



U.S. Department
of Transportation
**Federal Aviation
Administration**

Office of the Chief Counsel

800 Independence Ave., S.W.
Washington, D.C. 20591

Sarah MacLeod, Esq.
Executive Director
Aeronautical Repair Station Association
121 North Henry Street
Alexandria, VA 22314-2903

Dear Ms. MacLeod:

This letter responds to your letter dated August 22, 2024. In your letter you state “[i]t has come to [Aeronautical Repair Station Association (ARSA)’s] attention that an attorney from the Office of Chief Counsel publicly reprimanded an agency representative for stepping over the line of the supposed *ex parte* communication prohibition during informal rulemaking.” The letter goes on to state “[a]ttendees at the public forum report that the FAA was merely updating the audience on the proposed rule’s status and basic content.”

The Office of the Chief Counsel is unaware of any of its attorneys engaging in the action alleged. If you can provide us with additional details, such as the name or date of the event or the name of either the attorney or the agency representative at issue, it would assist our ability to conduct a review.

Your letter also raises concerns that the Agency is “us[ing] *ex parte* as a reason for refusing to engage with stakeholders,” contrary to DOT *ex parte* guidance and section 209¹ of the 2024 Reauthorization Act. Although our office agrees DOT’s *ex parte* guidance encourages contact with the public during informal rulemaking, we note it does place guideposts on such contacts, particularly when discussing deliberative, non-public information to the public after the initiation of a rulemaking.

For example, in your letter, you paraphrase the DOT *ex parte* guidance stating: “While agency ‘personnel cannot discuss or negotiate...the substance of a rulemaking while engaging in [ex parte] contacts’ (emphasis added), if such an exchange takes place, it must be memorialized in the docket.” This partial paraphrase of the guidance erroneously suggests the guidance allows agency employees to engage in substantive discussions or negotiations regarding rulemaking so long as such discussions or negotiations are memorialized and docketed. That is incorrect.

¹ Although your letter cites section 302 of the 2024 Reauthorization Act, I believe you meant to reference section 209, *Sense of Congress on FAA engagement during rulemaking activities*.

Rather, the DOT guidance leads with several explicit prohibitions applicable to Agency personnel engaging in *ex parte* contacts: “DOT personnel shall not: (1) release non-public information to outside parties; (2) give an advantage to one party over another; or (3) prematurely disclose the Department’s decisions...”²

In sum, although the guidance encourages open and transparent public participation in the rulemaking process, the guidance limits Agency participation in such contacts regarding a petition for rulemaking or after the initiation of a rulemaking:

“DOT must: (A) Act as the receiver of information. DOT personnel shall not engage in negotiation or provide any substantive, non-public information during any *ex parte* communication, including substantive aspects of any forthcoming rulemaking documents. DOT personnel will listen to and may ask clarifying questions of an outside party. DOT personnel may also answer factual questions about public documents, such as the intended meaning of a provision in a proposed rule that has already been published.”

We note the advice we provide to Agency personnel regarding *ex parte* contacts adheres to these guidelines. We hope this helps to clarify DOT guidance on the issue and responds to your concerns.

Sincerely,

Laura Megan-Posch
Assistant Chief Counsel for Regulations

² Memorandum for Secretarial Officers and Heads of Operating Administrations (April 19, 2022), DOT Deputy General Counsel, page 4.