

**EMPLOYMENT STANDARDS ADMINISTRATION
U.S. DEPARTMENT OF LABOR
OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS
WASHINGTON, D.C. 20210**

OFCCP Order No. LEG 77-1/Other
(formerly 660b7)

POLICY ISSUANCE 77-26/60-1

MEMORANDUM FOR: HEADS OF ALL AGENCIES

FROM: A. DIANE GRAHAM (signed 4-18-77)
 Acting Director, OFCCP

SUBJECT: Retention of Documents Obtained
 During a Compliance Review

Attached is the Office Federal Contract Compliance Programs' (OFCCP) decision regarding the right of the General Service Administration (GSA) to permanently retain certain documents, such as a contractor's Affirmative Action Compliance Program (AACP) and support data, obtained during the course of a compliance review. In addition to permitting the permanent retention of such material, the decision allows for the imposition of sanctions, such as provided in Section 209 of Executive Order 11246 and 41 CFR 60-1.26 upon a contractor's refusal to furnish the requested information.

The general principles contained in this decision apply to all similar situations

Attachment

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U.S. Department of Labor

Office of Federal Contract Compliance Programs

In the Matter of St. Regis Paper Co.)
Battle Creek Michigan Facility)
)

This is an appeal from a decision by the General Services Administration (GSA) to retain permanently certain documents submitted by the St. Regis Paper Company to GSA during the course of a compliance review of the company's Battle Creek, Michigan facility.

In relevant part the facts are as follows: On September 1, 1976, the Field Director of Contract Compliance for Region 5 of the General Services Administration issued a notice to the St. Regis facility at Battle Creek advising the company that GSA intended to perform a compliance review. Pursuant to the procedures established in Revised Order No. 14 (41 CFR Part 60-60) supporting data necessary to perform a desk audit was requested. On September 28, 1976, St. Regis' Corporate manager for EEO, Michael A. Roberts, advised GSA that the company intended to deliver the data requested on September 1 to the GSA regional office and to provide a company representative to assist during the desk audit. Mr. Roberts stated that upon completion of the desk audit, the company's representative would return the data to Battle Creek where it would be available for the subsequent on-site review. Mr. Roberts advised GSA that this procedure would be followed to ensure the confidentiality of the material and to preclude possible disclosure of such information by GSA pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. §552.

On October 5, 1976, Willie O. Green, GSA's Field Director, rejected St. Regis' proffer. Mr. Green suggested instead that pursuant to 41 CFR §60-60.4, St. Regis should identify those portions of the data which the company believed were not subject to disclosure under FOIA, and that it should specify the reason why such information was not disclosable. St. Regis was advised that it was expected to comply with the September 1 request by October 7, 1976. St. Regis did not, however, comply with the request. Thereafter, a show cause notice was issued by GSA on October 14, 1976, on the basis of St. Regis' failure to comply with the September 1 request for data. The show cause notice advised St. Regis that it could be found nonresponsible to perform any Government contracts until the show cause notice was resolved.

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St. Regis, by counsel, requested that the Director of the Office of Federal Contract Compliance Programs (OFCCP) direct that a hearing be convened on the issue of retention of data by GSA pursuant to either 41 CFR §60-1.24 or 2.2(b), and that OFCCP assume jurisdiction over the matter pursuant to 41 CFR §60-1.25. On October 19, 1976, counsel for St. Regis reiterated his request for a hearing, but limited the request to a hearing pursuant to 41 CFR §60-2.2(b), claiming the question of GSA's permanent retention of contractor data raised substantial issues of law or fact as provided therein. Counsel also asked that GSA be directed by OFCCP not to find St. Regis nonresponsible on account of these outstanding issues pending their final resolution.

Before OFCCP had an opportunity to respond to the St. Regis request, GSA and the company informally agreed to conciliate the issue relating to the show cause notice. The parties also agreed that St. Regis would not be found nonresponsible during the pendency of the show cause notice. St. Regis in turn asked OFCCP to postpone a decision on its request for a hearing.

Subsequently St. Regis complied with the September 1, 1976, request for data. GSA thereupon advised St. Regis that such material becomes the property of the United States Government, and that it would be retained in the custody of GSA pursuant to Executive Order 11246, as amended, and 41 CFR Part 60-2. GSA then rescinded the October 14, 1976, show cause notice.

On November 8, 1976, Mr. Roberts of St. Regis responded to the GSA letter in which the data supplied by the company was claimed as the property of the U.S. Government. Mr. Roberts stated that he found no basis in 41 CFR Part 60-2 for permanent retention of Federal contractor data provided pursuant to the requirement of 41 CFR Part 60-60. Mr. Roberts contended inter alia:

"It is our position that neither that language [41 CFR 60-2] nor any other part of the regulations, nor any part of the Executive Order, provides any legal basis for the Government to claim property rights over such materials."

Mr. Roberts concluded that there is no basis for the Government's retention of such material since it is not necessary to GSA's determination of the acceptability of the Battle Creek facility's affirmative action program.

On November 10, 1976, counsel for St. Regis advised OFCCP that the company had provided the material requested by GSA on September 1, 1976. Accordingly, he requested that a hearing be conducted pursuant to the provisions of 41 CFR §60-1.24(c) to determine the validity of GSA's position on the issue of permanent retention of data obtained for the purpose of conducting compliance reviews. Thereafter, counsel for St. Regis waived whatever right to a hearing that the company may have pursuant to 41 CFR §60-1.24(c) and agreed to submit its legal arguments in support of its position to the Director, based on the entire record of the case.

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St. Regis has framed the issue as follows:

Whether a contractor who provides full access to company records requested by a compliance agency in connection with a compliance review can nevertheless be found in non-compliance with Executive Order 11246 because it refuses to permit agency retention of such company records. Whether such records become the property of the Government and may be retained against the will of the contractor is implicit in this issue.

St. Regis has made several arguments in support of its contention that neither Executive Order 11246, as amended (hereafter Executive Order 11246 or the Executive Order), nor its implementing rules and regulations authorize permanent retention of records and material submitted by a contractor for purposes of a compliance review.

St. Regis' first argument is that Section 202(5) of Executive Order 11246 does not provide for permanent retention of information submitted by a contractor but, rather, provides only for inspection of such documents.¹

St. Regis contends that the terms "will furnish" and "permit access to" referred to in Section 202(5) are synonymous and contemplate only that relevant data will be made available to the compliance agency for its examination. It is an elementary rule of construction, however, that effect must be given, if possible, to every word, clause and sentence of a statute. U.S. v. Menasche, 348 U.S. 528, 75 S.Ct. 513 (1955). An Executive Order, just as a statute, should be construed to give effect to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant. Sands, Southerland Statutory Construction, Vol. 2A, p. 63. Assuming that Section 202(5) were to be interpreted as St. Regis proposes, there would be no reason for using the separate terms "will furnish" and "permit access to" without changing its meaning. Accordingly, it is doubtful that the President intended his use of these terms to be regarded synonymously. Rather, the plain meaning of these words was intended. Webster's New World Dictionary, Second Edition, defines "furnish" as meaning "to supply, provide; give." The same source defines "access" as "the right to enter, approach, or use; admittance." Clearly, the President intended that Section 202(5) require contractors subject to the Executive Order to supply, provide or give the Secretary of Labor or the appropriate compliance agency all information and reports required by the Order and its implementing rules, regulations, and orders, and to permit representatives of such federal agencies to enter the contractor's premises to inspect, copy or transcribe its books, records, and accounts in order to determine whether such contractor is in compliance. To read Section 202(5) otherwise renders one part or the other superfluous and, therefore, contrary to elementary rules of construction.

¹ Section 202(5) reads as follows:

The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

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The second part of St. Regis' argument asserts that the President did not expressly authorize the permanent retention of such records and materials and, thus, no such authority can be implied. There is no merit in this assertion. The President has the constitutional authority to require that nondiscrimination and affirmative action contract provisions be made a part of all Government contracts. See Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3rd Cir., 1971) cert. denied 404 U.S. 854 (1971). He also has the authority to require such contractors to keep records and information relating to matters which are the appropriate subjects of governmental regulation, and the enforcement of restrictions validly established (Wilson v. United States, 221 U.S. 361 (1911); Davis v. United States, 328 U.S. 582 (1946) so long as the records or reports required by the Government bear some reasonable relationship to the matters under inquiry, (United States v. Morton Salt, 338 U.S. 632, 70 S.Ct. 357 (1950)). In Shapiro v. United States, 335 U.S. 1, at 32-33, (1948), the Court recognized that "there are limits which the government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record-keeper himself. But no serious misgiving that those bounds have been overstepped would appear to be evoked when there is a sufficient relationship between the activity sought to be regulated and the public concern so that the government can constitutionally regulate or forbid the public activity concerned, and can constitutionally require the keeping of particular records, subject to inspection by the Administrator." In this case, those "limits" haven not been exceeded by GSA.

The material which GSA requested from St. Regis was required to be maintained under Executive Order 11246 and its implementing rules and regulations.²

The second argument made by St. Regis is that Department of Labor regulations do not authorize retention by the Federal Government of records or materials submitted by a contractor in the course of a compliance review.

There is no merit in St. Regis' argument. Executive Order 11246 has, in effect, been ratified by the United States Congress, and it has the force and effect of law. Contractor's Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 149 (3rd Cir., 1971), cert. denied, 404 U.S. 854, (1971); See also: Farkas v. Texas Instruments Co., 375 F.2d 629 (5th Cir., 1967), cert. denied, 389 U.S. 977 (1967). In addition, regulations issued by the Secretary of Labor pursuant to his authority under Section 201 of the Executive Order which are consistent

² An examination of the material submitted to GSA by St. Regis under protest, without exception, is required by "Revised Order No. 4" to be included in an acceptable affirmative action program. For instance, St. Regis objects to GSA's permanent retention of the utilization analysis prepared for the Battle Creek facility. A utilization analysis is expressly required by 41 CFR 60-2.11. The remained of the material that St. Regis claims should be returned similarly is required to be maintained.

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with the purpose and intent of the Order also have the force and effect of law. Maryland Casualty Company v. United States, 251 U.S. 342 (1919); United States v. New Orleans Public Service, Inc., ____ F.Supp. ____ (E.D. La. 1974) 8 FEP Cases 1089, 8 EPD ¶9795. (appeal pending)³

St Regis also asserts that the Secretary of Labor's regulations do not permit compliance agencies to retain permanently information and records provided during a compliance review. St. Regis' interpretation of the relevant regulations is incorrect. Among the Secretary's regulations are the following:

- (1) ". . . compliance agencies shall routinely request from among the Federal contractors within their jurisdiction affirmative action programs and supporting documentation, including the workforce analysis and support data for audit." 41 CFR §60-3(a).
- (2) "The contractor must provide all data determined by the compliance officer to be necessary for off-site analysis pursuant to 60-60.3(c) above. Such data may only be coded if the contractor believes that particular information which is to be taken off-site is not relevant to compliance with the Executive Order, the contractor may request a ruling by the agency Contract Compliance Officer. The contract compliance officer shall issue a ruling within 10 days. The contractor may appeal that ruling to the Director of OFCC within 10 days. The director of OFCC shall issue a final ruling within 10 days. Pending a final ruling, the information in question must be made available to the compliance officer off-site, but shall be considered a part of the investigatory file and subject to the provisions of paragraph (d) below. The agency shall take all necessary precautions to safeguard the confidentiality of such information until a final determination is made. Such information may not be copied by the agency and access to the information shall be limited to the compliance officer and agency personnel involved in the determination of relevancy. Data determined to be not relevant to the investigation will be restored to the contractor immediately." [41 CFR 60-60.4(c).]
- (3) "Information obtained from a contractor under Subpart B will be subject to the public inspection and copying provisions of the Freedom of Information Act, 5 U.S.C. §552. Contractors should identify any information which they believe is not subject to disclosure under 5 U.S.C. §552, and should specify the reasons why such information is not disclosable. The Contract Compliance Officer will consider the contractor's claim and make a determination, within 10 days, as to whether the material in question is exempt from disclosure. The contract compliance officer will inform the contractor of such a determination.

³ The Secretary of Labor has delegated his authority under Section 201 for carrying out the day-to-day responsibility of implementing Executive Order 11246 to the Director of OFCCP. See 41 CFR 60-1.2.

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The contractor may appeal that ruling to the Director of OFCC within 10 days of the filing of the appeal. However during the conduct of a compliance review or while enforcement action against the contractor is in progress or contemplated within a reasonable time, all information obtained from a contractor under Subpart B except information disclosable under §60-40.2 and §60-40.3 of this chapter is to be considered part of an investigatory file compiled for law enforcement purposes within the meaning of 5 U.S.C. §552(b)(7), and such information obtained from a contractor under Subpart B shall be treated as exempt from mandatory disclosure under the Freedom of Information Act during the compliance review." [41 CFR §60-1.7(a)(3).]

- (4) "The Director, the agency or the applicant, on their own motions, may require a contractor to keep employment or other records and to furnish, in the form requested, with reasonable limits, such information as the Director, agency or the applicant deems necessary for the administration of the Order." [41 CFR §60-1.7(a)(3).]
- (5) "Each prime contractor and subcontractor shall permit access during normal business hours to its premises for the purpose of conducting on-site compliance reviews and inspecting and copying such books, records, account, and other material as may be relevant to the matter under investigation and pertinent to compliance with the Order, and the rules and regulations promulgated pursuant thereto by the agency, or the Director. Information obtained in this manner shall be used only in connection with the administration of the Civil Rights Act of 1964 (as amended) and in furtherance of the purposes of the Order and that Act. (See 41 CFR Part 60-60, Contractor Evaluation Procedures for Nonconstruction Contractors; 41 CFR Part 60-40, Examination and Copying of OFCC Documents.)" [41 CFR §60-1.43.]

As discussed hereinabove, Section 202(5) of Executive Order 11246 authorizes the permanent retention by Federal compliance agencies of information and reports required by the Order. The regulations cited above clearly contemplate the submission to the appropriate compliance agency of information described in "Revised Order No. 4" (41 CFR Part 60-2). That the information submitted by St. Regis is within the coverage of the requirements of 41 CFR §60-60.3(a) is indisputable. (See footnote No. 2. supra.)

Moreover, the provisions of 41 CFR §60-60.4(c) and (d) assume agency authority to retain possession of such documents even after the compliance review precipitating the contractor's production of such documents has been completed and even in situations in which no enforcement action against the contractor is currently contemplated.⁴ Otherwise there is

⁴ Compare the original publication of Revised Order No. 14, 41 CFR Part 60-60, (38 FR 13376, May 21, 1973) which provided in Section 60-60.4(c) that whenever

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no reason to establish procedures for safeguarding their disclosure. St. Regis argues that 41 CFR §60-60.4(c) and (d) are of limited application, dealing only with the treatment of information obtained during an on-site compliance review which is considered by the contractor to be confidential or irrelevant. This is a misunderstanding of Section 60-60.4(d), the first sentence of which states that the section is applicable to all information obtained from a contractor under 41 CFR §60-60.3, and not just that information which a contractor believes nondisclosable under FOIA.⁵ In addition, Section 60-60.4(c) states the circumstances under which data collected by a compliance agency must be returned to a contractor.

Similarly, St. Regis contends that 41 CFR §60-1.43 is an unlawful attempt by the Secretary of Labor to confer upon compliance agencies the power to retain information and records required to be maintained by Executive Order 11246. Section 60-1.43 is, however, consistent with the provisions of Section 205(5) of the Executive Order as discussed herein. This section of the secretary's regulations permits the inspection and copying of books, records, accounts and other material relevant to the conduct of a compliance review. Contractors, by doing business with the Government, agree to comply with Executive Order 11246 and the rules, regulations and orders of the Secretary of Labor including 41 CFR §60-1.43. See United States v. New Orleans Public Service, Inc., supra.

This interpretation of the Secretary of Labor's regulations is consistent with the purposes of Executive Order 11246 as discussed hereinabove. Thus, the Department's regulations, just as the Executive Order, permit the retention by the compliance agencies of material provided by contractors for the purpose of determining whether such contractors are in compliance with Executive Order 11246.

data was taken by a compliance agency offsite during a compliance review, the contractor and the compliance agency "may agree that the data is to be considered on loan to the compliance agency for purposes of review and the data is not considered in the custody of the agency . . . The data shall be returned to the contractor whenever the agency concludes that the contractor is in compliance or the enforcement procedures concludes." This language was deleted from the current version of 41 CFR §60-60.4 which is cited hereinabove (39 FR 5630, February 14, 1974). Thus, St. Regis' contention may have had some validity under the terms of the earlier version of §60-60.4. However, deletion of all references in the regulations to such material being "on loan to the compliance agency" clearly shows that it was the conscious intention of the Secretary of Labor to permit compliance agencies to retain material submitted during a compliance review.

⁵ This decision should not be regarded as precluding St. Regis Paper Company or any other Government contractor or subcontractor from exercising its rights pursuant to 5 U.S.C. §552 and the Department of Labor's regulations concerning public disclosure of contractor information submitted during the course of a compliance review.

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St. Regis' final argument is that an "access-and-examination-only" rule, which it proposes, will not interfere with effective enforcement by the Government of the requirements of Executive Order 11246. This argument misconstrues the responsibility of the various compliance agencies to carry out their enforcement duties. Many agencies have found that it is useful to compare records and other information from earlier compliance reviews with the material furnished during a current review in order that a judgment can be made as to the relative improvement of the contractor's EEO posture. Just because earlier compliance reviews resulted in determinations that the contractor had made sufficient good faith efforts to justify a finding of compliance with Executive Order 11246 does not render the information gathered during the course of such reviews less relevant to a determination of the current compliance posture of the contractor.

For the reason stated herein, I have determined that GSA's policy of retaining information and reports required by the Executive Order and its implementing rules, regulations and orders is permissible. Moreover, a contractor's refusal to furnish such information is grounds for the imposition of sanctions as provided in Section 209 of Executive Order 11246 and 41 CFR §60-1.26.

(signed) A. Diane Graham
Acting Director, Office of
Federal Contract Compliance
Programs

April 1, 1977
Date