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

DEC 3 1979

B-196559

[National Endowment for the Arts and Use of Appropriated Funds]

The Honorable Edward P. Boland
Chairman, Subcommittee on HUD-
Independent Agencies
Committee on Appropriations
House of Representatives

Dear Mr. Chairman:

This is in response to your request for an independent opinion on whether the National Endowment for the Arts (NEA) violated the anti-lobbying restriction on the use of appropriated funds contained in section 304 of the Department of the Interior and related agencies Appropriation Act, fiscal year 1979, Pub. L. No. 95-465, October 17, 1978, 92 Stat. 1279, 1302. In view of the urgent nature of your request, we have not requested an administrative report from NEA. Instead, we studied the October 3, 1979, memorandum to you from the NEA General Counsel, Mr. Robert Wade, Subject: Endowment's Participation in the Livable Cities Program - Alleged Lobbying Activities, and also obtained a copy of the information package sent out by NEA. We agree that NEA violated the provisions of section 304 in this instance.

The facts may be summarized as follows. In the fall of 1977, NEA and the Department of Housing and Urban Development (HUD) jointly developed proposed legislation for a neighborhood revitalization program, utilizing the arts, culture, and historic preservation. Upon approval by the Administration in the spring of 1978, this proposed legislation, the Livable Cities Program, was submitted to the Congress, and was enacted as the Livable Cities Act of 1978, Pub. L. No. 95-557, October 31, 1978, 92 Stat. 2122, (42 U.S.C. §§ 8141 et. seq.). This enabling legislation authorized appropriations of $5 million for fiscal year 1979 and $10 million for fiscal year 1980. Although appropriations were authorized for the Program, no funds were appropriated to put the Program in operation.

The General Counsel of NEA states that from about the time the law was enacted in October 1978 until August 1979, his agency received a great number of inquiries from the public about the legislation. The inquiries indicated that there was substantial confusion and misunderstanding concerning

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the legislation's purpose and the NEA's role in the Program. NEA decided, according to the General Counsel, that it was necessary to inform people of the status of the legislation and to correct some misunderstandings involving among other things, the difference between authorization and appropriation of funds for the Program. HUD and NEA developed an information package for distribution to those who had made requests for information. The NEA General Counsel described the package as follows:

> "That package contained an article from the Washington Star, a fact sheet describing the future content of the potential program, a list of legislative actions to date and projected imminent final action by the House (the objective of all of the Administration's efforts in this program), and an explanation of the background and intent of the Livable Cities Act. This material was accompanied by a covering letter signed by Paul J. Asciolla, our designated Federal Agency Liaison. Mr. Asciolla had been coordinating our efforts with HUD on the Livable Cities Program since May 1978. This letter, after generally describing the situation with regard to the Livable Cities legislation, concludes with a statement indicating that should an appropriation be approved by the Congress, guidelines would be issued as soon as possible thereafter, a common practice relevant to all legislation, and thanking the addressees, appropriately in my opinion, for their continuing, i.e., sustained, interest in the efforts on behalf of this program over the period of many months that had elapsed during the legislative process."

Section 304 of Pub. L. No. 95-465, Department of the Interior and related agencies Appropriations, fiscal year 1979, under which NEA received its operating funds during the time in question, provides as follows:

> "No part of any appropriation contained in this Act shall be available for any activity or the publication or distribution of literature that in any way tends to promote public support or opposition to any legislative proposal on which congressional action is not complete, in accordance with the Act of June 25, 1948 (18 U.S.C. 1913)."

We have not previously had occasion to construe this provision of the law. However, we have construed appropriations restrictions prohibiting "lobbying" activities by Government officials, such as section 607(a), Treasury, Postal Service, and General Government Appropriations Act, 1979, Pub. L. No. 95-429 (October 10, 1978), 92 Stat. 1001, 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."

Since the NEA General Counsel relies on our decisions construing the similarly-worded predecessors of section 607(a) to argue that NEA has not violated section 304, and since section 607(a) is construed as having the same purpose as 18 U.S.C. § 1913, which is referred to in section 304, some discussion of section 607(a) and section 1913 is necessary as background to our discussion of section 304. (Also, the prohibition of section 607(a) applies to the use of any appropriations "contained in this or any other Act." Thus, it is applicable to NEA.)

In interpreting "publicity and progaganda" provisions such as section 607(a), this Office has recognized that every Federal agency has a legitimate interest in communicating with the public and with Congress regarding its policies and activities. If the policy of the Administration or of any agency is affected by pending legislation, including appropriations measures, 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 prohibited 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.

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

Our construction of section 607(a) was greatly influenced by the legislative history and judicial construction of the anti-lobbying penal statute, 18 U.S.C. § 1913, which is referred to in section 304 of the Department of the Interior and related agencies Appropriation Act and in its history. That statute provides:

"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 designated 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.

"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."

From our review of the legislative history of section 1913, and by its terms, it appears that the primary purpose of section 1913 was to prohibit Government officials from making appeals to the public to in turn contact their representatives with respect to legislation, but not to prohibit agency officials from expressing their views and agency policy on pending legislative and appropriations matters.

If your question had only involved section 1913 or section 607(a), supra, we would have agreed with the NEA General Counsel that no violation took place. However, section 304, the provision here at issue, is a very different matter. It originated as a Senate Appropriations Committee amendment to H.R. 7636, 95th Cong. Ultimately, H.R. 7636 was enacted as the Department of the Interior and related agencies Appropriations, fiscal year 1978, Pub. L. No. 95-74 (July 26, 1977) 91 Stat. 285, which included a slightly modified version of the original amendment. Instead of the phrase "for any activity or the publication or distribution of literature" which now appears in section 304, the original Senate version said "for the publication or distribution of literature designed for public use." The Senate Committee on Appropriations stated the purpose of the amendment as follows:

"The Committee is disturbed to learn of certain public information activities being conducted by the National Park Service, Fish and Wildlife Service, and Forest Service that

tend to promote pending legislative proposals to set aside certain areas in Alaska for national parks, wildlife refuges, national forest and other withdrawals. Colorful brochures printed and actively distributed by these agencies extol the benefits of such proposals and, as a result, tend to promote certain legislative goals of these agencies. The Committee considers these practices to be in violation of the intent, if not the letter, of the Act of June 25, 1948 (Title 18 U.S.C. Sec. 1913). Accordingly, language has been included in the bill prohibiting the use of Federal funds for the publication and distribution of such promotional literature. This prohibition should not be construed as an impediment on the agencies' ability to respond to public information inquiries." S. Rep. No. 95-276, 95th Cong., 1st Sess. 4-5.

As indicated in our discussion of 18 U.S.C. § 1913, we do not believe that statute would be construed by the Department of Justice or by the courts as prohibiting agency officials from expressing their views to the public on pending legislative and appropriations matters, as long as they refrain from suggesting that members of the public ask their Senators or Representatives to vote in a particular fashion on those matters. Section 304 is evidently intended to have broader coverage. We have not seen the brochures referred to in the legislative history of section 304 but there is no indication in the Senate Committee's description of them that they in fact urged readers to contact their elected representatives. The Senate Committee on Appropriations may thus have been mistaken in saying that 18 U.S.C. § 1913 was intended to prohibit such expressions of agency views as are referred to in the above-quoted legislative history. However, whether or not the understanding of 18 U.S.C. § 1913 was correct, the Senate Report in support of section 304 is a clear expression of Congressional intent that section 304 was designed to prohibit activities like the brochures decribed therein, even if the brochures were not in violation of section 1913 of title 18, because the brochures tended to promote public support for agency goals which were the subject of legislation (including appropriations) pending before the Congress.

The difference in wording, between section 304 on the one hand, and on the other, 18 U.S.C. § 1913 and section 607(a) confirms this difference in intended coverage. Section 304 does not use the term "publicity or propaganda purposes designed to support or defeat [pending] legislation," as does section 607(a), nor does it refer explicitly to activities "intended or designed to influence * * * a Member of Congress," as does section 1913. Morever, to construe section 304 as, in effect, prohibiting only the kinds of activities encompassed by section 607(a) would make it mere surplusage since, as noted above, section 607(a) is applicable to all appropriations, including NEA's and was enacted before section 304.

Accordingly, we do not read the reference in section 304 to 18 U.S.C. § 1913 as limiting the application of section 304 to the circumstances covered in section 1913 (and in section 607(a)). Rather, we construe section 304 as having been intended to cover situations not reached by 18 U.S.C. § 1913 or by section 607(a). It does so by prohibiting the expenditure of funds provided by the Act for any activity or for publication or distribution of literature that tends to promote public support for or opposition to legislative proposals pending before the Congress, without regard to whether the public will in turn be moved thereby to urge their elected representatives to act in a particular manner on the legislative proposals.

The section 304 prohibition, although it reaches activities which are permissible under 18 U.S.C. § 1913 (as we understand that section) and section 607(a), was not intended to prevent the agencies covered from communicating in any way with the public. The Senate Report, supra, indicates that section 304 should not be understood as impeding the agencies' ability to respond to public information inquiries. The implication is that a response to an inquiry is permissible as long as it is strictly factual and devoid of positive or negative sentiments about the program.

We must point out that there is a very thin line between the provision of legitimate information in response to public inquiries and the provision of information in response to the same requests which "tends to promote public support or opposition" to pending legislative proposals. There is little guidance for the agencies concerned in either the language or the legislative history of section 304. For example, a literal reading of the section might make it impossible for an agency to provide even a strictly factual response to a question about the status of its program's appropriation, since a statement that the appropriation was awaiting resolution by a Conference committee might well stimulate the reader to write to his Congressman on behalf of the resolution he prefers.

In the absence of any expression of Congressional wishes to the contrary, we have construed section 304 in the light of what we believe the Congress probably intended--just as we have done in the case of section 607(a). We conclude that section 304 was designed to cover particularly egregious examples of "lobbying" by Federal agencies, even though the material provided to the public stops short of actually soliciting the reader to contact his Congressman in support of or in opposition to pending legislation. Thus, a good faith effort to be responsive to a direct question from a member of the public, which did not gratuitously offer the agency's views about the merits of the pending legislation, would not be deemed a violation of section 304, even though the agency response might inadvertently and incidentally influence the reader's opinion about the legislation.

Applying this criterion in the instant case, we are forced to conclude that there was a violation of section 304.

We evaluated the NEA information package concerning the Livable Cities Program in the light of the circumstances concerning the pending legislation at the time the package was sent out. The Livable Cities Program was included in Pub. L. No. 95-557, supra, on October 31, 1978. In considering the HUD appropriation request for 1980, the Senate voted $3 million for the program but the House did not fund the Program. Just before the recess on August 2, 1979, the Senate and House conferees met in an attempt to resolve the disagreement on the Program funding. They were unable to reach agreement and the House conferees decided to take the conference report back to the House "in disagreement", where the issue would again be brought before the House sometime after the September 5 end of recess. The House then had the options of receding to the Senate's version or of disagreeing again which would send it back to conference.

On September 3, NEA sent its information package to people who, throughout the previous year, had expressed an interest in the Program. The cover letter for the package, timed to coincide with the House reconsideration of Program funding, purported to be in response to the addressee's request for updated information on the Program. It was highly supportive of the Program, describing it as a "unique piece of legislation", and highlighted the fact that the only obstacle that remained in the way of Program implementation was a favorable House vote on Program funding. The package included a newspaper account of the congressional debate over funding, a description of the legislation and its history and, under the heading "Livable Cities---Final Action", this statement:

> "Objective--we will have a Livable Cities Program if the full House votes to accept the Senate position--that is $3 million for 1980."

The NEA cover letter expressed disappointment with the $3 million Senate-approved funding but said that "we are particularly pleased at the high interest in Congress, and the unprecedented outpouring of support and interest from the field." It closed with the following remarks:

> "We share your interest in the outcome of the House vote which incidentally could come at any time after Congress reconvenes on September 5th. If the outcome is favorable, guidelines/regulations would be issued as soon as possible thereafter.
>
> "Thank you once again for your sustained interest in these efforts on behalf of this program."

We are of the opinion that the NEA information package, including the cover letter, was designed to promote public support for funding the Program and therefore violated the provisions of section 304. The letter was timed to reach members of the public just before the House reconsideration of its refusal to fund the Program. The implication of the package is that the reader should support a favorable outcome of the impending House vote and thereby save the program. Although the letter purports to respond to requests for updated information on the Program received over the past year from members of the public, it focuses on reconsideration of Program funding in the House of Representatives and, at least by implication, advocates support of that funding. Moreover, it is improbable that all of the hundreds of inquiries had in fact requested a later "update". For these reasons, we do not consider the mass mailing of the information package as merely a response to requests for specific information on the Program from individual members of the public, so as to be outside the restrictions of section 304, in accordance with the legislative history. Accordingly, we conclude that the NEA information package violated the restrictions contained in section 304.

The action to be taken by our Office with respect to expenditures of appropriated funds in violation of law is limited to recovery of the amounts illegally expended. B-178648, September 21, 1973. While appropriated funds were used by NEA in connection with the preparation and mailing of the September 3, 1979, information package on the Livable Cities Program, the amount involved in the violation is presumably relatively small and is commingled with proper expenditures. In view of the small amount involved, and the difficulty in determining the exact amount expended illegally as well as the identity of any particular voucher involved, it would be inappropriate for us to attempt to effect recovery. However, with your concurrence, we plan to notify the Chairman of NEA of the violation of section 304 and will request him to take action to insure that future violations do not occur.

Sincerely yours,

Comptroller General
of the United States