



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

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May 3, 1993

MEMORANDUM

TO : Paul K. Legler
Special Assistant
Office of the Assistant Secretary for
Planning and Evaluation

FROM : Associate General Counsel

SUBJECT: Working Group on Family Support and Independence

Stan -
Memo re: FACA
issues and
welfare reform.

-Jerem

I am responding to your April 6 memorandum to Harriet Rabb in which you seek legal advice on a series of questions related to development of a plan for welfare reform.

You indicate that a "Working Group on Family Support and Independence" ("Working Group") comprised solely of full-time federal employees will be formed to develop a welfare reform plan for submission to the Domestic Policy Council by September 3, 1993. Although you indicate that President Clinton has announced that he would form such a group, you do not say specifically whether the President or the Domestic Policy Council will establish the Working Group you describe. Second, you do not state specifically whether the President or the Council will utilize the Working Group; that is, whether the Working Group is intended to advise the President or the Council. These kinds of facts would normally be important to the questions of whether or not the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 2, applies and why, and further, if it does apply, what rules must then be followed. However, as you will note from our responses below, your statement that the Working Group's membership will be confined to full-time federal employees, is dispositive of the FACA-applicability question.

Our analysis and advice assume that the President will establish the Working Group, much as he did with the National Health Care Reform Task Force, which will be comprised solely of full-time federal employees and utilized by the President and/or the Council. We have ruled out an assumption that the Secretary of Health and Human Services ("HHS") will establish the Working Group under the Department's auspices. If we are incorrect, please let us know because the answers to some of your questions would be different.

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You also state that a separate entity of about 21 teams ("issue groups") comprised of current full-time Department of Health and Human Services ("HHS") and other federal agency employees will be organized to provide support services to the Working Group. We assume that these teams will be organized under HHS's auspices/leadership. Based on your description of their activities, we assume that these teams will not be subcommittees or subgroups of the Working Group. We make note of this because the FACA's definition of "advisory committee" makes plain that a "subcommittee" or "subgroup" of an advisory committee can itself be subject to the FACA. FACA § 3 (2). Even if our assumption be incorrect, you will note from our response to your question one, that the functions of a particular group are critical to determining whether it is a FACA-subject committee.

In addition to engaging the services of full-time federal employees to form the teams, you propose to call upon temporary employees, Intergovernmental Personnel Act assignees/detailees, other detailees, contractors, consultants, volunteers and others hired for short periods to support the Working Group effort. From the information you provided, it appears that the non-federal personnel will be providing factual information rather than developing or offering consensus advice to the Working Group and will interact primarily, if not exclusively, with members of the issue groups. Moreover, it appears from your material that the teams, regardless of their membership, will not in any case be "advising" the "utilizers" of the Working Group; namely, the President and/or the Domestic Policy Council.

You seek advice to ensure that any actions taken in connection with the Working Group and support teams comply with the FACA and other federal laws that may apply.

Before responding to your questions seriatim, I want to advise caution at the outset on one matter raised in the material. You indicate that you expect that the Working Group will conduct a series of public forums and you are soliciting foundation support to help organize and finance such events. As a general rule, an agency must operate within the limits of its appropriated funds and may not augment its appropriations from outside sources without specific statutory authority. See, e.g., 55 Comp. Gen. 1293 (1976) and 70 Comp. Gen. 597, 598 (1991). This prohibition derives from the constitutional requirement that "[n]o money may be drawn from the Treasury, but in Consequence of Appropriations made by Law..." U.S. Const. art. I, § 9, cl. 7.

The interdiction against "augmentation" is a corollary to the "separation of powers" doctrine. When Congress makes an appropriation, it is establishing an authorized program level which also operates as the funding ceiling. Accordingly, the

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"augmentation" prohibition seeks to ensure that the Executive Branch limits its expenditures to the appropriations it receives, unless specifically authorized by law to receive "donations" or "gifts." Simply stated, we follow the rule that an agency may not accept gifts of money or property in the absence of specific statutory authority. 16 Comp. Gen. 911 (1937).

Congress has vested HHS with several gift acceptance authorities, but they are for the benefit of the Public Health Service and the Social Security Trust Funds. Except for the statutory authorities to accept travel reimbursement from outside sources at 31 U.S.C. § 1353 and 42 U.S.C. § 3506, which apply HHS-wide, neither the Office of the Secretary nor the Administration for Children and Families has any authority to accept or solicit gifts.¹ Based on the facts you present, it is our view that HHS's soliciting outside financial support to help meet the costs of the proposed public forums would likely be an impermissible augmentation of funds.²

Though it is clear that accepting gifts of cash or property without statutory authority is impermissible, it is less clear whether any agency's acceptance of outside services without statutory authority would also produce an impermissible augmentation of its appropriations. The Comptroller General's decisions have not been consistent on this issue. Under various circumstances, which do not necessarily follow any clear pattern, the Comptroller General has found that in the absence of gift acceptance authority, an agency's acceptance of some services amounts to an illegal augmentation while its acceptance of other services does not. 11 Comp. Gen. 622 (1905) (Navy could accept installation of appliance); B-211079.2 (Jan. 2, 1987) (agency

¹ Also, because the authority to accept gifts is an exceptional one, the Office of the General Counsel narrowly construes any such authority and has consistently advised agency officials that gift acceptance authority does not ordinarily include gift solicitation authority. See, e.g., Mem. from the General Counsel to the Secretary, Feb. 20, 1991. (Attached at Tab A.)

² We wish to make very clear that our analysis and advice on this matter are confined to HHS actions. We defer to White House Counsel with respect to whether the Office of the President has any gift acceptance authority on which the Working Group as a Presidential Advisory Committee could rely to achieve the aims you mention. Likewise, we defer to the Counsels of other federal agencies whose officials may make up part of the Working Group and whose agencies may also be operating under less restrictive statutory authorities and could do what HHS cannot.

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cannot accept work of "workfare" participants). Of major significance in these cases is whether the agency would normally provide the service in question with its own personnel. If so, acceptance of the offered services may amount to an impermissible augmentation of appropriations. Accordingly, we recommend that offers to provide intangible gifts, such as services, be reviewed on a case-by-case basis and that you consult with us if any such offer arises involving HHS as the recipient.

Despite the limits on using outside resources, HHS may co-sponsor an event with a non-government entity under some circumstances. Co-sponsorship refers to the joint development and/or presentation of a conference, seminar, symposium, etc. by the Department and one or more non-federal entities which share a mutual interest in the subject matter. It generally involves a co-funding arrangement between the parties; that is, HHS typically makes grant or other funds available to the other party to help defray the costs of a co-sponsored forum or conference. Your office has considerable experience in such matters. If you consider co-sponsoring an event, I nonetheless recommend that you consult with us further on any FACA implications and contact the Ethics Division of this Office for specific guidance on ethical issues involved in co-sponsorship. Attached (Tab B) for your information is our Ethics Division's guidelines on co-sponsorship, which though in draft form, are currently being applied.

FEDERAL ADVISORY COMMITTEE ACT

1. What is the general rule for determining whether FACA applies?

ANSWER: We rely chiefly on three legal sources in determining whether the Federal Advisory Committee Act applies to any particular group: (a) the statute -- Federal Advisory Committee Act ("FACA" or "Act"), Pub. L. No. 92-463, as amended, 5 U.S.C. App. 2; (b) the sole Supreme Court decision construing the Act, Public Citizen v. United States Dep't of Justice, 109 S. Ct. 2558 (1989); and (c) the government-wide FACA regulations issued by the Administrator of the General Services Administration ("GSA"), 41 C.F.R. Subpart 101-6.10. The FACA vests the GSA Administrator with focal point authority for the Executive Branch's administration of the Act. FACA § 7. (HHS has also published Advisory Committee regulations which appear at 45 C.F.R. Part 11; however, they are not current in some key respects. Also, insofar as the Working Group appears to be a Presidential Advisory Committee, the HHS regulations would not apply to it.)

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By way of introduction, FACA was enacted to stem the proliferation of advisory committees through which private individuals outside the government were able to influence governmental decision making to the exclusion of the general public. See FACA § 2; see also, H. Rep. No. 92-1017, 92d Cong., 2d Sess. 2, 6 (1972), reprinted in U.S.C.C.A.N. 3491, 3492, 3496; Public Citizen, 109 S. Ct. at 2562. Accordingly, the FACA establishes a means to ensure that the need for such committees is properly justified, FACA § 2(b)(1)-(3), and increases the accountability of such committees by making their meetings open to the public and requiring disclosure of their purposes, membership, costs and activities, FACA § 2(b)(4)-(6).³

The Act defines the term "advisory committee" broadly as "any committee, board, commission, council, conference, panel, task force, or other similar group" that is--

- established by statute or reorganization plan, or
- established or utilized by the President, or
- established or utilized by one or more agencies

in the interest of obtaining advice or recommendations.
FACA § 3(2).

It excludes from its coverage, however, "any committee which is composed wholly of full-time officers or employees of the Federal Government" because they are not the government "outsiders" Congress was concerned about whose private interests could color the advice provided federal policy makers. FACA § 3(2)(iii), S. Rep. No. 92-1098, 92d Cong., 2d Sess. at 17. The FACA does not define "officers or employees of the Federal Government."⁴ However, there is general agreement that at least the definitions

³ In a similar vein, President Clinton issued Executive Order 12838, "Termination and Limitation of Federal Advisory Committees," on February 10, 1993, directing a comprehensive Executive Branch review of existing committees with a view toward their reduction. Pursuant to the Executive Order, Director Panetta issued OMB Bulletin No. 93-10 on April 10, 1993 spelling out the procedures for implementing the Executive Order.

⁴ Indeed, the question, for example, of whether the First Lady is a government officer or employee or the equivalent for purposes of the FACA's application to the President's Health Care Reform Task Force is before the Court of Appeals for the District of Columbia Circuit on the government's appeal of the district court's holding that she is not. Association of Am. Physicians and Surgeons v. Clinton, No. 93-0399 (D.D.C. Mar. 10, 1993), appeal docketed, No. 93-5086 (D.C. Cir. Mar. 22, 1993).

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of "officer" and "employee" set forth at 5 U.S.C. §§ 2104 and 2105 apply. Those sections provide in relevant part as follows:

Section 2104 - Officer

(a) For the purpose of this title [5], "officer,"... means ... an individual who is -

(1) required by law to be appointed in the civil service by one of the following acting in an official capacity -

- (A) the President;
- (B) a court of the United States;
- (C) the head of an Executive agency; or
- (D) the Secretary of a military department;

(2) engaged in the performance of a Federal function under the authority of law or an Executive act; and

(3) subject to the supervision of an authority named by paragraph (1) ... while engaged in the performance of the duties of his office.

Section 2105 - Employee

(a) For the purposes of this title [5], "employee," ... means an officer and an individual who is -

(1) appointed in the civil service by one of the following acting in an official capacity -

- (A) the President;
- (B) ...
- (D) an individual who is an employee under this section;
- (E) ...

(2) engaged in the performance of a Federal function under authority of law or an Executive act; and

(3) subject to the supervision of an individual named by paragraph (1) of this section while engaged in the performance of the duties of his position ...

5 U.S.C. §§ 2104 and 2105.

As noted above, the FACA defines an advisory committee as a committee establish or utilized "in the interest of obtaining advice or recommendations" for federal agencies or officers. FACA §3(2). Thus to the extent that a committee's function is to

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provide a forum for the exchange of information and data -- not advice and recommendations -- the committee by definition will not be an "advisory committee." A committee may also not be an advisory committee if its functions are oriented toward the performance of "operational" not advisory responsibilities, meaning that the "committee" will ordinarily do or perform practical work just as federal staff perform; for example, gathering information, developing work plans, performing studies and other analyses or drafting reports.

GSA regulations expressly recognize these interpretations in exempting from the FACA any committee which is established "to perform primarily operational as opposed to advisory functions." The regulations also recognize that a committee may have "mixed functions", some advisory, others not, in their provision that such a committee is still not subject to the FACA so long as it does not, during the course of its operations, become primarily advisory in nature. 41 C.F.R. § 101-6.1004(g).⁵ The courts have also upheld this construction of the FACA. See, e.g., National Anti-Hunger Coalition v. Executive Comm., 711 F.2d 1071, 1075 (D.C. Cir. 1983) ("NAHC"); Association of Am. Physicians and Surgeons v. Clinton, No. 93-399, slip. op. 12-15 (D.D.C. Mar. 10, 1993) ("Association of Am. Physicians").

GSA's regulations also provide that certain meetings of advisory committees are not subject to the FACA, regardless of whether the committee is subject to FACA. 41 C.F.R. § 101-6.1004. The FACA does not apply to any meeting initiated by a Federal official with one individual to obtain that individual's advice or recommendations. 41 C.F.R. § 101-6.1004(h). Nor does the FACA cover a Federal official's meeting with more than one individual to obtain the advice of individual attendees, but not to use the "group to obtain consensus advice or recommendations." 41 C.F.R. § 101-6.1004(i). Finally, the rules make the FACA inapplicable

⁵ HHS's Advisory Committee regulations contain a similar exclusion:

The functions of an advisory committee are to be solely advisory. Where a group provides some advice to the Department, but the group's advisory function is incidental and inseparable from other (e.g., operational) functions, the provisions of this part do not apply. However, if the advisory function is separable, the group is subject to this part to the extent that the group operates as an advisory committee.

45 C.F.R. § 11.2(b)(2).

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to any meeting with a group initiated "for the purpose of exchanging facts or information." 41 C.F.R. § 101-6.1004(1).

With respect to the question of whether the FACA applies to the Working Group, we would generally defer to White House Counsel for the controlling opinion because it appears in the first instance that a Presidential task force is contemplated. For your information, however, based on the government's arguments and the court's decision in the Association of Am. Physicians case, which concerns whether the FACA applies to the President's National Health Care Reform Task Force, we feel comfortable in stating that we believe that the Working Group is exempt from FACA because it will be comprised wholly of full-time federal employees.⁶ The prospective members of the Working Group whom you identify meet the title 5, U. S. Code, definitions we set out above.⁷

We also defer to White House Counsel on any question about whether the Working Group's actions in connection with any of its meetings could make that meeting subject to the FACA; for example, if the Working Group holds a meeting attended by a participant who is not a full-time federal employee.

With regard to the issue teams, based on your description of their proposed activities, we believe that the teams or issue groups are not advisory committees under the FACA because (a) they are intended to provide a forum for the exchange of information, not to be utilized by federal officials for the provision of advice; and (b) they will be engaged in operational activities, that is, performing assigned tasks -- performing staff, not advisory, functions for the Working Group. Please note that our conclusion derives from your characterization of

⁶ The district court's conclusion that the President's National Health Care Reform Task Force was at all subject to the FACA stemmed entirely from its holding that Hillary Rodham Clinton was not a federal officer or employee and thus the Task Force did not meet the FACA exemption for committees comprised wholly of federal employees. Association of Am. Physicians, slip op. at 11-12.

⁷ Also, if the Working Group were to be created and utilized by the Domestic Policy Council, rather than the President, we believe that an additional argument for exempting the Group from the FACA could be asserted; namely, that the Domestic Policy Council is not an agency for FACA purposes, and therefore, an agency neither created nor utilized the Working Group. See Kissinger v. Reporters' Comm. on Freedom of the Press, 100 S. Ct. 960, 971 (1980).

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their functions; it is not based on the same reasoning as our conclusion on the Working Group -- namely, that the latter would be comprised entirely of full-time federal employees.

With regard to the composition of the teams, detailees who are full-time employees from other federal agencies and individuals on detail or assignment under the Intergovernmental Personnel Act, 5 U.S.C. §§ 3371-3376 would be considered full-time federal employees for FACA purposes in any case. However, others, such as contractors and contractor employees, would not. Thus in disposing of the FACA question, we rely on the teams' functions as you describe them. See NAHC, 711 F.2d 1071, 1075; see also Association of Am. Physicians, No. 93-399, slip op. 12-15.

2. If FACA applies, what are the requirements that we are subject to?

ANSWER: If the FACA applies to the Working Group, the Act requires that the President must charter the Committee and file the Charter with the GSA Administrator. FACA § 9. If the FACA applied to the teams and they were to be organized under HHS's auspices, the Secretary must, in consultation with the GSA Administrator, make a determination that the "committee" is in the public interest, approve and send a Charter to OMB for its approval, and then file the Charter with the relevant Senate and House legislative oversight committees. FACA § 9; OMB Bulletin No. 93-10, Apr. 9, 1993.

Any Charter must set out the name of the Committee, its objectives and scope of activity, the time period needed to carry out its purposes, the agency official to whom it reports, estimated operating costs and the estimated number and frequency of meetings. FACA § 9(c). Notice of each meeting of a FACA-subject advisory committee must be published in the Federal Register at least fifteen days before the meeting; meetings must be open to the public unless closed in accordance with subsection (c) of the Government in the Sunshine Act, 5 U.S.C. § 552b(c) (that is, the authority for closing meetings subject to the Government in the Sunshine Act also controls for FACA meetings); interested persons must be permitted to attend, appear before or file statements with the committee; detailed minutes of each meeting must be kept; and records, reports, transcripts, minutes, working papers, drafts, etc., which were "made available to or prepared for or by" an advisory committee must be made available to the public in accordance with the FOIA. FACA §§ 9 and 10.

3. We are especially concerned about using outside personnel who are not employees of the federal government. What is the criteria for determining whether someone is a federal employee?

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ANSWER: As noted above, the Act exempts from coverage advisory committees made up entirely of "full-time officers or employees of the Federal Government." FACA § 3(3). Generally, for purposes of the FACA, a full-time federal officer or employee is an individual appointed in the civil service who is employed on a full-time basis or a commissioned officer of a uniformed service. 5 U.S.C. §§ 2104, 2105. "Full-time Federal employee" does not include individuals employed on an intermittent or when-actually-employed basis, but does include individuals on full-time assignment to the federal government pursuant to the Intergovernmental Personnel Act, 5 U.S.C. §§ 3371-3376. That statute authorizes us to accept individuals on assignment or detail from state and local governments and colleges and universities to work for up to two years. However, as noted above, from your description, the outside people you propose to use would be performing operational responsibilities or tasks, as opposed to giving advice, and in such a case, FACA would not be implicated.

4. Specifically, how does FACA apply to the following types of people who we may want to include in the Working Group or team meetings?

- a. Expert hired under IPA authority.
- b. Detailees from other federal agencies.
- c. Contractors.
- d. Consultants.
- e. Volunteers.
- f. Student interns.

ANSWER: We interpret this question as asking whether a meeting of the Working Group or a committee composed of Federal employees and one or more individuals from the above categories would render such committee meeting subject to the FACA. As a general rule, including certain types of individuals in a meeting with an advisory committee comprised of federal employees entirely could nonetheless make that meeting subject to the FACA. This is so because the premise that the group is not subject to FACA is that it is composed entirely of full-time Federal employees. If that composition changes the premise changes and makes meetings subject to attack as being a FACA-subject meeting taking place without the procedural and open meeting requirements being observed.

With regard to the Working Group, again since it appears to be a Presidentially-appointed group, we defer to White House Counsel. Nonetheless, to assist you, in our view, if one of the following categories of individuals were a member of the Working Group, as opposed to the issue groups, it would make the Group subject to the FACA and thus make it subject to certain procedural

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requirements: contractors or contractor employees; less than full-time experts or consultants; and student interns, if not full-time. Also, inclusion of part-time federal employees, whether permanent employees or not, would render the same result. The issue groups may, however, meet with outside individuals or groups for the purpose of gathering facts, information or opinions without regard to FACA. NAHC, 711 F.2d at 1075.

With respect to using volunteers, 31 U.S.C. § 1342 generally prohibits federal agencies from accepting volunteer services. We defer to White House Counsel on whether the Office of the President may accept volunteer services, and to counsel for the other federal agencies with respect to their agency authorities. However, if the issue groups are housed at HHS, you should know that the Office of the Secretary has no statutory authority to accept volunteer services except student volunteers providing services pursuant to 5 U.S.C. § 3111. Section 3111 authorizes Federal agencies to accept volunteer services of students (high school, trade or technical school or college) with the consent of their educational institution. They are not considered Federal employees except for limited purposes which are not relevant here. 5 U.S.C. § 3111(c)(1). Only certain Public Health Service agencies in HHS have broad authority to accept volunteer services. Therefore, we recommend that you not permit volunteer services.

5. Can experts who are contacted for their opinion or advice, but not hired by the agency, sit in on closed meetings?

ANSWER: We defer to White House Counsel on questions regarding meetings of the Working Group; however, the Government has taken the position before the Court of Appeals in Association of Am. Physicians that it would be Constitutionally impermissible to make the open-meetings provision of the FACA apply to any meeting of the Health Care Task Force including meetings attended by outsiders. Appellant's Brief at 36-38. In our view, such experts may attend meetings of the proposed issue teams. As noted above, the issue teams are operational and not subject to the FACA. Even if they were deemed to be FACA committees, the work they would be conducting would not entail open meetings because they would fall into one of the exceptions cited in the GSA regulations. 41 C.F.R. § 101-6.1004.

6. At what point does contact with someone outside the federal government become a meeting that is subject to FACA? For example, one or two people might want to meet with an IBM representative to discuss the feasibility of new computer systems for child support enforcement. Is that a meeting? What about talking with people with foundations or academia about such things as modeling, income dynamics, etc.?

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ANSWER: As noted above, not all meetings between Federal employees and others are advisory committee meetings. For example, meetings between Federal employees and other individuals for the purpose of exchanging facts or information, as opposed to soliciting or obtaining the non-federal individuals' consensus advice, would not constitute a FACA advisory committee meeting.

We also wish to advise caution, however, in light of your example of meeting with private enterprise or actual or potential recipients of federal grants to discuss a matter that may result in a future procurement or grant of federal funds. Such sessions may give a potential contractor or potential grantee (including expansion of funds to an existing grantee for a particular purpose) an unfair competitive advantage thereby tainting any subsequent procurement or grant process. 48 C.F.R. § 5.401 and HHS Grants Admin. Manual, Chapter 1-62.

7. Does it matter if people are simply providing the agency with information as opposed to providing advice, recommendations or opinions?

ANSWER: As discussed above, the FACA draws that distinction so that the provision of information only and not advice does not implicate the FACA. NAHC, 711 F.2d at 1075, aff'g, 557 F. Supp. 524 (D.D.C. 1983) ("The Act does not cover groups performing staff functions such as those performed by the so-called task forces.")

8. Would there be problems in having closed meetings with key state government groups, advocacy and interest groups, providers or business leaders?

ANSWER: Again we defer to White House Counsel regarding meetings of the Working Group. However, in our view, such meetings, especially if done on a one-time basis, would not necessarily constitute an FACA meeting. 41 C.F.R. § 101-6.1004(f). However, any meetings attended by one or more outside individuals is subject to challenge and you may want to avoid even an occasion for a challenge by not having them. As discussed above, the Government is arguing in the Court of Appeals that such meetings would not be subject to the FACA because that would intrude on the President's ability to get advice he needs. If it is the issue groups or members thereof who would be conducting these meetings, we do not think they would be FACA-subject meetings. Public Citizen, 109 S.Ct. 2558.

9. If a person who is not considered a federal employee attends a meeting that is closed to the public, what is the possible remedy, sanction, or penalty that the agency could face?

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ANSWER: As discussed above, we defer to White House Counsel regarding the Working Group. In our view, however, if a meeting is a FACA meeting properly closed to the public, or a non-FACA meeting to which the public does not have access (such as we believe meetings of the Working Group and issue groups are), an individual who is not a member of that committee may attend either to observe or to provide information to the committee. As noted above such participation may result in a challenge from an individual arguing that the group or the meeting is subject to FACA without the individual or group seeking an injunction prohibiting further meetings of the group until the FACA is observed or an order expunging any recommendations made by the group.

10. What should we know or do to avoid being sued by an outside interest group, as was the case for the Health Reform Task Force?

ANSWER: Generally, we cannot always avoid court challenges to any action and we defer to White House Counsel on this matter with regard to the Working Group. However, our best advice on avoiding suit by an interest group is either to ensure that all meetings of the Working Group are restricted to full-time federal employees or to consider the Working Group as an advisory committee subject to the FACA and to comply with the requirements of the FACA such as chartering the committee, etc. Any other action, although perhaps defensible, may render the activities of the Working Group subject to challenge. This is really a policy not a legal call.

I have attached a copy of the General Services Administration FACA regulation for your information. (Tab C).

FREEDOM OF INFORMATION ACT

1. In general, what are the rules for determining whether information must be made available to the public under the FOIA?

ANSWER: The Freedom of Information Act ("FOIA"), 5 U.S.C. § 551, is really a misnomer; it does not really apply to matters of information except with respect to matters of agency organization, functions and delegations of authority, which it requires be published. Otherwise it requires that records be made available to the public upon request unless they fall within one of nine specific exemptions. In discussing records, you should distinguish between agency records, i.e., HHS records, and Working Group records, which are not HHS records unless they are incorporated into HHS's records. Records of Working Group members do not become Department records simply by being physically located in Department offices.

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One of the FOIA exemptions is the so-called deliberative process exemption for pre-decisional inter- and intra-agency memoranda or letters containing opinion, advice or recommendations from staff to a decision maker. 5 U.S.C. § 552(b)(5); see Weber Aircraft Corp. v. United States, 565 U.S. 792 (1984) (discussing the parameters of this exemption). In all likelihood, much of the documentation produced by or for the Working Group would fall within this exemption. (Other exemptions that may be applicable are those for confidential commercial information and for information, release of which would result in a clearly unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(4) and (6)). You should be aware that before the district court decision in Association of Am. Physicians holding that the deliberative process privilege is available to withhold pre-decisional records of the Health Care Task Force, slip op. at 25-26, the Department of Justice had taken a contrary view.

2. How should the work product of the group be organized or written so that it is not subject to disclosure to the public because disclosure might inhibit open and frank examination of options?

ANSWER: Assuming that most of the documents generated by or for the Working Group would constitute pre-decisional advice and recommendations which would be properly withheld under the deliberative process exemption discussed above, it would be advisable to segregate to the extent feasible any factual content from the discussion and recommendation portions of the document. This would ease the separation of exempt material from non-exempt material in the event of a request for the document. For example, if you are preparing a decision memorandum you should start with a recitation of relevant facts and then go to sections on discussion and recommendation in such a way that any facts cited in those portions are intertwined with the advice and recommendations.

3. Are there distinctions between various types of work products such as drafts, opinions, advice, analysis, facts, issue papers, preliminary recommendations or plans, final plans submitted to the White House, manuals, instructions to employees about the task group's work, etc? If so, what advice do you have for the agency to best protect the confidentiality of its product? Are there certain types of work products to be solicited or ways that work products should be written that are preferable?

ANSWER: The primary exemption for the types of documents described is that for pre-decisional advice, recommendations, opinions, etc. 5 U.S.C. § 552(b)(5). The documents containing such matters are exempt regardless of the character or

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characterization of the document and the content, if exempt, is exempt currently and in the future. That is, exempt material does not lose its exempt character as a result of the lapse of time or of a decision being made. Materials such as manuals and instructions to employees may be exempt under other exemptions depending on content and would have to be reviewed on a case by case basis.

4. At what points in the process, if any, are we especially vulnerable to application of FOIA access rules?

ANSWER: We are always subject to the application of the FOIA to agency records. There is, however, a two step process -- identifying records subject to a request and application of the exemptions to those records; that is, just because we have a requested record does not mean we must disclose it. The Department's FOIA regulation, 45 C.F.R. Part 5, defines agency record as "any handwritten, typed or printed documents (such as memoranda, books, brochures, studies, writings, drafts, letters, transcripts, and minutes) and documentary material in other forms (such as punch cards, magnetic tapes, cards or discs; paper tapes; audio or video recordings; maps; photographs; slides; microfilm and motion pictures)". 45 C.F.R. § 5.5. Agency records include preliminary and subsequent drafts, as well as final products.

Agency records do not, however, include handwritten notes made for and used solely by an individual. That is, if you make personal notes for your use in performing your job and do not share these notes with others, they do not become agency records regardless of the context in which such notes are made. Because they are not considered agency records they are not subject to the FOIA and in some circumstances would not be subject to a subpoena. Also, as noted above, you should be alert to distinguish between agency records (i.e., HHS records) and Working Group records. Requests for Working Group records should be referred to the White House.

5. What about the products produced by contractors and grantees that may be performing part of the work for federal agencies?

ANSWER: Although certain materials produced by contractor employees and consultants may be withheld under the deliberative process privilege, most cannot. As a rule of thumb, you should consider all such material as subject to release to a FOIA requester. In HHS, only the authorized FOIA Officers may respond to FOIA requests. Therefore, I recommend that you consult with the Freedom of Information/Privacy Act Division of the Office of

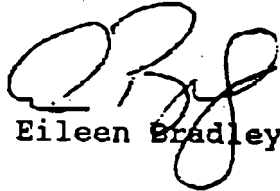
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Public affairs in regard to all requests for records from members of the public on a request by request basis.

OTHER FEDERAL LAWS

The FOIA specifically provides that none of the exemptions provides authority to withhold records from Congress and we have long interpreted that provision to include the General Accounting Office. (GAO operates under the same view of the law.) Traditionally, we have provided records requested by the heads of Congressional committees and subcommittees. Those requests are coordinated by the Assistant Secretary for Legislation.

I hope this clarifies some matters for you. We will be pleased to provide whatever further assistance you may require.



Eileen Bradley

Attachments

cc: w/attachments
Harriet Rabb
Beverly Dennis, III
Frank Dell'Acqua
Steven Pigeon, OS
Marcie Oppenheimer, OS
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**OPERATION PEOPLE FIRST:
TOWARD A NATIONAL DISABILITY POLICY**

**A REPORT OF
THE PRESIDENT'S COMMITTEE ON EMPLOYMENT OF
PEOPLE WITH DISABILITIES'
1993 TELECONFERENCE PROJECT**