persons," and not attended by a designated [agency] employee. Such working parties are more akin to public forums not directly organized by the agency. Any incidental attendance by [agency] employees as interested persons does not, in our opinion, transform a former Senior Employee's involvement at the working party level into a prohibited representational appearance before [the agency] or its employees. The former Senior Employee must, of course, avoid any direct communication, designed to influence, with [agency] employees who might attend as interested parties.

In reaching the opinions expressed above, we have not consulted with the Department of Justice. Nonetheless, I trust that this informal guidance will assist you in determining the extent to which your former Senior Employee might participate in the work of your Advisory Committee.

Sincerely,

Frank Q. Nebeker  
Director

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**1** Of course, if the former senior employee were requested by your agency, to act an expert on behalf of the United States and not as a representative of private industry or others, then he would not violate 18 U.S.C. § 207(c). See the legislative history in Senate Report No. 170, 95th Cong., 2nd Sess. 153 (1978), and OGE informal advisory letter 81 x 9 of February 25, 1981. However, we understand from the Committee's charter that all members are appointed to serve as representatives of industry.