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

B-129874

Sep. 11 1978

The Honorable John M. Ashbrook
House of Representatives

Dear Mr. Ashbrook:

This is in response to your request that we investigate the activities of the Office of the Special Assistant to the President for Consumer Affairs, headed by Ms. Esther Peterson, and the Office of Consumer Affairs (OCA), Department of Health, Education and Welfare (HEW), during the spring of 1977, for possible violations of Federal anti-lobbying statutes in connection with their efforts to obtain enactment of legislation to establish a Consumer Protection Agency (CPA). Legislation to establish such an agency has been introduced in every Congress since the 91st , and received increased emphasis during 1977. The most recent version of the legislation, H.R. 6805, was defeated in the House of Representatives on February 8, 1978.

The material which prompted your request consists primarily of a series of memoranda from Mr. Frank McLaughlin, then acting director of OCA, and Mr. C. R. Cavagnaro, acting director of OCA's External Liaison, to the staff of that and other HEW offices, directing the preparation of a variety of materials in support of the legislation. Mr. McLaughlin issued a series of four memoranda, dated March 23, March 25 (2), and March 31, 1977, to the OCA staff directing the performance of 20 specific tasks requested by Ms. Peterson. In addition, Mr. Cavagnaro, in a memo dated March 29, 1977, requested the development of certain materials to be provided to private lobbying organizations. As part of our investigation, we requested that both HEW and the Office of the President's Special Assistant provide us with copies of all material prepared as a consequence of the task assignments contained in these memos. Both of these offices have now provided us with a large volume of documents which we reviewed in the preparation of this response. Before discussing the contents of these memoranda and actions taken in response to directions contained therein, it may be useful to review the requirements of the statutes that prohibit lobbying activities by Federal officials and employees. These statutes may be categorized as penal statutes and Appropriation Act restrictions.

PENAL STATUTES

Federal "anti-lobbying" statutes are found at 18 U.S.C. § 1913 (1976) and 2 U.S.C. §§ 261-270 (1976). The Federal Regulation of

Lobbying Act, enacted as title III of the Legislation Reorganization Act of 1946, 2 U.S.C. §§ 261 et seq., requires the registration of certain persons and organizations engaged in activities described in the Act, and imposes penal sanctions for violations. Its constitutionality was upheld in United States v. Harriss, 347 U.S. 612 (1954). This Act is generally considered to be not applicable to the legislative activities of Government agencies. See in this connection the Report and Recommendations on Federal Lobbying Act by the House Select Committee on Lobbying Activities, H.R. Rep. No. 3239, 81st Cong., 2d Sess. 35 (1951).

The statute that is more pertinent to lobbying activities of Federal agencies is 18 U.S.C. § 1913, entitled "Lobbying with appropriated moneys" which provides as follows:

> "No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to Members of Congress on the request of any Member or to Congress, through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business.
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> "Whoever, being an officer or employee of the United States or of any department or agency thereof, violates or attempts to violate this section, shall be fined not more than $500 or imprisoned not more than one year, or both; and after notice and hearing by the superior officer vested with the power of removing him, shall be removed from office or employment."

To our knowledge there has never been a prosecution under this statute. Moreover, a review of the case law indicates that only three Federal court decisions have cited the statute. National Association for Community Development v. Hodgson, 356 F. Supp. 1399 (D.D.C. 1973), and

American Public Gas Association v. Federal Energy Administration, 408 F. Supp. 640 (D.D.C. 1976), interpreted the statute to a limited degree while Angilly v. United States, 105 F. Supp. 257 (S.D.N.Y. 1952) merely cited the statute without interpretation or discussion.

Since the above statutes contain fine and imprisonment provisions, their enforcement is the responsibility of the Department of Justice and the courts. Accordingly this Office does not consider it appropriate to comment on their applicability to particular situations or to speculate as to the conduct or activities that would or would not constitute a violation. 20 Comp. Gen. 488 (1941). Our role in this area is limited for the most part to determining whether appropriated funds were used in any given instance, and referring matters to the Department of Justice where deemed appropriate or when requested to do so.

APPROPRIATION ACT RESTRICTIONS

Since the early 1950's, various appropriation acts have contained general provisions prohibiting the use of appropriated funds for "publicity or propaganda." Acts appropriating funds for the Department of Health, Education and Welfare do not contain any such provision. On the other hand, the Treasury, Postal Service and General Government Appropriation Act, 1978, Pub. L. No. 95-81 (July 31, 1977), section 607(a), 91 Stat. 341, 355, is directly applicable to all appropriations for the executive branch of the Government, including the Executive Office of the President. It provides:

> "SEC. 607. (a) No part of any appropriation contained in this or any other Act, or of the funds available for expenditure by any corporation or agency, shall be used for publicity or propaganda purposes designed to support or defeat legislation pending before Congress."

The prohibition of section 607(a) applies to the use of any appropriation "contained in this or any other Act." Thus, it is applicable to the use of appropriated funds by OCA, HEW as well as by the Special Assistant to the President for Consumer Affairs. The prohibition of section 607(a) was also in effect during fiscal year 1977, when most of the activities here in question occurred. See Pub. L. No. 94-363 (July 14, 1976), section 607(a), 90 Stat. 963, 978 (fiscal year 1977).

In interpreting "publicity and propaganda" provisions such as section 607(a), this Office has consistently recognized that every Federal agency has a legitimate interest in communicating with the public and with the

Congress regarding its policies and activities. If the policy of the President or of an agency is affected by pending legislation, discussion by officials of that policy will necessarily, either explicitly or by implication, refer to such legislation, and will presumably be either in support of or in opposition to it. An interpretation of section 607(a) which strictly prohibits expenditures of public funds for dissemination of views on pending legislation would consequently preclude virtually any comment by officials on administration or agency policy, a result we do not believe was intended.

We believe, therefore, that Congress did not intend, by the enactment of section 607(a) and like measures, to preclude all expression by agency officials of views on pending legislation. Rather, the prohibition of section 607(a), in our view, applies primarily to expenditures involving direct appeals addressed to members of the public suggesting that they contact their elected representatives and indicate their support of or opposition to pending legislation, or to urge their representatives to vote in a particular manner. The foregoing general considerations form the basis for our determination in any given instance of whether there has been a violation of section 607(a). 56 Comp. Gen. 889 (1977); B-128938, July 12, 1976.

CONSIDERATION OF POSSIBLE VIOLATIONS

In the context of the guidelines outlined above, we have reviewed the memoranda prepared by both the OCA and the Special Assistant to the President concerning the strategy and activities that those offices planned to utilize during 1977, when legislation to establish a Consumer Protection Agency was being considered by the Congress. We have selected certain controversial elements of this activity for further analysis and evaluation below.

On March 23, 1977, Mr. Frank E. McLaughlin, the acting director, OCA, sent a memorandum, subject: "Message from the Special Assistant to the President for Consumer Affairs" to the OCA professional staff assigning specific OCA elements various tasks to accomplish in preparation for congressional consideration of CPA legislation. This memo read in part as follows (the office symbols refer to offices within OCA as it then existed):

"What the Special Assistant for Consumer Affairs will need from the Office of Consumer Affairs:

"1. All professionals must be thoroughly cognizant of principal elements of proposed CPA legislation, arguments for the bill, arguments against the bill and against various sections of the bill and refutations of arguments against. PDI and GC will pull together packets of materials.

"2. Arguments directed at and a plan for presenting them to business, attempting to enlist business support (or at least drop outright opposition) must be prepared. PDI will prepare.

"3. Examples and case histories must be drawn up to buttress arguments to business. PDI will prepare.

"4. The legislative history of S200 and HR 7575 must be thoroughly combed and arguments for and against the legislation, as well as for and against each section culled out, examined, analyzed and a method of dealing with them and short arguments pertaining to them in support of the bill prepared. GC will prepare with EP&P assistance.

"5. An analysis of the opinion on the restraints (legislative, judicial, and executive) on OCA lobbying on behalf of CPA must be prepared immediately, discussed and understood by all professionals. GC will prepare.

"6. A paper dealing specifically with the relationship to and the potential contributions of the CPA to the regulatory reform effort must be prepared leaning heavily on economic arguments. EP&P will prepare with assistance of GC.

"7. A plan for explaining the Administration's position on CPA to local consumer and other public interest groups, including steps they can take in support of the bill must be prepared. External Liaison will prepare with assistance of GC and PA.

"8. A paragraph or two must be prepared immediately, explaining why a representative of business is taking a job to push legislation opposed by most of business. PDI will prepare.

"9. Form responses to consumer and general press inquiries on the Administration's position must be prepared. PA will prepare with assistance of External Liaison.

"10. All materials prepared will be reviewed by Frank McLaughlin and presented to the Special Assistant for her clearance. The writer is under instruction from the Special Assistant to informally clear and coordinate OCA efforts with Congress Watch, CFA, and other public interest lobby members."

A careful reading of the above-quoted memorandum indicates that OCA was mustering its resources to aggressively engage in the political controversy as a proponent of proposed legislation that would establish a Consumer Protection Agency. In this regard OCA planned to develop a propaganda campaign designed to gain the support of the business community and public interest groups for the proposed new agency. It may be presumed that OCA hoped and intended that members of the target groups would convey their support for the Consumer Agency to members of Congress and thereby enhance the chances for passage of the legislation.

Many of the tasks described in the OCA memorandum would, on their face, appear to violate the restrictions on the use of appropriated funds contained in section 607(a), if carried out as originally intended. However, for the most part, that did not occur, primarily because Mr. McLaughlin, in item 5 of his March 23 memorandum, requested the OCA General Counsel to immediately provide guidance for the OCA professional staff on restraints imposed by anti-lobbying statutes. In response to this assignment, the General Counsel prepared lengthy memoranda dated March 30 and April 7, 1977, which outlined the requirements of the anti-lobbying statutes and indicated how these restrictions applied to the various task assignments. As a result of the General Counsel's memoranda, both the Special Assistant to the President and the OCA professional staff were made aware of the anti-lobbying statutory constraints governing their activities, and apparently modified their activities to conform to the requirements of law.

As an example of the guidance provided, the following excerpt is taken from the April 7 memorandum:

"With respect to the Special Assistant meeting with organizations, businesses or individuals to inform them of the President's views on proposed or pending legislation, nothing in the statute bars such

meetings. However, while the Special Assistant is free to meet with any and all groups, the fact that her actions will be judged in their totality dictates that she exercise extreme care in her dealing with those organizations whose stated positions on pending or proposed legislation concur with those of the Administration and could be interpreted as a form of indirect lobbying. Specifically, the Special Assistant should avoid supplying information on a priority basis, developing information on a priority basis pursuant to their request, clearing informally with them any proposed actions, and similar actions which would be equivalent to direct assignment of manpower paid for by government appropriations."

In comments prepared at our request, Mr. Richard Beattie, HEW Deputy General Counsel, has advised us that the legal guidelines contained in the March 30 and April 7 memos were followed by the OCA staff. Mr. Beattie states:

"As soon as the perimeters of legislative support services were provided to Mr. McLaughlin and Mrs. Peterson, OCA immediately discarded any plans which appeared to constitute improper lobbying. * * *

* * * * *

"In sum, a few of the activities originally contemplated for OCA with respect to the legislation might not have been proper if carried out. They were not carried out, however, because Mr. McLaughlin sought advice from his General Counsel at the same time that projects were being proposed."

We have also been advised by Robert Lipshutz, Counsel to the President, that Ms. Peterson and her staff were aware of statutory restrictions on executive branch lobbying and adhered to these restrictions in their activities on behalf of the CPA legislation.

One component of the OCA program, item 7, was an education campaign targeted at "local consumer and other public interest groups." OCA planned to alert these groups to the "steps they can take in support

of the bill." The clear implication here is that such groups would be urged and expected to use their influence with Members of Congress to obtain support for the Consumer Protection Agency legislation. This activity, if implemented, would constitute indirect or "grass roots" lobbying which is conduct proscribed by section 607(a). The only document we received as being prepared in response to item 7 was a March 30, 1977 memo from Mr. Cavagnaro to Mr. McLaughlin suggesting that Ms. Peterson arrange a meeting of consumer leaders in the White House, hopefully to be re-enforced by a walk-in visit from the President. The agenda was to "publicly focus on joint efforts to obtain passage of CPA" and called for an "admonition by Esther to go forth and multiply." While the implications of these recommendations seem rather questionable, the language is capable to being construed as legally acceptable, and we have been furnished no evidence that "grass roots lobbying" in fact took place at any such meeting.

In addition, the acting director, OCA, had been instructed by the Special Assistant to the President to "informally clear and coordinate OCA efforts" with groups such as the Consumer Federation of America (CFA), Congress Watch, "and other public interest lobby members" (item 10). Such coordination could well involve the passing on of OCA's work product to the consumer groups for use in their pro-CPA lobbying efforts with Members of Congress and the general public. This activity, if carried out, would appear highly questionable because it would involve the expenditure of appropriated funds to assist consumer lobby groups whose mission it is to appeal to the public to contact their elected representatives and express their support for consumer-oriented legislation. See National Association for Community Development v. Hodgson, supra, 356 F. Supp. at 1404. However, assuming the General Counsel's advice was followed, it would appear that no law was violated.

Again on March 25, 1977, the acting director, OCA, wrote another memorandum, subject: "Second Message from Esther Peterson" to the OCA Professional Staff. That memorandum continued the assignment of tasks and read in part as follows:

> "Additionally, the Special Assistant to the President for Consumer Affairs, in her advocacy of the CPA bill will need:
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> "12. The Congressional Records of the 94th Congress should be screened for those Congressmen whose comments suggest that they are borderline on CPA. Their objections and their concerns should be noted, and answers thereto prepared in a convenient document.

General Counsel will prepare with assistance of Economic Policy & Planning.

"13. Canned editorial materials and sample letters to the editor should be prepared for possible use. Public Affairs and External Liaison will prepare."

We are of the opinion that a Special Assistant to the President has a legitimate right and obligation to express the President's viewpoint concerning proposed legislation. By the same token, we believe it is permissible under section 607(a) for a Special Assistant, or the executive branch generally, to determine the position of Members of Congress on specific proposed legislation and to contact those members not in agreement with the President, in order to present the Administration's viewpoint to them. However, expending appropriated funds for the preparation of "canned editorial materials and sample letters to the editor" is a different situation. These canned and sample propaganda materials have been traditionally associated with high-powered lobbying campaigns in which public support for a particular point of view is made to appear greater than it actually is. We have been advised, however, that no materials were prepared in response to items 12 and 13.

Also, on March 29, 1977, Mr. C. R. Cavagnaro sent a memorandum entitled "Top Priority Request for Information: through Mr. McLaughlin to Allan Finkel, OCA General Counsel. The memorandum read in part as follows:

"We have a request for information from Congress Watch and CFA - and I would hope that we could supply this information to them on a priority basis by c.o.b. Friday, April 1.

"Could we provide them with five or more specific examples of where CPA, if it had been operative in '76, could have intervened on behalf of consumers and influenced or impacted on a regulatory or agency decision. This information would graphically illustrate how CPA would operate and would be greatly useful in contact work with Congressmen."

The above memorandum provides convincing evidence of the desire to give assistance to lobbying organizations favoring pro-CPA legislation. The information that was requested was not concrete data or information immediately available to OCA. Rather, this request required OCA to speculate as to how such a consumer agency could have benefited consumers

had it been established and in operation at some prior point in time. Moreover, the avowed purpose of the information to be developed by OCA was to be utilized by private lobbying organizations in their congressional lobbying efforts to enact legislation establishing a consumer protection agency. The requested material was in fact compiled and presented to Mr. Cavagnaro in a memorandum dated April 1, 1977. The memorandum covered such areas as mechanically deboned meat and Red Dye No. 2. In our opinion, if this material had been provided to the lobbying groups, it would constitute a clear violation of section 607(a).

In National Association for Community Development v. Hodgson, supra, the Court said with respect to 18 U.S.C. § 1913:

> "This general purpose when combined with the plain meaning of the words of the statute, clearly indicates that the intention of Congress in passing Section 1913 was to prevent corruption of the legislative processes through government financial support of an organization 'intended or designed to influence in any manner a Member of Congress, to favor or oppose . . . any legislation or appropriation' and thereby precludes the drowning out of the privately financed 'voice of the people' by a publicly funded special interest group." 356 F. Supp. at 1404.

While we venture no opinion with respect to section 1913, it seems clear that this type of activity--the use of appropriated funds to develop propaganda material to be given to private lobbying organizations to be used in their efforts to lobby Members of Congress--must be deemed a violation of section 607(a). On the other hand, we believe it would have been acceptable for OCA to have routinely serviced the requests of these organizations for information with stock educational materials or position papers from its files (which would presumably be available in any event under the Freedom of Information Act, 5 U.S.C. § 552).

We have no evidence that OCA did provide the material requested in the April 1 memorandum to either or both of the requesting groups. Even if the material was so provided, the amount of public funds improperly spent (presumably the time of one staff member for a relatively few hours plus the requisite secretarial work) would appear minimal and would not warrant further action by our Office.

In sum, many of the activities proposed in the OCA memos, if carried out as originally intended, would have been illegal. However, the staff

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was made aware of pertinent legal restrictions and apparently modified its activity accordingly. We have found no evidence that either OCA or the Office of the President's Special Assistant used appropriated funds to urge the public to contact Members of Congress in support of the CPA bill. There may have been a few isolated instances where public funds were used to provide assistance to private lobbying organizations. This, in our opinion would violate section 607(a) of Pub. L. No. 94-363 or 95-81, but the amounts improperly expended would be slight. With these possible exceptions, it does not appear that Federal anti-lobbying statutes were violated.

Sincerely yours,

(Signed) Elmer B. Staats

Comptroller General
of the United States