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The Honorable F. James Sensenbrenner, Jr.
Chairman, Committee on Science
House of Representatives

Dear Mr. Chairman:

This is in response to your letter dated April 10, 1998, written jointly with the Honorable George E. Brown, Jr., requesting our opinion on several questions pertaining to the National Academy of Sciences (Academy). You asked (1) whether the Federal Advisory Committee Act Amendments of 1997 are applicable to the subgroups of the Academy (National Research Council, National Academy of Engineering, and Institute of Medicine), (2) whether the Freedom of Information Act is applicable to the Academy, its subgroups or their advisory panels, and (3) whether there are statutory or contractual barriers to the release of underlying data by the Academy and its subgroups to federal agencies, Congress, or the public. Your letter also requested information on the committee processes at the Academy, which are addressed separately.¹

For the reasons stated below, we find that (1) the 1997 amendments do apply to the subgroups of the Academy and thus federal agencies may not use the advice or recommendations of the Academy and its subgroups unless the requirements added by the 1997 amendments are met, (2) the Freedom of Information Act (FOIA) does not apply to the Academy, its subgroups or their advisory panels, and (3) other than criminal statutes that prohibit the disclosure of national security type information, federal laws generally do not directly bar private entities like the Academy from releasing data; however, contractual provisions with government agencies, private entities or individuals could preclude the Academy's release of the data, and section 15(b) added by the 1997 amendments could also limit the Academy's ability to release documents if their release would disclose matters exempt under FOIA.

In preparing this opinion, we formally solicited the views of the Academy about these questions, and James R. Wright, General Counsel of the Academy, provided his legal opinion in a letter which is enclosed for your information. The Academy generally agrees with our answers to these questions.

¹See Federal Research: The National Academy of Sciences and the Federal Advisory Committee Act (GAO/RCED-99-17, Nov. 13, 1998).

BACKGROUND

In 1972, Congress passed the Federal Advisory Committee Act (FACA), which set standards and procedures for the uniform operation and administration of advisory committees. Each federal advisory committee is now required to file a charter with the General Services Administration which includes its objectives, scope of duties, estimated number of meetings and termination date. In addition to having a federal employee attend all of their meetings, advisory committees must also keep detailed minutes of meetings, open their meetings to the public, and make records available to the public.

Crucial to whether an agency must comply with the requirements of FACA is the definition for "advisory committee" found in FACA. An advisory committee is broadly defined in FACA as:

[A]ny committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof, which is -

- (A) established by statute or reorganization plan, or
- (B) established or utilized by the President, or
- (C) established or utilized by one or more agencies,

in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government

5 U.S.C.A. App. 2 § 3(2) (1996 & Supp. 1998).

The Academy has never followed FACA. An early court decision found that a committee of the Academy was not an advisory committee under FACA.² But in 1997, the Court of Appeals for the District of Columbia Circuit held that an Academy committee doing work for the Department of Health and Human Services did come under the definition of advisory committee in FACA. Animal Legal Defense Fund, Inc. v. Shalala, 104 F.3d 424 (D.C. Cir. 1997), cert. denied, ___ U.S. ___, 118 S.Ct. 367 (1997).

²Lombardo v. Handler, 397 F. Supp. 792 (D.C.C. 1975), aff'd without opinion, 546 F.2d 1043 (D.C. Cir. 1976), cert. denied, 431 U.S. 932 (1977). In this same case, the court also held that the Freedom of Information Act (FOIA) definition of "agency" does not include the Academy, and therefore the Academy is not subject to FOIA. This holding, which has not been overturned, will be discussed further under question 2 below.

The Court of Appeals' holding in Animal Legal Defense Fund prompted the Academy to seek enactment of Pub. L. No. 105-153, 111 Stat. 2689 (1997), the Federal Advisory Committee Act Amendments of 1997. The amendments do two things. First, the amendments change the definition of advisory committee for purposes of FACA by excluding committees created by the Academy from the definition. The amended definition states, ". . . such term [advisory committee] excludes . . . any committee that is created by the National Academy of Sciences . . ." 5 U.S.C.A. App. 2 § 3(2)(1996 & Supp. 1998). By excluding the Academy's committees from the definition of advisory committee, the amendments exempt the committees from compliance with the first 14 sections of FACA.

Second, the amendments add a new section 15 to FACA that details special requirements relating to the committees of the Academy. Most important, the amendments preclude an agency from using the Academy's advice or recommendations unless the section 15 conditions are met.³ Under section 15, the Academy's committees must be independent from agency control.⁴ The Academy must also provide public notice of appointments to committees and of committee meetings. Data gathering meetings must be open to the public, unless the Academy determines that doing so would disclose matters exempt under FOIA.⁵ If the meetings are closed, the Academy must provide summaries of the closed meetings. Written materials and reports must also be available to the public, unless the Academy determines that doing so would disclose matters exempt under FOIA.

ISSUES

You have asked us to answer the following questions concerning the 1997 amendments.

Question 1: Do the Federal Advisory Committee Act Amendments of 1997 apply to the subgroups of the Academy: National Research Council, National Academy of Engineering, and Institute of Medicine?

After examining the structure of the Academy, and the language and legislative history of the 1997 amendments, we find that the 1997 amendments do apply to the

³The full text of section 15 is set out in the enclosure.

⁴The section 15 requirements for Academy committees are narrower than the rules FACA committees must follow. FACA committees are not independent from agency control and must *inter alia* file charters, have a federal employee attend all meetings, keep detailed minutes of meetings, and open deliberative meetings to the public.

⁵Exemptions to FOIA are found at 5 U.S.C. § 552(b)(1994 & Supp. II 1996).

subgroups of the Academy. Thus federal agencies may not use the advice or recommendations of the Academy and its subgroups - the National Research Council (NRC), the National Academy of Engineering (NAE), and the Institute of Medicine (IOM) - unless the section 15 requirements added by the 1997 amendments are met.

The 1997 FACA amendments exclude any committee "created by the National Academy of Sciences . . ." from the definition of advisory committee under FACA. 5 U.S.C.A. App. 2 § 3(2) (1996 & Supp. 1998). Thus committees created by the Academy do not need to comply with sections 1 to 14 of FACA.⁶ At issue here is whether committees created by the NRC, NAE, and IOM are also "created" by the Academy and therefore exempt from sections 1 to 14 of FACA but must comply with section 15, which was added by the 1997 amendments. The 1997 amendments do not specifically mention the NRC, NAE, or IOM, all of which are connected to the Academy and use advisory committees in developing their reports or recommendations. In the next several paragraphs, we set out how each of the entities was formed and describe the relationship among the entities. Then we discuss whether committees formed by these entities are "created" by the Academy for purposes of the FACA amendments.

The Academy and Its Subgroups

The Academy is a private corporation established under federal law in 1863 by a congressional charter approved by President Lincoln. It is charged with reporting, when called upon by "any department of the Government," on any subject of science or art, but it can only charge the government for its expenses. 36 U.S.C. § 253 (1994). Among its powers under the charter is the power to "make its own organization including its constitution, by-laws, and rules and regulations" 36 U.S.C. § 252. Under these powers, the Academy created the NRC, the NAE and the IOM. The Academy, as the only legal entity, is the sole employer and is signatory to all contracts and grants, regardless of whether the work is performed by the NRC, NAE or IOM.

The National Research Council (NRC) was the first of the entities in question to be established by the Academy and was organized by the Academy in 1916 at the request of President Wilson. It is not separately incorporated. One of the purposes of the NRC is to "stimulate research in the mathematical, physical, and biological sciences . . . with the object of increasing knowledge, of strengthening the national defense, and of contributing in other ways to the public welfare." Exec. Order No.

⁶As was stated above, Federal agencies are precluded from using advice or recommendations of the Academy and its committees unless they comply with section 15 of FACA; such compliance, however, does not make them FACA advisory committees.

2859, reprinted as amended in 36 U.S.C. § 253. The NRC is the "operating arm" of the Academy. Its staff monitors advisory committees, provides editorial or support services to committees, the Academy and its constituent entities, and publishes reports.

The National Academy of Engineering (NAE) was established by the Academy through articles of organization in 1964 as a separate membership organization of the Academy. It is not incorporated.⁷ The NAE sponsors engineering studies, encourages engineering education and research, and explores means for promoting cooperation in engineering in the United States and abroad. It is described in the Academy's annual report to Congress as "autonomous in its administration and selection of its members." Although the NAE executive committee selects its own office members and councils, it is constrained by its Articles of Organization such that it is not authorized to perform any activities that are not consistent with the Academy's charter. It must also work jointly with the Academy in matters dealing with Congress and other countries. Under its Articles of Organization the NAE does not have the authority to amend its Articles of Organization without the approval of the Academy. Most of NAE's studies are conducted by the NRC.

The Institute of Medicine (IOM) was created by the Academy by charter in 1970 to identify concerns in medical care, research and education and to secure the services of members of appropriate medical professions to examine policy matters relating to public health. It is a membership society, but unlike the NAE and Academy, members are not elected for life. The IOM is not incorporated. The IOM's projects are subject to the approval and review procedures of the NRC and its operations are subject to the general operating procedures of the NRC. The members of committees conducting studies and preparing reports for dissemination outside the IOM are appointed by the President of the IOM, subject to the approval of the NRC chairman.

The interrelationships among the Academy, NRC, NAE and IOM are complex and numerous. The president of the Academy is the chair of the NRC and on the executive committees of the NAE and IOM. The NAE performs most of its work through NRC committees, and the IOM follows the general operating procedures of the NRC. The president of the IOM is nominated by the IOM Council but appointed by the president of the Academy. Both the president of the IOM and NAE are members of the NRC executive committee. The NRC staff support the work of the Academy and NAE.

⁷The National Academy of Engineering Fund (NAEF), which holds assets for the benefit of the NAE, is incorporated as a separate nonprofit corporation. The NAE council is responsible for control of all funds administered by the NAEF. The NAEF issues its own financial report. Expenses of NAE incurred by the NRC and Academy are reimbursed by the NAEF.

According to a recent list of committees of the Academy, NRC, NAE, and IOM, the NRC has by far the largest number of active committees, over 500, while the Academy itself has the fewest - only six active committees. The NAE has eight active committees, and the IOM has over 90 active committees.⁸

Discussion

In analyzing whether a committee created by the subgroups of the Academy is created by the Academy and thus subject to the section 15 requirements added by the 1997 amendments, we look first to the statute.

In the 1997 amendments, the definition of what constitutes a FACA advisory committee was amended to exclude, *inter alia*, committees created by the Academy. The 1997 amendments revised the exclusions to read as follows:

. . . such term [advisory committee] excludes (i) any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government, and (ii) *any committee that is created by the National Academy of Sciences or the National Academy of Public Administration.*⁹

5 U.S.C.A. App. 2 § 3(2)(1996 & Supp. 1998) (emphasis added). In straightforward language, the amendments exclude all committees created by the Academy from the definition. By logical extension, this exclusion also applies to all of the subgroups of the Academy.

As can be seen from the facts presented above about the organization of the Academy and its subgroups, it is clear that the Academy is the creator of each group and is the only incorporated organization. The interrelationships among the Academy entities are complex and numerous, including interlocking executive committees and shared policies and procedures, and the NAE, NRC, and IOM are all part of the corporate entity of the Academy. All their grant documents and contracts are signed by the Academy and all employees, regardless of whether their work is for the IOM or the NRC, are paid by the Academy. As subgroups of the

⁸The Academy's six committees and NAE's eight committees are not subject to the governing board and their work tends to be different in nature from the work performed by the NRC committees. For example, one joint committee (Academy, NAE, and IOM) meets with scientific leaders in other countries to promote human rights; another works on developing a series on science that could run as public service announcements; a third develops conferences and programs.

⁹Committees created by the National Academy of Public Administration must follow some, but not all, of the section 15 requirements.

Academy, the NRC, NAE, and IOM are bound by the same laws that bind the Academy. It is logical that committees created by internal, unincorporated subgroups of the Academy would also be committees created by the Academy and therefore excluded from the definition of advisory committee.¹⁰

In addition, the posture in which the amendments were enacted lends support to the position that Congress intended the exclusion to apply to the committees formed by the Academy's subgroups. The amendments were proposed in response to Animal Legal Defense Fund, the court decision that made FACA applicable to an NRC committee. Although the litigation involved an NRC committee, the court's decision focused on the Academy, not on the NRC. It is reasonable to assume that since the amendments were intended to overrule the court decision, the amendments would apply to the NRC.

The legislative history, though sparse, supports this statutory interpretation.¹¹ In a hearing on FACA and proposed amendments to FACA on November 5, 1997,¹² it is apparent from the hearing transcript that the chair of the committee presumed that NRC committees are Academy committees since all the discussion at the hearing was addressed to the Academy and the amendments were being considered to overrule the court decision noted above.

On November 9, the day the House passed the bill, the floor manager and sponsor of the bill, Steven Horn, noted that the Academy frequently sets up committees that provide independent advice to the Government: "90 per cent of these reports are

¹⁰By way of analogy, the interconnectedness of the Academy and its subgroups include many of the factors (common directors, common employees, unified administrative control, common offices, etc.) used to analyze whether a group of corporations constitutes a "single business enterprise" such that a court might extend liability to all of the affiliated organizations. See 1 William Meade Fletcher et al., Fletcher Cyclopedic of the Law of Private Corporations § 43 (perm. ed. rev. vol. 1990 & Supp. 1998).

¹¹The bill, H.R. 2977, was introduced and passed the House of Representatives the same day, November 9, 1997. Four days later the House-passed bill was introduced and passed by the Senate. No committee reports accompanied the legislation.

¹²Although the hearing preceded the date that H.R. 2977 (the bill that became law) was introduced, the remarks of Chairman Steven Horn and other witnesses indicate that some of the provisions found in H.R. 2977 were under discussion, especially "openness" changes in the way the Academy conducts its studies. See, e.g., Federal Advisory Committee Act: Hearing Before the Subcomm. on Government Management, Information, and Technology of the House Comm. on Government Reform and Oversight, 105th Cong. 6, 8-9, 58-59, 66-67, 72 (1997).

requested by government agencies and/or legislative committees of Congress."¹³ When he refers to "90 per cent" of the reports from the advisory committees, he cannot be referring solely to the Academy, because it has only six committees and they do not produce "90 per cent" of the reports. His statistics must include the NRC and IOM because together they produce more than 90 per cent of the reports from the committees. As noted above, the NRC has the most committees of the entities within the Academy and it is not likely that Congress passed the 1997 amendments for the Academy's six committees and ignored the over 500 committees of the NRC, where the bulk of the Academy's work is carried out.

Congress is also aware that the Academy works through its subgroups for most of its work. On occasion, public laws even specify which committee of the Academy should be approached to do a study. For example, one statute states, "The Secretary shall commission the National Academy of Sciences, working through the Board on Agriculture of the National Research Council, to conduct a study" of the delivery systems used to provide farmers with veterinary services. 7 U.S.C. § 3193 (1994).

Conclusion

The interrelationship of the Academy and its subgroups and the legislative history of the 1997 amendments support our view that the 1997 amendments do apply to the subgroups of the Academy. Thus, committees formed by the NRC, NAE and IOM are "created" by the Academy, and they must comply with section 15 requirements added by the 1997 amendments. Federal agencies may not use the advice or recommendations of the Academy and its constituent entities unless the requirements of section 15 are met.

Question 2: Does the Freedom of Information Act apply to the National Academy of Sciences, the National Research Council, the National Academy of Engineering, the Institute of Medicine, or the Academy advisory panels that conduct federally funded studies?

No, the Academy, NRC, NAE, IOM and their advisory panels are not subject to the Freedom of Information Act (FOIA). 5 U.S.C. § 552 (1994).

FOIA applies only to entities that meet the definition of "agency" under FOIA:

For purposes of this section [section 552], the term 'agency' as defined in section 551(l) of this title includes any executive department, military department, Government corporation,

¹³143 Cong. Rec. H10578, 10580 (daily ed. Nov. 9, 1997) (statement of Rep. Horn).

Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

5 U.S.C. § 552(f)(1)(Supp. II 1996). One court has already addressed the question of whether FOIA is applicable to the Academy. In Lombardo v. Handler, 397 F. Supp. 792, 801 (D.D.C. 1975), aff'd without opinion, 546 F.2d 1043 (D.C. Cir. 1976), cert. denied, 431 U.S. 932 (1977), the U.S. District Court for the District of Columbia held that the Academy is not an agency under FOIA. The court found that the Academy is clearly not an establishment in the executive branch of the government; it neither functions under the President nor was it created by the President. Lombardo, 397 F. Supp. at 802. Although the Academy was chartered by the Congress, it is not a government corporation because it is not a "wholly government-owned enterprise." The court also stated that the Academy is not a government-controlled corporation because no significant control by government has been shown. Finally, the court pointed out that the Academy is not an authority of the government and does not perform governmental functions like an administrative agency. Lombardo, 397 F. Supp. at 802.

Although the Academy was established by Acts of Congress, 36 U.S.C. § 251-254 (1994), the Academy does not possess characteristics typical of an agency under FOIA. It has no authority for rule making, adjudication, or licensing. It has no power to implement its own advice or impose sanctions. For these reasons, the Academy is not a "center of gravity in the exercise of administrative power," Lombardo, 397 F. Supp. at 795, and cannot be an agency.

As the Academy points out in its legal opinion, additional support that FOIA is inapplicable to the Academy can be found by the presence of section 15(b)(3) - (5) added by the 1997 amendments which requires the Academy and its advisory committees to make their data gathering meetings public, disclose written materials submitted to the committees and make brief summaries of meetings and Academy reports available. 5 U.S.C.A. App. 2 § 15 (1996 & Supp. 1998). These provisions would be unnecessary if the Academy were an "agency" subject to the requirements of FOIA. In other words, these written materials, brief summaries and Academy reports would already be "agency records" subject to FOIA and have to be disclosed as materials under the control of the Academy that had been created or obtained by the Academy.

The holding of Lombardo with regard to the Academy and FOIA has not been overturned or revisited.¹⁴ Thus, the Academy is not subject to FOIA. Although Lombardo did not directly address the status of the NAE, NRC and IOM, or their advisory panels conducting federally funded studies, the court's rationale is equally applicable. None of these entities is an executive department, a military department, a government corporation, a government-controlled corporation, or other establishment in the executive branch of the government. None are incorporated. None are independent regulatory agencies. None of the advisory panels possess the ability to act independently. None of these entities can be considered an agency for the purposes of FOIA.

Question 3: Are there statutory or contractual barriers to the release of underlying data by the Academy and its subgroups to the public, Congress, or federal agencies?

Other than criminal statutes which prohibit the disclosure of classified information or information related to national defense, federal laws generally do not directly bar private entities like the Academy and its subgroups from releasing underlying data to the public, Congress or federal agencies. However, contractual provisions with government agencies, private entities or individuals could preclude the Academy's release of underlying data, and section 15(b) added by the 1997 amendments could also limit the Academy's ability to release documents if their release would disclose matters exempt under FOIA.

With the exception of criminal statutes related to national security, federal non-disclosure laws generally do not directly bar private entities like the Academy from releasing information because they generally apply only to federal agencies and/or federal employees.¹⁵ Federal employees, for example, are prohibited by statute from disclosing any information coming to them in the course of their employment

¹⁴Recent cases have followed the rationale in Lombardo. For example, in Dong v. Smithsonian Institution, 125 F.3d 877, 882 (D.C. Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 2311 (1998), the court held that the Smithsonian is not an agency subject to the Privacy Act (which uses the same definition of "agency" as FOIA). The court found that the Smithsonian does not have the amount of "substantial independent authority" needed to be considered an agency. The American National Red Cross is also not an "agency" for purposes of FOIA. Irwin Memorial Blood Bank of San Francisco Medical Soc. v. American National Red Cross, 640 F.2d 1051 (9th Cir. 1981).

¹⁵It should be noted that the Academy and its constituent entities are private and thus not required to release data to the public, the Congress or to federal agencies. However, as noted above, federal agencies may not use the advice or a recommendation provided by the Academy that was developed by the use of a committee unless the requirements of section 15 are met. 5 U.S.C.A. App. 2 § 15.

relating to such things as trade secrets, confidential statistical data, or income returns to anyone not authorized by law. The penalty for disclosure could be a fine, prison and/or dismissal from employment. 18 U.S.C. § 1905 (Supp. II 1996). This law does not apply to private individuals or entities. However, many criminal statutes relating to national security type matters apply to individuals, whether they are employed by the government or not. Thus Academy employees or members of Academy committees may be subject to criminal statutes if they disclose national security information to unauthorized persons. 18 U.S.C. § 798 (1994 & Supp. II 1996).

Contracts with federal agencies frequently include provisions in which the Academy agrees not to disclose information covered by federal non-disclosure laws such as trade secrets, personally identifiable records, or national security information. When the Academy is entering into a contract with an agency that may result in the release of classified information to Academy employees, the contract will have a provision whereby the Academy agrees to comply with special procedures to protect classified information from disclosure and to adhere to the classification determination made by the agency with regard to national security information.¹⁶ Contract provisions with private entities may also bar the Academy from disclosing certain types of information. This could include personal information like that found in medical records or proprietary commercial information received directly from industry, such as commercial or financial information provided by a commercial test publisher.

Another source of possible restrictions to the Academy's releasing information is found in section 15 added by the 1997 amendments. It requires that data gathering meetings be open unless open meetings "would disclose matters described" in the exemptions to FOIA.¹⁷ Similarly, written materials presented to the Academy committee, summaries of closed meetings, and final reports must also be made available to the public unless the Academy determines that releasing the information "would disclose matters described" in the exemptions to FOIA. Thus, if release of documents would disclose matters described in the exemptions, the Academy must keep them confidential to comply with section 15.

¹⁶For example, a contract between the Academy and the Department of Defense that may result in the release of classified information to Academy employees will contain a special agreement that the contractor (the Academy) will comply with DOD 5220.22-M, National Industrial Security Program Operating Manual, January 1995 (NISPOM) under which the Academy agrees to protect classified information provided by the U.S. Government from disclosure.

¹⁷Exemptions to FOIA are found at 5 U.S.C. 552(b)(1994 & Supp. II 1996).

According to the Academy, the FOIA exemptions that would most frequently be invoked would be exemption (b)(1) relating to national security information, (b)(3) relating to information exempted by another statute, and (b)(4) relating to trade secrets or confidential commercial or financial information. The Academy has indicated that it anticipates that trade secrets and commercial or financial information will be the most commonly invoked rationale for withholding information presented to Academy committees from the public.

Under Academy policy and NRC guidelines, classified information, trade secrets, and information of a personal nature are to be kept privileged. Additional classes of information under the Academy's policy that may be deemed privileged include information subject to statutory restriction on access and disclosure, draft manuscripts, original data or other information for which the institution recognized a right of first publication by the author, and information that by contractual stipulation or prior agreement is received on a privileged basis. As a private entity, the Academy may make its own disclosure policies. However, the Academy has stated that to the extent that an activity is subject to the new section 15 added by the 1997 amendments, the policy and guidelines are superseded and underlying data will be made available in accordance with section 15.

We hope you find the analysis of these issues useful. If we can be of further assistance, let us know.

Sincerely,

Robert P. Murphy
General Counsel

Enclosures