



GAO

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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

FACT SHEET ON GAO'S ACCESS CASE

January 31, 2002

GAO's authority to obtain energy task force records

- GAO's legislation clearly authorizes it to perform a basic factual review of the process the National Energy Policy Development Group (NEPDG) used to develop the President's national energy strategy.
- Section 717(b), Title 31, U.S.C., provides that the Comptroller General "shall evaluate the results of a program or activity the Government carries out under existing law (1) on the initiative of the Comptroller General; (2) when either House of Congress orders an evaluation; or (3) when a committee of Congress with jurisdiction over the program or activity requests the evaluation."
- Section 712(1), Title 31, U.S.C., authorizes GAO to investigate "all matters related to the receipt, disbursement, and use of public money," and there is no doubt that public money was used to fund the activities of the NEPDG.
- Section 716, Title 31, U.S.C., establishes GAO's basic access to records authority. Under section 716, "Each agency shall give the Comptroller General information the Comptroller General requires about the duties, powers, activities, organization, and financial transactions of the agency. The Comptroller General may inspect an agency record to get the information."
- To accommodate executive branch concerns about the extent to which GAO could judicially compel disclosure of highly sensitive information, section 716 as amended in 1980 includes a "certification" mechanism. This enables the President or the Director of the Office of Management and Budget to preclude a suit by the Comptroller General if certain privileges apply and disclosure of the information GAO seeks reasonably could be expected to substantially impair the operations of Government. The Administration did not provide a certification in connection with GAO's request concerning the NEPDG, nor has the President claimed Executive Privilege.
- The Vice President and his representatives have asserted that GAO lacks the statutory authority to examine the activities of the NEPDG, recognizing only GAO's authority to audit financial transactions. They have also asserted that GAO's examination would unconstitutionally interfere with the functioning of the executive branch. They also argue that the study is not authorized by statute because GAO is limited to looking at the "results" of programs and that GAO does not have a right of access to documents because the Vice President is not included under the term "agency" used in GAO's statute.
- GAO strongly disagrees with the Vice President's positions. Disclosing the records GAO is seeking would not reveal communications between the President and his advisers and would not interfere with the functioning of the executive branch. Furthermore, GAO has ample authority to conduct this review, and this authority has been recognized by various presidential

administrations for many years. Finally, neither the plain meaning of the statute nor the legislative history supports the Vice President's interpretation of the terms "results" and "agency." On the latter point, GAO is seeking records from the Vice President in his capacity as Chair of the NEPDG, and not in his constitutional capacity as Vice President. In this regard, the NEPDG is an agency within GAO's access statute.

GAO's efforts to obtain energy task force records

- Since April 2001, GAO has been seeking to obtain certain factual information from Vice President Cheney, in his capacity as head of the NEPDG, in order to review the process used to develop the National Energy Policy. Specifically, GAO originally requested the names and attendees, dates and locations, and the subjects of the meetings, as well as minutes and notes and the information presented by members of the public. From the outset, the Vice President and his representatives have refused to provide any of this information to GAO, despite numerous explanations of GAO's statutory authorities and repeated attempts since April to reach a reasonable accommodation on this matter.
- On July 18, 2001, the Comptroller General issued a letter to the Vice President in his capacity as Chair of the NEPDG, under 31 U.S.C. § 716(b), requesting access to the information described above and restating GAO's authority for inspecting the records and the reason for GAO's inspection. The Vice President neither furnished the records nor responded to GAO with a description of the records withheld and the reasons for withholding them as required by the statute, although he did send a brief letter to the Senate and House of Representatives on August 2 in which he continued to contest GAO's authority.
- In communications with the Vice President's Counsel prior to the August 2 letter, GAO offered to withdraw its earlier request for minutes and notes and for the information presented by members of the public, even though GAO is legally entitled to this information. As a matter of comity, GAO offered to scale back the records requested to exclude these two items of information.
- Because full access was not provided within 20 days following GAO's July 18 letter pursuant to 31 U.S.C. §716(b)(1), GAO submitted a statutory report on August 17 to the Congress, President Bush, Vice President Cheney, and other executive branch officials concerning GAO's efforts to obtain access to the information requested. In the August 17 report, in an effort to reach an accommodation with the Vice President, GAO withdrew its earlier request for minutes and notes and for the information presented by members of the public. The letter also emphasized GAO's flexibility with regard to how the remaining information GAO was seeking would be provided. Despite these and other efforts on GAO's part to resolve the impasse, the Vice President's representatives showed no interest in reaching any accommodation.
- Because neither the President nor the Director of the Office of Management and Budget filed a certification, and the Vice President has not provided the information, GAO reluctantly plans to take the necessary steps to bring a civil action to enforce its access request pursuant to 31 U.S.C. § 716(b)(2). This will be the first time GAO has filed suit against a federal official to enforce its right of access to records.

Key needs for information

- GAO developed a narrowly focused study to answer the question, "What process did the NEPDG use to develop the National Energy Policy proposal?" To answer that question, GAO has

requested documents that provide certain basic factual information. It will be impossible for GAO to answer the question fully without obtaining these data.

- The Congress has a strong legislative interest in how the Administration's energy policy proposal was formulated. Indeed, Congress is currently considering national energy legislation. GAO's inability to obtain the records it is seeking hinders Congress from determining the basis and support for the Administration's recommendations.
- Congress also has had a long-standing oversight interest in how energy policy is formulated. The information GAO is seeking would better enable Congress to determine how national energy policies should be developed.
- GAO initially received a request for this information from two House committee ranking members. In addition, GAO recently received a request from four Senate committee chairmen and subcommittee chairmen to obtain and analyze the NEPDG information it is seeking.

Policy concerns raised by the Vice President's actions

- The Vice President and his representatives have raised fundamental challenges to GAO's authority to review governmental activities by challenging the basic audit authority contained in GAO's enabling legislation. Moreover, were the Vice President's arguments in this case to prevail, an Administration could attempt to insulate any activities from oversight and public scrutiny simply by assigning those activities to the Vice President or a White House official.
- The Vice President's stance on refusing to disclose basic factual information concerning the NEPDG, were it to succeed, would challenge important Congressional prerogatives regarding how Congress chooses to carry out its oversight and investigative authorities.
- Allowing the Vice President to withhold basic factual information also would violate the principles of transparency and accountability that are essential elements of a democracy.