



United States Government Accountability Office
Washington, DC 20548

B-325124

June 19, 2014

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
House of Representatives

The Honorable Darrell Issa
Chairman
Committee on Oversight and Government Reform
House of Representatives

Subject: *Department of Housing and Urban Development—Application of
Section 713 of the Financial Services and General Government
Appropriations Act, 2012*

This responds to your request for our opinion regarding a potential violation of the prohibition in the Financial Services and General Government Appropriations Act, 2012, on the use of appropriated funds to pay the salary of a federal officer or employee who prohibits or prevents, or attempts or threatens to prohibit or prevent, another federal officer or employee from communicating with Congress. Letter from Ranking Member of the Committee on the Judiciary, United States Senate, Chairman of the Committee on Oversight and Government Reform, House of Representatives, and Chairman of the Committee on the Judiciary, House of Representatives, to the General Counsel, GAO (Aug. 1, 2013) (Request Letter); Pub. L. No. 112-74, div. C, title VII, § 713, 125 Stat. 786, 884, 931–32 (Dec. 23, 2011).¹ Specifically, the issue is whether an e-mail, sent by the Associate General Counsel of the Department of Housing and Urban Development's (HUD) Financial and Administrative Law Division, to the Regional Director of HUD's

¹ Section 713 was carried forward into fiscal year 2013 by the Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, div. F, title I, §§ 1101(a)(2), 1105, 127 Stat. 198, 412–413 (Mar. 26, 2013).

Chicago Fair Housing and Equal Opportunity Office, prohibited or prevented, or attempted or threatened to prohibit or prevent, the Regional Director from communicating with Congress.

Our practice when rendering decisions is to obtain the views of the relevant agency to establish a factual record and 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. Accordingly, our office requested and received the views of HUD's Office of General Counsel regarding the factual circumstances of the matter, as well as its legal views regarding whether HUD's actions were in compliance with section 713 of the Financial Services and General Government Appropriations Act, 2012. Letter from Acting General Counsel, HUD, to Assistant General Counsel for Appropriations Law, GAO (Jan. 30, 2014) (Response Letter).

As agreed with your staff, this opinion also relies on facts investigated and documented in four memoranda prepared by HUD's Office of Inspector General (OIG), including supporting documentation, which you attached to your request letter. These four memoranda detail interviews conducted by HUD's OIG, Office of Investigation, from May 29, 2013, through June 7, 2013, referred to herein as "HUD OIG Memoranda of Interview." They pertain to the factual circumstances of HUD's response to your requests to conduct and transcribe interviews with the Regional Director of HUD's Chicago Fair Housing and Equal Opportunity Office and certain other employees.²

As discussed below, we conclude that the Associate General Counsel did not prohibit or prevent, or attempt or threaten to prohibit or prevent, the Regional Director from communicating with Congress and therefore, HUD's appropriation remained available for payment of the salary of the Associate General Counsel.

BACKGROUND

The events leading to the actions at issue took place over several months beginning in October 2012. On October 26, 2012, you sent a letter to HUD's Office of Congressional and Intergovernmental Relations (OCIR) as part of a congressional investigation into the circumstances of certain federal court litigation. Request Letter, at 1. You requested, among other things, copies of HUD documents, and that the Regional Director and three other HUD employees be made available for transcribed interviews. Request Letter, at 1; Response Letter, at 1.

After receiving your October 26 letter, HUD officials informed the Regional Director that Members of Congress had requested that he be made available for a

² Although HUD's OIG investigated the matter, the OIG did not prepare a report or otherwise document any conclusions drawn from the information obtained.

transcribed interview. HUD OIG Memoranda of Interview. You subsequently made other requests for a transcribed interview with the Regional Director. The requests were made to HUD officials, as well as directly to the Regional Director. Request Letter, at 1; Response Letter, at 1. The Regional Director sent an e-mail to the Associate General Counsel and asked “[p]lease advise.” HUD OIG Memoranda of Interview. The Associate General Counsel responded by e-mail as follows:

“We are in regular consultation with the Committee about these requested interviews. Please do not communicate with the Committee directly. If necessary, refer requests/questions back to [the Deputy Assistant Secretary of HUD’s OCIR]. Thanks[.]”

Id.

On April 23, 2013, congressional staff advised the Regional Director that a Member of Congress had authorized the issuance of a subpoena to compel his appearance. Request Letter, at 2. The Regional Director notified the HUD Associate General Counsel, who advised the Regional Director to appear before Congress so as to avoid the issuance of a subpoena. HUD OIG Memoranda of Interview.

Congressional staff conducted a transcribed interview of the Regional Director on May 2, 2013. Request Letter, at 2. When asked during that interview if he had been “willing to speak with the committees” at the times the requests for a transcribed interview had been made, the Regional Director replied “[y]es.” *Id.* When asked why he had not spoken with the “committees” as previously requested, the Regional Director replied, referring to the above e-mail from the Associate General Counsel, that “[o]n the advice of HUD’s counsel, I was instructed not to.” *Id.* When interviewed by HUD’s OIG, the Regional Director informed HUD’s OIG that he was “never told ‘[n]ot to testify’ by anyone.” HUD OIG Memoranda of Interview.

In HUD’s response to our development letter, the Acting General Counsel explained that all congressional requests, discussions and scheduling are handled by HUD’s OCIR. Response Letter at 1. HUD stated that employees were told that HUD would handle the negotiations and scheduling with the congressional committees, members and staff. *Id.*

It is the above e-mail from the Associate General Counsel, and its statement to “not communicate with the Committee directly,” that is the focus of this opinion.

DISCUSSION

The issue here is whether the e-mail quoted above, and sent by the Associate General Counsel to the Regional Director, prohibited or prevented, or attempted or threatened to prohibit or prevent, the Regional Director from participating in the requested transcribed interview. If so, then HUD’s appropriation, which was otherwise available for the payment of the salary of the Associate General Counsel,

was unavailable for such purpose because of the prohibitions set forth in section 713 of the Financial Services and General Government Appropriations Act, 2012. Section 713 provides as follows:

“No part of any appropriation contained in this or any other Act shall be available for the payment of the salary of any officer or employee of the Federal Government, who . . . prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress in connection with any matter pertaining to the employment of such other officer or employee or pertaining to the department or agency of such other officer or employee in any way, irrespective of whether such communication or contact is at the initiative of such other officer or employee or in response to the request or inquiry of such Member, committee, or subcommittee.”

Pub. L. No. 112-74, § 713.

In a 2004 opinion considering the application of this governmentwide prohibition, we engaged in a detailed analysis of the prohibition’s legislative history and that of its antecedents. B-302911, Sep. 7, 2004. We noted that Congress intended to advance two goals in enacting the governmentwide prohibition, with one being to preserve the First Amendment rights of federal employees, and the other being to ensure that Congress had access to programmatic information from frontline employees. *Id.*, at 9. As evidenced below, the facts in this case implicate the latter of these goals, as did the facts in B-302911.

In B-302911, we found that the governmentwide prohibition had been violated where the Chief Actuary of the Centers for Medicare & Medicaid Services (CMS) had been requested to provide certain information to Congress, and had been ordered by his supervisor, the Administrator of CMS, not to do so. B-302911, at 3. We specifically noted that the Chief Actuary had been warned that there would be “extremely severe” consequences should the Chief Actuary communicate with Congress, and that the Chief Actuary had interpreted this warning to mean that his employment would be terminated if he were to communicate with Congress as Congress had requested. *Id.* We concluded that the Administrator’s actions fell squarely within the terms of the prohibition, that is, that the Administrator of CMS had prohibited and had threatened to prohibit the Chief Actuary from communicating with Congress, and that the agency’s appropriation was thus unavailable for payment of the Administrator’s salary during this period. B-302911.

The facts of this case are in contrast to the Administrator’s actions in B-302911. In B-302911, the Administrator prohibited the Chief Actuary from providing information to Congress, and the Administrator was not attempting to reach resolution of the requests of Members and their staff. Here, in response to the Regional

Administrator's request to "[p]lease advise," the Associate General Counsel stated that HUD was in "regular consultation with the Committee about the requested interviews." The Associate General Counsel asked the Regional Director to "[p]lease . . . not communicate with the Committee directly" and to "refer requests/questions back to [the Deputy Assistant Secretary of HUD's OCIR]." HUD OIG Memoranda of Interview. When the Regional Director notified the Associate General Counsel that a Member of Congress had authorized the issuance of a subpoena to compel his appearance, the Associate General Counsel advised the Regional Director to appear. *Id.*

In our view, the Associate General Counsel's response to the Regional Director's request for advice did not prohibit or prevent, or attempt or threaten to prohibit or prevent, the Regional Director from communicating with Congress. The Associate General Counsel, by stating that HUD was in "regular consultation with the Committee" regarding the requested interview with the Regional Director and that the Regional Director should refer questions to HUD's OCIR, was only informing the Regional Director of the status of HUD's ongoing discussions with the congressional requesters regarding such interviews.

Further, the Associate General Counsel's e-mail neither stated nor implied that any negative consequence would befall the Regional Director if the Regional Director were to communicate with Congress. The Regional Director, in contrast to the situation involving the Chief Actuary as set forth in B-302911, never expressed any concern about punishment or the threat of punishment by the Associate General Counsel. Specifically, the Regional Director informed HUD's OIG that he was "never told '[n]ot to testify' by anyone." HUD OIG Memoranda of Interview. The Regional Director explained that he understood from the Associate General Counsel only that the Associate General Counsel was discussing and negotiating with the congressional requesters as to the relevance and extent of the Regional Director's testimony.³ *Id.* This understanding is consistent with HUD's explanation of its process for handling congressional requests and scheduling.

CONCLUSION

It is important that committees and staff continue oversight and pursue indications, like this, of possible violations of law. In this case, however, the Associate General Counsel's e-mail, examined in light of the context described above and HUD's explanation of its process for handling congressional requests, does not violate the prohibition in section 713. In reaching this conclusion, we are mindful of the

³ We note that the Regional Director, when committee staff asked why he had not spoken with the committees previously, replied, "[o]n the advice of HUD's counsel, I was instructed not to." It appears, from the excerpted transcript of the May 2, 2013 interview with the committee, that the Regional Director did not offer this context when he was responding to staff's questions.

importance of the prohibition and the need to ensure a thorough analysis of the facts and circumstances so that officers and employees of the federal government remain available to Congress as a source of information. If you have any questions, please contact Edda Emmanuelli Perez, Managing Associate General Counsel, at (202) 512-2853 or Julia C. Matta, Assistant General Counsel for Appropriations Law, at (202) 512-4023.

Sincerely yours,

A rectangular box containing a handwritten signature in black ink. The signature is cursive and appears to read "S. Poling".

Susan A. Poling
General Counsel