



Decision

Matter of: U.S. Department of Transportation—Violation of Governmentwide Anti-Lobbying Provision

File: B-329368

Date: December 13, 2017

DIGEST

The U.S. Department of Transportation (DOT) violated an anti-lobbying provision in the Financial Services and General Government Appropriations Act, 2017, when it “retweeted” and “liked” a tweet urging followers to “[t]ell Congress to pass” pending legislation. Although DOT was not the author of the tweet, DOT, by retweeting and liking it, not only endorsed the message, but also created agency content. Because DOT obligated and expended appropriated funds in violation of a statutory prohibition, DOT also violated the Antideficiency Act.

DECISION

The Chief Counsel of the Office of Inspector General (OIG), U.S. Department of Transportation (DOT), requested a decision on whether recent actions on DOT’s Smarter Skies Twitter account—specifically, a “retweet” and a “like” of a tweet on July 12, 2017—were in violation of an appropriations act provision applicable to DOT in fiscal year (FY) 2017. Letter from Chief Counsel, OIG, DOT, to General Counsel, GAO (Aug. 30, 2017). As explained below, we conclude that DOT violated an anti-lobbying provision in the Financial Services and General Government Appropriations Act, 2017, when it “retweeted” and “liked” a tweet urging followers to “[t]ell Congress to pass” pending legislation. See Pub. L. No. 115-31, div. E, title VII, § 715, 131 Stat. 135, 380 (May 5, 2017) (governmentwide anti-lobbying provision). Although DOT was not the author of the tweet, DOT, by retweeting and liking it, not only endorsed the message, but also created agency content. Because DOT obligated and expended appropriated funds in violation of a statutory prohibition, we also conclude that DOT violated the Antideficiency Act and should report accordingly. See 31 U.S.C. § 1341(a)(1)(A). DOT should determine the cost associated with the prohibited conduct and include the amount in its report of its Antideficiency Act violation.

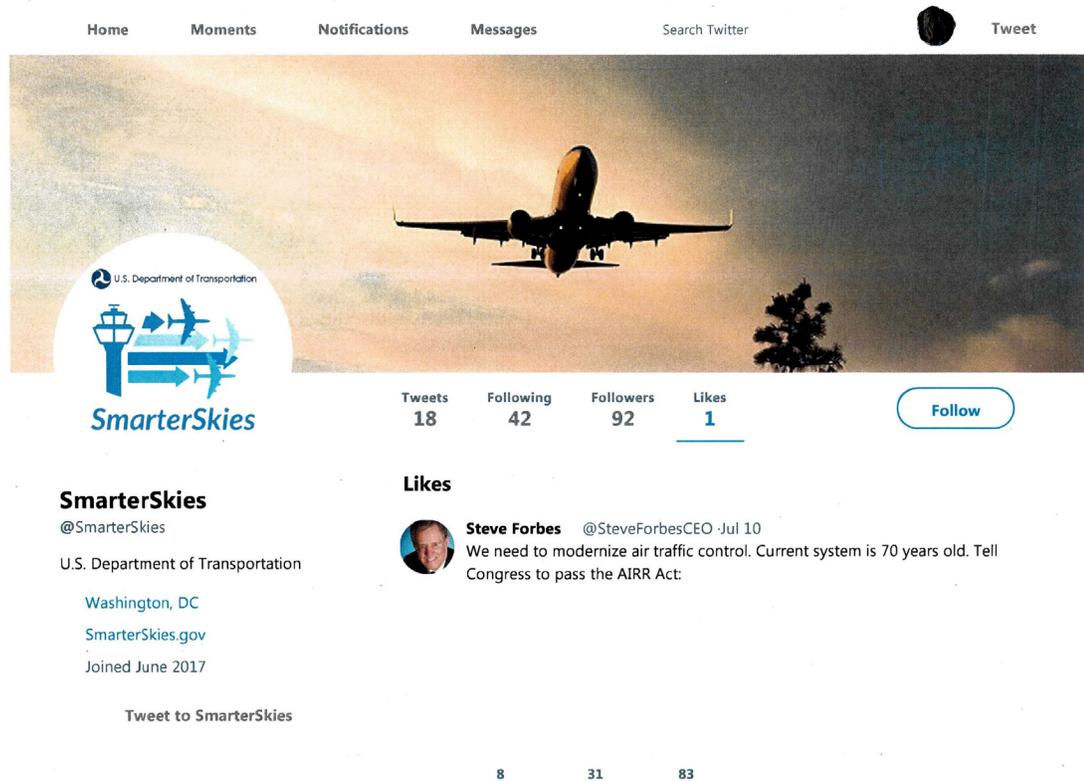
BACKGROUND

On July 12, 2017, DOT, through its Smarter Skies Twitter account (@SmarterSkies), retweeted and liked a tweet originally posted on the @SteveForbesCEO Twitter account. The tweet stated: “We need to modernize air traffic control. Current system is 70 years old. Tell Congress to pass the [21st Century Aviation Innovation, Reform, and Reauthorization Act].” The tweet also included a hyperlink to the homepage for Citizens for On Time Flights, which, in turn, stated, “Tell Congress to support air traffic control reform!” and contained data fields for individuals to enter their contact information to send an auto-generated email to their Members of Congress. Letter from Inspector General, DOT, to Ranking Members, House of Representatives, Aug. 30, 2017, *available at* www.oig.dot.gov/sites/default/files/Anti-Lobbying%20Act%20Letter%20%282017-08-30%29%20Transmittal%20Copy_508.pdf (last visited Dec. 8, 2017) (IG Letter).

To understand how DOT retweeted and liked the tweet from @SteveForbesCEO, it is necessary to understand how Twitter facilitates communications among its users. As a social media platform, Twitter enables users to create and share content, which then becomes viewable and archived on each user’s individual page. According to Twitter, a “[t]weet that you share publicly with your followers is known as a [r]etweet.” Twitter, *Retweeting another Tweet*, *available at* <https://support.twitter.com/articles/20169873#> (last visited Dec. 8, 2017). Further, according to Twitter, a like is “used to show appreciation for a [t]weet,” and another user “can view [t]weets an account has liked from their profile page by clicking or tapping into the likes tab.” Twitter, *Liking a Tweet or Moment*, *available at* <https://support.twitter.com/articles/20169874#> (last visited Dec. 8, 2017). Essentially, a Twitter account user can post a retweet or a like to share another user’s original tweet, and both can be viewed on that user’s page either directly or through an associated tab.

On July 13, 2017, DOT Office of General Counsel noticed the retweet on the Smarter Skies Twitter account and directed that it be removed immediately; a DOT official confirmed that the retweet was deleted within an hour of that instruction. IG Letter, at 7. However, on August 15, 2017, DOT IG discovered that the agency had not yet unliked the tweet. DOT IG explains that, although the like occurred on the @SteveForbesCEO Twitter feed, Twitter’s user interface allows a user to view all of the tweets that another account has liked, if he or she is logged into a Twitter account at the time he or she visits the account. Consequently, as DOT IG explains, until the tweet was unliked, it was possible to see it by visiting the Smarter Skies Twitter account and clicking on the “Likes” tab. When DOT IG brought this to the department’s attention, DOT unliked the tweet. *Id.*

Figure 1: Screenshot of DOT's "Like" of @SteveForbesCEO's Tweet



Source: OIG, DOT | GAO B-329368

In accordance with our regular practice, we contacted DOT for factual information and its legal views on this matter. Letter from Assistant General Counsel for Appropriations Law, GAO, to Acting General Counsel, DOT (Oct. 5, 2017); GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/products/GAO-06-1064SP. DOT provided its legal analysis and factual information on the issue. Letter from General Counsel, DOT, to Assistant General Counsel for Appropriations Law, GAO (Nov. 30, 2017) (DOT Letter).

DISCUSSION

At issue here is whether DOT violated any statutory prohibitions on the use of its FY 2017 appropriations through its actions on the Smarter Skies Twitter account. One of the most fundamental statutes dealing with the use of appropriated funds is 31 U.S.C. § 1301(a): "Appropriations shall be applied only to the objects for which appropriations were made except as otherwise provided by law." DOT's appropriations are generally available for communicating with the public, and we agree with DOT's view that its Smarter Skies Twitter account was designed to serve this purpose. DOT Letter, at 2. Congress, however, has placed some limitations on

agency communications. The key statutory limitation applicable to the retweet and like in question is the governmentwide anti-lobbying provision.

Section 715 of the Financial Services and General Government Appropriations Act, 2017, provides:

“No part of any funds appropriated in this or any other Act shall be used by an agency of the executive branch, other than for normal and recognized executive-legislative relationships, for publicity or propaganda purposes, and for the preparation, distribution or use of any kit, pamphlet, booklet, publication, radio, television, or film presentation designed to support or defeat legislation pending before the Congress, except in presentation to the Congress itself.”

Pub. L. No. 115-31, div. E, title VII, § 715.

GAO has long construed this language as prohibiting indirect or grassroots lobbying, that is, a clear appeal to the public to contact Members of Congress in support of or in opposition to pending legislation. See, e.g., B-326944, Dec. 14, 2015, at 17–26 (Environmental Protection Agency’s use of certain social media platforms violated anti-lobbying provisions contained in applicable appropriations acts); B-325248, Sept. 9, 2014; B-270875, July 5, 1996; B-192658, Sept. 1, 1978. Thus, to violate the governmentwide anti-lobbying provision, there must be a clear appeal by an agency to the public to contact Members of Congress and that appeal must be in support of or in opposition to pending legislation.

Here, both elements of the governmentwide anti-lobbying provision were met. The language of the tweet and the linked page therein clearly directed the reader to contact Members of Congress by unequivocally stating, “Tell Congress to pass the AIRR Act” and “Tell Congress to support air traffic control reform!”¹ Further, the linked page contained data fields for individuals to enter their contact information and send an auto-generated message to their Members of Congress. Finally, the language was specifically in support of the AIRR Act, which was and still is pending in Congress. H.R. 2297, 115th Cong. (2017).

Although DOT was not the author of the tweet, DOT, by retweeting and liking it, not only endorsed the message, but also created agency content. The facts here are

¹ In this regard, we note a distinction between the original tweet by a nonfederal entity and the retweet and like by a federal agency. A nonfederal entity’s tweet is not covered by the prohibitions in a federal agency’s appropriations act and is, of course, fundamentally protected by the First Amendment. See U.S. Const. amend. I. See also *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (recognizing that “the vast democratic forums of the Internet,” and “social media in particular,” are forums for the exercise of First Amendment rights).

similar to our opinion in B-326944. There, an official blog post published by the Environmental Protection Agency (EPA) contained hyperlinks to external webpages that contained link buttons to contact Members of Congress in support of a proposed rule that would be affected by pending legislation. As discussed in that opinion, by its nature, including a hyperlink invites readers to visit the website to which the hyperlink connects, and EPA associated itself with the linked content when it chose to hyperlink to those webpages within its official blog post. Similarly, DOT associated itself with the message of the tweet and the hyperlink therein, by retweeting and liking it through the Smarter Skies Twitter account.

As we explained in B-326944, this concept—that including a hyperlink forms an expressive act and conveys a message that is informed by the linked content—finds support in a line of court cases under the government speech doctrine. The Supreme Court and several federal circuit courts have, in other contexts, recognized that the government’s decision to include third-party speech within its own communication channels is an expressive act in and of itself that conveys a message. *Pleasant Grove City v. Summum*, 555 U.S. 460, 473, 476 (2009) (emphasizing city’s control over selection of monuments as evidence of its control over its message); *Sutcliffe v. Epping School Dist.*, 584 F.3d 314, 331–33 (1st Cir. 2009) (choice of external websites to hyperlink using town website conveyed a message independent of the message within the third-party speech). Thus, the fact that neither the original tweet nor the hyperlink included therein was created by DOT does not excuse the agency from responsibility for its own message in retweeting and liking the tweet.

We acknowledge the fact that DOT ultimately deleted the retweet and the like. As we discussed in B-326944, while we recognized that websites are dynamic, EPA was responsible for the message it endorsed at the time of its creation as well as what it continues to endorse. In this regard, we must also note here that there is no *de minimis* violation of grassroots lobbying. A violation occurs regardless of how much the initial and remedial actions cost. See, e.g., B-285298, May 22, 2000, at 4 (email authorized by a member of the White House China Trade Relations Working Group constituted a violation of the applicable anti-lobbying provision, despite involving a minimal expenditure of appropriated funds). Here, it is of no consequence that the initial retweet and like were posted for a short amount of time—a day and a month, respectively—and that the initial and remedial actions possibly cost very little. A violation still occurred.

DOT asserted in its response to GAO that the retweet and like did not violate the governmentwide anti-lobbying provision because the original tweet and associated hyperlinks were “unequivocally labeled” as “Steve Forbes (@SteveForbesCEO)” and “Citizens for On Time Flights,” respectively. DOT Letter, at 2–3. The important factor in determining whether an anti-lobbying violation has occurred in this context, however, is whether the agency’s actions have caused the agency to adopt the content as its own, not whether a third-party’s content is so labeled. DOT also asserted that the retweet and like did not rise to the level of an anti-lobbying violation

because it did not require a significant expenditure of appropriated funds and was not “substantial.” DOT Letter, at 3. DOT’s assertion is rooted in the Department of Justice Office of Legal Counsel’s interpretations of the Anti-Lobbying Act, 18 U.S.C. § 1913, which DOT acknowledges is not at issue here. *Id.*, at 2. GAO has consistently noted the distinction between anti-lobbying provisions in appropriations acts and the Anti-Lobbying Act. B-270875, July 5, 1996, at 1–3 (distinguishing between two separate types of anti-lobbying provisions imposed by Congress); see also IG Letter, at 3–4. Finally, as explained above, there is no *de minimis* violation of grassroots lobbying.

Because DOT obligated and expended appropriated funds in violation of the anti-lobbying provision in the Financial Services and General Government Appropriations Act, 2017, we also conclude that DOT violated the Antideficiency Act, 31 U.S.C. § 1341(a)(1)(A). Accordingly, DOT should report the violation to the President and Congress, with a copy to the Comptroller General, as required by the Antideficiency Act.² The agency should determine the cost associated with the prohibited conduct and include the amount in its report of its Antideficiency Act violation.

CONCLUSION

DOT violated the anti-lobbying provision in the Financial Services and General Government Appropriations Act, 2017, as a result of its Smarter Skies Twitter account’s retweet and like of a tweet that urged the public to contact Congress in support of pending legislation. Although DOT was not the author of the tweet, DOT, by retweeting and liking it, not only endorsed the message, but also created agency content. Because DOT obligated and expended appropriated funds in violation of a statutory prohibition, the agency also violated the Antideficiency Act. DOT should determine the cost associated with the prohibited conduct and report the violation as required by the Antideficiency Act.



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General Counsel

² 31 U.S.C. § 1351. The Office of Management and Budget has published guidance for executive agencies for reporting violations. OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget*, §§ 145, 145.8, available at www.whitehouse.gov/omb/circulars/a11_current_year/a11_toc (last visited Dec. 8, 2017).