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If you can't recall the last issue of this publication, don't worry—there wasn't one. With all the memos, reports, digests, forms, and other categories of paper that regularly inundate all of us in GAO, you probably wonder why we are suggesting, nay urging, that you read this one.

Let us state at the outset that this publication, "The OGC Adviser," is unique. It is a legal journal for the GAO community, lawyer and non-lawyer, with the goal of providing legal viewpoints on matters of interest and use to GAO's professional staff. Many of the questions we are asked require individual attention, and the answers are relevant only to the work of the division or office making the request. However, a significant number of legal problems are common to GAO, and their solutions can be helpful to us all.

It is our hope in this and future issues of the "Adviser" to present legal issues in a lively, non-technical, and readable format; to answer frequently-asked questions; to anticipate questions; and generally to advise on matters that we consider of importance and interest to GAO. In return, your comments, suggestions, and advice will be appreciated.

The Editors

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GAO AND THE PRIVACY ACT

Paul G. Dembling¹

The Privacy Act of 1974, Public Law 93-579, became law on December 31, 1974. The major provisions of the statute took effect on September 27, 1975, and are codified at 5 U.S.C. §552a. The purpose of the Act is to provide safeguards for individuals against invasions of personal privacy by imposing requirements for the collection, maintenance, use, and dissemination of personal information by Federal agencies. The major goals of the Act are limiting systems of records to those that are relevant and necessary to the functioning of the Government; eliminating secret record systems; protecting Government records about individuals from misuse, including improper disclosures; and permitting individuals access to their records.

The limitations on the use of records imposed by 5 U.S.C. §552a apply to Federal agencies. It is our position that the term "agency," as used in the Act, does not include GAO. Therefore, the Privacy Act does not restrict GAO use of records. While the Office may follow some of the provisions of the law on a voluntary basis, there will be no requirement that audit systems of records comply with the Act. Of course, records used in connection with audits should always be maintained with a high degree of concern for security and privacy, even though those records are not directly affected by the Act.

Although the Privacy Act does not apply to GAO, this does not mean that the Act will not have an effect on GAO audit work. Agencies that are subject to the Act can only disclose records in accordance with its provisions. However, GAO's basic right of access is secure because the law specifically recognizes the importance of the use of agency records in the audit process. 5 U.S.C. §552a(b)(10) exempts from the disclosure limitations the disclosure of records "to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office. . ." We interpret this section to mean that GAO has the same right of access to Federal records that it had before the Privacy Act became law. Agencies cannot cite the disclosure limitations of the Privacy Act in an attempt to keep GAO auditors from looking at agency records.

However, while agencies must allow GAO access to records, the Privacy Act requires them to make an accounting of the date, nature, and purpose of each disclosure and of the name and address of the person to whom the disclosure is made. In making requests for records, GAO auditors should keep in mind the accounting burden that their requests will impose on agencies. In order to make the audit trail required by the Act, agencies may take more time to fulfill GAO requests. On audits where large numbers of records are needed, the requirement for accounting could cause very lengthy delays unless some means of easing the burden is found. There are several possible techniques to accomplish this goal.

1. Agencies may find it easier to account for disclosures of a complete category of records rather than a selection of some records from that category. For example, a request for one thousand randomly selected records from a system of ten thousand records may require the agency to note accounting data on each of the thousand records disclosed. However, a request for all ten thousand records might be handled by making one notation in a central accounting file. We could select the sample from the ten thousand available records. The extent to which this class accounting technique will be useful may vary from agency to agency and from system to system, depending upon how the accounting requirements are handled. If this technique appears potentially useful, it should be discussed with the records management personnel of the agency maintaining the records.

2. In some cases, it may be useful to let the agency perform operations on records according to our instructions without disclosing all of the records to us. For example, if a sample of two hundred records must be selected from a system of twenty thousand records, GAO might supply the agency with a computer program for selecting the sample, let the agency select the sample using its own computer, and then disclose only the selected records to GAO. Again, the usefulness of this technique depends upon the extent of cooperation from the agency.

¹General Counsel, GAO. The following article is adapted from a recent memorandum to Heads of Divisions and Offices.

3. Another way to avoid accounting for disclosure of records is to devise a means for satisfying GAO's audit needs without disclosing records. A record is defined by the Privacy Act as an item, collection, or grouping of information about an individual that contains his name, identifying number, symbol, or other identifying particular assigned to the individual including fingerprints, voiceprints, and photographs. Thus, if GAO can complete its audit work without the need to identify individual records, then, with the cooperation of the agency, GAO might obtain either raw or compiled statistical data for use in the audit. The Privacy Act permits agencies to disclose information that is not individually

identifiable to those who will use the information for statistical or reporting purposes.

In negotiating with agencies for the disclosure of records, auditors may encounter more resistance than usual to our requests. This is understandable to some extent not only because the Privacy Act is new and presents many difficult problems of interpretation, but also because there are civil and criminal penalties for improper disclosures. When necessary, the Office of the General Counsel is available to help overcome agency reluctance to the disclosure of records to GAO. Assistance is available by calling either Geraldine Rubar or Robert Gellman, 275-5212.

THE GAO AUDITOR IN COURT

Response to Subpoenas for GAO Testimony or Records

You may never be served with a subpoena to testify or produce records at a judicial or administrative hearing or trial, but just in case it happens, do you know what action to take? Would you:

1. Hide until the process server gets tired and leaves?
2. Refuse to accept the subpoena?
3. Refer the process server to the Comptroller General?
4. Accept service, inform your superior, and forward the subpoena to him or her?

Most of us would be tempted by responses 1 or 2. Response 3 is inappropriate if the subpoena is directed to you personally. Choice 4, although the most mundane, is probably the best course to follow.

GAO presently lacks a formal procedure for handling all types of judicial subpoenas. Comptroller General's Order 1.10 provides that requests or subpoenas *duces tecum*¹ for General Accounting Office records should be directed to the Comptroller General and served upon the Records Management and Services Officer, Office of Administrative Services. If a subpoena or request is served on any other officer or employee, it should be forwarded to the Records Management and Services Branch, OAS, which will handle the request and, if necessary, provide any required documents or certified copies.

But what if a GAO officer or employee is served with a subpoena *ad testificandum*², a mandatory process requiring the appearance and testimony of one or more individuals at a judicial or administrative proceeding? Until the promulgation of an Operations Manual order covering this situation, OGC recommends the following procedure:

1. Whatever the nature of the subpoena (*duces tecum* or *ad testificandum*, or both) immediately inform your superior of its

receipt, and give the original subpoena to him or her. You may wish to retain a copy for your records, particularly if you are named personally in the subpoena.

2. The subpoena should then be forwarded to the office of the division director (or regional manager, with a copy to the Director, FOD).
3. The office of the division director should then send a copy of the subpoena to the Associate General Counsel, Special Studies and Analysis, OGC, and, if the subpoena calls for the production of GAO records, a copy of the subpoena should also go to the Records Management Services Branch, OAS.
4. OGC and the division affected will agree upon an appropriate response to the subpoena, and OGC will provide whatever legal services are required in connection with that response, including correspondence with attorneys, courts or other agencies, review of requested documents, consultation with the individual subpoenaed, and counsel for the affected employee(s) at proceedings where GAO testimony is to be given.

Some of the considerations that may influence the manner in which a subpoena is handled include: (1) whether an employee is subpoenaed in his individual or official capacity, (2) whether the proceeding is brought by a private party or a Government agency, and (3) whether GAO is a party to the proceeding.

If an employee is subpoenaed in his personal capacity, and no GAO records are sought, OGC will not normally become involved. However, in some instances an employee may be called in his personal capacity *as an expert witness*, to give a deposition or testimony on behalf of a party to private litigation. In such a case, although GAO records might not directly be involved, the motive behind the subpoena may relate to knowledge or experience gained or utilized in the employee's work at GAO.

¹Literally, "bring with you."

²Literally, "for giving testimony."

Employees should feel free to consult their superiors and OGC in such situations, as the nature of the proceeding may indicate that testimony regarding the employee's official duties is to be solicited. OGC may provide advice to employees in these cases on an *ad hoc* basis. On the other hand, where the subpoena relates to a purely personal matter, i.e., a domestic relations case, OGC advice would not be available.

Where expertise relating to official duties is involved, it may be advisable to request that the subpoena be issued by the court, to avoid the implication that GAO favors either litigant.

If an employee is subpoenaed in his official capacity to testify in a proceeding brought by a private party, the response will usually turn on the nature of the testimony or records sought. If they involve confidential, classified, or proprietary data, or their disclosure might jeopardize an ongoing audit, GAO may resist disclosure. Likewise, if the request would involve an undue burden of travel or record search; if it is overly vague or non-specific; or if the court or agency lacks jurisdiction, GAO may have a basis to request that the subpoena be quashed or modified.

If the subpoena is issued in connection with litigation brought by a Government agency, the above factors will be relevant; but, additionally,

GAO will want to consider the extent to which its relations with the other agency would be adversely affected by compliance, or the extent to which a governmental privilege may exist, if the records sought were originally obtained from the party agency.

Where GAO is a party, the effect of the requested testimony or records upon GAO's tactical position in the litigation will be considered along with the extent to which documents and testimony may be protected by the attorney work-product exception or the attorney-client privilege. Different rules may apply as to what records may be obtained where GAO is a party.

On the practical side, employees testifying in their official capacities do so as a part of their official duties for pay, leave, and travel purposes. Employees who must testify in their individual capacities should look at Chapter 630.10 of the Federal Personnel Manual, which deals with court leave.

To conclude, the cardinal rule in dealing with subpoenas is: don't try to handle the matter yourself! Whether the subpoena is directed at GAO or you, the employee, help is available from the Office of the General Counsel.

COPYING THE COPYRIGHT

Use of Copyrighted Materials in Audit Reports

Robert G. Crystal¹

Auditors frequently ask whether they can use copyrighted material in the text of audit reports without violating the copyright laws. While the answer to this question varies, depending upon the facts of a given case, there are definite tests or guidelines to be applied in determining the answer.

The holder of a copyright has the exclusive right to print, reprint, publish, copy and sell the copyrighted work. The copyright laws protect these rights by providing various remedies for their violation.

Under the doctrine of "fair use," others are permitted to utilize copyrighted material in certain ways. "Fair use" has been defined as a privilege of persons other than the owner of a copyright to use copyrighted material in a reasonable manner, without the owner's consent, notwithstanding the monopoly granted by the copyright laws to such owner.²

Whether a particular use of copyrighted material is a fair use depends, again, upon the circumstances of the particular case, many factors being considered in determining whether a fair use exists. These factors include the purpose and character of the use, the nature of the copyrighted work, the amount and significance of the material used in relation to the copyrighted work as a whole, and the effect of the use on the copyright owner's potential market for and value of his work.

In a relatively recent case³, a publisher claimed that the Department of Health, Education, and Welfare infringed his copyrights in certain medical journals by making unauthorized photocopies of articles from those periodicals and disseminating them outside the Government. In deciding that the Government had made fair use of the materials, the court considered the factors mentioned above and pointed out that the Government did not have a profit motive: the materials were used for re-

search, not for reduplication and sale or other distribution; and the copied articles were scientific studies useful to the requesters in their work.

In another case⁴, the court stated that determining whether the use is fair turns initially on whether distribution of the copyrighted material would serve the public interest in the free dissemination of information, and on the extent to which its preparation required some use of prior materials dealing with the same subject matter.

One other case⁵ established four tests to determine whether the doctrine of "fair use" applies: first, was there a substantial taking, qualitatively or quantitatively? second, if so, did it materially reduce the demand for the original copyrighted property? third, does the distribution of the material serve the public interest in the free dissemination of information? and fourth, does the preparation of the material require the use of prior publications dealing with the same subject matter?

The safest course of action to follow to avoid violating the copyright laws, if not always the most practical one, is to obtain the author's permission to use the copyrighted material. It also may be desirable to give appropriate credit to the author in the report for the purpose, among others, of encouraging consent to the use of the material.

Whichever of the above tests or guidelines may apply, *it is unlikely that the use of a small portion of a copyrighted work in an audit report would be viewed by the courts as a violation of the copyright laws* since GAO does not have a profit motive and GAO reports serve the public interest. However, with the use of larger portions of copyrighted materials, greater distribution of the audit report, and reduced need for reliance on other materials, it becomes more likely that the use would be found not fair and therefore in violation of the copyright laws.

¹J.D., *The George Washington University; Attorney-Adviser, Office of the General Counsel, GAO.*

²*Toksvig v. Bruce Pub. Co.*, 181 F. 2d 664 (7th Cir. 1950).

³*Williams & Wilkins Co. v. United States*, 487 F. 2d 1345 (Ct. Cl. 1973).

⁴*Rosemont Enterprises v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966).

⁵*Marvin Worth Prod. v. Superior Films Corp.*, 319 F. Supp. 1269 (S.D.N.Y. 1970).

AUDIT DIVISIONS ARE ESSENTIAL TO ADMINISTRATION OF THE IMPOUNDMENT CONTROL ACT

The Impoundment Control Act of 1974 was enacted to give the Congress greater control over executive branch withholding of appropriated funds. Under this law, the Comptroller General is given the responsibility to review all impoundments and, when necessary, to enforce the Act by initiating lawsuits to terminate improper withholdings.

Since the statute's enactment over two years ago, GAO's audit divisions have reviewed for factual accuracy the messages submitted by the President, evaluated statements on program implementation, determined if prudent and effective use can be made of impounded funds, and used their resources to confirm the termination of impoundments by OMB and the executive departments. Without the assistance of the audit divisions, GAO's ability to administer effectively the Comptroller General's duties under the Act would be severely hampered.

Transfer of the administration of the Comptroller's duties under the Act from the Office of Program Analysis to the Office of the General Counsel has given us greater insight into the role that the audit divisions can play in impoundment monitoring. Our recent experience clearly shows

that, in addition to the assistance already given to us by the divisions, the audit groups can be of further help by bringing to our attention situations that may indicate the existence of impoundments that have not been reported to the Congress by the President. The Impoundment Control Act makes special provision that such matters be reported to the Congress by the Comptroller General and, when he does so, his report is accorded the same effect as are reports from the President.

With this in mind, and since GAO has underway reviews of a multitude of Federal programs involving the use of appropriated funds, it may well develop that, in the course of a review, division personnel may obtain information suggesting the existence of an impoundment. Whenever this arises, we in OGC would appreciate hearing of the situation so that we can pursue the matter. The persons to call on these issues, or for any questions you might have on the administration, application, or interpretation of the Act are Ralph Lotkin and Nola Casieri, 275-5212.

Your continued cooperation is sincerely appreciated.

SO YOU CAN'T GET THOSE AGENCY RECORDS ?

One of the most persistent questions encountered in the daily activities of General Accounting Office staff members relates to the access of GAO auditors to records held or maintained by agencies for which GAO has oversight responsibilities. When difficulties arise, the result is an "access to records problem."

The problem is superficially simple because GAO's right to obtain agency records is clear. Section 54 of title 31 of the United States Code (section 313 of the Budget and Accounting Act of 1921) states in part:

"All departments and establishments shall furnish to the Comptroller General such information regarding the powers, duties, activities, organization, financial transactions, and methods of business of their respective offices as he may from time to time require of them: and the Comptroller General, or any of his assistants or employees, when duly authorized by him, *shall*, for the purposes of securing such information, *have access* to and the right to examine *any books, documents, papers, or records of any such department or establishment.*" (Emphasis added).

"Department" and "establishment" are defined to include virtually every agency of the Federal government other than the legislative branch and the Supreme Court.

The broad authority conferred by 31 U.S.C. 54 is restated in a multitude of specific acts, but, as to agencies of the Government, this section remains the clearest general statement of GAO's basic right of access to records. Historically, the problem has not been one of construing the statute. Rather, it has been the practical one of getting physical possession notwithstanding claims of "national security," "proprietary data," "confidential relationship," and "irrelevance."

Of course, every once in a while an agency may

assert that its own statutory authority somehow supersedes GAO's right of access as provided in the Budget and Accounting Act. An example of this is the Internal Revenue Service's claim that access to its records is given by law only to the Joint Committee on Internal Revenue Taxation. Fortunately, such situations are few. The issues most frequently raised relate to the considerations mentioned above.

Since most of the problems are practical, it follows that much of our success in handling them in the past has been based on finding practical solutions. For example, if an auditor is confronted with national security objections, clearances can be obtained. If the objection is confidentiality, assurances can sometimes be given. If the physical security of the documents is an issue, locked storage and other precautions may be observed.

In some of these situations, the assistance of a lawyer may be helpful. Even though the problems may rarely be "legal," the agency's lawyers usually hold the key, and contact between agency and GAO lawyers often can resolve an access question on a mutually acceptable and informal level.

This may be a function of the axiom that dispute settlement may be easier when it is conducted one step away from the heat of a controversy—hence the role of lawyers as negotiators and arbitrators.

Whatever the situation, the lawyer can at least determine whether any legal basis exists for withholding records. As stated, this rarely may be the case. Hopefully, the lawyer can offer a creative solution based on past experience with similar access problems.

We have tried to show in this brief introductory discussion that GAO access to records problems, being largely practical, are not often solved by rattling sabres and citing statutes. A lawyer nevertheless may be useful, but usually he will be wearing his negotiating hat rather than his litigating six shooter.

Help Us Help You

We hope you liked what you read in this issue, and that you'll send us your suggestions for topics you'd like to see covered in future "Advisers."

Address your comments to:

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