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August 30, 1984

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Digests

1. Federal Advisory Committee Act, 5 U.S.C. app. §§ 1-15 (1982), and the procedural requirements thereof, do not apply to meetings designed solely to elicit the individual views of knowledgeable or concerned persons, even in a group setting. General Services Administration regulations implementing the Act, however, provide insufficient guidance to agencies to distinguish between those meetings subject to the Act and those to which the Act does not apply.

2. Meeting between members of Interagency Arctic Policy Group and representatives of petroleum industry, organized by the Department of Energy, was an "advisory committee" subject to the Federal Advisory Committee Act, 5 U.S.C. app. §§ 1-15 (1982), where private sector participants were selected from list provided by an established industry advisory committee, where they were selected because of previous participation in collegial study on Arctic oil and gas, and where record indicates attendees were selected to represent both individual and industry views.



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

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August 30, 1984

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The Honorable John D. Dingell
Chairman, Subcommittee on Oversight
and Investigations
Committee on Energy and Commerce
U.S. House of Representatives

Dear Mr. Chairman:

This responds to your letter, dated February 29, 1984, requesting our views on certain aspects of a meeting held with industry representatives in connection with the work of the Interagency Arctic Policy Group (IAPG), and a proposed Department of Energy (DOE) workshop on Arctic and offshore research. The IAPG, according to the Department of Energy, is a group of senior Federal officials which, under the auspices of the National Security Council, reviews and coordinates implementation of United States Arctic policy. You have questioned whether the meetings, both past and proposed, conform to the requirements of the Federal Advisory Committee Act (FACA), 5 U.S.C. app. §§ 1-15 (1982), as well as the General Services Administration (GSA) regulations implementing that Act. This letter addresses your legal concerns. Your further request that we evaluate the adequacy of the IAPG program, in terms of its consideration of all relevant factors and the extent of input from Federal and non-Federal sources, will be addressed separately.

As discussed in detail below, we conclude that a January 17, 1984 meeting between an IAPG working group and representatives of the petroleum industry was in fact subject to the FACA, the requirements of which were not observed. Another proposed meeting (originally scheduled for April 16, 1984, but since rescheduled for November 1984) is, in our opinion, not subject to the Act. We also conclude that the GSA regulations implementing the Act correctly provide that its restrictions do not apply to meetings designed solely to elicit the individual views of knowledgeable or concerned persons, even in a group setting. We believe, however, that GSA's regulations provide insufficient guidance to agencies to distinguish between those meetings subject to the Act and those to which the Act does not apply.

BACKGROUND

In April of 1983, President Reagan directed the IAPG to conduct a study to determine the need for Federal services in the Arctic region over the next decade. According to the Department of Energy, officials from that agency were asked by a working group of the IAPG to obtain "input from industry experts" on the question. To accomplish this, DOE officials contacted the National Petroleum Council, an industry organization (and a chartered DOE advisory committee), for assistance. The executive director of the Council suggested that the working group meet with a group of "industry experts" selected from a list provided by him.

The meeting in question was held on January 17, 1984. It was specifically structured to fall within GSA guidelines providing that meetings conducted for the purpose of obtaining the advice of individual attendees are not subject to the Federal Advisory Committee Act. Attendees were informed by letter prior to the meeting that the working group was interested in their individual views only and did not seek any kind of consensus view.

Because of the manner in which the meeting was structured, none of the procedural requirements that normally are required for advisory committee meetings (Federal Register notice, detailed minutes taken of proceedings, etc.)^{1/} were considered to apply. Due to the absence of a transcript, the actual proceedings of the IAPG working group meeting can only be roughly ascertained from preparatory documents (letters to participants, opening remarks, agenda) and from notes taken by attendees. Neither the meeting agenda nor notes taken during the proceedings clearly indicates whether predominantly collective or individual views by industry participants were given or solicited.^{2/} As discussed below, however, certain aspects of the proceedings lead us to question DOE's conclusion that the meeting was designed solely to collect individual views.

^{1/} The specific requirements of the Federal Advisory Committee Act are described in further detail infra, p. 3.

^{2/} For example, notes taken during the meeting use such various phrases as "industry would like * * *" and "Shell guy said * * *." Several DOE officials later characterized the meeting as resembling a typical advisory committee meeting, although DOE's General Counsel has concluded that, because the meeting was held to seek only the individual views of the attendees, it was not subject to the Federal Advisory Committee Act.

DISCUSSION

The Federal Advisory Committee Act, 5 U.S.C. app. §§ 1-15, sets forth certain guidelines and restrictions governing the use of "advisory committees" by Federal agencies. The Act requires that all such committees be formally established and chartered; committee meetings are to be open to the public and announced beforehand in the Federal Register. Interested parties are to be given reasonable opportunities to appear or to file statements, and detailed minutes of each meeting are to be kept. All committees are subject to specific termination requirements. 5 U.S.C. app. §§ 9, 10, and 14. In addition, the membership of legislative advisory committees must reflect a fair balance of points of view--a requirement that officials establishing non-legislative advisory committees are required to follow "to the extent they are applicable." 5 U.S.C. app. § 5(b)(2) and (c) 3/

The Federal Advisory Committee Act defines the term "advisory committee" to mean:

"* * * any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof * * * which is--

* * * * *

"(B) established or utilized by the President, or

"(C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government * * *." 5 U.S.C. app. § 3(2) (1982).

The applicability of this broadly-worded definition to informal and ad hoc advisory groups has received much attention, both by commentators and the courts, since enactment of the statute. See, e.g., D. Marblestone, "The Coverage of the Federal Advisory Committee Act," 35 Fed. B.J. 119 (1976);

^{3/} Department of Energy advisory committees are subject to additional procedural requirements (including balanced membership) under section 17 of the Federal Energy Administration Act of 1974, 15 U.S.C. § 776 (1982).

Nader v. Baroody, 396 F. Supp. 1231[✓](D.D.C. 1975), vacated as moot, No. 75-1969 (D.C. Cir. January 10, 1977). Early guidance provided by the Office of Management and Budget (OMB), the agency originally charged with implementing the Act, stated that "while broad coverage was intended, the statute is aimed at advisory committees or similar groups in the ordinary sense. In general, such bodies would have all or most of" these characteristics: fixed membership; established by a Federal official; a defined purpose of providing advice on a particular subject; an organizational structure (e.g. officers) and a staff; and regular or periodic meetings. Draft OMB/DOJ Memorandum on Advisory Committee Management, 38 Fed. Reg. 2306, January 23, 1973. OMB's interpretation was followed in Nader v. Baroody, ^{supra}, in which the U.S. District Court for the District of Columbia held that the Federal Advisory Committee Act did not apply to informal bi-weekly meetings held between high level executive branch officials (including the President) and private sector groups to discuss matters of general concern.

Other court decisions have given broader application to the term "advisory committee" with respect to informal or ad hoc meetings between agency officials and private groups. In Food Chemical News, Inc. v. Davis, 378 F. Supp. 1048[✓](D.D.C. 1974), the U.S. District Court for the District of Columbia held that two separate informal meetings between officials of the Bureau of Alcohol, Tobacco and Firearms and industry and consumer groups, to obtain the groups' "comments or suggestions" on proposed regulations, fell within the requirements of the Federal Advisory Committee Act. Similarly, in National Nutritional Foods Association v. Califano, 603 F.2d 327[✓] (2d Cir. 1979), the Act was held to be applicable to a one-time informal meeting between Food and Drug Administration officials and a group of five experts in the field of obesity research, on possible methods of controlling use of liquid protein diet supplements. See also, Natural Resources Defense Council v. Edwards, 2 Gov't Disclosure Serv. (P-H) ¶82,070[✓] (D.D.C. 1981) (DOE use of industry representatives, discussed in further detail infra, p. 9).

GSA Implementing Regulations. Recently, the General Services Administration (to whom the responsibility for implementing the Federal Advisory Committee Act was delegated by Section 5(F) of Reorganization Plan No. 1 of 1977, 42 Fed. Reg. 56101, 56102), issued new interim regulations governing agencies' use of advisory committees. Those regulations once again address the Act's applicability to informal and ad hoc meetings, and provide that, under certain circumstances, such

meetings are not subject to the Act. Among these circumstances are: (1) meetings arranged for the purpose of exchanging facts or information; (2) meetings initiated by a group to express that group's point of view (so long as the group is not then utilized by the agency as a preferred source of advice); (3) meetings between Federal officials and groups of private individuals arranged:

"* * * for the purpose of obtaining the advice of individual attendees and not for the purpose of utilizing the group to obtain consensus advice or recommendations." 41 C.F.R. § 101-6.1004(j)√(1983).

As indicated previously, it is this latter interpretation of the applicability of the Federal Advisory Committee Act that DOE cites to justify its actions in the present case.

We have examined the basis for GSA's view that the Act's restrictions do not apply to meetings arranged for the purpose of obtaining advice of individual attendees, and we agree, in principle, with that concept. The source of this view is not the series of court opinions described above, as those cases dealt with utilization by agency officials of ad hoc or informal groups to obtain a group or consensual view of specific proposals for administrative action (or of broader policy matters in the case of Nader v. Baroody, *supra*). Rather, the source of the GSA view appears to be an analysis, published in 1976, of the applicability of the Act to the following hypothetical situation:

"A federal agency which is considering either a general problem (e.g., housing production) or a particular course of action (e.g., issuing a regulation) calls in several experts, not employed by the government, to discuss the matter. A meeting is held, during which the experts express their individual views. There was no special preparation for the meeting. No further meetings of the group are planned, and no report representing the views of the experts as a group is prepared." D. Marblestone, "The Coverage of the Federal Advisory Committee Act," 35 Fed. B.J. 119, 120 (1976).

The Marblestone article, based upon a review of the language and legislative history of the Act, concludes that such meetings are not subject to the Act. According to Marblestone:

"One element of the [Act's] definition of 'advisory committee' requires that the body be a 'committee, board, commission, council, conference, panel, task force, or other similar group, or * * * [a] subgroup thereof.' The latter terms (committee, etc.) are not defined in the Act. One possible interpretation of those words is that they are all-inclusive, i.e., that they are the equivalent of the term 'group.' A difficulty with such an interpretation is that it seems inconsistent with the plain meaning of the statutory language. In ordinary usage, not every group of persons is referred to as a 'committee.' It is surely not self-evident that the hypothetical group described above would be considered a 'committee.' To most persons, 'committee' connotes some type of collective activity beyond mere participation in a meeting at which individual, but not joint, views are stated. The same is true to a greater or lesser degree of 'board,' 'commission,' and the other types of groups listed in the definition of 'advisory committee.'

"The list set forth in § 3(2) of the Act includes, in addition to 'committee' and the other relatively specific terms, any 'other similar group.' If the Act were applicable to every type of group, the term 'similar' would have no meaning. Thus, the inclusion of 'similar' should indicate that coverage is limited to the specifically enumerated types of groups and to other groups possessing similar attributes." Marblestone, supra, 35 Fed. B.J. at 120-21 (footnotes omitted).

Marblestone continues by examining the legislative history of the provision, noting the consistency between the statutory definition of advisory committee and the definition used in a 1962 executive order, which the legislation was intended to supersede, and which was not considered to apply to informal, non-recurring meetings. Marblestone, supra, 35 Fed. B.J. at 123-24. His analysis further concludes that a "plain meaning" interpretation of the term "committee or similar group" would not be inconsistent with the policies or purposes of the Act, which expressed Congress' concern with the operation and influence "of groups possessing the attributes of committees." Marblestone, supra, 35 Fed. B.J. at 127.

In our view, it is reasonable to limit the applicability of the Federal Advisory Committee Act to groups consulted for their consensual views. This Office has before expressed the view that the Act would present severe constraints to agency operations if considered to apply to meetings between agency officials and two or more experts or consultants, called in to present their individual opinions in a frank and informal exchange. See B-127685, March 12, 1976. The interpretation adopted by GSA, based upon the analysis described above, is consistent with the language and legislative history of the statute.^{4/}

At the same time, we recognize that there is a fine line between an agency's use of a small group of experts or consultants for the purpose of obtaining individual views, and its use of informal advisory groups such as those which, in the court decisions described above, have been held to be subject to the Act. Consequently, although we agree with the concept behind GSA's interim regulations in this area, we do not believe those regulations provide adequate guidance to agencies trying to determine the applicability of the Act to various informal meetings held with individuals from the private sector. The absence of such guidance, in our view, encourages misuse of the regulations to "exempt" from the procedural requirements of the Federal Advisory Committee Act meetings that would otherwise be subject to the Act, simply by stating that consensual advice is not being sought. We believe that this situation may continue unless GSA's regulations are revised.

January 17, 1984 IAPG Working Group Meeting. Having stated our general agreement with GSA that the terms of the Federal Advisory Committee Act do not apply to informal meetings held with experts or consultants to obtain their individual views, the question remains as to whether the January 17 meeting at issue in the present case falls within that category. It is apparent that the DOE officials involved consulted with their General Counsel's office to determine the parameters of the Act, and attempted to structure the meeting to avoid the Act's restrictions. There is, of course,

^{4/} We do not, however, give a blanket endorsement to the Marblestone analysis. For example, we do not agree with the author's implication that, for a group to come within the coverage of the Act, it should have regular or periodic meetings and an organizational structure (including a staff). In addition, the courts have clearly not adopted this view. See National Nutritional Foods Association v. Califano, supra 603 F. Supp. at 335.

nothing inherently wrong with this: agencies, like individuals, are permitted to design their activities (if otherwise lawful) so that they are not encumbered by restrictions imposed by law. The issue in such cases, instead, is whether the agency has in fact been successful in designing its activities to fall outside of those governed by the statute in question. In the present case, it is our view that DOE has not been successful in this regard.

As indicated above, the January 17, 1984, meeting of the IAPG working group was specifically designed to fall within the "exception" included in GSA's regulations. The meeting did, in fact, contain several of the outward trappings of the type of meeting described above. For example, the written invitations to private-sector participants emphasized that each was selected because of his individual expertise, and that the objective of the meeting was not the presentation of a consensus view by industry representatives.

Notwithstanding these instructions to private-sector participants, the particular attendees were actually selected because of their previous organizational participation in a 1981 consensus-type study on Arctic oil and gas, prepared for the National Petroleum Council.^{5/} According to DOE's General Counsel, those invited by DOE were chosen from a list furnished by the National Petroleum Council, representing corporate entities involved in the 1981 study. DOE's reliance on this list had the effect of reconstituting or replicating part of a previously established subgroup of the Council, to explore further the 1981 study's recommendation that Government agencies be organized and staffed to meet responsibilities in support of industry activities in the Arctic region. Letters of invitation to industry participants reflect this connection with the Council, lauding "your organization's activities in the Arctic as well as its participation in the development of the National Petroleum Council's 1981 Report." The group's association with the National Petroleum Council is also reflected in the written agenda for the January 17, 1984 meeting, which states that it is for a "Working Group of the Interagency Arctic Policy Group Meeting with Representatives of the National Petroleum Council."

^{5/} As has been mentioned previously, the National Petroleum Council is a chartered DOE advisory group, used to advise the department as to the petroleum industry's views on DOE activities and proposals. The legislative history of the Federal Advisory Committee Act specifically mentions the Council as the type of group which, when brought together by an agency by "formal or informal means," is to be covered by the Act. See S. Rep. No. 92-1098, 92d Cong., 2d Sess. 8 (1972).

In addition to the group's ties to an existing advisory committee, there are numerous indications in written materials connected with the January 17 meeting that private-sector participants were chosen not only to represent their individual companies or organizations (and thus the expertise of those organizations), but also as representatives of a broader industry view. Those participants are continuously referred to by DOE officials as "representatives of the petroleum industry;" notes taken at the meeting indicate that participants spoke both for themselves and for "industry."^{6/}

Apart from the single factor that letters of invitation contained assurances that only individual views were sought by DOE, there appears to be little substantive difference between the January 17 meeting and a DOE meeting recently ruled by the U.S. District Court for the District of Columbia to be subject to the Federal Advisory Committee Act. In Natural Resources Defense Council v. Edwards, 2 Gov't Disclosure Serv. (P-H) ¶82,070 (D.D.C. 1981), the court reviewed an informal, one-time meeting between DOE officials and 13 nuclear industry representatives, to discuss industry views on United States nuclear fuel reprocessing capability, and to review policy and regulatory issues considered to be obstacles to private industry. The meeting was held in connection with the work of the Vice President's Task Force on Regulatory Review, and was intended to fulfill a presidential directive to DOE to consult with industry on such matters. Industry representatives expressed the needs and desires of the nuclear industry, as well as the views and positions of their own companies. 2 Gov't Disclosure Serv. ¶82,070 n.5. The court held that the meeting was in fact subject to the Act, stating that:

"* * * where an agency head, acting under the President's direction, calls together industry representatives to gain industry views and recommendations on a specific identified government policy, that group is an 'advisory committee' for purposes of [the Act]." 2 Gov't Disclosure Serv. ¶82,070 at p. 82,347.

^{6/} For example, notes by one DOE official state that "Walt Spring, Shell, said that industry wants action, and the list of requirements has not changed."

In the present case, the purpose of the IAPG meeting (to obtain "input" from industry representatives), the manner in which industry representatives were selected, and the manner in which the meeting was conducted ("resembling a fairly typical advisory committee meeting," according to one DOE official), convinces us that the meeting was subject to the Federal Advisory Committee Act. Although as indicated above, we recognize that the Act does not apply to meetings conducted solely to hear the individual views of experts or consultants, meetings that would ordinarily be subject to the Act cannot be "exempted" from its requirements merely because an agency has taken the precaution of assuring participants that no consensus view will be sought.

Proposed DOE "Arctic Workshop" Meeting. The second meeting in question, a DOE-sponsored meeting on Arctic oil and gas, was originally proposed to be held in mid-April 1984, but has been rescheduled for November. Unlike the January 17 meeting, the "Arctic and Offshore Research Workshop" will be open to any member of the public (upon payment of a \$30 registration fee) and is primarily intended to promote an exchange of information between the Federal Government and persons interested in Arctic research. A letter of invitation, sent to about 400 individuals, stated:

"DOE/METC has initiated an Arctic and Offshore Research Program focused on the technical issues of oil and gas development. The upcoming workshop will enable all segments of the Arctic research community (industry, Government, universities) to participate in the identification, characterization, and prioritization of Arctic energy research necessary to advance Arctic technologies. The research community can also suggest the most appropriate areas for government involvement."

The meeting was also publicized through a number of publications.

There was some initial concern on the part of DOE's Office of General Counsel that the meeting could be construed to be for the purpose of seeking advice, and thus could be subject to the Federal Advisory Committee Act. Workshop organizers, however, have agreed to supply materials for the rescheduled meeting that will clarify that the purpose of the meeting is to facilitate an exchange of information between persons interested in Arctic research, rather than for obtaining advice or recommendations for the Government; the General Counsel's Office is now apparently satisfied that the meeting is not subject to the Act.

Although there is some language in materials associated with the proposed workshop to indicate that private sector participants were encouraged to share their views on Arctic policy with agency officials, it appears that the purpose of the meeting is to facilitate an open exchange of technical information of general applicability, which would be beneficial to future efforts (both public and private) in the Arctic. It is our opinion that this type of meeting is not the type of "advisory committee or similar group" contemplated by the drafters of the Federal Advisory Committee Act. Although it is possible that some parties to the event may make recommendations to the Government, this would be, in our view, a side-effect of the meeting and not its primary purpose. As in the case of Nader v. Baroody,^X *supra*, we do not believe that the Act should be imposed to impede contacts between agencies and the public for general exchanges of information or ideas, even though the agency might receive some incidental advice or information useful in carrying out its functions. There the court stated:

"* * * Nowhere is there an indication that Congress intended to intrude upon the day-to-day functioning of the presidency or in any way to impede casual, informal contacts by the President or his immediate staff with interested segments of the population or restrict his ability to receive unsolicited views on topics useful to him in carrying out his overall executive and political responsibilities." 396 F. Supp. at 1234.

This view, in our opinion, is equally applicable to the principal officers of executive departments such as DOE. Consequently, with the proposed addition (as described previously) of precautionary statements in materials to be used at the meeting, we have no objection to DOE's Arctic and Offshore Research Workshop, planned for November.

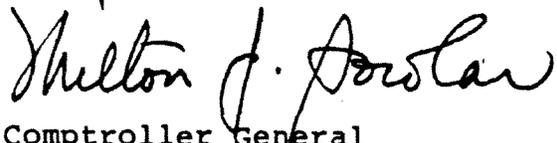
CONCLUSION

To summarize, we have examined GSA regulations implementing the Federal Advisory Committee Act, and agree in principle with GSA's conclusion that the Act was not intended to cover meetings designated solely to elicit the individual opinions of experts or consultants, even in a group situation. Nonetheless, the mere inclusion of assurances in letters of invitation that consensual views will not be sought is not conclusive evidence that a particular meeting falls under this

rule. Rather, the entirety of the circumstances surrounding the meeting (including purpose, manner of selection of attendees, and the manner in which the meeting is carried out) must be examined to determine the applicability of the Federal Advisory Committee Act. Having made such an examination in the present case, it is our conclusion that the January 17, 1984, meeting of the IAPG working group was subject to the Act, but that a planned Arctic and Offshore Research Workshop, to be conducted in November, is not subject to the Act.

We hope that the foregoing is of assistance to you. Unless you indicate to us otherwise, this opinion will be made publicly available after 30 days.

Sincerely yours,

for 
Comptroller General
of the United States

1.
FEDERAL ADVISORY COMMITTEE ACT
Applicability

2.
FEDERAL ADVISORY COMMITTEE ACT
Applicability

WORDS AND PHRASES
"Advisory committee"