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From: FOIA <foia@arts.gov>

Sent: Thu, May 21, 2020 8:58 am

Subject: RESPONSE F20-24: New FOIA request received for National Endowment for the Arts

Dear Sir,

This e-mail responds to your request for records under the Freedom of Information Act (FOIA), 5 U.S.C. §552. Your request has been assigned file number F20-024. In your below e-mail, you requested:

“copy of the handbook provided by the Office of General Counsel to all senior level officials, career and non career, at NEA.”

Attached are the responsive documents for your FOIA request with minimal redactions. Dates from which age may be inferred, and other personal data have been redacted in accordance with exemption (b)(6), which protects against “a clearly unwarranted invasion of personal privacy,” 5 U.S.C. 552(b)(6).

The National Endowment for the Arts is governed by the provisions of the National Foundation on the Arts and the Humanities Act, 20 U.S.C. 951 et seq., and the Freedom of Information Act with respect to the release of agency records. In accordance with the NEA's FOIA regulations, 45 CFR 1148.8 you may appeal the Agency's determination. Such an appeal must be made to the Chairman not less than 90 days after the date receipt of this e-mail, additional information about the appeal process can be found at FOIA| NEA .

If you would like to discuss our response before filing an appeal to attempt to resolve your dispute, you can contact our FOIA Public Liaison for assistance. If we are unable to resolve your FOIA dispute through our FOIA Public Liaison, the Office of Government Information Services(OGIS), the Federal FOIA Ombudsman office, offers mediation services to help resolve disputes between FOIA requesters and Federal agencies. The contact information for OGIS is:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, MD 20740-6001
ogis@nara.gov

Please contact me if you have any questions about this response.

Respectfully,
Desiree Flippins
FOIA Officer | Office of the General Counsel
National Endowment for the Arts
400 7th Street SW | Washington DC 20506
202-682-5572 (fax)

Office of General Counsel



2017



Office of General Counsel

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Convenings

Arts & Artifacts Indemnity Program

President's Council on the Arts & Humanities (PCAH)



Who We Are

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What We Do

The NEA's Office of General Counsel is responsible for providing legal and policy advice to the Endowment staff at all levels. We respond to a wide range of legal matters including grants and contracts law, ethics and conflicts of interest, intellectual property (licensing and permissions, and service /trademark registrations), Freedom of Information Act and Privacy Act, personnel, civil rights, appropriations law and expenditures of donated funds and other questions related to the acceptance and expenditure of donated funds and other questions related to the Endowment's developmental activities, audits, historic preservation and environmental law. OGC also ensures that the NEA's legal policies and regulations are up-to-date. OGC reports to the Chairman and advises the Chairperson on legal and related matters. Providing the legal interpretation of statutes, legislation, regulations and any other legally binds the NEA.

The OGC maintains an "open door" policy, encouraging staff to meet with us early in any planning process in order to ensure that all agency activities and actions are carried out and consistent with all Federal laws and regulations. Of particular note, over the last several years, OGC has developed an intellectual property practice necessitated by the agency's creation of products (e.g., CDs, films) for national initiatives, such as JAZZ Masters, American Masterpieces and the Big Read. In addition, OGC has filed for, and been granted, on behalf of the NEA, trademark registrations by the U.S. Office of Patent and Trademarks.

The NEA's Office of General Counsel serves as legal counsel for the President's Council on Arts and Humanities(PCAH). This briefing book includes highlights of key legal areas and additional information can be provided.



India J. Pinkney
General Counsel
National Endowment for the Arts

Ms. India J. Pinkney currently serves as the General Counsel for the National Endowment for the Arts (NEA). Prior to moving to the NEA as an Assistant General Counsel during the spring of 2011,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



OGC Staff

Aswathi Zachariah is Assistant General Counsel, Aswathi works on a variety of matters affecting the NEA including ethics compliance and counseling as well as contract drafting and negotiation. She also provides general legal guidance to agency officials. Prior to joining the NEA, [REDACTED]

Sarah Weingast is Assistant General Counsel with the National Endowment for the Arts. Sarah works on a variety of matters including employment and accessibility issues, as well as contract drafting and negotiation. She also provides general legal guidance to agency officials. Prior to joining the NEA in August 2014, [REDACTED]

Desiree Flippins is the paralegal for the Office of General Counsel (OGC), National Endowment for the Arts (NEA). Desiree has over 15 years experience as a paralegal including both the private and public sector. In her current role with NEA, she supports three Attorneys while maintaining the duty of the agency's FOIA Officer and the day to day operations of OGC. She serves on the Special Observance Committee (SOC) which is a interagency committee with the National Endowment for the Humanities (NEH), and the President's Committee on Arts and Humanities (PCAH), which hosts educational and diversity events throughout the year. Prior to coming to the NEA in June of 2013 [REDACTED]

Valencia Rainey – *Biography forthcoming.*

Daniel Fishman, is Attorney Advisor, on a four year term appointment with the Office of General Counsel. He counsels NEA staff on a range of matters including intellectual property, regulations, program development and ethics. During law school, Daniel served as a student practitioner with the George Washington University Small Business and Community Economic Development Clinic, providing legal advice to local small businesses and nonprofit organizations. Daniel was an intern with the NEA while completing his J.D. at the George Washington University. Prior to law school, [REDACTED]

[REDACTED]



SUMMARY: NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES ACT OF 1965

The NEA is a federal government agency, and the National Foundation on the Arts and Humanities Act of 1965 is its "authorizing legislation." The NEA can only exercise the powers granted to it explicitly by Congress through that Act. This means the NEA has certain limits in its ability to act, as opposed to a private foundation or nonprofit corporation. Similarly, in your position as Chairperson, you are only able to exercise those powers granted directly to you by Congress. During your tenure as NEA Chairperson, OGC will help you navigate this dynamic to ensure that you can best use these powers in service of the agency and the arts.

The main source of funds for NEA operations and grant making comes from Congress. By law, there are certain restrictions placed on the use of federal funds. Our office will assist you by interpreting these laws.

GRANTMAKING

The principal function of the NEA is to fund state arts agencies, as well as projects and programs conducted by other tax-exempt arts organizations that support artistic excellence. In general, these grants are reviewed by Arts Advisory Panels, and range from amounts of \$10,000 to \$200,000, depending on the program. Congress has approved certain other grants, namely, a limited number of grants to individuals (through the Jazz Masters, National Heritage and literature fellowship programs only) and matching grants to state and regional organizations.

THE NATIONAL COUNCIL ON THE ARTS

The National Council on the Arts ("the Council") is an advisory body whose membership consists of eighteen individuals appointed by the President with the advice and consent of the Senate, as well as a number of members of the House and Senate who serve *ex officio*. The Council's chief responsibility is to review grants that have been approved by NEA arts advisory panels and recommend grants for approval to the Chairperson. The Council does so by vote, and meets twice a year to vote to either approve or disapprove of NEA expenditures. In your capacity as Chairperson, you will also serve as the chair of the Council.

THE AUTHORITY OF THE CHAIR

When you read the statute attached, you will notice that much of the agency's "authority" is described in terms of authority assigned to the Chairperson. The Chairperson of the NEA is granted much of the agency's "authority" which she carries out through the NEA's various departments, offices and employees. In some cases, your powers will be explicitly delegated or designated to another program or administrative office. Many of these delegations will be explained to you by specific program offices over the course of the first days of your tenure.

Among the authorities granted to you are: final approval/disapproval of grant applications; the ability to prescribe regulations; the ability to hire employees pursuant to the civil service laws; and to accept gifts and make certain small grants without the approval of the National Council.

SMALL GRANTS

The NEA Chairperson may expend 5% of the funds appropriated by Congress for NEA grant making to fund small grants in amounts not to exceed \$10,000 without National Council's approval. Furthermore, the NEA Chairperson may expend 10% of the funds appropriated by Congress for NEA grant making to fund small grants in amounts not to exceed \$30,000 without National Council's approval. These grants will all be reviewed and approved by the National Council at a later time.

COOPERATIVE AGREEMENTS

The NEA Chairperson has the authority to enter into cooperative agreements on behalf of the agency. A cooperative agreement has many of the same characteristics as both a grant and a contract. Like a grant, it results in the an expenditure of funds to further the agency's mission through some sort of programmatic activity. Unlike grants, where the activities are prepared and executed by a third party, cooperative agreements usually see the NEA participating in some aspect of overseeing, preparing, and/or executing the activity. Like contracts, these agreements are subject by law to certain rules and restrictions. We encourage all staff developing cooperative agreements to reach out to the Grants Office and OGC early in the development process.

RESPONSIBILITIES OF THE CHAIR

It is the Chairperson's responsibility to ensure that no grant is made which is obscene or indecent. This particular responsibility of the Chairperson is the result of the controversies involving the NEA in the 1980s, and is codified in the National Foundation on the Arts and Humanities Act. Because "obscenity" has a legal definition, our office will assist you in making these determinations.

GIFT ACCEPTANCE AUTHORITY

The Chairperson has the authority to accept gifts on behalf of the agency. Few other federal agencies have this ability. The agency has the ability to accept gifts with restrictions (for instance, a donation may be made to support only a particular programmatic activity or national initiative). The only restrictions that are impermissible are generally those that would implicate ethics rules or civil rights laws. These funds are referred to as "gift funds."

Unrestricted gift funds may be used for some expenditures that would normally not be permissible with appropriated funds. For example, funds that are given to us by Congress each year may not be used for "reception and representation" ("R+R") purposes, that is, for entertainment and hospitality expenses. However, gift funds may be used for these purposes.

Not every restriction on the use of NEA funds can be circumvented by using gift funds. For example, your authority to expend funds for R+R purposes cannot be used for expenses not related to the agency's mission, and cannot be used to provide free food to a group federal employees at their "duty station" (i.e. Washington, D.C.).

Our office regularly works with senior staff and programs to ensure that these and other laws are respected throughout the agency, and regularly reviews requests for the use of gift funds.

Office of General Counsel

Administrative Offices

Chairman
Chief of Staff
Senior Deputy Chairman
Deputy Chairman for Programs & Partnerships
Deputy Chairman for Management & Budget
Civil Rights/EEO
Finance
Budget
Administrative Services
Grants & Contracts
Guidelines & Panel Operations
Human Resources
Information & Technology Management
Inspector General
Public Affairs

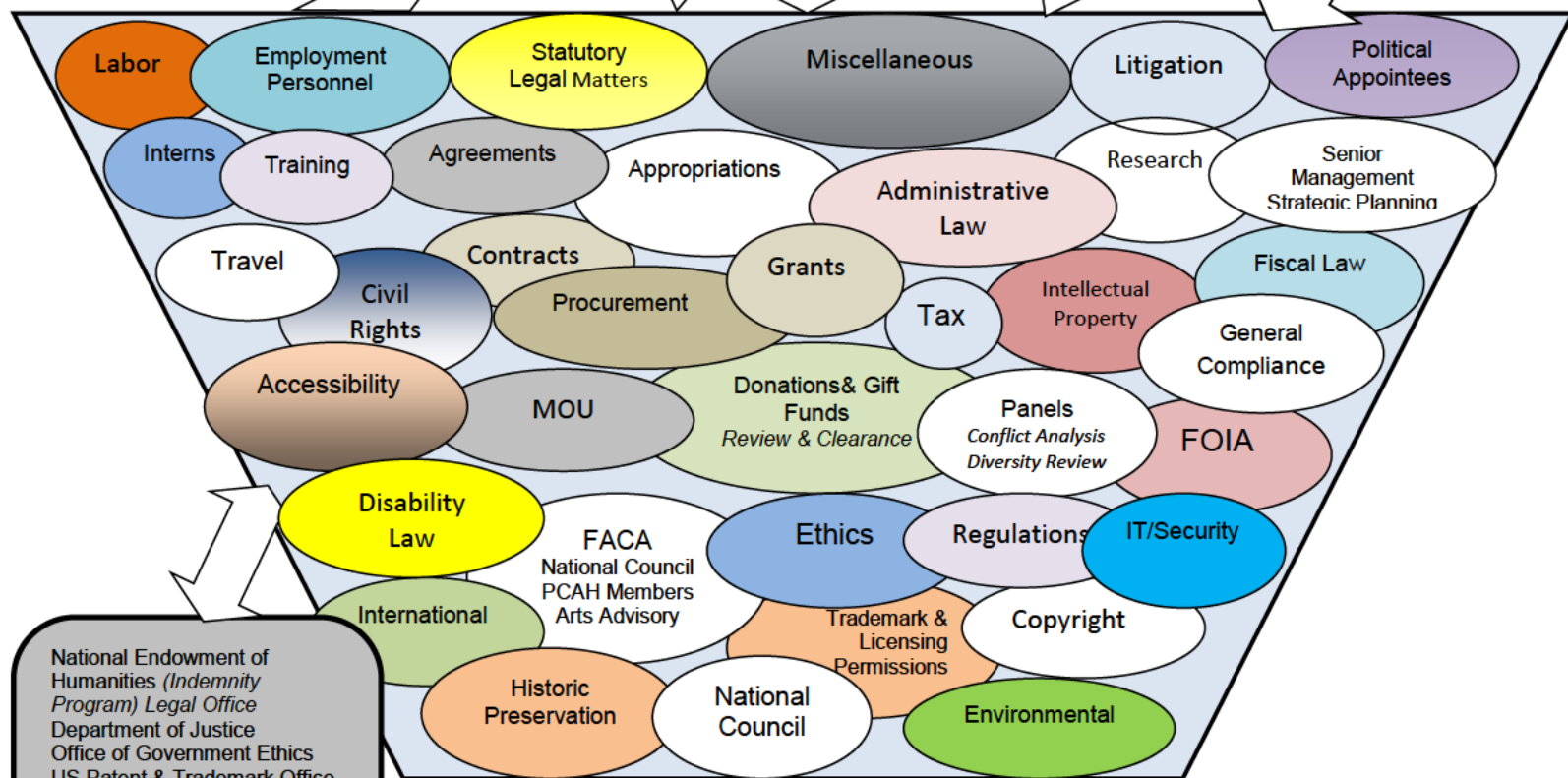
Office of The Chairman

Divisions

Literature & Arts Education
Multidisciplinary Arts (*Artist Communities/Folk & Traditional/Presenting*)
Partnership (*Accessibility/Challenge America/Local Arts Agencies/States & Regions*)
Performing Arts (*Dance/Music/Opera/Musical Theater*)
Visual Arts (*Design/Media Arts/Museums/Visual Arts*)

President's Council on Arts and Humanities (PCAH)

Senior Management Team (SMT)



National Endowment of Humanities (*Indemnity Program*) Legal Office
Department of Justice
Office of Government Ethics
US Patent & Trademark Office
EEOC
Office of Special Counsel
U.S. Department of State
White House EOP
Office of Management & Budget
Government Accounting Office

Office of General Counsel

India Pinkney, *General Counsel*
Aswathi Zachariah, *Assistant General Counsel*
Sarah Weingast, *Assistant General Counsel*
Daniel Fishman, *Attorney Advisor*
Desiree Flippins, *Paralegal*

Ethics

- Conflicts of Interest
- Confidential Financial Disclosure
- Gift Travel
- Ethics Review of Chair, National Council, PCAH Members
- Required OGE Reporting
- Post Employment & Seeking

Historic Preservation

- Communications with grantees regarding compliance with National Historic Preservation Act
- Coordinates with NEA Historic Preservation Specialist
- Monitoring programmatic agreement with NCSHPO and ACHP

Environmental

- Promulgating regulations under NEPA
- Communications with grantees regarding compliance with NEPA

Regulations

- Draft New Regulations
- Update/Revise Regulations
- Coordinate with GSA
- Create Fall and Spring Unified Agenda
- Coordinate Public Comment for New Regulations
- Ensure Compliance to Government-wide Regulations

Labor

- Staying abreast of current legal developments
- Communications with HR/LR regarding union issues
- Review of agency administrative actions to ensure compliance with FLRA

Employment Law

- Staying abreast of current legal developments
- Communications with HR/ER regarding employee issues
- Legal research to respond to requests as needed

Procurement & Government Contracts

- Review contracts for procurements and Some Sole Source
- Review Acquisition Summary Memos
- Research, Draft Responses, Represent Agency in Contract-Related Challenges
- Work with Procurement Officers to Update Policies as Needed
- Address Questions/Concerns Regarding Contracting Matters

Tax

Questions relating to an entity's legal status since only 501(c)(3)'s can apply for NEA grants and to include hybrid and new forms of entities

Disability Law

- Staying abreast of current legal developments
- Communications with HR/ER regarding requests for accommodation
- Legal research to respond to requests as needed

FOIA

- Review Incoming Requests
- Coordinate Responses (Research, Redact etc.,)
- Respond to FOIA Appeals
- Prepare Reports Quarterly & Annual to DOJ/OIP

IT/Security

- Legal Reviews of IT Policy & Procedure
- Work with IT Council
- Stay abreast of executive orders and new laws impacting IT Security

Agreements

Draft, Review and Clear Inter-Agency Agreements, MOU's Agreements with Outside Agencies & Non-Government (non-procurement) related contracts with Outside Entities

Office of General Counsel

Administrative Law

Creation, Implementation of rules regulations, applications, available information , hearings, appeals & decision making with legal impact that affects the agency

Intellectual Property

- Copyright
- Trademark
- Licensing & Permissions
 - Jazz Masters
 - Heritage Rewards
 - Opera Honors
 - Poetry Out Loud
 - Shakespeare in American Communities

International

- Review of Agreements
- Interfacing with State Departments legal office on specific questions
- Researching & Providing counsel on eligibility
- Making determinations on agency funds & grants countries sanctioned by OFAC

Training

- Responsible for conducting ethics training for the agency to include but not limited to: new employees, outgoing employees, 278 filers, 450 filers, Employment, EEO related training, NEPA/NHPA
- Respond to HR legal questions regarding training
- Legal Analysis of Agency's compliance to training per ethics and federal contracting laws

Fiscal Law & Appropriations

- Federal Budget Process
- Anti-Deficiency Act
- Work with closely Budget & Finance

Interns - train new interns at least 2-3 times a year to assist accomplishing the legal work

Civil Rights Law

Grants/ Cooperative/ Agreements

Privacy Law
System of Records



Ethics

The Office of Government Ethics (OGE) requires all federal agencies to have an ethics program in order to foster high ethical standards for executive branch employees and strengthen the public's confidence that the Government's business is conducted with impartiality and integrity.

Federal ethics law practice is governed through criminal statute as well as regulations.

The ethics portion of OGC's practice consists of a variety of matters including, but not limited to:

- *Ensuring compliance with the Agency's ethics policies and procedures, often in consultation with OGE.*
- *Developing, coordinating and conducting required ethics training including annual training for Agency staff, members of the National Council on the Arts and members of the President's Council on the Arts and the Humanities (PCAH) as well as periodic topical training.*
- *Counseling Agency staff, members of the National Council on the Arts and members of PCAH when ethics matters arise.*
- *Reviewing financial disclosures for all Agency 278 (Public Financial Disclosure Report) Filers and 450 (Confidential Financial Disclosure Report) Filers.*

Given the specific and nuanced ethics guidelines that federal employees must abide by, our office spends a significant portion of time on ethics compliance, training and counseling. Ethics matters often arise in the areas of gift acceptance/gift travel, widely attended gatherings, and outside activities.

Both India Pinkney, the Designated Agency Ethics Official (DAEO) and Aswathi Zachariah, the Alternate Designated Agency Ethics Official (ADAEO) have completed specialized ethics training and possess certification in order to assist the Agency in ethics matters.



STANDARDS OF CONDUCT

Attached please find the following guidance:

1. Standards of Conduct for NEA Panelists
2. Standards of Conduct Summaries for NEA Employees - these summaries are provided by the Office of Government Ethics (OGE). Each federal agency (including the NEA), in consultation with OGE, may tailor or promulgate agency specific supplements to the Standards of Conduct to better capture the mission of the Agency.

In light of the NEA's transition to an remote panel format, OGC is currently working on updating panel conflict of interest guidelines to capture conflicts (actual and perceived) that might arise in a remote panel environment.

*Please note that the OGC will provide specific guidance to you in your role as Chairperson of the NEA.

5 C.F.R. Part 2635: Standards of Ethical Conduct for Employees of the Executive Branch

In 1989, the President’s Commission on Federal Ethics Law Reform recommended that individual agency standards of conduct be replaced with a single regulation applicable to all employees of the executive branch. Acting upon that recommendation, President Bush signed [Executive Order 12674](#) on April 12, 1989. That Executive Order (as modified by [Executive Order 12731](#)) set out fourteen basic principles of ethical conduct for executive branch personnel and directed OGE to establish a single, comprehensive, and clear set of executive branch standards of ethical conduct. OGE published the Standards of Ethical Conduct for Employees of the Executive Branch on August 7, 1992. The regulation became effective on February 3, 1993, and was codified in 5 C.F.R. part 2635. Part 2635 has been amended several times. Review the [rulemaking history](#) of 5 C.F.R. part 2635.

Note: Some agencies have published [agency supplemental regulations](#) that modify or supplement 5 C.F.R. part 2635.

Brief Summary of 5 C.F.R. Part 2635

Subpart A – General Provisions

Subpart A establishes the framework for the rest of the regulation. It includes definitions, provides authority for supplementation of the regulation when necessary by individual agencies, and encourages employees to seek advice from agency ethics officials. It also:

- Restates the 14 principles of ethical conduct and instructs employees to apply them when considering situations not specifically addressed by the regulation; and
- For situations that involve appearances of conflicts, provides that the circumstances be judged from the perspective of a reasonable person with knowledge of the relevant facts.

Subpart B – Gifts from Outside Sources

Subpart B prohibits employees from soliciting or accepting gifts from prohibited sources or gifts given because of their official position. The term “prohibited source” includes anyone seeking business with or official action by an employee’s agency and anyone substantially affected by the performance of the employee’s duties. For example, a company bidding for an agency contract or a person seeking an agency grant would be a prohibited source of gifts to employees of that agency.

The term “gift” is defined to include nearly anything of market value. However, it does not include items that clearly are not gifts, such as publicly available discounts and commercial loans and it does not include certain inconsequential items, such as coffee, donuts, greeting cards, and certificates.

There are several exceptions to the prohibitions against gifts from outside sources. For example, with some limitations, employees may accept:

- Unsolicited gifts with a market value of \$20 or less per occasion, aggregating no more than \$50 in a calendar year from any single source;
- Gifts motivated by a family relationship or personal friendship;
- Free attendance at certain widely-attended gatherings, such as conferences and receptions, when the cost of attendance is borne by the sponsor of the event; and
- Food, refreshments, and entertainment at certain meetings or events while on duty in a foreign country.

The subpart also contains guidance on returning or paying for gifts that cannot be accepted.

Subpart C – Gifts Between Employees

Subpart C prohibits employees from:

- Giving or soliciting for a gift to another employee who is an official superior; or
- Accepting a gift from a lower-paid employee, unless the two employees are personal friends who are not in a superior-subordinate relationship.

The following are among the exceptions to these prohibitions:

- On an occasional basis, employees may give and accept items aggregating \$10 or less per occasion, food and refreshments shared in the office, or personal hospitality at a residence. This exception can be used for birthdays and those holidays when gifts are traditionally exchanged.
- On infrequent occasions of personal significance, such as marriage, and on occasions that terminate the superior-subordinate relationship, such as retirement, employees may give and accept gifts appropriate to the occasion and they may make or solicit voluntary contributions of nominal value for group gifts.

Subpart D – Conflicting Financial Interests

Subpart D contains two provisions designed to deal with financial interests that conflict with employees’ official duties.

The first provision, entitled “Disqualifying financial interests,” prohibits an employee from participating in an official government capacity in a matter in which he has a financial interest or in which his spouse, minor child, employer, or any one of several other specified persons has a financial interest. For example, an agency purchasing agent could not place an agency order for computer software with a company owned by his

wife. The provision includes alternatives to nonparticipation, which may involve selling or giving up the conflicting interest or obtaining a statutory waiver that will permit the employee to continue to perform specific official duties.

The second provision, entitled “Prohibited financial interests,” contains authority by which agencies may prohibit employee from acquiring or retaining certain financial interests.

Employees required by Subpart D to sell financial interests may be eligible to defer the tax consequences of that divestiture.

Subpart E – Impartiality in Performing Official Duties

There may be circumstances other than those covered by Subpart D in which employees should not perform official duties in order to avoid an appearance of loss of impartiality. Subpart E contains two disqualification provisions addressing those appearance issues.

The first provision, entitled “Personal and business relationships,” states that employees should obtain specific authorization before participating in certain Government matters where their impartiality is likely to be questioned. The matters specifically covered by this standard include those:

- Involving specific parties, such as contracts, grants, or investigations, that are likely to affect the financial interests of members of employees’ households; or
- In which persons with whom employees have specific relationships are parties or represent parties. This would include, for example, matters involving recent employers, employers of spouses or minor children, or anyone with whom the employees have or seek a business or financial relationship.

There are procedures by which employees may be authorized to participate in such matters when it serves the employing agency’s interests. The process set out in Subpart E should be used to address any matter in which an employee’s impartiality is likely to be questioned.

The second provision, entitled “Extraordinary payments from former employers,” restricts employees’ participation in certain matters involving former employers. If a former employer gave an employee an “extraordinary payment” in excess of \$10,000 prior to entering Federal service, it bars the employee from participating for two years in matters in which that former employer is a party or represents a party. A \$25,000 payment voted on an ad hoc basis by a board of directors would be an “extraordinary payment.” A routine severance payment made under an established employee benefit plan would not.

Subpart F – Seeking Other Employment

Subpart F prohibits an employee from participating in their official capacities in particular matters that have a direct and predictable effect on the financial interests of

person with whom they are “seeking employment” or with whom they have an arrangement concerning future employment.

The term “seeking employment” encompasses actual employment negotiations as well as more preliminary efforts to obtain employment, such as sending an unsolicited resume. It does not include:

- Sending an unsolicited resume, for example, to someone only affected by the employee’s work on general rulemaking;
- Requesting a job application or rejecting an unsolicited employment overture.

An employee generally continues to be “seeking employment” until the employee or the prospective employer rejects the possibility of employment and all discussions end. However, an employee is no longer “seeking employment” with the recipient of an unsolicited resume after two months have passed with no response.

Subpart G – Misuse of Position

Subpart G contains four provisions designed to ensure that employee do not misuse their official positions. These include:

- A prohibition against employees using public office for their own private gain for the private gain of friends, relatives, or persons with whom they are affiliated in a non-Government capacity, or for the endorsement or any product, service, or enterprise;
- A prohibition against engaging in financial transactions using nonpublic information, or allowing the improper use of nonpublic information to further private interests;
- An affirmative duty to protect and conserve Government property and to use Government property only for authorized purposes; and
- A prohibition against using official time other than in an honest effort to perform official duties and a prohibition against encouraging or requesting a subordinate to use official time to perform unauthorized activities.

Subpart H – Outside Activities

Subpart H contains provisions governing employees’ involvement in outside activities including outside employment. These provisions are in addition to the provisions set out in other parts of the regulation. The provisions in Subpart H include:

- Synopses of statutes and a constitutional provision that may limit certain outside activities;
- A prohibition against engaging in outside activities that conflict with employees’ official duties;
- Authority by which individual agencies may require employees to obtain approval before engaging in outside activities;
- An outside earned income ban applicable to certain Presidential appointees and certain noncareer employees;

- A prohibition against serving as an expert witness, other than on behalf of the United States, in certain proceedings in which the United States is a party or has a direct and substantial interest;
- A prohibition against receiving compensation for teaching, speaking, or writing related to their official duties;
- Limitations on fundraising in a personal capacity; and
- A requirement that employees satisfy their just financial obligations.

Subpart I – Related Statutory Authorities

Subpart I lists references to other statutes which relate to employee conduct.



Standards of Conduct for NEA Panelists

National Endowment for the Arts

The *Standards of Conduct for NEA Panelists* has been provided to help you identify and avoid potential conflicts, as well as other actions that would violate the public trust.

Panel Service as Public Service

Panel service is, above all, *public* service. As such, it must be undertaken in an ethical manner and free from any conflicts of interest. While serving as an NEA panelist, reader, or other reviewer, you are considered a Special Government Employee (SGE), and therefore must abide by guidelines established for federal service.

Each panelist is therefore responsible for acquainting himself or herself with this document. Please note that ignorance of the *Standards of Conduct* will not excuse inadvertent violations. Each panelist is also responsible for seeking advice on possible conflicts of interest when the need arises. This can be done through your staff contact or by calling the NEA's legal department at (202) 682-5418.

Conflicts of Interest

Conflicts of interest occur when a panelist reviews an application in which he or she has a financial or personal stake. Federal law prohibits individuals who have applications pending at the NEA from serving on the panels that will review them.¹ This means that, in the case of Fellowships, a panelist may not review his or her own application or a nomination submitted by a third party on the panelist's behalf. The prohibition also extends to organizational applications submitted on behalf of:

- an organization which employs the panelist;²
- an organization with which the panelist is otherwise affiliated.
- a project with which the panelist is affiliated, regardless of whether the panelist is affiliated with the organization submitting the application.

In addition, a panelist that stands to receive any remuneration under a grant application is prohibited from reviewing it.

¹ 20 U.S.C. § 959(c).

² Please note that working in a different office or department than the one applying will not resolve the conflict. For example, if you work for an orchestra's education department and the artistic department is applying for funding, you will be in direct conflict with that application. Note that you are not expected to canvas all departments of your organization. NEA staff will advise you of any such pending applications.

Conflicts of interest can also arise when certain people related to the panelist stand to benefit from a particular proposal. When a panelist's spouse or dependent children have an interest, that interest will be imputed to the panelist. This means that a panelist is also unable to review applications that could benefit those individuals.

Keep in mind that there may be other applications to which a panelist cannot bring an unbiased judgment. A panelist should recuse himself or herself from these applications.

Please do not wait until the panel meeting to inform NEA staff about conflicts that you found during the application review. If you are unaware of a conflict at the time you agreed to serve as a panelist, please advise NEA staff as soon as possible after becoming aware of it.

Disclosure of Finances and Affiliations

Prior to confirming your service as a panelist, an NEA staff member will ask you to complete a "Confidential Statement of Relevant Affiliations, Employment, and Financial Interests," also known as the "Affiliations Form." It requires you to list all of your affiliations, as well as those of your spouse and your dependent children, and pertains to any affiliations from one year prior to, through one year following, your panel service. At the beginning of the meeting, you will have the opportunity to review and sign the Affiliations Form to certify that the information is accurate as of the date of the panel meeting.

Please complete your Affiliations Form as soon as possible and return it to the appropriate NEA staff member. This gives the NEA sufficient time to make any necessary adjustments, and helps avoid any inconvenience to you. In addition, by remembering to include all of your affiliations, you help staff to determine whether any possible conflicts have been overlooked.

Prohibited Practices

Misuse of Panel Position

In addition to conflicts of interest, there are other ethical issues that pertain to panel service. The following constitute a misuse of one's panel position and are categorically prohibited:

- *Private gain:* A panelist shall not use panel membership for private gain, or for the private gain of friends, relatives, or other people or organizations with whom the panelist is affiliated.
- *Misuse of nonpublic information:* A panelist shall not use, or attempt to use, nonpublic information³ to further his or her own private interest or that of another, including any organization with which the panelist is affiliated.
- *Endorsement:* A panelist shall not use panel membership for the endorsement of any product, service, or enterprise.

³ Nonpublic information is information that the panelist gains by reason of panel service, and that the panelist knows or reasonably should know has not been made available to the general public. In other words, if the information would not have been acquired but for your service on the panel, it is nonpublic information.

- *Government sanction:* A panelist shall not use or permit the use of his or her status as a panel member in a manner that could imply that the NEA or the U.S. Government sanctions or endorses personal (non-panel) activities.

Prohibition on Working on a Reviewed Project

For one year after panel service, a panelist cannot work on a project reviewed during the panel meeting.

Prohibition on Lobbyists

Registered lobbyists are not permitted to serve on NEA panels.

Confidentiality

Although panel deliberations are open to the public, the application materials you receive are not to be shared outside the NEA panel process. At the conclusion of the panel meeting, you will be required to leave all substantive panel materials at the NEA and delete or destroy any electronic of application materials.

Acknowledgment of Panel Service in Biographical Materials

Former panelists are permitted to acknowledge their panel service in their biographical information. However, it must be included among several biographical details and must never be the sole means of identifying the former panelist.

Conclusion

Panel service provides critical support for the agency's mission, which is to advance artistic excellence, creativity, and innovation for the benefit of individuals and communities. Your participation is the foundation of the NEA's funding process.

Grant applications are to be reviewed on the basis of the review criteria in the Partnership Agreement Guidelines. Conflicts of interest invite outside factors to impermissibly – and illegally – influence the panel's recommendations. By failing to disclose an affiliation, or by placing private gain above public service, a panelist undermines not only the panel's review process, but also the NEA's funding process. Fulfilling your obligations under the *Standards of Conduct* helps us ensure that your panel is conducted ethically and in accordance with the agency's goals.

Employment Law/Labor Law/Civil Rights/Accessibility

The OGC plays a key role in employment law/labor law, civil rights and disability/accessibility matters. The NEA's Office of Human Resources, Civil Rights and Disability/Accessibility are expected to consult regularly with OGC in order to facilitate timely resolutions to issues that may arise in these areas as well as to keep OGC abreast of matters that may implicate legal analysis/review.

Employment Law

The OGC handles employment law matters which include communicating with the Agency's Office of Human Resources and senior management on employee issues, performing legal research and analysis for employment law-related issues, and staying abreast of changes in the rapidly changing area of employment law. The OGC also works with the Office of Human Resources to develop training for Agency staff in order to continue to encourage a positive work environment for NEA employees and to minimize Agency liability in this area.

Labor Law:

The OGC also provides legal guidance to the Agency's labor relations specialist, Linda Williams, and senior management with regard to labor union matters and reviews Agency administrative actions to ensure compliance with federal labor laws. The OGC would defend the Agency against any claims brought before the Federal Labor Relations Authority (FLRA); as such, the labor relations specialist communicates relevant concerns to OGC early enough in the process for legal analysis and counsel before matters escalate beyond a certain level.

Civil Rights/Equal Employment Opportunity (EEO):

There are two components to OGC's Civil Rights practice - external and internal. The external portion relates to ensuring grantee compliance with federal civil rights law. The OGC, in coordination and consultation with the Agency's Office of Civil Rights, assist grantees with civil rights matters that relate to grantee programs funded, in whole or in part, by the Agency. The Office of Civil Rights has a specific intake process to manage any external complaints.

The internal portion of OGC's Civil Rights process involves an informal complaint stage and formal complaint stage that are provided for by law.

In short, the informal complaint stage provides an employee who asserts that he or she has been discriminated against on the basis of a protected class with a neutral office and process through which to seek assistance. The OGC is to have contact with the Office of Civil Rights during the informal stage in a very limited way, in order to safeguard the neutrality of the civil rights program. Once a matter moves out of the informal stage, then the OGC becomes very engaged in terms of defense of the agency, which can include mediation, arbitration, or litigation, but also can include effectively addressing any matters that are problematic for the agency, should those exist. We will provide a separate briefing for you on the specific process prescribed by law, including the Chair's responsibilities pursuant to that process, relevant background on the EEO and Anti-Harassment policy statements, the legal relationship between the various offices and roles of those working on EEO matters, and pending EEO litigation matters.

Disability/Accessibility:

Grantees are required to comply with federal disability laws such as the Americans with Disability Act and Section 504 of the Rehabilitation Act. The NEA's Office of Accessibility provides technical assistance to the field in order to further compliance. The Office of Accessibility does not process complaints arising out of NEA federally-funded assistance (such as grants) or related to access an NEA-sponsored program, even if it is based on disability. All complaints must be filed with the Office of Civil Rights, which in turn consults with OGC.

The Department of Justice has required Agencies to update their Section 504 regulations with regards to alterations on existing structures and new design in a manner that will streamline compliance.



MEMORANDUM

Date: April 22, 2016

To: All National Endowment for the Arts Employees

From: Jane Chu, Chairman *Jane Chu 22 April 2016*

Subject: Anti-Harassment Policy Statement 2016

The National Endowment for the Arts (NEA) is committed to ensuring that all employees are free from harassing conduct in the workplace.

Harassment is any unwelcome conduct, **verbal or physical**, based on race, color, religion, sex (including pregnancy, gender identity, sexual orientation, and sex-stereotyping), national origin, age (40 and over), disability, or genetic information, and any other reason prohibited by law. Also prohibited is harassment against an individual in retaliation for that person filing a discrimination charge, participating in an employment discrimination proceeding (such as an investigation or lawsuit), or opposing discriminatory employment practices. Additionally, harassment based on other conduct that is threatening, intimidating and/or bullying will also not be tolerated.

The NEA Anti-Harassment Policy and Procedures outlines how any employee who believes that he or she has been subject to or has witnessed harassing conduct, can promptly report the matter. Employees found to have engaged in harassment or discrimination will be subjected to disciplinary action, up to and including removal.

Harassment adversely affects both mission accomplishments and productivity in the workplace. Harassment has no place at the NEA and it is against the law. Please be assured that I remain fully committed to fostering a safe work environment where every employee is treated with dignity and respect.



Intellectual Property

Background

Unlike an individual, private company, or non-profit corporation, the federal government does not enjoy copyright protection when creating something. As such, all material published or released by the NEA is considered to be "in the public domain." Even though the federal government cannot create copyrighted works, it can be held liable for infringing on the copyright of others. The following is a brief summary of copyright and trademark issues that tend to arise, what the legal status of these issues are, and how our office works with you and program personnel in addressing these problems.

Trademarks

When developing a new initiative you should consult with OGC about trademarking the name of the initiative, and possibly any associated logos. Please be mindful that the US Patent and Trademark Office takes a long time to process trademark applications (sometimes four months to over a year).

The NEA keeps and maintains a portfolio of registered trademarks to prevent others from using names that are very similar to ours in a way that might imply federal endorsement or confuse the average consumer. We also keep and maintain registration for these marks to preempt challenges that we have infringed on the marks of others. Please consider these challenges when choosing a name for an initiative. It is possible that another, tangentially related organization is using a similar name for a program, or that other technical or legal obstacles might exist in using a name. Our office is equipped to conduct research and advise you on the legal implications of the branding of any particular initiative.

Permissions and Copyright Infringement

The NEA avoids infringing on the copyright or publicity rights of others out of respect for the creations of artists, the privacy of individuals, and to avoid legal liability for infringement. In creating informational content such as podcasts and web pages, distributing information about grantees, or putting together events and symposia, it is necessary to secure releases from individuals for use of their likeness, as well as images, writings, and other media.

Our office generates both standard forms and general forms for program and administrative staff to use in obtaining music, video, pictures or written material from

others for use in materials published online and in print. In addition to these standard forms, our office also generates forms specific to certain programs or events.

Obtaining permissions from individuals involved in an event or a specific publication may be coordinated by third party contractors and cooperators. In these events, organizations are generally required to use our forms to obtain permission. In most cases, a letter generally indicating that an individual has no objection to granting permission does not suffice for permissions purposes.

Intellectual Property in Grant Making

Applicants in certain categories must provide evidence that they have received permission for the use of the materials of others. This is required to avoid "suborning infringement" by funding a work created without permission. Issues related to this requirement have arisen in fellowship grants.

Your Remarks

Anything you, or any NEA official, say in your official capacity (in speeches, proclamations, press releases, informal remarks, etc.) is considered to be "in the public domain" and can be copied, used and re-used by anyone. Much of your communication on subjects related to the arts during your tenure at the NEA will therefore be available for anyone to use and publish however they please. Public Affairs coordinates with OGC on matters that raise intellectual property or other legal concerns.



CONVENINGS HOSTED BY THE NEA

The NEA has been hosting convenings with different subject matter focus, typically in the areas of arts research and program innovation. Recently, in addition to those areas, the NEA - as a result of the workflow analysis - is providing funding and resources towards the Directors' Convening Fund. Under this initiative, the Agency will develop and host a number of small convenings as well as one large convening each year.

The first small convening is scheduled to take place during November of 2014 and the remaining small convenings will continue throughout the next fiscal year. Generally, one programmatic discipline will be highlighted during each small convening. The Director of each discipline area is in charge of working with his or her group to conceptualize and execute their respective convening. The large convening is still in the early conceptual/developmental stages and will not occur until 2015.

Ned Read, Special Assistant to the Deputy Chairman for Management and Budget, will be each Director's primary point of contact to facilitate the coordination of each convening (small and large).

The OGC works extensively during the planning phases of the convenings, in order to structure and draft overarching agreements, complete an ethics analysis on any proposed partnerships, analyze the use of gift funds and address other fiscal law matters, work through any procurement law issues, assess any intellectual property matters particularly if a published document will be produced as a result of a convening or workshop, along with working through other legal considerations. The OGC has provided the Directors with a Convening Checklist, which serves as a roadmap for the structural framework necessary to execute the convenings. In producing the checklist, OGC coordinated with the following offices: Budget & Finance, Contracts, and Panel Operations. OGC strongly recommends that discipline Directors consult with OGC at least 6 months prior to their convening (and do so on a regular basis) in order to ensure the necessary legal permissions, documentation and reviews occur in a timely and organized manner.



Arts and Artifacts Indemnity Program

The Indemnity Program is governed by the *Arts and Artifacts Indemnity Act* (P.L. 94-158). The program is administered on behalf of the Federal Council on the Arts and the Humanities, which is comprised of the heads of many federal agencies, including the National Endowment for the Arts, the National Endowment for the Humanities, Commission of Fine Arts, General Services Administration, Institute of Museum and Library Services, Library of Congress, National Archives and Records Administration, National Museum and Library Services Board, National Science Foundation, and the Departments of State, Commerce, Education, Health and Human Services, Housing and Urban Development, the Interior, Labor, Transportation, and Veterans Affairs. Responsibilities are divided by law among the federal agencies.

Key facts to know in terms of the operation of the Indemnity Program include that the Chair of the NEA signs the indemnity agreements, the Office of General Counsel National Endowment for the Humanities, not NEA, serves as the legal counsel for the Indemnity Program. The program is, however, functionally administered by the NEA. The Indemnity Administrator and Assistant Indemnity Administrator are members of the NEA Visual Arts Division.

The Program & Partnership staff will provide you with a briefing on the Indemnity Program. Either the Indemnity Office or my office can arrange for you to meet with the NEH General Counsel so that you have a complete understanding of the working relationship for this program.



INTRODUCTION

The PCAH was established in 1989 via Executive Order 12692. The original objective of the PCAH is to make recommendations to the President, the National Endowment of the Arts (NEA) the National Endowment for the Humanities (NEH) and within the past several years, the Institute of Museum and Library Services (IMLS) in the following areas:

- The promotion of private sector support for the arts and humanities, particularly at state and local levels;
- Gauging the effectiveness of Federal support for the arts and humanities as a tool to stimulate private sector involvement;
- Planning and coordination of various projects/productions in major and historic national events;
- The various ways in which to recognize excellence in arts and humanities.¹

The primary mission of the PCAH is to assist in the efforts to increase private sector support for the arts and the humanities.

MAKE-UP

The PCAH shall be made up of the following members:²

- Chairperson of the NEA
- Chairperson of the NEH
- Secretary of the Treasury
- Secretary of the Interior
- Secretary of Education
- Administrator of General Services
- Director of the Institute of Museum and Library Services
- Member designated by the Secretary of State
- Non-Federal members (selected by the President)

FACA GUIDELINES

The PCAH is a Federal Advisory Committee and as such, is regulated by the Federal Advisory Committee Act (FACA).³ As a FACA Committee, the PCAH operates for a two-year time period.⁴ At the expiration of such time period, its Executive Order must

¹ Exec. Order No. 12367, 3 C.F.R. 188 (1982).

² *Id.*

³ The Federal Advisory Committee Act, 5 U.S.C. Appendix - Federal Advisory Committee Act, 86 stat 770, as amended (2001).

⁴ *Id.* at §14.

be renewed/extended.⁵ The NEA is the agency primarily responsible for the administration of PCAH.

PCAH meetings must be open to the public and items such as records, reports, minutes, working papers and agendas should be made available for public review.⁶ Minutes must be kept from each meeting of the PCAH and be certified to the Chairperson of the PCAH.⁷

FUNDING, PROGRAMMING, REPORTING

Funding

Both the NEA and the NEH have statutory gift acceptance authority but the PCAH does not.⁸ The NEA functions as the sole conduit by which funds marked for the use and benefit or on behalf of the PCAH are provided to the PCAH.⁹ The PCAH is prohibited from using the NEA's gift acceptance authority as its own.¹⁰ It must ensure that any gifts are channeled through the NEA in order to be in compliance with statutory construct. The PCAH does not have independent fundraising authority, nor is it a 501(c)(3) organization.¹¹

Due to the very specific manner in which the PCAH must receive funds, it is essential that the PCAH work closely with the NEA when considering any type of fundraising activity and/or providing instructions to donors. Funds must flow to the PCAH in the manner set forth in its Executive Order and as prescribed above. If the PCAH is unsure as to whether a particular method of soliciting donor funding is appropriate or how to proceed with soliciting donations, it should consult with the NEA's OGC.

Administrative Functions

The administrative functions for PCAH are split between the NEA and NEH. Each year, the NEA and NEH sign an interagency agreement regarding shared administrative costs. The key divisions of labor are as follows:

NEA provides legal, financial, communications, contracting services, as well as administrative services.

NEH provides computer support and equipment and financial analyses support.

⁵ Reference most recent Executive Order.

⁶ *Id.* at §9.

⁷ *Id.*

⁸ Memorandum from National Endowment of the Arts Office of General Counsel (Confidential and subject to Attorney-Client Privilege), May 1999., p. 1.

⁹*Id.*

¹⁰ *Id.*

¹¹ *Id.* at 2.

Programming

The OGC works with PCAH on structuring the legal framework for its initiatives. We provide counsel in a wide range of legal subject matter areas. We also provide ethics training for the PCAH members and respond to any legal questions they may have pertaining to PCAH.

The NEA also facilitates interagency agreements to achieve the objectives of PCAH. The other agencies that typically transfer funds to NEA for these initiatives are NEH and IMLS. PCAH also partners with other federal agencies on various initiatives, such as the Turnaround Arts Initiative.

Recently, the NEA, in agreement with NEH and IMLS, determined to transfer the administration of the Film Forward cooperative agreement on behalf of PCAH to IMLS. The NEA and IMLS are currently working through the actual transfer.

CONCLUSION

This memorandum, taken in conjunction with statutory law and guidance, provides a general roadmap for the PCAH and its operation. It is by no means an exhaustive account of the scope under which the PCAH operates. If there are any questions or clarification is requested in any topic set forth herein, please contact the NEA's OGC.