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DECISION



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

FILE: B-114829

DATE: September 8, 1978

**MATTER OF: Printing by Government Printing Office for
National Railroad Passenger Corporation**

DIGEST:

1. The National Railroad Passenger Corporation (Amtrak) is an "agency" for purposes of the Freedom of Information, Privacy, and Sunshine Acts, notwithstanding the statement in 45 U. S. C. § 541 that Amtrak was not "to be an agency or establishment of the Government of the United States" since it is (1) headed by a collegial body--board of directors--the majority of whom are appointed by the President with the advice and consent of the Senate, and (2) a Government-controlled Corporation as that term is used in 5 U. S. C. § 552(e). Furthermore, legislative history of Freedom of Information and Sunshine Acts indicates congressional intent to include Amtrak.

2. GPO is required by 44 U. S. C. § 1504(a)(3) to publish information in Federal Register that Amtrak is required to publish under Freedom of Information, Privacy, and Sunshine Acts. Furthermore, Amtrak may be billed for such publication in accordance with 44 U. S. C. § 1509, as amended by Pub. L. No. 95-94, since Amtrak is an "agency" within the context of that provision.

This decision to the Public Printer is in response to an inquiry from the General Counsel, Government Printing Office (GPO), asking whether the GPO is authorized to open an account for the National Railroad Passenger Corporation (Amtrak) for printing notices submitted by Amtrak pursuant to section 3(a) of the Government in the Sunshine Act, 5 U. S. C. § 552b (1976) (Sunshine Act).

Specifically, we have been asked:

"* * * whether Amtrak is an agency or establishment of the United States Government and, therefore, whether an Amtrak printing account can be opened at GPO for printing Sunshine Act notices, etc., in the Federal Register. Is there an implied authority to

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the GPO to print by virtue of Amtrak being placed under the Sunshine Act? Can GPO print Amtrak's material in the Federal Register and bill Amtrak for such printing?"

In order to respond to these questions, an analysis of the relevant legislative provisions is necessary.

The GPO is authorized and required to do all the Government's printing by 44 U.S.C. § 501 (1970), which provides, in pertinent part (with exceptions not relevant here) that:

"All printing, binding, and blank-book work for Congress, the Executive Office, the Judiciary, other than the Supreme Court of the United States, and every executive department, independent office and establishment of the Government, shall be done at the Government Printing Office, * * *.

* * * * *

"Printing or binding may be done at the Government Printing Office only when authorized by law."

The GPO's publication of the Federal Register is authorized by 44 U.S.C. § 1504 (1970). Further, the law requires publication in the Federal Register of, inter alia, "documents or classes of documents that may be required so to be published by Act of Congress" 44 U.S.C. § 1505(a)(3)(1970). "Document", as used in section 1505, is defined in 44 U.S.C. § 1501 (quoted infra).

The documents in question are submitted by Amtrak pursuant to section 3(a) the Sunshine Act, Pub. L. No. 94-409 (September 13, 1976), 90 Stat. 1241, which requires that every meeting of an agency be announced in advance and opened to the public unless otherwise excepted, and also provides in pertinent part that:

"Immediately following each public announcement required by this subsection, notice of the time, place, and subject matter of a meeting, whether the meeting is open or closed, any change in one of the preceding, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting, shall also be submitted for publication in the Federal Register." 5 U.S.C. § 552b(e)(3).

The Act further provides:

"Each agency subject to the requirements of this section shall, within 180 days after the date of enactment of this section, following consultation with the Office of the Chairman of the Administrative Conference of the United States and published notice in the Federal Register of at least thirty days and opportunity for written comment by any person, promulgate regulations to implement the requirements of subsection (b) through (f) of this section * * *" 5 U.S.C. § 552b(g).

Thus, if Amtrak is an "agency" for purposes of the Sunshine Act, then GPO is authorized and required to publish this information in the Federal Register. Furthermore, since a finding that Amtrak is an "agency" for purposes of 5 U.S.C. § 552b would, as discussed below, require a finding that it is also an agency as defined in 5 U.S.C. § 552(e), then GPO would similarly be required to publish certain material required by the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a, which both apply to agencies as defined in 5 U.S.C. § 552(e).

"Agency" is defined by 5 U.S.C. § 552b(a)(1) to mean:

"* * * any agency, as defined in section 552(e) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;"

while 5 U.S.C. § 552(e) (1976) provides that:

"For purposes of this section, the term 'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency."

5 U.S.C. § 551(1) defines an "agency" to mean "each authority of the Government of the United States, whether or not it is within or subject to review by another agency * * *" with certain exceptions not

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relevant here. See also 5 U.S.C. § 103 concerning the terms "Government corporation" and "Government controlled corporation." Thus whether Amtrak is an "agency" for purposes of the Sunshine Act depends upon whether it is an "agency" as defined by 5 U.S.C. § 552(e) and is headed by a "collegial body" as required by 5 U.S.C. § 552b(a)(1).

Section 301 of the Rail Passenger Service Act of 1970, 45 U.S.C. § 541 (1970), established Amtrak as a "for profit corporation" whose purpose is to "provide intercity rail passenger service, employing innovative operating and marketing concepts so as to fully develop the potential of modern rail service in meeting the Nation's intercity passenger transportation requirements." It is a mixed-ownership Government corporation for purposes of the Government Corporation Control Act, 31 U.S.C. § 856. Pursuant to 45 U.S.C. § 545(a), Amtrak possesses all the usual powers conferred upon a stock corporation by the District of Columbia Business Corporation Act, D.C. Code §§ 29-901 et seq. (1973), which places the authority for managing corporate business affairs in the board of directors. D.C. Code § 29-916.

Amtrak is governed by a board of directors who are citizens of the United States and which is comprised as follows:

"(A) The Secretary of Transportation, ex officio, and the President of the Corporation, ex officio.

"(B) Eight members appointed by the President, by and with the advice and consent of the Senate, to serve for terms of four years or until their successors have been appointed and qualified, of whom not more than five shall be appointed from the same political party.

"(C) Three members elected annually by the common stockholders of the Corporation.

"(D) Four members elected annually by the preferred stockholders of the Corporation, which members shall be elected as soon as practicable after the first issuance of preferred stock by the Corporation." 45 U.S.C. § 543(a)(1) (Supp. V, 1975).

Thus, there are potentially 17 members of the Amtrak Board of Directors. It is clear that the 8 members specified in 45 U.S.C. § 543(a)(1)(B) qualify to be counted toward the majority of the "collegial body" under 5 U.S.C. § 552b(a)(1). It is equally clear that the 3 members in subsection (C), the 4 members in subsection (D), and

the President of the Corporation do not so qualify. It may be argued that the Secretary of Transportation, although appointed by the President with the advice and consent of the Senate, is not appointed "to such position" vis-a-vis Amtrak. However, since the Secretary's membership on the Amtrak Board is a statutory ex officio position, it automatically and necessarily accompanies the appointment as Secretary and should therefore, in our opinion, be viewed as an appointment "to such position" for purposes of 5 U.S.C. § 552b(a)(1). Therefore, we believe a majority of the Amtrak Board of Directors qualifies under 5 U.S.C. § 552b(a)(1) and the Board is thus a "collegial body" as the term is used in that subsection. We would also note that it has been indicated that there are presently no preferred stockholders, reducing the Board's de facto membership by four, the number that the preferred stockholders are authorized to elect. While the day-by-day business of Amtrak might be carried on by officers selected by the Board of Directors, it is clear that the ultimate decisionmaking authority is the Board and thus Amtrak is "headed by a collegial body" for purposes of the Sunshine Act.

The applicability of 5 U.S.C. § 552b(a)(1) to Amtrak is confirmed by reference to the legislative history of the Sunshine Act, where, in the Conference Committee Report, it is stated that:

"The conference substitute is subsection (a) of new section 552b. It is the same as the House amendment, except as follows:

* * * * *

"2. Although the language of the House amendment referring to a covered agency as 'headed by a collegial body' is used in the substitute instead of the reference in the Senate bill to 'the collegial body comprising the agency', the intent and understanding of the conferees regarding this provision is that meetings of a collegial body governing an agency whose day-to-day management may be under the authority of a single individual (such as the United States Postal Service and the National Railroad Passenger Corporation (Amtrak) are included within the definition of agency." H.R. Rep. No. 94-1441, 10 (1976). (Emphasis supplied.)

That Amtrak is also an "agency" for purposes of 5 U.S.C. § 552(e) is equally clear.

Section 301 of the Rail Passenger Service Act of 1970, *supra*, 45 U.S.C. § 541, which established Amtrak, also provided that it would "not be an agency or establishment of the United States Government." Standing alone, this provision could generally be construed to exempt Amtrak from the coverage of laws applicable to such agencies or establishments. Notwithstanding this provision, however, Amtrak is of course subject to laws expressly made applicable to it or to mixed-ownership Government corporations generally. Furthermore, where there is conflict between the effects of a new provision and prior statutes, the new provision, as a later expression of the will of the legislature is controlling. 55 Comp. Gen. 117 (1975).

It should be noted that prior to 1974 the FOIA did not set forth a definition of "agency." Also the uncertainty of whether the definition of "agency" in 5 U.S.C. § 551(l) applied to Government controlled corporations, in conjunction with the statement in 45 U.S.C. § 541, seemed to indicate that the FOIA did not apply to Amtrak. Congress resolved the doubt by enacting Pub. L. No. 92-316 (June 22, 1972), § 3(b), 86 Stat. 228, specifically subjecting Amtrak to the FOIA. 45 U.S.C. § 545(g) (Supp. V, 1975). Subsequently, the Congress addressed the more general problem of the application of the FOIA by enacting Pub. L. No. 93-502 (November 21, 1974), § 3, 88 Stat. 1564, which added subsection (e) to 5 U.S.C. § 552 (quoted *supra*), defining "agency" for purposes of the FOIA. Thus Government-controlled corporations were specifically brought under the FOIA's coverage.

The legislative history of the 1974 FOIA amendments clearly establishes that Congress intended the term "Government controlled corporation" to include Amtrak. For example, in explaining the definition of "agency" in the House bill, the report of the House Committee on Government Operations states:

"For the purposes of this section, the definition of 'agency' has been expanded to include those entities which may not be considered agencies under section 551(l) of title 5, U.S. Code, but which perform governmental functions and control information of interest to the public. The bill expands the definition of 'agency' for purposes of section 552, title 5, United States Code. Its effect is to insure inclusion under the Act of Government corporations, Government controlled corporations, or other establishments within the executive branch, such as the U.S. Postal Service.

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"The term 'Government controlled corporation,' as used in this subsection, would include a corporation which is not owned by the Federal Government, such as the National Railroad Passenger Corporation (Amtrak) * * *." (Emphasis supplied.) H. R. Rep. No. 93-876, 93d Cong., 2d Sess. 8 (1974).

Similarly, the Senate Judiciary Committee reported as follows:

"To assure FOIA application to the Postal Service and also to include publicly funded corporations established under the authority of the United States, like the National Railroad Passenger Corporation (45 U. S. C. § 541), section 3 incorporates an expanded definition of agency to apply under the FOIA." S. Rep. No. 93-854, 93d Cong., 2d Sess. 33 (1974).

See also Rocap v. Indiek, 539 F. 2d 174, 177-178 (D. C. Cir. 1976), in which the Court discussed this legislative history in concluding that FOIA applied to the Federal Home Loan Mortgage Corporation.

Thus notwithstanding 45 U. S. C. § 541 which provides that Amtrak is not an agency or establishment of the Government, the Congress has through subsequent legislation made Amtrak an "agency" for purposes of the Freedom of Information, Privacy, and Sunshine Acts. Thus Amtrak must publish the information required by these acts in the Federal Register, and the GPO is required to publish this information by virtue of 44 U. S. C. § 1505(a)(3).

Regarding payments for printing, the Legislative Branch Appropriation Act, 1978, Pub. L. No. 95-94 (August 5, 1977), § 408, 91 Stat. 683, amended 44 U. S. C. § 1509(a) to provide, as follows:

"The cost of printing, reprinting, wrapping, binding, and distributing the Federal Register and the Code of Federal Regulations, and, except as provided in subsection (b), other expenses incurred by the Government Printing Office in carrying out the duties placed upon it by this chapter shall be charged to the revolving fund provided in section 309. Reimbursements for such costs and expenses shall be made by the Federal agencies and credited, together with all receipts, as provided in section 309(b)."

We note that 44 U. S. C. § 1501 provides in pertinent part that:

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"As used in this chapter, unless the context otherwise requires--

"'document' means a Presidential proclamation or Executive order and an order, regulation, rule, certificate, code of fair competition, license, notice, or similar instrument, issued, prescribed, or promulgated by a Federal agency;

"'Federal agency' or 'agency' means the President of the United States, or an executive department, independent board, establishment, bureau, agency, institution, commission, or separate office of the administrative branch of the Government of the United States but not the legislative or judicial branches of the Government;"

The purpose of the amendment to 44 U. S. C. § 1509 was to shift the burden of bearing the cost of publishing the Federal Register and the Code of Federal Regulations from the legislative branch appropriation acts (where GPO funds for printing and binding were provided) to the agencies that most directly benefit from their use, thereby better relating the cost of the activity to the program or function that benefits from it. See S. Rep. No. 95-338, 62-63 (1977). Since Amtrak is required to publish certain information in the Federal Register, consistent with the purposes of 44 U. S. C. § 1509 as amended by Pub. L. No. 95-94, Amtrak is an agency for purposes of that section and thus should be billed for the printing done on its behalf in the Federal Register. Furthermore, there would be no basis for objecting to GPO's opening an account directly in favor of Amtrak other than billing it through the Department of Transportation as is now the case.

Deputy


Comptroller General
of the United States