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COMPTROLLER GENERAL OF THE UNITED STATES

WASHINGTON, D.C. 20548

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B-168527

OCT 14 1970

Dear Mr. Scherle:

In response to your request of August 20, 1970, we have obtained a statement of the estimated costs incurred by the National Institutes of Health in connection with a rock concert sponsored by the Viet Nam Moratorium Committee-NIM-NIMH and held on the grounds of the National Institutes of Health in Bethesda, Maryland, on August 20, 1970.

You also requested our opinion as to whether the National Institutes of Health had a legal right to disburse Federal funds in support of this concert. As stated in our letter to you of September 8, 1970, we have requested a report from the Department of Health, Education, and Welfare regarding this matter. While that letter has been acknowledged, we have not yet received a final reply.

We discussed the concert and its associated costs with officials of the National Institutes of Health who advised us that the Government incurred estimated costs of \$2,048 in connection therewith. Of this amount, \$1,123 represents costs which would not have been incurred if the concert had not been held. Overtime pay to National Institutes of Health security guards accounts for \$1,098 of this amount, and the remaining \$25 represents the costs of electrical material made available for the amplifying system used by the band. No cost has been estimated for use of the National Institutes of Health's electric power because the quantity involved was considered negligible.

The total estimated costs incurred by the Government also includes \$925 for wages and other operating expenses directly related to the concert, but which would have been incurred even if the concert had not been held. This category of estimated costs is composed of the following:

Administrative personnel	\$140
Regular pay of guards	227
Doctor	13
Grounds maintenance	132
Cleanup	15
Electrical service personnel	100
General administrative, first aid, and other expenses	<u>298</u>
Total	<u>\$925</u>

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An official of the National Institutes of Health informed us that to his knowledge no additional costs were incurred as a result of the concert by any Federal agency other than the National Institutes of Health.

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The Department of Health, Education, and Welfare has not been given the opportunity to comment formally on this report; however, the information in the report was discussed with National Institutes of Health officials. We plan to make no further distribution of this report unless copies are specifically requested, and then we shall make distribution only after your agreement has been obtained or public announcement has been made by you concerning the contents of this report.

Sincerely yours,

R.F.KELLER

Assistant Comptroller General
of the United States

The Honorable William J. Scherle
House of Representatives



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20348

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B-172015

October 2, 1972

Captain Karen S. Sollenberger, ANC
Box C-6
Tripler Army Medical Center
APO San Francisco 96438

Dear Captain Sollenberger:

This refers to your letter dated July 21, 1972, with enclosures, requesting that we reconsider our decision of February 16, 1953, B-113093, 32 Comp. Gen. 364, which you say is the basic authority on which the Army has declined to pay you the basic allowance for quarters at the "with dependents" rate on account of a dependent husband. We are also in receipt of a letter in your behalf from the Honorable Patsy T. Mink, House of Representatives, concerning this matter.

You contend that the interpretation in the above decision of the term "dependent" as defined in 37 U.S.C. 401 is no longer valid because it is in disagreement with the clear language of that statute and opposed to current expressions of Congressional intent that women must receive equal pay for equal work. You also give other reasons in support of that contention and you have furnished us with a copy of a claim which you had submitted on February 22, 1972, to the Finance Officer, Fort Sheridan, Illinois. That claim contains numerous legal arguments which you contend would serve as justification for that officer to no longer follow the holding in our decision and which represent a legal basis for payment to you of the basic allowance for quarters effective January 26, 1971, the date of your marriage.

Attached to your claim are copies of (1) an affidavit in which you aver that you have provided over 50 percent of the financial support of your husband since January 26, 1971, (2) a statement from an appropriate official at Fort Sheridan concerning the nonavailability of family quarters for you, and (3) laws, regulations, United States Supreme Court case, etc., relating to this matter.

Also in your letter you express the desire to amend your claim to include payment of every entitlement which you are now being denied by reason of the above decision.

Apparently, the Army denied your claim for the allowance on the basis of paragraph 30242 of the Department of Defense Military Pay and Allowances Entitlements Manual. That paragraph provides for payment

of the basic allowance for quarters to a female member on account of a dependent husband only when it is shown that he is physically or mentally incapable of self-support and is in fact dependent upon her for more than one-half of his support. That regulation is based on our decision in 32 Comp. Gen. 364, supra. In that decision we interpreted and applied in the case there involved section 102(g) of the Career Compensation Act of 1949, ch. 681, approved October 12, 1949, 63 Stat. 804, 37 U.S.C. 231(g) (1958 ed.), a provision of law which is substantially similar to 37 U.S.C. 401, mentioned above.

We held that a female officer of the uniformed services who voluntarily assumed the support of her husband in order to permit him to attend college, although he was physically and mentally capable of self-support, did not have a husband who was "in fact dependent" upon her for over half of his support within the meaning and intent of the governing law so as to entitle her to increased basic quarters allowance.

We have reexamined our decision concerning the entitlement of female members to the basic allowance for quarters on account of a dependent husband. By decision of July 3, 1972, B-161261, 52 Comp. Gen. ____, to the Secretary of Defense (copy enclosed), we reconsidered our decision in 32 Comp. Gen. 364, and concluded that effective that date a female member of the uniformed services may be considered as having a dependent husband within the meaning of the governing statute, 37 U.S.C. 401, where there is sufficient evidence to establish his dependence on her for over one-half of his support without regard to the husband's mental or physical capability to support himself.

In that decision, however, we said that unless and until legislation similar to the bills cited in the decision is enacted into law, it was our opinion that there is no authority in the law to authorize to a female member increased quarters allowance on account of a dependent husband unless it is established that he is dependent upon her for over one-half of his support as specifically required by the present law. In this connection, in our decision of July 3, 1972, we cited a decision dated April 5, 1972, by the United States District Court for the Middle District of Alabama in the Frontiero case wherein that court upheld the constitutionality of section 401 of title 37, U.S. Code.

It appears that under the purview of the above decision of July 3, 1972, you may be entitled to the increased basic allowance for quarters commencing July 3, 1972, on account of a dependent husband, should it be determined by the Department of the Army that your husband is in

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fact dependant upon you for more than one-half of his support. However, that decision provides no authority for crediting your account in such instance with the increased allowance for the period prior to the date thereof.

In view of the above, it is suggested that you present this letter and the copy of the decision of July 3, 1972, to the finance officer at your installation with the request that appropriate action be taken on your pending claim for the increased allowance.

Sincerely yours,

PAUL G. DEMBLING

For the Comptroller General
of the United States

COMPTROLLER GENERAL OF THE UNITED STATES

WASHINGTON, D.C. 20548

*May be released - MAR 66
See Memo in file - 7/23/76*

SEP 21 1973

B-178648

The Honorable Terbert H. Macdonald, Chairman
Subcommittee on Communications and Power
Committee on Interstate and Foreign Commerce
House of Representatives

Dear Mr. Chairman:

This refers to your letter of May 10, 1973, requesting that we investigate a news report concerning the dissemination to radio stations, by Federal executive departments, of prerecorded news releases, and specifically that we determine (1) how many departments and agencies provide prerecorded news reports; (2) the contents of the reports; and (3) whether any Federal statute has been violated.

In discussions with your staff, it was agreed, as confirmed by our letter of May 30, 1973, that we would examine into the practices of the major executive departments and agencies which provide prerecorded news reports, and would review the contents of the reports prepared by them during the period January 1, 1973, to May 31, 1973. We reviewed the activities of a total of 30 departments and agencies, and found that 18 of them provided prerecorded news reports to radio stations as part of their public information programs. Ten of the 18 agencies provided news reports daily, while the other eight agencies provided them on a less frequent basis. The agencies reviewed are listed in Attachment I.

Typically, the radio stations would obtain the prerecorded news reports by calling the agencies on designated telephone lines. The news reports could then be broadcast by a station as they were being received on the phone or could be recorded for broadcast at a later time. In addition, some agencies mailed tape recorded news reports to radio stations.

The 18 agencies which provided prerecorded news reports prepared 1,524 reports during the 5-month period covered by our review. We reviewed 1,462 of these reports. According to agency officials, recordings or transcripts of the remaining 62 news reports were no longer available at the time of our review.

We held discussions with responsible officials concerning the guidelines used in preparing the reports and obtained estimates of the costs of providing prerecorded news reports. Through our discussions with agency

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officials we found that the 18 agencies had not established definitive guidelines to govern the content of prerecorded news reports. Rather, the staffs in charge of the radio services either had been given no guidelines or had been given wide latitude to exercise their own judgment as to what was timely and newsworthy in selecting items for recording.

The prerecorded news reports we reviewed covered a diverse range of subjects. In most cases the reports contained a discussion of a program or activity within the agency's area of responsibility. The reports often contained excerpts from speeches or commentaries by high-ranking agency officials.

We obtained, from officials of those ten agencies that provided daily prerecorded news reports, estimates of the cost of providing the news services. These are set forth in Attachment II, and include major equipment costs and annual operating costs.

In view of the use of appropriated funds to finance the dissemination of the prerecorded news reports, and as agreed with your staff, we analyzed the content of the 1,462 reports available during the 5-month period covered by our review to determine if section 608(a) of the Treasury, Postal Service, and General Government Appropriation Act, 1973, approved July 13, 1972, Pub. L. 92-351, 86 Stat. 471, or any other statute, had been violated. Section 608(a) of the act of July 13, 1972, provides that:

"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."

We consider that in General section 608(a) is not violated by the dissemination by an agency of general comment on, or discussion of, pending legislation. This view is, we believe, necessarily implied by consideration of the nature of those public information functions of an agency which are legitimate and lawful. Thus, public officials may with propriety report on the activities of their agencies, may expound to the public the policies of those agencies, and of the administration of which they are members, and may likewise offer rebuttal to attacks on those policies. Expenditure of appropriated funds for dissemination of information in those categories is hence lawful. But it must be recognized that, to the extent to which the policy of an agency or administration is embodied in pending legislation, 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 that legislation or in opposition to other non-administration

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legislation, or both. An interpretation of section 608(a) which strictly prohibited expenditures of appropriated funds for dissemination of views on pending legislation would consequently preclude virtually any comment by officials on administration or agency policy, a result which, as noted above, we do not believe was intended.

We conclude, therefore, that the Congress did not intend, by the enactment of section 608(a) and like measures, to preclude all expression by agency officials of views on pending legislation. Rather, the prohibition of section 608(a) in our view applies only to expenditures involving direct appeals addressed to the public suggesting that they contact Members of Congress and indicate their support of or opposition to pending legislation, i.e., appeals to members of the public for them in turn to urge their representatives to vote in a particular manner. The foregoing general considerations form the basis for our determination in any given instance of whether there has been a violation of section 608(a).

We note further, in this regard, that the statutory injunction of section 608(a) is too vague to be susceptible of definitively drawn guidelines which would clearly delineate unauthorized types of expenditures. Consequently, we do not consider it appropriate to override administrative determinations of propriety with respect to any specific action, except where the ultimate aim of such action is so palpably designed to support or defeat pending legislation in the manner described above as to compel the conclusion that the administrative determinations are unreasonable in the face of the statutory prohibition.

The following discussion of the materials disseminated by the various agencies through their broadcast news services and examined by us is based on this interpretation of section 608(a). We have found, in our examination of the materials thus made available by the agencies, that most of the news releases do not violate section 608(a), either because they are clearly in the category of exposition of administration policy or because, although they discuss pending legislation, they do not do so in terms which are clearly designed to suggest that the public contact Members of Congress to influence their vote on pending legislation. But in our view there were ten instances of violations of section 608(a) of the act of July 13, 1972: one by the Department of Transportation; one by the Department of Housing and Urban Development (HUD); six by the Department of Labor; and two by the Department of Commerce. Details of each of these violations are set forth below. The following ten reports, in our opinion, are in violation of section 608(a) because they are patently designed to influence the general public to contact Members of Congress to urge the members to vote for or against (i.e., support or defeat) pending legislation:

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1) The following statement by the Deputy Assistant Secretary of Labor and Administrator of the Occupational Safety and Health Administration was available through the Labor Department broadcast news service on March 28, 1973:

"* * * What the President has proposed is a budget of restraint and reform. It promises prosperity without inflation.

"If the President's position of resisting higher taxes resulting from big spending is to be upheld, the people need to be heard. The voice of America can reach Capitol Hill and can be a positive persuader."

an inescapable import of this is that the people are exhorted to contact their elected representatives and let them know that they favor the President's budget, so that those representatives will vote for the legislation embodying that budget. In our view this is publicity or propaganda designed to support or defeat legislation pending before Congress, within the meaning of section 608(a).†

2) On March 19, 1973, the following statement by the Federal Railroad Administrator was available through the Department of Transportation broadcast news service:

"* * * If we are going to have economic stability and fiscal responsibility, we must all support the President's budget program—and let Congress know we support it."

His again urges listeners to make known to Congress their support for the President's budget, which is embodied in pending legislation.

3) The following statement by the Assistant Secretary of Labor for Occupational Safety and Health was available on April 5, 1973:

"At the moment there is a struggle going on in Washington. Its outcome will vitally affect the American taxpayer. Congress is under pressure to expand President Nixon's budget of restraint.

"Many of the additions to the budget some members in Congress want to make would only give new life to old and outworn programs. It is going to take a good deal of effort to assure success for the Administration's responsible budget.

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"With the public's help, government spending can be held down. The people must tell their elected representatives they are no longer willing to pay for bigger government that is not necessarily better government."

4) A statement by the Deputy Under Secretary of Labor, available on April 9, 1973, was as follows:

"The consequences of breaching the President's budget ceiling are inevitable and brutal. As a matter of simple arithmetic, an increase in government expenditures requires either an increase in taxation or a larger Federal deficit or both. If we are unwilling to accept increases in taxes--and most of us are unwilling--the consequence of increased government spending will be a strengthening of the always dangerous, always cruel inflationary forces. If the ceiling is breached, we can expect rising prices, rising interest rates, rising imports, decreasing exports, and other distortions in our economic processes which will threaten our living standards. If you fear inflation--as you should--this is not the time to be silent--contact your congressman."

5) The following statement by the Deputy Assistant Secretary of Labor was available on April 5, 1973:

"The Occupational Safety and Health Act of 1970 is a good example of President Nixon's emphasis upon government decentralization. Allowing the States to develop their own safety and health programs plans under Federal guidance should help stem the tide of rising Federal expenditures and control."

"Those in Congress who resist this effort by calling for more Federal outlays are asking the American workingman to bear the brunt of heavier taxes and renewed inflation. The public must let these big spenders know that it supports the President in the fight to hold down Federal spending."

6) The following statement by the Deputy Under Secretary of Labor was available on April 7-8, 1973:

"A highly significant confrontation is now developing between the President and the Congress on each of the big spending bills. The President knows that if his budget ceiling is not adhered to, either taxes or the Federal deficit must rise. If this happens, the American public must

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pay in the form of either higher taxes or higher prices or both. Because of this, the President has already vetoed two of these spending bills. You can help the President in this vital effort by letting your congressman know where you stand. If you are willing to pay higher prices and higher taxes, let him know. But if you oppose higher prices and higher taxes, let him know that too."

Some discussion of our conclusion with respect to this statement and several similar ones, noted hereafter, is necessary. While the last statement, and the four following statements, advise the listener to make his views concerning pending legislation known to his representative in Congress, the tenor of each statement makes it clear that the statement is intended to convince the listener to present to his Congressman the view espoused in the statement and thus support or defeat pending legislation. Hence these statements are also in violation of section 608(a).

7) The following statement, available on April 13, 1973, was made by the Assistant Secretary of Labor:

"President Nixon has proposed a sensible budget that places a tight lid on the runaway spending that hampered the nation in the 1960s. It calls for pruning those expensive programs that don't work, so we can focus our efforts on those programs that do work. It will help us achieve the first peacetime prosperity without inflation in nearly twenty years.

"If we don't slow down Federal spending, if the President's budgetary cuts are thwarted, we face a 15-percent increase in income taxes and more inflation. I don't think any American wants this. But, in the final analysis the responsibility rests with the voters and the taxpayers. They must let the Congress know how they feel on this critical issue."

8 and 9) The broadcast news service of the Department of Commerce made the following statement by the Secretary of Commerce available on two occasions, March 21 and again on March 30, 1973:

"The opposition to President Nixon's budget is not coming from the people. The people, as we have seen are benefiting from the largest human resources budget in our Nation's history. The display of anguish originates from the poverty middlemen. They see their roles as well-paid,

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publicly financed, 'advisors to the poor' being diminished. President Nixon has taken his stand. We have heard from those who oppose his effort. Now the people must make their choice, and they must make their choice known to their elected representatives in Congress."

10) The following statement by the Secretary of Housing and Urban Development was available on March 29, 1973:

"All those unneeded new bills headed for the President's desk from Congress—all the unworthy Federal programs and projects—are guns pointed at the heads of American taxpayers. Or more accurately, they are pointed at the income of the taxpayers—ready to shoot them down. * * * We live in historic times. The question is whether * * * as a Nation * * * we will take advantage of the opportunity President Nixon's vision and determination afford us. Right now, Congress is getting all kinds of letters from special interest groups. Those groups are pleading their own selfish causes. I think Congress should hear from all Americans on what the President is trying to do whatever their views may be. And I say that regardless of whether those who contact their Congressman happen to be in agreement with me."

As indicated above, this is clearly an attempt to influence pending legislation in violation of section 608(a). The violation, as noted above, is not cured by the disclaimer of intent to influence that legislation in a particular fashion.

With regard to the question of whether any Federal statute has been violated, there is also for consideration section 701 of the Departments of State, Justice, and Commerce, The Judiciary, and Related Agencies Appropriation Act, 1973, approved October 25, 1972, Pub. L. 92-544, 86 Stat. 1109. Section 701 provides that—

"No part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not authorized by the Congress."

We have generally considered, in interpreting other statutes using essentially the same language as section 701, that this language is intended to prevent publicity of a nature tending to emphasize the importance of the agency or activity in question. 31 Comp. Gen. 311 (1952). We have not found in the Commerce Department or State Department material examined any instances of such self-aggrandizing uses of the broadcast news service. None of the other agencies examined are subject to section 701.

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We note further that section 1913 of title 18, United States Code, provides, in pertinent part, that:

"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 designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation."

Whether expenditure of appropriated funds for any of the recorded news announcements under consideration herein is a violation of 18 U.S.C. 1913 is properly a matter for consideration by the Department of Justice since it provides for penal sanctions and, consequently, it would not be appropriate for us to express an opinion thereon.

Finally, with respect to the cost of the broadcast services, generally we found that six agencies provided their prerecorded news services over conventional telephone lines which require the caller to pay the toll, including long-distance charges. Three agencies--the Department of Transportation (DOT), the Cost of Living Council (COLC), and HUD--used both conventional and toll-free wide area telephone service (WATS) lines, while the Environmental Protection Agency (EPA) used WATS lines exclusively. The cost incurred in providing toll-free service to radio stations varied considerably among the agencies as shown in the table below:

Agency	Number of WATS lines	Total annual cost for WATS lines	Average annual cost per WATS line	Average number of calls received per day
HUD	2	\$ 8,202	\$ 4,101	161
DOT	2	7,800	3,900	102
COLC	3	35,808	11,936	117
EPA	3	27,808	9,269	228

(Amounts shown for EPA were projected by GAO based on contract costs incurred during the first 13 weeks the service was provided.)

DOT and HUD used "measured" WATS lines which enabled the agencies to use the WATS lines for a given number of hours at a fixed monthly charge, and to pay an additional charge for each additional hour the WATS lines were used. COLC and EPA each used a "full-time" WATS line in addition to measured WATS lines. Full-time WATS lines have no limits on their usage, but they cost considerably more than measured WATS lines.

In view of the cost savings possible through the use of conventional telephone lines, we believe that HUD, DOT, COLC and EPA should reevaluate the need for providing toll-free telephone service. If it is found that toll-free service is needed, COLC and EPA should reevaluate the need for full-time WATS lines.

The action to be taken by our Office with respect to the expenditures of appropriated funds in violation of law is limited to recovery of the amounts illegally expended. While appropriated funds were used in connection with the preparation of news reports which were part of an effort to influence directly pending legislation in the manner described, the amount expended for each violation would have been relatively small and commingled with proper expenditures. In view of the small amounts involved, the difficulty in determining the exact amount expended illegally as well as the identity of any particular voucher involved, we believe that it would be inappropriate for us to attempt to effect their recovery.

As you are aware, Senator Proxmire has also asked that we examine into the practices of the Federal executive departments in providing pre-recorded news reports to radio stations. As agreed with the Senator and you, we will transmit to the Senator the identical information contained in this report, after you have had an opportunity to examine it. We plan to make no further distribution of the report unless copies are specifically requested, and then distribution will be made only after your approval has been obtained or the report has been released publicly.

Sincerely yours,

(SIGNED) ELMER B. STAATS

Comptroller General
of the United States

Enclosures

D-178649

ATTACHMENT I

FEDERAL AGENCIES INCLUDED IN
REVIEW OF GOVERNMENT SUPPLIED NEWS STORIES
JANUARY 1 - MAY 31, 1973

RADIO NEWS SERVICE PROVIDED DAILY

1. Department of Agriculture
2. Department of Commerce
3. Department of Health, Education, and Welfare
4. Department of Housing and Urban Development
5. Department of the Interior
6. Department of Labor
7. Department of Transportation
8. Department of the Treasury
9. Cost of Living Council
10. Environmental Protection Agency

RADIO NEWS SERVICE PROVIDED PERIODICALLY

1. Department of Defense
2. Atomic Energy Commission
3. National Aeronautics and Space Administration
4. Small Business Administration
5. United States Postal Service
6. Department of State
7. General Services Administration
8. Veterans Administration

NO RADIO NEWS SERVICE PROVIDED

1. Department of Justice
2. Civil Aeronautics Board
3. Federal Communications Commission
4. Federal Maritime Commission
5. Federal Power Commission
6. Federal Trade Commission
7. Interstate Commerce Commission
8. National Science Foundation
9. Office of Economic Opportunity
10. Securities and Exchange Commission
11. United States Civil Service Commission
12. United States Information Agency

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ATTACHMENT II

ESTIMATED COST OF PROVIDING
RADIO NEWS SERVICEESTIMATED ANNUAL OPERATING COSTS

AGENCY	MAJOR EQUIPMENT COSTS	SALARIES	TELEPHONE LINES	TOTAL ANNUAL 1/ COSTS
Department of Agriculture	\$ 5,774	\$ 63,350	\$ 1,491	\$ 64,841
Department of Commerce	4,922	40,433	255	40,688
Department of Health, Education, and Welfare	13,829	23,088	960	24,048
Department of Housing and Urban Development	6,267	21,014	8,501	29,515
Department of the Interior	4,016	17,644	156	17,800
Department of Labor	16,184	61,266	1,212	62,478
Department of Transportation	6,444	23,035	8,220	31,255
Department of the Treasury	1,709	15,320	240	15,560
Cost of Living Council	2,754	4,200	36,103	40,303
Environmental Protection Agency 2/	—	—	6,952	13,776

1/ Total annual costs do not include the costs of expendable supplies or the cost of mailing tapes to radio stations.

2/ Prerecorded radio news services are performed for EPA by a contractor. The amounts shown are the costs incurred under the contract for the first 13 weeks.



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

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DEC 27 1973 -

B-178648

The Honorable Torbert H. Macdonald, Chairman
Subcommittee on Communications and Power
Committee on Interstate and Foreign Commerce
House of Representatives

Dear Mr. Chairman:

This refers to your letters, dated October 12 and October 16, 1973, requesting that we determine whether certain materials you forwarded therewith are in violation of the law limiting the use of appropriated funds for publicity and propaganda purposes (section 608(a) of the Treasury, Postal Service, and General Government Appropriation Act, 1973, approved July 13, 1972, Pub. L. 92-351, 86 Stat. 471, and section 607(a) of the Treasury, Postal Service, and General Government Appropriation Act, 1974, approved October 30, 1973, Pub. L. 93-143, 87 Stat. 510), as interpreted in our letter report of September 21, 1973, to you. The materials in question are (1) a tape recording and accompanying transcript of a statement by the Secretary of Transportation and (2) a transcript (which evidently accompanied a segment of 16mm color sound motion picture film, not forwarded) of a statement by the Secretary of Housing and Urban Development (HUD). Both items were received within the past few months by a corporation comprising a television station and AM and FM radio stations. We have carefully considered the materials in question and we must conclude that they do not violate the cited statutory prohibitions concerning publicity and propaganda.

Section 608(a) of the act of July 13, 1972, which was discussed in our letter to you of September 21, and section 607(a) of the act of October 30, 1973, are identical and provide that:

"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."

For the reasons set forth in our September 21 letter to you, we consider that the above-quoted provision of law is violated only by a direct appeal addressed to the public which suggests or urges that they

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contact Members of Congress and indicate their support of, or opposition to, pending legislation. The statement by the Secretary of Transportation, although it discusses a pending bill which would deal with the problem of rail service for the Northeast, is essentially an exposition of the Administration's views on that bill and associated issues. It contains nothing which, in our opinion, could be understood as a direct appeal for members of the public to urge their elected representatives to vote in a particular manner. The statement by the Secretary of HUD also discusses proposed legislation but it too is, in essence, expository, and contains no suggestion that listeners should urge that a particular position on the legislation be taken by their representatives.

We have long held that, under existing law, the legitimate public information functions of an agency include exposition by officials of agency and administration policies and the legislative history of these statutory provisions shows that such legitimate public information functions are within the purview of such provisions of law. We believe that the materials you sent us fall within that category.

We trust that the foregoing information will be helpful to you.

Sincerely yours,

R. F. Keller

Deputy Comptroller General
of the United States

DOCUMENT RESUME

02893 - [A1953014]

[Overtime Compensation for Sky Marshal Duties]. B-178261. July 7, 1977. 4 pp.

Decision re: Security Officers, United States Customs Service; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Personnel Management and Compensation: Compensation (305).

Contact: Office of the General Counsel: Civilian Personnel.

Budget Function: General Government: Central Personnel Management (805).

Authority: 5 U.S.C. 5545(c)(2). 5 U.S.C. 5542(r). B-151168 (1971). B-180036 (1974). 47 Comp. Gen. 573. John F. Fay et al. v. United States, U.S.D.C., D.C. Burich v. United States, 366 F.2d 984 (Ct. Cl. 1966). Anderson v. United States, 201 Ct. Cl. 660 (1973). Rotgeb et al. v. Staats et al., C.A. No. 4082 (S.D. Ohio 1974).

The Assistant Secretary of the Treasury requested an advance decision with regard to whether Customs Security Officers could be paid their claims for time and one-half overtime, night differential, layover time, and Sunday and holiday pay during the performance of sky marshal duties. Since the overtime was scheduled in advance and recurred at frequent intervals, it could be paid. The claims for night differential and Sunday and holiday pay could also be paid. However, claims for layover time between flights was not allowed. (Author/SC)

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DECISION



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

Civ. Per
Volpe

FILE: B-176261

DATE: July 7, 1977

MATTER OF: Customs Security Officers - Overtime
Compensation for Sky Marshal Duties

DIGEST: Customs Security Officers, who were not part of the class action lawsuit in John F. Fay et al. v. United States, claim time and one-half overtime, night differential, and Sunday and holiday pay for sky marshal duties performed. Since overtime was scheduled in advance and recurred at frequent intervals, it may be considered "regularly scheduled" and thus compensable under 5 U.S.C. §5542(a). Night differential and Sunday and holiday pay may also be paid. However, claims for layover time may not be allowed.

This action is in response to the request of September 7, 1976, for an advance decision from the Assistant Secretary of the Treasury (Enforcement, Operations and Tariff Affairs), reference ENF-3-06 CC:H:KG, whether the U.S. Customs Service may pay the overtime claims of certain Customs Security Officers (CSO's) who served as sky marshals in the Federal program to deter airline hijackings from approximately January 1971 to August 1972.

It appears from the record that CSO's were hired and trained specifically for air security duties, and they replaced various other Treasury agents who had been temporarily assigned to sky marshal duties. In February 1971, the Department of the Treasury requested a decision from our Office whether it could pay CSO's premium pay under 5 U.S.C. §5545(c)(2) (1970) for administratively uncontrollable overtime instead of time and one-half compensation under 5 U.S.C. §5542(a) (Supp. V, 1975) for regularly scheduled overtime. After reviewing the facts as presented by the agency, we held that we would not object to a determination by the head of the agency concerned (subject to the approval of the Civil Service Commission) that the hours of duty were uncontrollable for premium pay purposes. B-151168, April 6, 1971. The agency then paid the CSO's premium pay for administratively uncontrollable overtime under 5 U.S.C. §5545(c)(2).

In March 1973, a class action lawsuit was filed on behalf of all CSO's seeking time and one-half overtime, night differential pay, Sunday pay, and compensation for layover time between airline flights. John F. Fay et al. v. United States, U.S.D.C., D.C., Civil Action No. 455-73. The suit was terminated on February 18, 1976, when the parties

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entered into a compromise settlement approved by the court authorizing payment of 75 percent of the plaintiffs' claims for time and one-half overtime and night differential and denying payment of the claims for Sunday and holiday pay and layover time. However, of the potential class of approximately 1,600 CSO's, approximately 120 of them "opted out" of the class action prior to settlement, and it is the entitlement to overtime pay of these 120 or so CSO's that must now be decided.

The agency contends that the compromise settlement in the Fay case does not serve as a basis for concluding that the legal issues have been resolved either favorably or adversely to the United States. In addition, we are not aware of any authority by which the U.S. Customs Service or the Department of the Treasury could offer a settlement or compromise based upon the Fay case to this group of 120 or so CSO's. Therefore, with respect to those CSO's who "opted out" of the class action, the question presented is whether the work performed was "regularly scheduled" as contemplated under 5 U.S.C. §5542(a) or "irregular and occasional" as contemplated under 5 U.S.C. §5545(c)(2).

The agency states, in a supplemental report dated April 14, 1977, that it would have no basis to deny time and one-half overtime to CSO's in light of the fact that both Internal Revenue Service (IRS) agents and Secret Service agents were so paid for comparable inflight overtime. See Rothgab et al. v. Staats et al., Civil Action No. 4082 (S.D. Ohio 1974) and our decision in Matter of Sky Marshal Program, B-151168, May 25, 1976. In fact, the record before us indicates that the duties performed by CSO's were quite similar to those performed by the IRS and Secret Service agents who were the predecessors of the CSO's in the Sky Marshal Program.

The authority for the payment of time and one-half overtime compensation for "regularly scheduled" overtime is contained in 5 U.S.C. §5542(a) while the authority for the payment of premium pay for "administratively uncontrollable overtime" is contained in 5 U.S.C. §5545 (c)(2). These two forms of compensation are distinct and do not overlap for the same work. See Sky Marshal Program, *supra*. However, there exists a gray area in distinguishing between whether overtime is "regularly scheduled" or "administratively uncontrollable". As the court stated in the Fay case:

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"In view of the varying approaches the courts have taken in determining whether overtime is regularly scheduled and therefore subject to compensation under 5 U.S.C. §5542(a) (as compared to being administratively uncontrollable pursuant to 5 U.S.C. §5545(c)(2)), the outcome of this issue as a matter of law was far from obvious. See e.g., Burich v. United States, 366 F. 2d 984 (Ct. Cl. 1966); Anderson v. United States, 201 Ct. Cl. 660 (1973); Rothgeb v. Staats, C.A. No. 4082 (S.D. Ohio 1973)." Fay, supra, Order dated February 18, 1976.

Our Office has held in Sky Marshal Program that the "inflight" overtime claimed by the Secret Service agents appeared to be regularly scheduled and, therefore, was compensable at time and one-half rates under 5 U.S.C. §5542. Based upon the record before us in the present case and our holding in Sky Marshal Program, we conclude that the "inflight" overtime performed by the CSO's was regularly scheduled overtime. Compensation previously received by the agents in the form of premium pay for such "inflight" overtime should be offset against payments made in accordance with this decision. In addition, the claims of the CSO's for night differential, Sunday pay, and holiday pay should be paid in accordance with the provisions of 5 U.S.C. §5545(a) and §5546. However, based upon the record before us we cannot find that the layover time constituted hours of work under 5 U.S.C. §5542(a), and claims for layover time may not be paid. See B-180036, May 20, 1974; Aldridge v. United States, 202 Ct. Cl. 365 (1973); and Rapp v. United States, 167 Ct. Cl. 852 (1964). The agency report indicates that such standby or layover time when performed at the duty station, the airport terminal, was credited as working time for administratively uncontrollable premium pay under 5 U.S.C. §5545(c)(2), but when the CSO's were away from the terminal their layover was principally used for personal activities. We agree that no compensation is due for the layover time away from the duty station.

This decision is applicable only to those Customs Security Officers who "opted out" of the class action in Fay since the compromise settlement in Fay operates to bar the claims of all the members of that class action under the principle of res judicata. 17 Comp. Gen. 573 (1968).

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Accordingly, settlement of the claims may be made in the amounts found due in accordance with the discussion above.


Deputy Comptroller General
of the United States



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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

Cassidy
SSA

OFFICE OF GENERAL COUNSEL

IN REPLY
REFER TO:

B-173761

January 4, 1979

Mr. Henry J. Sauer
Manufacturing Chemists Association
1825 Connecticut Avenue, N.W.
Washington, D.C.

JAN 4 1979

[Request For Access To GAO Written Reports of Interviews]
Dear Mr. Sauer:

This replies to your September 12, 1978, request for access to General Accounting Office documents relating to our report entitled, "The Federal Government Should Establish and Meet Energy Conservation Goals," EMD-78-38, issued on June 30, 1978. Specifically, you requested copies of:

"Written reports of interviews conducted with the Manufacturing Chemists Association and/or the following member companies: Union Carbide Corporation, Allied Chemical Corporation, Pfizer Incorporated, E. I. du Pont de Nemours & Co., and the Dow Chemical Company;" and

"Written reports of interviews conducted with the American Iron and Steel Institute, the Motor Vehicle Manufacturers Association, and the Portland Cement Association."

Based upon our review of the requested documents, we conclude that the interview records are exempt from disclosure under section 81.6(a)(5) of our access to records regulations, copy enclosed. This exemption specifically includes "* * * internal drafts, workpapers, memorandums between officials or agencies, opinions and interpretations prepared by agency staff * * *." Moreover, we point out that, at the time the information was obtained, it was agreed that individual and company positions would not be identified on the issues discussed. Disclosing the interview documents at this time would be a breach of that pledge. We also point out that records containing "* * * information submitted by any person to the Government in confidence or where the Government has obligated itself not to disclose information it received * * *" is exempted from disclosure by our regulations. (See 4 C.F.R. §81.6(a)(4).) In view of the foregoing we must deny your request. However, we would consider release of the

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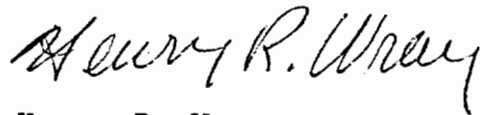
Letter

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interview documents for those firms in the chemical industry in which you have an expressed interest if those persons and companies first gave their consent to such disclosure.

In accordance with 4 C.F.R. §81.4, you are advised that further consideration of your request may be obtained by an appeal letter to the Comptroller General of the United States setting forth the basis for your belief that the denial of your request is unwarranted.

Sincerely yours,

A handwritten signature in cursive script, reading "Henry R. Wray".

Henry R. Wray
Assistant General Counsel

Enclosure

