

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Consumer Product Safety Commission—Prohibitions on Grassroots Lobbying and Publicity or Propaganda

File: B-322882

Date: November 8, 2012

DIGEST

An e-mail from an employee of the U.S. Consumer Product Safety Commission (CPSC) to a pool and spa industry participant that encouraged him to contact Members of Congress regarding a recent CPSC administrative action did not violate the governmentwide prohibitions on the use of appropriations for grassroots lobbying or for publicity or propaganda. Although the e-mail in question encouraged the recipient to contact certain Members of Congress, the e-mail communication did not pertain to pending legislation, nor did the content of the e-mail constitute a purely partisan communication devoid of any connection with official CPSC functions.

DECISION

The U.S. Consumer Product Safety Commission (CPSC) has requested a decision regarding the use of its appropriations for a particular activity—the transmission of an e-mail by a CPSC employee to a pool and spa industry participant. Letter from General Counsel, CPSC, to General Counsel, GAO (Dec. 13, 2011) (Request Letter). The e-mail (CPSC E-mail) at issue, sent on November 30, 2011, in reply to an e-mail received from a member of an industry regulated by CPSC, encouraged the industry participant to contact Members of Congress regarding a recent CPSC administrative action. The question before us is whether the text of the CPSC E-mail violated the governmentwide prohibitions on the use of appropriations for (1) grassroots lobbying, or (2) publicity or propaganda contained in sections 717 and 720, respectively, of the Financial Services and General Government Appropriations Act, 2010.¹ As explained below, we conclude that CPSC did not violate these

¹ Pub. L. No. 111-117, div. C, title VII, §§ 717 (prohibition on grassroots lobbying) and 720 (prohibition on publicity or propaganda), 123 Stat. 3034, 3159, 3210

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prohibitions. CPSC also has also asked whether the CPSC E-mail violated the lobbying prohibition of 18 U.S.C. § 1913, which is enforced by the U.S. Department of Justice (DOJ), not GAO. We address section 1913 below, as well.

Our practice when rendering decisions is to obtain the views of the relevant agency to establish a factual record and to elicit the agency's legal position on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/legal/resources.html. In this case, CPSC provided its legal views at the time of its request. See Request Letter. CPSC provided additional factual information by e-mail. See E-mails from Assistant General Counsel for General Law, CPSC, to Senior Attorney, GAO, dated February 17, 2012 and April 11, 2012 (February 17 E-mail; April 11 E-mail). CPSC also provided a copy of the CPSC E-mail.

BACKGROUND

The Virginia Graeme Baker Pool and Spa Safety Act (P&SS Act)² requires, among other things, that each public pool or spa with a single main drain other than an “unblockable drain” (as defined in the P&SS Act) be equipped with a secondary anti-entrapment system. 15 U.S.C. § 8003(c)(1)(A)(ii). In April 2010, CPSC issued a rule interpreting the term “unblockable drain.” The interpretive rule essentially permitted public pool and spa owners to convert an otherwise blockable drain into an “unblockable drain” by attaching a cover to the drain, thus obviating the need to install a secondary anti-entrapment system. See 75 Fed. Reg. 21985 (Apr. 27, 2010). In October 2011, CPSC revoked this interpretation of the term “unblockable drain.” See 76 Fed. Reg. 62605 (Oct. 11, 2011). As a result, public pools and spas that could previously comply with P&SS Act by attaching a drain cover now were required to install secondary anti-entrapment systems. In other words, a blockable drain could no longer be rendered “unblockable” simply by installing a drain cover. *Id.* at 62606. The three commissioners who voted in favor of the revocation were initially appointed by a Democratic President, and the two commissioners who voted against the administrative action were appointed by a Republican President. 76 Fed. Reg. at 62605 n.1.

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(Dec. 16, 2009). The application of sections 717 and 720 was extended through December 16, 2011, by the Full-Year Continuing Appropriations, 2011, Pub. L. No. 112-10, div. B, title I, §§ 1101(a)(6), 1102, 1104, 125 Stat. 38, 102–103 (Apr. 15, 2011) and the Continuing Appropriations Act, 2012, Pub. L. No. 112-36, §§ 101(a)(2), 103, 125 Stat. 386–87 (Oct. 5, 2011), as amended.

² Pub. L. No. 110-140, title XIV, 121 Stat. 1794 (Dec. 19, 2007), *codified at* 15 U.S.C. §§ 8001–8007.

The public has access to each of the CPSC commissioners via e-mail and telephone, although such communication is normally filtered through the commissioners' administrative assistants. See April 11 E-mail. Members of the public routinely call the commissioners regarding specific matters, health and safety risks, and advocacy initiatives. *Id.* On November 29, 2011, a pool industry participant sent an e-mail addressed to a commissioner who had voted against the revocation of CPSC's interpretation of "unblockable drain." In his e-mail, the pool industry participant expressed his concerns regarding CPSC's administrative action to revoke its earlier interpretation of the definition of an "unblockable drain."

On November 30, 2011, the commissioner's assistant acknowledged the communication by sending the CPSC E-mail. In the CPSC E-mail, the commissioner's assistant wrote:

"Your letter underlines many of [the commissioner's] original concerns regarding this decision by the Commission Majority . . . I would encourage you to contact the following Members of Congress who supported the change to the current interpretation. Perhaps hearing from you will provide [the Members] with some insight into the safety of the current system."³

The CPSC E-mail identified nine Members of Congress and provided for each of the listed Members contact information for staff. The next day, the pool industry participant sent an e-mail to the nine staff contacts about his concerns, and noted that he was contacting the Members at the recommendation of a CPSC commissioner. E-mail from pool industry participant to staff contacts of Members of Congress, dated Dec. 1, 2011.

DISCUSSION

At issue here is whether the CPSC E-mail constitutes a violation of the governmentwide prohibition on grassroots lobbying or the governmentwide prohibition on publicity or propaganda contained in sections 717 and 720 of the Financial Services and General Government Appropriations Act, 2010.⁴ We address, also, 18 U.S.C. § 1913, a lobbying prohibition enforced by DOJ.

³ In the Request Letter, CPSC surmised that "[b]ecause the current Administration is Democratic, we believe this [the reference to "the Commission Majority"] was a direct reference to the Democratic Party." Request Letter, at 1.

⁴ See note 1, *supra*.

Prohibition on Grassroots Lobbying

Section 717 prohibits executive branch agencies from using appropriated funds, other than for normal and recognized executive-legislative relationships,

“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.”

GAO has interpreted provisions in the annual appropriations acts that are similar to section 717 as prohibiting indirect or “grassroots” lobbying aimed at defeating or supporting legislation currently pending before Congress. B-319075, Apr. 23, 2010, at 5–6. The case law has articulated a bright-line rule to determine whether an agency’s communication violates the prohibition, that is, evidence of a clear appeal by the agency to the public to contact Members of Congress in support of, or in opposition to, legislation pending before Congress. *Id.* (E-mails did not contain clear, direct appeal for Web users to contact Members of Congress regarding pending healthcare reform legislation, and therefore, did not violate the lobbying prohibition). This requirement is consistent with a proper respect for the right and responsibility of federal agencies to communicate with the public, as well as Congress, regarding agency policies and activities. B-304715, Apr. 27, 2005, at 4.

In the Request Letter, CPSC also asked whether the CPSC E-mail violated 18 U.S.C. § 1913. Section 1913 provides that no appropriated funds may 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.”

The interpretation and enforcement of section 1913 is the responsibility of DOJ. We note, however, that DOJ’s Office of Legal Counsel has articulated the same bright-line rule for determining a violation of section 1913, requiring that the communication be aimed at defeating legislation currently pending before Congress. See *Application of 18 U.S.C. § 1913 to “Grass roots Lobbying” by Union Representatives*, Office of Legal Counsel, Nov. 23, 2005.

Here, while the CPSC E-mail did suggest that the pool industry participant contact Members, it was not regarding *pending* legislation. Cf. B-285298, May 22, 2000 (interagency working group e-mail communication requesting that outside organizations contact Members of Congress regarding pending legislation violated governmentwide restriction on lobbying); B-116331, May 29, 1961 (editorials asking public to contact Members of Congress to urge opposition to a bill violated

restrictions on lobbying). While the CPSC E-mail did identify specific Members of Congress who had, according to the commissioner's assistant, supported CPSC's administrative action, the subject of the e-mail did not appeal to the recipient to contact the Members in support of, or opposition to, legislation pending before Congress. Indeed, according to CPSC, no legislation on the "unblockable drains" issue, in fact, was pending before Congress at the time the CPSC E-mail was transmitted. Request Letter, at 2. CPSC noted that, while there were amendments to the P&SS Act pending before Congress at the time the CPSC E-mail was sent, those pending amendments were unrelated to the statutory definition addressed in the email.⁵ Request Letter, at 2. Accordingly, the CPSC E-mail does not violate the section 717 grassroots lobbying prohibitions.⁶

Prohibition on Publicity or Propaganda

Section 720 of the Financial Services and General Government Appropriations Act, 2010 prohibits the use of appropriated funds for publicity or propaganda purposes.⁷ Generally, we will not object to an agency's use of appropriated funds to engage in information functions, if the agency justifies its activity as "made in connection with official duties" and there is a reasonable basis for that justification. See, e.g., B-304228, Sept. 30, 2005, at 9; B-302504, at 7.

However, our case law has identified three categories of agency communications that are restricted by the publicity or propaganda prohibition: (1) communications that do not identify the agency as the source of the communication, also known as, covert communications, (2) self-aggrandizement, and (3) purely partisan communications. B-319834, Sept. 9, 2010, at 5. The CPSC E-mail identifies its author as a CPSC commissioner's assistant, and does not emphasize the importance of CPSC, one of the commissioners, or any CPSC employee. Therefore, the CPSC E-mail does not constitute a covert communication or self-

⁵ Our review of bills introduced in the 112th Congress prior to the date of the CPSC E-mail indicates that no legislation regarding the definition of unblockable drains was pending before Congress.

⁶ In this decision, we offer no views on the prudence of the CPSC E-mail.

⁷ Specifically, section 720 provides as follows:

"No part of any appropriation contained in this or any other Act shall be used directly or indirectly, including by private contractor, for publicity or propaganda purposes within the United States not heretofore authorized by the Congress."

Pub. L. No. 111-117, div. C, title VII, § 720, 123 Stat. 3034, 3159, 3210 (Dec. 16, 2009).

aggrandizement. See *id.* At issue here is whether the CPSC E-mail constituted a purely partisan communication because the reference to “the Commission Majority” may have been a direct reference to the Democratic Party, and the e-mail encouraged the recipient to contact nine Members of Congress, all of whom were Democrats, regarding his concerns. See Request Letter, at 1.

Communications are considered purely partisan in nature if they are completely devoid of any connection with official functions and completely political in nature. See B-304228; B-302992. It is often difficult to determine whether materials are political or not because “the lines separating the nonpolitical from the political cannot be precisely drawn.” B-147578, Nov. 8, 1962.

In 2005, we concluded that the Department of Education violated the prohibition when it engaged a contractor to conduct media analyses evaluating whether news articles reported, among other things, that “the Bush Administration/the GOP” is committed to education.” B-304228. We explained that appropriations are available for official government functions, not for political activities, and that the gathering of information regarding the media’s and the public’s views of a particular political party serves no purpose except for partisan, political purposes. *Id.*

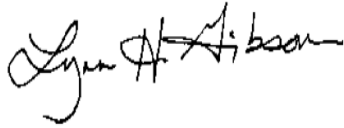
The identification of solely Democratic Members of Congress who purportedly supported a view inapposite to that of the commission minority may imbue the CPSC E-mail with a subtle political tone. However, the e-mail, notwithstanding the fact that it encouraged the addressee to contact Members of Congress on behalf of a view shared by the Commissioner, explained that “hearing from you will provide them with some more insight into the safety of the current system.” The prohibition on publicity or propaganda does not bar materials that may have some political content or express support for a particular view. Also, the fact that materials do not present a balanced view of both the negative and the positive consequences of a particular activity does not render the materials purely partisan. See, e.g., B-319834 (agency brochure informing beneficiaries of changes in Medicare benefits as a result of new legislation was not purely partisan in nature although it presented a view of the legislation that was not universally shared); B-302504 (flyers and television and print advertisements regarding benefits under new Medicare legislation were not purely partisan despite noticeable omissions of information and not being totally devoid of political tone). Cf. B-304228.

On its face, the CPSC E-mail appears to facilitate an exchange of information regarding public pool and spa safety considerations. It is not completely devoid of any connection to CPSC official functions. We conclude, therefore, that the e-mail did not violate the publicity or propaganda prohibitions.

CONCLUSION

The use of appropriated funds to compose and send the CPSC E-mail did not violate the section 717 prohibition on grassroots lobbying, because it did not appeal to a

member of the public to contact Members of Congress regarding pending legislation. Further, the CPSC E-mail was sent in connection with a CPSC Commissioner's official functions, and its content does not constitute a covert, self-aggrandizing or purely partisan communication in violation of the governmentwide section 720 prohibition on publicity or propaganda.

A handwritten signature in black ink, appearing to read "Lynn H. Gibson". The signature is written in a cursive, somewhat stylized font.

Lynn H. Gibson
General Counsel