



U.S. ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF INSPECTOR GENERAL

Catalyst for Improving the Environment

Office of Counsel Legal Review

Response to Congressional Inquiry Concerning EPA's Preparation and Provision of Information Regarding California Waiver Decision

Report No. 09-P-0043

November 26, 2008



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
INSPECTOR GENERAL

November 26, 2008

The Honorable James M. Inhofe
Ranking Member
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Senator Inhofe,

Pursuant to your request of March 5, 2008, the Office of Inspector General Office of Counsel (OIG-OC) has reviewed allegations that "Talking Points" related to the California waiver petition were improperly disclosed to former EPA Administrator William Reilly on October 18, 2007, "to use in his lobbying efforts" in order to influence the Administration. Specifically, you suggested that the preparation and subsequent release of the "Talking Points" was an improper use of Agency funds and a potential violation of law, including the Anti-Lobbying Act. The results of our review are discussed below.

I. Summary of Conclusion

We found that the preparation and subsequent release of information to former Administrator Reilly do not constitute a violation of law, regulation, or policy. The "Talking Points" specifically referred to in your inquiry was one of four pages drafted in response to a mid October request for information by Mr. Reilly to EPA senior staff member Margo Oge. However, we conclude that Ms. Oge did not provide the "Talking Points" page to Mr. Reilly as part of the October 18 response to his request for information about the California waiver. The "Talking Points" page was not provided to Mr. Reilly until after it was released to the media during a congressional press conference several months later in February 2008. As discussed below, the preparation by senior staff member Christopher Grundler of the four-page document referred to as "Homework Assignment" was consistent with the Office of Transportation and Air Quality's (OTAQ's) unwritten stakeholder communication practice, as was the initial release of the first three pages to Mr. Reilly. In light of the concerns raised as a result of OTAQ's response to Mr. Reilly pursuant to its unwritten practice, we suggest that OTAQ consider formalizing its practice.

II. Background

A. Sequence of Events

Margo Oge, the Director of OTAQ¹ since October 1994, received a telephone call from Mr. Reilly sometime shortly before October 17, 2007. Mr. Reilly served as EPA Administrator from February 1989 to January 1993.

Mr. Reilly's and Ms. Oge's recollection of the details of that conversation vary slightly; however, they both recall that Mr. Reilly was looking for information to assist him in preparing for a telephone call he planned to make to Administrator Stephen Johnson concerning the then-pending California waiver decision.² Both Mr. Reilly and Ms. Oge recall that Mr. Reilly was seeking information including the nature and number of the waiver decisions he had made when he was Administrator.

Ms. Oge recalled that, in addition to what she characterized as background information about waiver decisions when Mr. Reilly was at the Agency, he also wanted information that was "readily available" before he spoke to Administrator Johnson. Ms. Oge believed that Mr. Reilly was not asking for inside information, or anything that was confidential or could be considered deliberative, but that he wanted public information, like what the press was reporting on the matter and what was being discussed in public such as at the public hearing in Washington DC. The public hearing was conducted as part of the Administrator's process in making a decision on an application to waive a requirement of the Clean Air Act.³ Ms. Oge also recalled that Mr. Reilly wanted to know what position California was taking with regard to the issue, and what opponents and proponents were saying.

Mr. Reilly recalled that, in addition to asking for information about the number of waivers he had granted, he also asked about how the waiver issue was being addressed by

¹ OTAQ is one of four offices in EPA's Office of Air and Radiation (OAR). OAR develops national programs, technical policies, and regulations for controlling air pollution and radiation exposure. OAR is concerned with pollution prevention and energy efficiency, indoor and outdoor air quality, industrial air pollution, pollution from vehicles and engines, radon, acid rain, stratospheric ozone depletion, climate change, and radiation protection. OTAQ's mission is to reconcile the transportation sector with the environment by advancing clean fuels and technology, and working to promote more livable communities. OTAQ is responsible for carrying out laws to control air pollution from motor vehicles, engines, and their fuels.

² The California Air Resources Board in December 2005 requested a waiver of pre-emption for its greenhouse-gas regulations for certain new motor vehicles beginning with Model Year 2009. California's request was subject to the waiver criteria set forth in the Clean Air Act. (42 USC 7543(b)). EPA sent a letter to California on December 19, 2007, setting forth its intent to deny the waiver in favor of a national solution for vehicle greenhouse-gas emissions. On February 29, 2008, EPA Administrator Johnson signed a Federal Register Notice Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles.

³ Section 209(b) of the Clean Air Act requires the Administrator, after notice and opportunity for public hearing, to waive application of the prohibitions of section 209(a).

the Agency. Specifically, he wanted to know what the outstanding questions were and what he (Mr. Reilly) might be confronted with when he called the Administrator. Mr. Reilly stated that calling Ms. Oge was consistent with his having previously, but infrequently, reached out to her and others when he had questions relating to the environment. Our review concluded that Mr. Reilly was not acting as a lobbyist concerning the California waiver issue at the time of the waiver application and decision, although he had lobbied a number of years ago on an unrelated issue concerning the Presidio Trust.⁴

After speaking with Mr. Reilly, Ms. Oge turned to Christopher Grundler, OTAQ's Deputy Director since 1995, to prepare a response. Both she and Mr. Grundler recall her asking him to compile information for Mr. Reilly that was factually accurate and available to the public, i.e., not deliberative information. Mr. Grundler recalled Ms. Oge explaining that Mr. Reilly had requested information about Clean Air Act waivers, including a summary of the arguments on both sides for the pending waiver request and the number of these decisions he made when he was Administrator. Mr. Grundler recalled that he and Ms. Oge discussed his compilation of general background information on the Clean Air Act provisions regarding the waiver, as well as EPA's internal process for reviewing waiver petitions and how many waiver decisions Mr. Reilly had made as Administrator. Those were the only directions that Mr. Grundler recalled. They both recalled discussing the assignment – Mr. Grundler specifically recalled it being a telephone conversation – and it was the only one they had about Mr. Grundler's task. Ms. Oge said that it was a short discussion, no more than 10 minutes if she had to guess, and that it occurred during working hours. She did not ask Mr. Grundler to work on the assignment at home. Mr. Grundler was aware that Mr. Reilly was in favor of the Administrator granting the waiver.

Mr. Grundler, relying on publicly available information that he already knew, as well as similar information that was readily available, compiled the document that he eventually sent to Ms. Oge. He did not seek input from anyone when he began drafting the response. Mr. Grundler recalled that he worked on the response after working hours at home, as well as at work. Mr. Grundler drafted a four page document, the fourth page of which was entitled "Talking Points." He sent the entire draft to Karl Simon, OTAQ's Director of the Compliance and Strategies Division responsible for waiver reviews, during the afternoon of October 17, 2007. Mr. Simon believed that Mr. Grundler had sent him the document for fact-checking, and recalled confirming the number of waivers that had been previously granted by having a staff attorney check the list of waivers and by adding some language about California "act[ing] as a laboratory." He sent Mr. Grundler his reply e-mail later the same day and they spoke shortly thereafter. In his e-mail, Mr. Simon indicated that he did not know what the purpose of the "Talking Points" page was, but neither he nor Mr. Grundler recalled discussing the "Talking Points" page much when they spoke. Mr. Simon only recalled that Mr. Grundler

⁴ OIG conducted searches of legislative databases that include information for the 2007 time period at issue and William K. Reilly was not identified as a registered lobbyist.

indicated that the "Talking Points" were for Mr. Reilly. All told, Mr. Simon recalled having spent only a few minutes on his review.

Mr. Grundler then e-mailed the revised document, which he labeled "Homework Assignment," to Ms. Oge in the early evening of October 17. He estimated that, in total, he spent about an hour or two working on the document. Ms. Oge recalled skimming through the document the following day, October 18, 2007. She was satisfied that the first three pages of the document responded to Mr. Reilly's request and contained publicly available information. She decided not to send the "Talking Points" page to Mr. Reilly because she did not believe it contained information that was substantively different from that found in the first three pages, and because she thought the language was "too flowery." Ms. Oge's Chief of Staff recalled sending the first three pages of the document to Mr. Reilly via Federal Express. No record or copy of what was sent was maintained as it was not the Office's practice to do so, but the Federal Express receipt was provided to OIG.

The electronic file containing all four pages of the "Homework Assignment" draft document was provided to Senator Barbara Boxer in response to a December 20, 2007 document request for Agency materials concerning the denial of the California waiver request. The file was in an October 17, 2007 e-mail from Mr. Grundler to Ms. Oge. On February 26, 2008, Senator Boxer held a press conference during which she displayed a poster-sized copy of the "Talking Points" page and characterized it as having been prepared by senior staff⁵ for the Administrator. After learning about this characterization, Ms. Oge reached out to Mr. Reilly so he could clarify for Senator Boxer that the document Senator Boxer had disclosed was not prepared for Ms. Oge, but was prepared in response to Mr. Reilly's request for information in October 2007. Because Ms. Oge had not originally sent Mr. Reilly the last page of the "Homework Assignment" document, captioned "Talking Points," she had the entire document, including the "Talking Points" page, sent to him so he would know what Senator Boxer had referenced.

Although Mr. Reilly recalls receiving the four-page document at some point, he could not recall whether he had initially received the first three pages of the document and then later received the entire four pages or initially received all four pages. He recalled discussing the "Talking Points" page with Senator Boxer or her staff and the press, telling them that the document was prepared for him, but that he did not rely on it for his conversation with Administrator Johnson. Mr. Reilly had used some of the background information, like the number of waivers he had granted, in his conversation with Administrator Johnson, but it is clear that he did not rely on the "Talking Points" page in his conversations with Administrator Johnson because he did not have that page until the following February. Mr. Reilly stated that he spoke to Administrator Johnson before and after the waiver decision was made.

⁵ Senator Boxer was referring to Margo Oge and Christopher Grundler, who are members of the Senior Executive Service (SES). Mr. Simon, who was not mentioned by Senator Boxer, is also considered senior staff and is in the SES.

B. OTAQ's Unwritten Practice Regarding Information Requests

According to Ms. Oge, Mr. Grundler, and Mr. Simon, OTAQ's practice has been to share information as freely as possible with any stakeholder provided that the information is not privileged.⁶ They indicated that OTAQ regularly engages in collaborative processes with stakeholders, and that it is very common to share non-deliberative material, if it is publicly releasable; this is how they develop consensus on rulemakings. All three considered sharing the background information with Mr. Reilly as consistent with their practice. This practice is not a written policy or procedure, but has been accepted as a best practice.⁷ In fact, Mr. Grundler stated that, if an automotive executive had asked for similar written material, he would have provided it. When asked, each denied receiving any benefit for performing the limited work they did regarding the request and there is no evidence to suggest otherwise.

C. The "Homework Assignment" Document

The "Homework Assignment" document that Mr. Grundler prepared consisted of four pages. The first two pages were cut-and-pasted from various sources, including earlier California waiver briefings for the Administrator,⁸ existing legal precedents, earlier waiver decisions, public comments by automakers and California, and public statements that were part of the California waiver docket. These pages are entitled "Legal Arguments," and discuss seven bullet points. The third page is a short discussion of a separate point concerning the President's 20-in-10 targets that likewise contains publicly available information.⁹ The fourth page was drafted by Mr. Grundler, who was trying to capture what he thought Mr. Reilly might want to say to the Administrator

⁶ Ms. Oge explained that a stakeholder is, from her perspective, anybody who is interested in what her organization is doing and affected by the work of her office. OTAQ serves the public, which includes everyone from an interested individual to a State group, environmental group, or industry. Her perspective is corroborated by a 2002 EPA report which concluded that "Stakeholders may include other state/local government agencies, the regulated community, citizen organizations, environmental groups, and individual members of the public." United States Environmental Protection Agency, "Innovating for Better Environmental Results: A Strategy to Guide the Next Generation of Innovation at EPA," 2002, available at <http://www.epa.gov/innovation/pdf/strategy.pdf> and cited in the report referenced in footnote 7, below, p. 3.

⁷ This practice was embraced in OTAQ's rulemaking process for the "Control of Emissions of Air Pollution from Nonroad Diesel Engines and Fuel Rule" and was subsequently the focus of a report endorsing the practice. See, Council for Excellence in Government, *The Role of Collaboration in EPA Rulemaking: Lessons from the Nonroad Diesel Engines & Fuel Rule* (Nov. 15, 2005).

⁸ The portions of the Administrator's briefings that Mr. Grundler copied consisted of publicly available information and were not privileged.

⁹ 20-in-10 refers to the President's national goal to displace 20 percent of U.S. gasoline consumption within 10 years. Mr. Grundler included the information about the President's goal here because he thought it might be helpful information given that the Greenhouse Gas rulemaking was in development at the same time the waiver matter was being considered, and the President had directed that EPA use the "20-in-10" program as a starting point for the rulemaking.

during their telephone call. It is entitled "Talking Points." This is the page that Ms. Oge and her Chief of Staff recalled removing from the document before sending it to Mr. Reilly.

Ms. Oge, Mr. Grundler, and Mr. Simon all assert that none of the information in the document was, to the best of their understanding, privileged; i.e., there was nothing in it that was not available publicly or was "confidential." Attorneys from the Agency's Office of General Counsel as well as OIG-OC agree.

III. Legal Discussion

OIG-OC's review disclosed no violations of federal law or regulation. Specifically, we found that the Anti-Lobbying Act provisions are not applicable to these events. We found that the activities did not violate the ethics regulations governing use of government equipment, resources, and position. Furthermore, the preparation by senior staff member Christopher Grundler of the four-page document referred to as "Homework Assignment" was consistent with OTAQ's unwritten practice of sharing information with stakeholders, as was the initial release of the first three pages to Mr. Reilly.

A. Anti-Lobbying Act

In general the Anti-Lobbying Act prohibits federal executive branch employees from using appropriated funds to influence members of Congress, a jurisdiction, or any government official to favor or oppose certain matters such as any legislation, law, or appropriation, particularly through grass-roots campaigning. As described in detail above, EPA staff did not engage in any effort to influence a member of Congress or other covered official to act with respect to any legislative activity.¹⁰ Instead, Ms. Oge provided publicly available information in the first three pages of the "Homework Assignment" document to Mr. Reilly so he could discuss a matter not covered by this Act; i.e., the pending California waiver decision. As such, we found that the Anti-Lobbying Act is inapplicable here. In fact, we found that the "Talking Points" page was not provided to Mr. Reilly until it was publicly released by Senator Boxer; this was after Administrator Johnson informed California Governor Arnold Schwarzenegger and the media of his decision to deny the waiver application. In April 2008, Representative Henry Waxman reached the same conclusion. As reported to the media by his spokesperson, Representative Waxman's Committee found no evidence that the EPA career staff lobbied members of Congress with respect to California's request.

B. Ethics Regulations

In addition to the Anti-Lobbying Act, you raised the question of improper use of Agency equipment and resources. Two regulations address these concerns: use of

¹⁰ A decision regarding an application for a waiver under the Clean Air Act is considered a "final Agency action" under Section 307(b)(1) of the Act.

Government property and use of official time.¹¹ With respect to the use of Government property, an employee has a duty to protect and conserve such property and use it for authorized purposes. Here, the use of government property was in the furtherance of an authorized purpose. The "Homework Assignment," which was e-mailed on EPA's Lotus Notes system and was crafted, at least in part, on an EPA computer, was created for a stakeholder – Mr. Reilly – with an interest in EPA's California waiver decision. No confidential or other unauthorized disclosure was made. We found that there was no improper or inappropriate use of Government property.

In brief, the regulatory provisions concerning use of official time require employees to use official time to perform official duties; this includes the requirement that a supervisor direct subordinates to use official time to perform only official duties and not other unrelated activities. Here, the use of official time by the senior staff to respond to an information request from a stakeholder was within OTAQ's normal practice and constituted official duties. Although the document produced by Mr. Grundler is labeled "Homework Assignment," Ms. Oge stated that she did not request Mr. Grundler to work at home.

C. Other Legal Concerns

You also inquired as to whether the senior staff's activities may have violated other laws or regulations. To address this issue, we examined prohibitions against the use of nonpublic information and basic obligations of public service, such as the ethical requirement that federal employees avoid the appearance of a violation of law or ethical standards. The regulation against the use of nonpublic information generally prohibits an employee from improperly using or knowingly disclosing nonpublic information for his or her own or another's benefit.¹² Nonpublic information is defined, in part, as that which "[h]as not actually been disseminated to the general public and is not authorized to be made available to the public on request." We found that none of the released information was nonpublic and that EPA senior staff did not receive a benefit for disclosing it. Likewise, Mr. Reilly did not receive any prohibited benefit; rather, he received what was available to the public upon request.

Lastly, the principles underlying public service require that employees act impartially and avoid actions that create the appearance that they are violating the law or ethical standards. In light of all the circumstances surrounding the response to Mr. Reilly's request, we find that Ms. Oge did not violate the impartiality standard when she provided the first three pages of the "Homework Assignment" to Mr. Reilly. She provided publicly available information to a stakeholder, as she would do in response to any other request for similar information. Mr. Grundler likewise did not violate the

¹¹ See *Prohibitions on the Use of Government property (5 CFR 2635.704) and Use of official time (5 CFR 2635.705(a-b))*. In addition, 5 CFR 2635.702(a) is cited in the Use of official time regulation to demonstrate that a supervisor's use of a subordinate's time for his or her personal benefit is prohibited.

¹² See 5 CFR 2635.703.

impartiality requirement because he prepared the entire "Homework Assignment" document based on publicly available information and provided it to Ms. Oge, and because he also would have prepared and provided similar documents to other stakeholders if their request was legitimate. We further conclude that Mr. Grundler's drafting of the "Talking Points" page did not create an appearance that he had violated the law or ethical standards. We further conclude that a reasonable person with knowledge of the relevant facts would not find that these circumstances created an appearance of a violation of the standard. Here the relevant facts are that Mr. Grundler drafted the "Talking Points" page to satisfy a legitimate request from his supervisor using information that was publicly available; Mr. Grundler did not receive the request directly from nor provide the response directly to Mr. Reilly. Mr. Grundler drafted the "Talking Points" page in order to provide requested information to a stakeholder in the format he thought the requestor (Mr. Reilly) would want, which he also stated that he would do for any other stakeholder making a legitimate request. These facts support our conclusion that Mr. Grundler's actions do not create an appearance of a violation of law or ethical standards.

IV. Conclusion

As noted above, we found that the preparation and subsequent release of information to former Administrator Reilly do not constitute a violation of law, regulation, or policy. We also noted that, in light of the concerns raised as a result of OTAQ's response to Mr. Reilly pursuant to its unwritten practice, OTAQ should consider formalizing its practice.

The estimated cost of this report – calculated by multiplying the project's staff days by the applicable daily full cost billing rates in effect at the time – is \$52,858.

If you have any questions or need additional information, please do not hesitate to contact my Associate Deputy Inspector General and Counsel, Mark Bialek, at (202) 566-0861.

Sincerely,



Bill A. Roderick
Deputy Inspector General