



U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505
202-254-3600

NOV 03 2015

National Weather Service Employees Organization (NWSEO)
c/o Mr. Richard Hirn, Esq.
NWSEO General Counsel
5335 Wisconsin Ave. NW, Suite 440
Washington, DC 20015

Re: OSC File No. MA-16-0157

Dear Mr. Hirn:

This letter responds to the complaint you submitted to the U.S. Office of Special Counsel (OSC).¹ In your complaint, you allege that officials at the Department of Commerce, National Oceanic and Atmospheric Administration (NOAA), National Weather Service (NWS) committed one or more prohibited personnel practices. The Complaints Examining Unit (CEU) has carefully considered the information you have provided. However, based on our evaluation of the facts and law applicable to your circumstance, we have made the **preliminary** determination to close our file in this matter.

The OSC is authorized to investigate allegations of prohibited personnel practices and activities prohibited by civil service law, rule, or regulation. 5 U.S.C. §§ 1214(a)(1)(A), 1216(a) and 2302(b). The provisions of 5 U.S.C. § 2302(b) specifically define thirteen (13) prohibited personnel practices for which we have jurisdiction to investigate. Thus, when reviewing a complaint, CEU analysts consider whether the information provided for each allegation is sufficient to suggest a prohibited personnel practice, or any other violation under our jurisdiction, occurred. Our decision depends on whether the facts of the case appear likely to satisfy all of the elements of the alleged prohibited personnel practice. The elements are found in section 2302(b) and/or case law established by the Courts or the Merit Systems Protection Board (MSPB), which is OSC's deciding authority.

You submitted three documents to OSC that you believe constitute unenforceable nondisclosure policies, forms, or agreements in violation of section 2302(b)(13) of title 5, United States Code. The first document, Operations and Workforce Analysis (OWA) Project: Charter for All Workstream Core Teams, includes a confidentiality provision that requires confidentiality regarding "all information and materials shared as part of the OWA project" and precludes dissemination of information/documents "beyond the Core Team and any consultants or SMEs who are providing independent advice."²

The second document, a draft settlement agreement from the Department of Commerce Office of General Counsel (DOC OGC), includes a nondisclosure provision to keep the terms of the settlement

¹ You filed the complaint jointly with Public Employees for Environmental Responsibility (PEER).

² The "Core Teams" include NWS employees, NWSWO bargaining unit members, and McKinsey & Company, an independent third-party consultant for NWS.

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confidential.³ You argue that the nondisclosure provision is in direct violation of a Department of Justice regulation regarding the use of nondisclosure or confidentiality agreements, 28 C.F.R. § 50.23(a).

Finally, the third document, Memorandum of Understanding between the NWS and the NWSWO Concerning Ground Rules for Bargaining Over a Term Collective Bargaining Agreement, includes a provision that requires each party (i.e., NWS or NWSEO) to keep the negotiations confidential and precludes either party from initiating contact with the media. The provision does allow either party to release confidential information if necessary, including to Congress, but requires notice to the other party before release.

OSC analyzed your allegations for a potential violation of 5 U.S.C. § 2302(b)(13). Under the Whistleblower Protection Enhancement Act of 2012 (WPEA), it is a prohibited personnel practice to “implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the following statement: ‘These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.’” This provision makes it illegal to take a personnel action with regard to a nondisclosure policy or agreement that does not conform to the statute.

While not in the text of the law, there is a note to section 5 U.S.C. § 2302(b)(13) describing two ways for an agency to remedy this prohibited personnel practice. First, nondisclosure policies, forms, or agreements which pre-date the WPEA are not prohibited with regard to current employees if the agency provides the employee notice of the quoted statement above. Second, it is not a prohibited personnel practice to enforce a nondisclosure policy, form, or agreement with regard to former employees if the agency includes the quoted paragraph above on its website.

After review of the documents provided, OSC does not intend to seek correction action from the MSPB. First, the DOC OGC settlement agreement’s nondisclosure provision includes the required statement listed above verbatim. Still, even if it did not, we cannot conclude that the nondisclosure provision could be interpreted to restrict your right to lawfully communicate information which you reasonably believe to evidence the type of misconduct identified protected by the Whistleblower Protection Act.⁴ Furthermore, we do not believe the nondisclosure provision violates or contravenes the

³ You state that DOC OGC instituted a new policy in July 2015 to require such nondisclosure provisions in settlement agreements.

⁴ The term “nondisclosure policy, form, or agreement” applies to “disclosures.” A “disclosure” means “a formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant providing the disclosure reasonably believes that the disclosure

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Department of Justice's policy on nondisclosure/confidential clauses at 28 C.F.R. § 20.23(a). *See* 28 C.F.R. § 50.23(d) (noting that the principles in subsection (a) are only intended to provide guidance and are "not intended to create or recognize any legally enforceable right in any person").

Second, we do not believe the Memorandum of Understanding between NWS and NWSEO constitutes a nondisclosure policy, form, or agreement. However, even if it is covered by section 2302(b)(13), there is no language in the document that could be interpreted to restrict your right to blow the whistle. Indeed, the memorandum expressly allows disclosure of information if either party deems it necessary, as long as there is notice to the other side. There is nothing in the agreement to suggest the non-disclosing party's objections, if any, could prevent disclosure after the required notice.

Finally, while we are concerned by the OWA Project confidentiality clause, because our examination of the evidence shows that the agency has implemented one of the remedies authorized by Congress by posting notice of your right to blow the whistle at www.oig.doc.gov/Pages/Whistleblower-Protection-Program.aspx, we do not intend to take further action in this matter.

As previously stated, our determination to close our inquiry into your complaint is preliminary. You have the opportunity to provide comments in response to this letter. Your comments must be **in writing** and **must address** the reasons we cite in reaching the preliminary determination to close our inquiry into your complaint. You have **thirteen (13) days from the date of this letter** to submit your comments to **my attention**. Please reference your **OSC File Number (MA-16-0157)** in your response. You may mail your comments to the return address on the first page of this letter, fax them to 202-254-3711, or email them to nfortinsky@osc.gov. If we do not receive any comments by the end of the thirteen-day period, we anticipate closing your file. We will then send you a letter terminating our inquiry and advising you of any additional rights you may have.

Sincerely,



Noah Fortinsky
Attorney
Complaints Examining Unit

evidences— (i) any violation of any law, rule, or regulation; or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." 5 U.S.C. § 2302(a)(2)(D).



**Public Employees for
Environmental Responsibility**

2000 P Street, NW, Suite 240 • Washington, DC 20036
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Email: info@peer.org • Web: <http://www.peer.org>



**National Weather Service
Employees Organization**

Special Counsel Carolyn Lerner
U.S. Office of Special Counsel
1730 M Street, NW
Suite 218
Washington, DC 20036-4505

Noah Fortinsky
Attorney, Complaints Examining Unit
U.S. Office of Special Counsel
1730 M Street, NW
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RE: OSC File Number MA-16-0157

Dear Ms. Lerner and Mr. Fortinsky:

The National Weather Service Employees Organization and the Public Employees for Environmental Responsibility are submitting these comments in response to the November 3, 2016 preliminary determination to close your file in this matter. We believe that you have overlooked the following:

1. Operations and Workforce Analysis (OWA) Project

As we read your letter, you appear to contend that because the Commerce Department Office of Inspector General (IG) has an all-purpose whistleblower non-disclosure disclaimer on its website that it cures the OWA non-disclosure directive. That position would absolve every agency gag-order if there is a disclaimer buried someplace on an IG website. Moreover, a departmental IG has no authority to stop a line agency such as the National Weather Service from disciplining an employee; nor are line agencies required to follow IG dicta or disclaimers.

The position you appear to be articulating would eviscerate the anti-gag provision of the Whistleblower Protection Enhancement Act (WPEA). We do not believe that this stance fairly reflects the posture of the Special Counsel on this matter.

2. Collective Bargaining Agreement (CBA) ground rules

Your letter appears to state that a confidentiality clause does not constitute a non-disclosure policy. Yet your letter provides no reasoning behind this rather surprising conclusion.

Moreover, you seem to suggest that if agency non-disclosure orders are simply re-titled as "confidentiality" provisions, the WPEA does not apply. The broad wording of the WPEA, however, suggests that such orders – whatever they are called – are illegal.

In addition, the Lloyd LaFollette Act (5 U.S.C. § 7211) gives federal employees the unfettered right to contact Congress. As you correctly note, an employee may still contact Congress by giving the agency notice. However, such notice requirement is not contained in 5 U.S.C. § 7211 and places limitations on the right to contact Congress under that the statutory language stipulating that the right of a federal employee "to furnish information" to Congress "may not be interfered with." While the requirement of these ground rules is not a complete denial of the right to furnish info to Congress, it certainly "interferes" with that right by preconditioning its exercise. As such, it is a prohibited personnel practice.

For these reasons, we strongly suggest that you reconsider your preliminary determination to close the file on this matter.

Sincerely yours,

Richard J. Hirn

Richard J. Hirn
General Counsel
NWSEO

Jeff Ruch

Jeff Ruch
Executive Director
PEER



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NWSEO General Counsel
5335 Wisconsin Ave. NW, Suite 440
Washington, DC 20015

NOV 23 2015

Re: OSC File No. MA-16-0157

Dear Mr. Hirn:

On November 3, 2015, we sent you our preliminary determination letter that set forth the U.S. Office of Special Counsel's (OSC) proposed factual and legal determinations regarding your complaint. We have received your November 18, 2015, response to our preliminary determination and thoroughly reviewed all of the information in support of your complaint along with the applicable laws, rules, and regulations. Unfortunately, we found no new or additional information or facts that would lead us to believe our preliminary determination was in error.¹

In your response, you make two primary arguments. First, you state that OSC will eviscerate the Whistleblower Protection Enhancement Act of 2012 (WPEA) anti-gag order provision if it does not seek corrective action when an agency's Office of Inspector General website (or an agency website) includes an all-purpose whistleblower nondisclosure disclaimer. Second, you question OSC's statement that a confidentiality clause does not necessarily constitute a nondisclosure policy and suggest that OSC does not believe the WPEA applies as long as the provision is styled as a "confidentiality clause." Furthermore, you aver that the CBA ground rules document violates 5 U.S.C. § 7211,² which provides employees the statutory right to furnish information to Congress (including a committee or member thereof) without interference.

As noted in the preliminary determination letter, the nondisclosure policies, forms, or agreements prohibited by 5 U.S.C. § 2302(b)(13) apply only to "disclosures." A disclosure is defined as "a formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant providing the disclosure reasonably believes that the disclosure evidences— (i) any violation of any law, rule, or regulation; or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." 5 U.S.C. § 2302(a)(2)(D); *Mithen v. Dep't of Veterans Affairs*, 119 M.S.P.R. 215, ¶ 13, n.9 (2013). Confidentiality clauses may constitute

¹ We would like to clarify one typo in the preliminary determination letter. On page 3 of 3, OSC meant to cite to 28 C.F.R. § 50.23(a), not 20.23(a). We apologize for the error.

² Congress adopted this provision in section 6 of the Lloyd-La Follette Act of 1912, 37 Stat. 555.

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nondisclosure policies, forms, or agreements, but we do not believe the documents with confidentiality clauses that you submitted to OSC for review can be interpreted to restrict an NWSEO member's right to lawfully communicate information which he or she reasonably believes evidences the types of misconduct protected by the Whistleblower Protection Act. We also cannot conclude that any of the documents provided, including the CBA ground rules document, intrudes or interferes with a NWSEO *member's* right to furnish information to Congress pursuant to 5 U.S.C. § 7211. If anything, the *union's* right to furnish information to Congress may be slightly delayed.

Further, as noted in the preliminary determination letter, we believe that the Department of Commerce, Office of Inspector General's Whistleblower Protection Program website (<https://www.oig.doc.gov/Pages/Whistleblower-Protection-Program.aspx>) provides NWSEO members with the congressionally-mandated notice regarding nondisclosure policies, forms, or agreements. WPEA, Pub. L. No. 112-199, § 104(b)(2). We do not believe that this eviscerates the WPEA anti-gag order provisions, especially when OSC reviews section 2302(b)(13) complaints individually based on the specific language used in the alleged nondisclosure policy, form, or agreement.

Accordingly, while we understand your concerns, we have made a final determination to close our file on your complaint.

Sincerely,



Noah Fortinsky
Attorney
Complaints Examining Unit

Ricardo Beas

From: Ricardo Beas
Sent: Sunday, January 6, 2019 7:55 PM
To: Jeff Ruch
Subject: Re: NWSEO gag

Jeff,

Considering the gag-orders and how they may apply to you, I would appreciate it if you could answer the following hypothetical questions.

1. Do any or all of the gag-orders in question preclude any NOAA, National Weather Service and or the Department of Commerce employee from disclosing any information pertaining to any activities undertaken and or planned by the heads of these organizations, which such heads consider non-disclosable?

2. If NOAA, the National Weather Service and or the Dept. of Commerce are involved in any way in any sort of clandestine activities, or covering for such clandestine activities, related to large-scale manipulation of the weather at a state, national and or international level, such as those referred to as Climate Engineering, Geoengineering, Solar Radiation Management, Stratospheric Aerosol Injection (SAI), Albedo Modification, Weather Modification, Stratospheric Controlled Perturbation Experiment, Chemtrails, and the like -- would such employees be precluded from sharing such information with congressional representatives or with anyone else?

Your sincere response to the above questions is greatly appreciated.

Ricardo Beas

From: Jeff Ruch <jruch@peer.org>
Sent: Friday, January 4, 2019 2:09 PM
To: ricardobeasy@hotmail.com
Subject: NWSEO gag

Here is what we have:

<https://www.peer.org/news/press-releases/weather-service-employees-tethered-by-illegal-gag-orders.html>

See attached.

Jeff

Jeff Ruch
Executive Director
Public Employees for Environmental Responsibility (PEER)
962 Wayne Ave, Suite 610
Silver Spring, MD 20910
Tel: (202) 265-7337 ; Fax: (202) 265-4192

Re: NWSEO gag

Ricardo Beas

Wed 1/16/2019, 10:14 AM

To: Jeff Ruch <jruch@peer.org>

Then please answer the question directly. Under the gag orders, would any such employees be prohibited from answering questions regarding clandestine weather modification activities as I described in my email and would they be prohibited from disclosing such information to Congress?

Best wishes,
Ricardo

From: Jeff Ruch <jruch@peer.org>
Sent: Wednesday, January 16, 2019 8:56 AM
To: Ricardo Beas
Subject: RE: NWSEO gag

Ricardo,

I was happy to provide you with information. I am not interested in answering hypothetical questions.

From: Ricardo Beas <ricardobeasv@hotmail.com>
Sent: Tuesday, January 15, 2019 9:47 PM
To: Jeff Ruch <jruch@peer.org>
Subject: Re: NWSEO gag

Hi Jeff,

Please advise on the answer to the questions I provided you recently. Again, these are hypothetical questions so I am just asking you to guess:

1. Do any or all of the gag-orders in question preclude any NOAA, National Weather Service and or the Department of Commerce employee from disclosing any information pertaining to any activities undertaken and or planned by the heads of these organizations, which such heads consider non-disclosable?
2. If NOAA, the National Weather Service and or the Dept. of Commerce are involved in any way in any sort of clandestine activities, or covering for such clandestine activities, related to large-scale manipulation of the weather at a state, national and or international level, such as those referred to as Climate Engineering, Geoengineering, Solar Radiation Management, Stratospheric Aerosol Injection (SAI), Albedo Modification, Weather Modification, Stratospheric Controlled Perturbation Experiment, Chemtrails, and the like -- would such employees be precluded from sharing such information with congressional representatives or with anyone else?

Your sincere response to the above questions is greatly appreciated.