

Letter to a Designated Agency Ethics Official
dated March 30, 2006

I am writing in response to your letter of March 10, 2006, in which you request an exemption, pursuant to 18 U.S.C. § 207(c)(2)(C), from the one-year cooling-off restriction with respect to "a category of [agencies with a shared mission] Community employees." Your request stems from OGE's legal interpretation, stated by the Office of Government Ethics (OGE) in discussions with [Agency A], that section 207(c) would prohibit certain representational contacts by former [Agency A] senior employees with current [Agency A] employees serving on detail to other agencies in the Community, even if the former [Agency A] employees had not served in these other agencies during their last year of Government employment.¹ In response, you request a waiver that would permit former senior employees of any [Community] office to make representational contacts with current employees of their former agencies who happen to be on detail to [Agency B]. Your proposed waiver would not apply to any former employees who served in [Agency B] itself during their last year of Government service.

I certainly appreciate the difficulties discussed in your letter with respect to the use of [Community] detailees by [Agency B]. Unfortunately, however, the statute does not provide OGE the authority to grant the relief that you request.

¹Your letter indicates that you are aware of the discussions among OGE, [Agency A] and the Department of Justice (DOJ) concerning the question of whether section 207(c) covers contacts by a former senior [Agency A] employee with a current [Agency A] employee on detail to another agency within the [Community]. It was not clear whether you were also aware that the Office of Legal Counsel within DOJ already has received a formal request from [Agency A] for a legal opinion on this subject and that this matter is still pending. We recognize that your request for a waiver extends to positions in other [Community] offices besides [Agency A], including various components of [several] Departments.

It may be helpful if I first explain the operation of section 207(c)(2)(C) and the implementing regulations at 5 C.F.R. § 2641.201(d). Under the statute and the implementing regulations, OGE may waive the application of section 207(c) to a particular position or category of positions, upon the request of the Designated Agency Ethics Official (DAEO) for the agency where the position is located.² The effect of a waiver is that any current or future incumbent of the position will be completely exempt, and "the one-year restriction of section 207(c) will not be triggered upon any employee's termination from the position." 5 C.F.R. § 2641.201(d)(1)(Effect of Exemption). See also DAEOgram DO-04-023A [OGE Informal Advisory Memorandum 04 x 11], at 9 (July 29, 2004)(section 207(c) "waived altogether as to certain senior employee positions or categories of positions"). Section 207(c)(2)(C), therefore, provides for an absolute exclusion from section 207(c) and is not a mechanism for finely tailoring a waiver for a particular subset of circumstances, such as a particular type of communication, setting or Government audience. It is also significant that a position waiver under section 207(c)(2)(C) has the additional effect of categorically exempting senior employees from the restrictions in 18 U.S.C. § 207(f) with respect to activities on behalf of foreign entities. See 68 *Federal Register* 7844, 7867 (February 18, 2003)(preamble to proposed rule describing waiver procedure and relationship to foreign entity restrictions).

In order to grant such a waiver, OGE must make a two-fold determination. First, OGE must determine that the imposition of the post-employment restrictions with respect to the particular positions would create undue hardship on the agency in recruiting personnel for those positions. This standard is carefully limited to hardship based on recruitment problems for the particular position, and it does not take into account other kinds of hardship, such as hardship to an individual employee or even institutional hardship to an agency desirous of "the free exchange of ideas" with former employees. OGE Informal Advisory Letter 97 x 16; see also OGE Informal Advisory Letter 96 x 15; OGE Informal Advisory Letter 94 x 12. Generally, the agency recommendation should be "supported by some evidence that an agency has encountered or is encountering recruitment difficulties." OGE 97 x 16. Moreover, the agency must demonstrate some "nexus" between the identified recruiting

² Once a waiver is granted, OGE lists the position, by agency, in the register of exempted positions published annually in Appendix A of 5 C.F.R. part 2641.

difficulties and the application of the post-employment restrictions, such that a waiver of the criminal prohibitions would likely ameliorate the recruiting problem for the particular position. *Id.*

Second, OGE must determine that the proposed waiver would not create the potential for use of undue influence or unfair advantage. Because a waiver under section 207(c)(2)(C) also has the effect of waiving the restrictions of section 207(f), the determination must take into account the potential for undue influence or unfair advantage in connection with representing, aiding or advising a foreign government or foreign political party with the intent to influence any officer or employee of any agency or department, including Members of Congress, the President, and the Vice President.

From the foregoing description, it should be apparent that OGE cannot grant your request, for several reasons.

First, your request does not seek the exemption of positions in your own agency. The only employees who could take advantage of the proposed waiver would be in positions in one of [a certain number of] other agencies (or agency components) within the [Community]. The request for an exemption for any position in those agencies would have to come from the DAEO of the particular agency, based on the DAEO's application of the standards described above. (However, as indicated below, OGE would not have authority to grant the waiver you propose even if the request came from the DAEOs of the agencies where the positions are located.)

Second, it does not appear that your request actually seeks a position exemption. Under your proposal, the [Community] positions generally would remain subject to the one-year cooling-off period. Your request seeks a waiver permitting former [Community] employees, regardless of position, to speak to a particular set of employees, i.e., detailees from their former agencies to [Agency B]. In essence, you are requesting the exemption of certain Federal audiences (employees on detail), rather than an exemption of certain positions from the cooling-off restrictions. As indicated above, there is no basis for using section 207(c)(2)(C) to tailor a waiver to a particular set of circumstances dependent on the employees to whom the representational contacts will be made. For this reason alone, OGE would have to deny your request for a waiver, even if the other criteria for a waiver could be satisfied.

Third, the information included in your request would not satisfy the "undue hardship" prong of the waiver standard. Most of the hardships described are not relevant to recruitment for the particular positions that would be covered. For example, even if the application of section 207(c) would impede the flow of communications between [Agency B] and certain contractor employees who happen to be former employees of [Community] agencies, this is not a recruitment hardship.

Your request does include one statement addressing a recruitment issue pertaining to the use of detailees. At page 3, you write, "[a]bsent a waiver as requested above, the restriction will deter officers from taking cross-[Community] assignments during their last year in government service because to do so could adversely impact their future marketability." However, this prediction of difficulty in recruiting detailees is not accompanied by any evidence, such as vacancy rates or the payment of special rates of pay as an incentive, "that the agency has encountered or is encountering recruiting difficulties." OGE 97 x 16; see 5 C.F.R. § 2641.201(d)(5)(ii). More important, there is no indication that the requested waiver would ameliorate any problem of recruiting employees to serve on details in their last year of service. Your request (p. 2) expressly disclaims any intent to seek a waiver for such employees: "It appears, therefore, that 18 U.S.C. §§ 207(c) and (g) would prohibit a former senior detailee from communicating (with the intent to influence) with his home agency and with the agency to which he was detailed during his last year of federal service. This request does not seek relief from this restriction." The requested waiver would benefit only the former employees who want to make representational contacts with detailees, not the detailees themselves.

Fourth, the information included in your request would not be sufficient to satisfy the requirement that a waiver not create the potential for undue influence or unfair advantage. For one thing, there is no discussion at all of the potential for undue influence or unfair advantage on behalf of foreign entities, which is important as noted above. Moreover, the discussion of undue influence and unfair advantage in your request seems to assume that the representational contacts invariably would occur in situations where "[Agency B] is consciously seeking the expertise that such former [Community] employees have to offer." However, a waiver under section 207(c)(2)(C) is not limited to situations where the agency initiates the contact or otherwise seeks a former employee's expertise. Representational contacts could be made on behalf of

an [Agency B] contractor, a foreign government, a trade association, or any other non-Federal entity or person, and such contacts could include the entire range of matters otherwise covered by the post-employment law, including adversarial proceedings, claims for money, investigations, etc.

Nor is it clear to us that all former senior [Community] employees necessarily would lack influence or advantage when dealing with detailees from their former agency. A former senior [Community] employee is more likely than a member of the general public to know detailed employees of his former agency or at least to share a common network of associates at the former agency. One could envision situations in which a detailee would be inclined, consciously or unconsciously, to accord greater weight or attention to the views of someone whose credentials include recent service in a senior position in that detailee's own home agency.

In conclusion, for the reasons indicated above, OGE cannot grant your request for a waiver under section 207(c)(2)(C). If you have any questions about this matter, please contact me.

Sincerely,

Marilyn L. Glynn
Acting Director