UNITED STATES GOVERNMENT GENERAL ACCOUNTING OFFICE

Memorandum

SEP 10 1976

B-130961.140-O.M.

TO : Director, EMD

FROM : General Counsel - Paul G. Dembling
Paul G. Dembling

SUBJECT: Distribution of nuclear energy pamphlet by Energy Research and Development Administration - B-130961-O.M.

This memorandum is in reference to two congressional requests concerning the propriety of the publication and distribution of a pamphlet entitled "Shedding Light on Facts About Nuclear Energy" by the Energy Research and Development Administration (ERDA). The requests are dated May 24, 1976 (Representative Hannaford) and June 16, 1976 (Representatives Udall, Miller, and Weaver). It is our understanding that our comments on the legal issues will be incorporated into a single report being prepared by your Division, to be issued to the four congressmen.

It appears that, out of 100,000 pamphlets printed, 78,000 were distributed in California in the weeks prior to that State's nuclear safeguards initiative election ("Proposition 15") held on June 8, 1976. It is thus alleged that the distribution of the pamphlet was designed to influence the voters of California in that election. In this connection, it is noted that the pamphlet's preamble states "Don't allow others to make decisions for you, Get the facts, then—Let your voice be heard!"

The request from Congressman Udall, as Chairman, Subcommittee on Energy and the Environment, House Committee on Interior and Insular Affairs, included a memorandum submitted by the Scientists' Institute for Public Information (SIPI), arguing that the publication and distribution of the pamphlet violated the Energy Reorganization Act of 1974, the First Amendment to the United States Constitution, the Hatch Act, and the Independent Offices Appropriation Act of 1952. In addition to these areas, we have reviewed Federal anti-lobbying statutes and the Government Printing and Binding Regulations. Since we have no authority to make determinations under State law, we have not reviewed California statutes.

ENERGY REORGANIZATION ACT OF 1974

ERDA was established by the Energy Reorganization Act of 1974, Pub. L. No. 93-438, 42 U.S.C. §§ 5801 et seq. (Supp. IV, 1974). The Act gives ERDA

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broad authority to develop and disseminate scientific and technical information. SIPI argues that the "Shedding Light" pamphlet, because of its timing and pro-nuclear posture, constitutes "political advocacy" and thus exceeds ERDA's legitimate information function.

Section 103 of the Act, 42 U.S.C. § 5813, provides that the responsibilities of the Administrator shall include, inter alia:

> "(6) developing, collecting, distributing, and making available for distribution, scientific and technical information concerning the manufacture or development of energy and its efficient extraction, conversion, transmission, and utilization;
>
> "(7) creating and encouraging the development of general information to the public on all energy conservation technologies and energy sources as they become available for general use, and the Administrator, in conjunction with the Administrator of the Federal Energy Administration shall, to the extent practicable, disseminate such information through the use of mass communications * * *."

Section 107(e), 42 U.S.C. § 5817(e), provides:

> "Subject to the provisions of chapter 12 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2161-2166), and other applicable law, the Administrator shall disseminate scientific, technical, and practical information acquired pursuant to this title through information programs and other appropriate means, and shall encourage the dissemination of scientific, technical, and practical information relating to energy so as to enlarge the fund of such information and to provide that free interchange of ideas and criticism which is essential to scientific and industrial progress and public understanding."

In a report to us dated July 15, 1976, ERDA expressly denied that the "Shedding Light" pamphlet was prepared in furtherance of ERDA's statutory information function. Rather, ERDA justifies the pamphlet as part of its "Performance Awareness Program." The Performance Awareness Program, established in May 1974, is designed to improve the morale and effectiveness of ERDA contractor employees engaged in all reactor development programs of ERDA's Division of Reactor Research and Development. The program uses materials such as posters, newsletters, brochures, decals, and various other training and incentive devices.

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42 USC 5817(a)

The Energy Reorganization Act does not specifically authorize the Awareness program. However, section 107(a) authorizes the Administrator "generally to take such steps as he may deem necessary or appropriate to perform functions now or hereafter vested in him." This would seem sufficiently broad to encompass an employee motivational program such as the Awareness program.

In material previously submitted to Chairman Udall, ERDA stated that it considered the number of copies sent to California reasonable, noting that there are "110 major contractors or subcontractors and over 1500 support contractors currently engaged in LMFBR [Liquid Metal Fast Breeder Reactor] related work in California." According to information developed by your Division, printings of prior brochures in the Awareness program numbered in the vicinity of 10,000 copies, of which perhaps half would normally be distributed in California. Here, as noted, 100,000 copies were printed and 78,000 distributed in California. While it appears that ERDA generally did not make direct distribution to the "public," it furnished copies to the California contractors and to ERDA offices in California in numbers far exceeding previous Awareness items. Also, it made no attempt to control or restrict redistribution by the initial recipients, although ERDA's report to us does state that it suspended distribution or further printing of the pamphlet in early May, 1976, due to controversy over its possible effect on the California initiative. Originally, ERDA's transmittal letters to the contractors stated that the pamphlets were being sent "for distribution to your employees and others who might benefit from the information." Since the Awareness program was created and developed administratively, there are no statutory criteria to support a conclusion as to what types of contractors it should or should not include. Thus, while the distribution of "Shedding Light" clearly exceeded the scope of the existing Awareness program, in terms of numbers of copies distributed, we are unable to point to any provision of the Energy Reorganization Act that was violated by the distribution pattern.

With reference to the pro-nuclear posture of the pamphlet, section 2(b) of the Energy Reorganization Act, 42 U.S.C. § 5801(b), states the congressional intent that "all possible sources of energy be developed consistent with warranted priorities." The Senate bill had originally provided that "no energy technology be given an unwarranted priority." The final wording was developed in conference. See H.R. Rep. No. 93-1445, 25 (1974). SIPI cites language from the report of the Senate Committee on Government Operations (S. Rep. No. 93-980, 14-15 (1974)) to support its contention that ERDA has no congressional mandate to demonstrate "unwarranted bias" in favor of nuclear energy. Apart from pointing out that the language in the Senate report was directed at a version of section 2(b) that was not enacted, we do not believe that the issuance of a pamphlet, even with an

admittedly pro-nuclear tenor, can be deemed a violation of section 2(b) or any other section of the Act, in the absence of a showing that other energy forms were not being "developed consistent with warranted priorities."

FIRST AMENDMENT

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law * * * abridging the freedom of speech." SIPI argues that the First Amendment is violated where "public funds are used to promote the views on one side of a controversial issue which has been placed on the ballot, and hence some taxpayers are being forced to subsidize political advertising expressing points of view with which they do not agree." SIPI contends that there is a constitutional requirement of neutrality with regard to "questions which have been left to voter resolution, whether it be a choice on candidates for public office or a referendum issue which the voters are asked to approve or disapprove."

In support of its position, SIPI cites a footnote in the recent case of Buckley v. Valeo, in which the Supreme Court, upholding the constitutionality of the tax return dollar check-off provision for campaign financing, noted:

> "The scheme involves no compulsion upon individuals to finance the dissemination of ideas with which they disagree, Lathrop v. Donahue, 367 U.S. 820, 871, 882 (1961) (Black, J., and Douglas, J., dissenting); International Association of Machinists v. Street, 367 U.S. 740, 778, 788-792 (1961) (Douglas, J., concurring, and Black, J., dissenting). * * *"

Buckley v. Valeo, 44 U.S.L.W. 4127, 4154, note 124 (January 30, 1976). The cases cited in the footnote contain language which tends to support SIPI's position, but in neither instance was this language part of the opinion of the Court. For example, in International Association of Machinists v. Street, supra, at 791, Mr. Justice Black stated in a dissenting opinion that the First Amendment-

> "* * * deprives the Government of all power to make any person pay out one single penny against his will to be used in any way to advocate doctrines or views he is against, whether economic, scientific, political, religious or any other."

While the note in Valeo and the language in Donahue and Street tend to support the neutrality concept, courts have also indicated that the Government may publish controversial positions. Thus, the Fourth Circuit Court of Appeals has stated that both Federal and State governments "may spend

money to publish the positions they take on controversial subjects." Joyner v. Whiting, 477 F.2d 456, 461 (4th Cir. 1973). See also Arrington v. Taylor, 380 F. Supp. 1348, 1364 (M.D.N.C. 1974), wherein the Court stated, citing Joyner:

> "More fundamentally, the notion that it is unconstitutional and somehow violative of the rights of individual members of society for a government to advocate a particular position is erroneous. * * * What is condemned by the free speech guarantee of the First Amendment is not advocacy by the government, but rather conduct which limits similar rights guaranteed to individual members of society."

While Joyner and Arrington did not involve impending elections, this distinction would not appear necessarily dispositive with respect to the First Amendment. That is, to the extent the First Amendment might be deemed to bar advocacy by a Government entity, based on a compulsory subsidization theory, such a bar would seem applicable whether or not the advocacy were geared to an impending election.

Thus, the position advanced by SIPI does not yet appear to have been affirmatively adopted by the courts. In the absence of more definitive judicial guidance, we cannot conclude that ERDA's action in the present situation violated the First Amendment.

HATCH ACT

The Hatch Act prohibits a variety of political activity by Government employees. Specifically as pertains to the present case, 5 U.S.C. § 7324(a) (1970) provides in part:

> "An employee in an Executive agency or an individual employed by the Government of the District of Columbia may not--
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> "(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election; or
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> "(2) take an active part in political management or in political campaigns. * * *"

Subsection (2) is expressly made inapplicable to certain types of nonpartisan political activity, including referendums. 5 U.S.C. § 7326 (1970). There is no comparable statutory exemption for subsection (1). Thus, the relevant questions are (1) whether the term "election" as used in 5 U.S.C. § 7324(a)(1)

includes referendums and, if so, (2) whether ERDA distributed the pamphlet "for the purpose of interfering with or affecting the result of" the Proposition 15 ballot question.

The interpretation and application of the Hatch Act are matters for determination by the Civil Service Commission, which has published implementing regulations at 5 C.F.R. Part 733 (1976). Accordingly, further comment by this Office would be inappropriate. See B-165548, January 3, 1969.

INDEPENDENT OFFICES APPROPRIATION ACT OF 1952

Title V of the Independent Offices Appropriation Act of 1952, 31 U.S.C. § 483a (1970), the so-called "User Charge" statute, provides:

"It is the sense of the Congress that any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945) to or for any person (including groups, associations, organizations, partnerships, corporations, or businesses), except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) to prescribe therefor such fee, charge, or price, if any, as he shall determine, in case none exists, or redetermine, in case of an existing one, to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts, any any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts: Provided, That nothing contained in this section shall repeal or modify existing statutes prohibiting the collection, fixing the amount, or directing the disposition of any fee, charge or price: Provided further, That nothing contained in this section shall repeal or modify existing statutes prescribing bases for calculation of any fee, charge or price, but this proviso shall not restrict the redetermination or recalculation in accordance with the prescribed bases of the amount of any such fee, charge or price."

The User Charge statute does not establish an affirmative requirement that charges be made for all services rendered by Government agencies. It merely authorizes the establishment of charges in certain situations. Aeronautical Radio, Inc., v. United States, 335 F.2d 304 (7th Cir. 1964), cert. denied, 379 U.S. 966; 42 Comp. Gen. 663, 665 (1963). Thus, the failure by ERDA to charge a fee to recipients of the pamphlet does not constitute a violation of law. In any event, we do not believe that the User Charge statute applies here since ERDA apparently published and distributed the pamphlet originally at its own initiative and to serve its own purposes.

ANTI-LOBBYING STATUTES

We have also reviewed Federal anti-lobbying statutes and find that existing statutes do not extend to lobbying at the State level. The primary statutes dealing with lobbying activities are 18 U.S.C. § 1913 (1970) and the Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261-270 (1970), both of which are penal statutes. The enforcement of penal statutes is the responsibility of the Department of Justice and the courts, and our authority in this area is limited to referring questionable situations to the Department of Justice. We do note, however, that both statutes are by their terms inapplicable to the present situation. 18 U.S.C. § 1913 prohibits the use of appropriated funds to take certain actions designed to influence a member of the United States Congress "to favor or oppose, by vote, or otherwise, any legislation or appropriation by Congress * * *" The Federal Regulation of Lobbying Act is similarly limited to Federal legislation. 2 U.S.C. § 266.

Several appropriation acts contain general provisions prohibiting the use of appropriated funds for certain "publicity or propaganda" purposes. ERDA's fiscal year 1976 appropriations for its nuclear activities are contained in title I, Public Works for Water and Power Development and Energy Research Appropriation Act, 1976, Pub. L. No. 94-180 (December 26, 1975), 89 Stat. 1035. Pub. L. No. 94-180 does not contain a "publicity or propaganda" provision. The only fiscal year 1976 "publicity or propaganda" provision applicable to ERDA is section 607(a) of the Treasury, Postal Service, and General Government Appropriation Act, 1976, Pub. L. No. 94-91 (August 9, 1975), 89 Stat. 441, 459, which provides:

> "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." (Emphasis added.)

In construing provisions such as section 607(a), it is important to recognize that any agency has a legitimate interest in communicating with the public and with legislators regarding its policies. It has been our position that the prohibition of section 607(a) applies primarily to expenditures involving direct appeals to the public suggesting that they contact their elected representatives and indicate their support of or opposition to pending legislation, i.e., appeals to members of the public for them in turn to urge their representatives to vote in a particular manner. B-128938, July 12, 1976. In any event, like the penal statutes, section 607(a) is limited by its terms to Federal legislation.

PRINTING & BINDING REGULATIONS

The Government Printing & Binding Regulations (October 1974, No. 23) are published by the Joint Committee on Printing pursuant to its oversight authority over the Government Printing Office. See 44 U.S.C. § 103 (1970). Paragraph 39 of the Regulations is set forth below:

> "39-1. Publications, Free Distribution of.--Departments shall not make free distribution of any publication to any private individual or private organization in quantities exceeding 50 copies without prior approval of the Joint Committee on Printing. This quantity limitation shall not apply when the production cost of the publications to be distributed is less than $50.
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> "39-2. Requests for committee approval shall list the name of the publication, the name of the person or organization desiring the same, and the number of copies desired.
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> "39-3. This restriction includes the free distribution in bulk of any material to private individuals or organizations for redistribution to names on their mailing lists. Committee approval is not required when the initiative for distribution through nongovernmental facilities is taken by departments. (See also sec. 3204, title 39, U.S.C.)"

The term "department" is defined in paragraph 3 of the Regulations to include independent agencies.

The original distribution of the pamphlet was made at ERDA's initiative, and would therefore be exempt from Committee approval under subparagraph 39-3 of the Regulations. However, in reviewing pertinent ERDA correspondence, we note that ERDA has received several requests for copies of "Shedding Light"

from organizations other than participants in the Awareness program. One example is a request dated March 29, 1976, from the Public Service Company of Oklahoma, Tulsa, Oklahoma, for 1,000 copies. We have no knowledge as to whether any of these requests have been filled. If, however, ERDA filled any of these requests for more than 50 copies without prior approval of the Joint Committee on Printing, then, subject to the exemption provided when production cost is less than $50, there would appear to be a violation of paragraph 39-1. See B-150978, February 22, 1971.