

CAUSE of ACTION

INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

August 31, 2017

VIA CERTIFIED MAIL

Acting Administrator Timothy O. Horne
U.S. General Services Administration
ATTN: Office of the Administrator
1800 F Street, N.W.
Washington, D.C. 20405

Re: GSA Order ADM 1040.3 (July 24, 2017)

Dear Acting Administrator Horne:

I write on behalf of Cause of Action Institute (“CoA Institute”)¹ to request clarification of the General Services Administration’s (“GSA”) procedures for handling congressional inquiries.

As you are likely aware, earlier this summer, the press reported that the White House was directing federal agencies to ignore “oversight requests” from Democrat legislators.² According to unnamed “Republican sources,” a White House lawyer instructed “agencies not to cooperate” with records requests from the minority.³ One news source described this as “amount[ing] to a new level of partisanship in Washington[.]”⁴ Congressional criticism of the Administration’s ostensibly novel policy followed, particularly after it became known that the Department of Justice’s Office of Legal Counsel had published an opinion letter also limiting the extent of the Executive Branch’s legal obligation to respond to congressional oversight requests.⁵

Following these reports, CoA Institute submitted a Freedom of Information Act request to the GSA seeking access to various records concerning the agency’s policies or procedures for handling congressional inquiries.⁶ The GSA only disclosed two records in response to that request, neither of which pertained to the new policy of responding only to Republican congressional leadership.

The GSA’s failure to locate relevant records was particularly surprising because, while testifying before the U.S. House of Representatives Committee on Appropriations, you explicitly

¹ CoA Institute is a nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair. In carrying out its mission, CoA Institute uses investigative and legal tools to educate the public about the importance of government transparency and accountability. See COA INST., *About*, www.causeofaction.org/about (last accessed Aug. 31, 2017).

² See, e.g., Burgess Everett & Josh Dawsey, *White House orders agencies to ignore Democrats’ oversight requests*, POLITICO (June 2, 2017), <http://politi.co/2qZx4L2>; see also Ryan Mulvey, *Is President Trump Directing Agencies To Ignore Democrats’ Oversight Requests?*, COA INST. (June 8, 2017), <http://coainst.org/2tJoiGo>.

³ Everett & Dawsey, *supra* note 2.

⁴ *Id.*

⁵ U.S. Dep’t of Justice, Office of Legal Counsel, Opinion Letter: Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch (May 1, 2017), available at <http://bit.ly/2uBkfcj>; see John Bresnahan, *Democrats outraged by Trump ban on info requests*, POLITICO (June 2, 2017), <http://politi.co/2vIMrtw>; Laura Jarrett, *DOJ opens door for executive branch to ignore Dems’ requests*, CNN (June 2, 2017), <http://cnn.it/2xAuAWV>.

⁶ Letter from CoA Inst. to Gen. Servs. Admin. (June 8, 2017), available at <http://coainst.org/2wLFsUB>.

stated that “the [Trump] Administration has instituted a new policy that matters of oversight need to be requested by the Committee chair.”⁷ Moreover, while clarifying that the White House had not provided a formal written version of that policy, you explained that the GSA was in the process of “formalizing” relevant guidance.

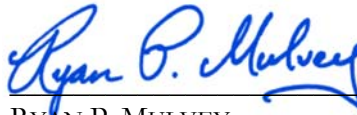
CoA Institute appealed the GSA’s initial determination and, in response, the agency disclosed two additional records.⁸ The first was a copy of the May 1, 2017 Office of Legal Counsel opinion letter. The second was GSA Order ADM 1040.3.⁹ The latter document expressly states that the GSA’s detailed procedures for responding to congressional requests are “consistent with the views of the Agency and the Administration as outlined in the Department of Justice Office of Legal Counsel opinion . . . dated May 1, 2017.” In other words, the Order claims that the opinion letter *is* the Administration’s official policy.

Yet, if the GSA’s July 24, 2017 Order is accurate, it contradicts the White House’s publicly-stated position, which was set forth in a July 20, 2017 letter from Director of Legislative Affairs Marc Short to Senator Charles Grassley.¹⁰ Mr. Short advised Senator Grassley that the Office of Legal Counsel opinion letter was merely advisory, did “not set forth Administration policy,” and only presented “legal advice consistent with the research of the Congressional Research Service.”¹¹

We respectfully request that you provide public clarification as to this apparent contradiction and, if necessary, rescind the GSA Order and issue revised guidance on the GSA’s procedures for handling congressional inquiries.

Thank you for your attention to this matter. Please feel free to contact me by telephone at (202) 499-4232 or by e-mail at ryan.mulvey@causeofaction.org.

Sincerely,



RYAN P. MULVEY
COUNSEL

⁷ *Hearing: Gen. Servs. Admin.*, H.R. COMM. ON APPROPRIATIONS, <http://bit.ly/2rZMaU9> (last accessed Aug. 31, 2017); see Letter from Hon. Elijah E. Cummings, *et al.*, U.S. H.R. Comm. on Oversight & Gov’t Reform, to Timothy O. Horne, Acting Adm’r, Gen. Servs. Admin. at 4 (June 5, 2017) (“[Horne] also testified that [the GSA] would respond to Democratic requests by providing only public information with other information redacted[.]”), available at <http://politi.co/2grgNxR>; see also Ryan Mulvey, *The GSA Has No Records on its New Policy for Congressional Oversight Requests*, COA INST. (July 26, 2017), <http://coainst.org/2eHooVq>.

⁸ Letter from Gen. Servs. Admin. to CoA Inst. (Aug. 17, 2017), available at <http://coainst.org/2gr2GbM>.

⁹ Gen. Servs. Admin., Order ADM 1040.3 (July 24, 2017) (attached as Exhibit 1).

¹⁰ Letter from Marc Short, Dir. of Legislative Affairs, The White House, to Hon. Charles E. Grassley, Chairman, U.S. S. Comm. on the Judiciary (July 20, 2017) (attached as Exhibit 2).

¹¹ *Id.*; see generally Letter from Hon. Charles E. Grassley, Chairman, U.S. S. Comm. on the Judiciary, to Hon. Donald J. Trump, President, The White House (June 7, 2017), available at <http://bit.ly/2wLsGoN>; Ryan Mulvey, *Senator Grassley Claims the Trump Administration is Rejecting the DOJ’s Opinion on Responding to Congressional Records Requests*, COA INST. (July 31, 2017), <http://coainst.org/2wkXziR>.

Timothy O. Horne

August 31, 2017

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CC:

Hon. Charles E. Grassley
Chairman, Committee on the Judiciary
United States Senate

Hon. Dianne Feinstein
Ranking Member, Committee on the Judiciary
United States Senate

Mr. Marc Short
Director of Legislative Affairs
The White House

EXHIBIT

1

GENERAL SERVICES ADMINISTRATION
Washington, DC 20405

ADM 1040.3
July 24, 2017

GSA ORDER

SUBJECT: Congressional and Intergovernmental Inquiries and Relations

1. Purpose. This Order establishes the policy and procedures GSA Services, Staff Offices, and Regions must follow for handling Congressional and Intergovernmental inquiries and relations. This Order formalizes agency procedures for communications with the U.S. Congress (Congress), State & local governments, and tribal and foreign governments by:

a. Ensuring the Administrator's and Administration's positions and policies are conveyed to Congress and State & local governments accurately, clearly, promptly, professionally, and consistently;

b. Making preparations so that Members of Congress, their staffs, and individuals from other governments can work with GSA in a systematic and efficient manner; and

c. Providing a mechanism to keep the Administrator informed of all agency-related matters of interest to Congress, State, local, tribal, and foreign governments.

2. Cancellation. GSA Order, [ADM 1040.2 Congressional and Intergovernmental Inquiries and Relations](#), dated February 20, 2015, is cancelled.

3. Background. GSA must speak with one voice. Information provided to Congress, State, local, tribal, and foreign governments by GSA employees that addresses official GSA policies and positions must be consistent, factually accurate, clear, and in accordance with GSA policies and positions. This Order sets out procedures all GSA employees must follow in providing information about GSA policies and positions to Congress, State, local, tribal, and foreign governments.

4. Policy. GSA employees must obtain approval from the Associate Administrator for Congressional and Intergovernmental Affairs or his/her designee before responding to

inquiries from Congress for the Administrator's or other official GSA position on legislation or other substantive issues to ensure accurate and up-to-date information is provided. Congressional inquiries include those from the following people:

- a. Members of Congress
- b. Congressional Committee staff
- c. Members of Congress personal staff (Washington, DC and District or State offices)
- d. Members of Congress Leadership staff
- e. Congressional Research Service (CRS) staff
- f. Congressional Budget Office (CBO) staff
- g. Clerk of the U.S. House of Representatives and his/her staff
- h. Chief Administrative Officer of the U.S. House of Representatives and his/her staff
- i. U.S. Senate Sergeant at Arms and his/her staff

5. Procedures. All GSA employees represent the agency while they are working in their official capacity, and they must be certain that, in their communications with Congress or other governments, they are explicit about whether a position is an official GSA view or position. Therefore, official communications with Congress and other governments must be consistent and convey the views of the Administrator and, where applicable, other GSA officials with delegated program responsibility. The following procedures will be followed in dealings with Congress:

a. Congressional communications.

(1) Correspondence. All Congressional communications, whether by correspondence, telephone calls, email, fax, or any other media, must be immediately forwarded to the Associate Administrator for Congressional and Intergovernmental Affairs or his/her designee. The Office of Congressional and Intergovernmental Affairs (OCIA) will be responsible for coordinating all responses back to Congress to ensure they are accurate, timely, helpful, and consistent with the views of the Agency and the Administration as outlined in the Department of Justice Office of Legal Counsel opinion,

“Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch,” dated May 1, 2017. When a formal response is prepared, OCIA determines which office will prepare the draft response, who the signatory will be, and will input this information, along with the incoming letter, into GSA’s correspondence data tracking system. OCIA will coordinate closely with GSA’s Executive Secretariat and the drafting office as the response moves through the concurrence process. Should OCIA find any reason to postpone the drafting of the letter (for example, a more detailed briefing is being coordinated), OCIA will notify Executive Secretariat and the drafting office.

(2) Congressional hearings.

(a) Testimony. OCIA leads the preparation and clearance of statements to be presented by GSA witnesses before a Congressional Committee. At a minimum, the Office of General Counsel must review each statement. Congressional statements also require approval from the Office of Management and Budget (OMB) before submission to Congress. Given these required clearances, other organizations should strive to be as timely as possible in providing any information or data that may be needed by OCIA in support of statement preparation. If possible, statements should be submitted to OCIA 10 days prior to the scheduled hearing.

(b) Questions for the record. OCIA leads the preparation and clearance of answers to questions from Congressional hearings that are submitted in writing after hearings. At a minimum, the Office of General Counsel must review these responses. Questions for the record also require approval from the Office of Management and Budget (OMB) before submission to Congress. Given these required clearances, other organizations should strive to be as timely as possible in providing any information or data that may be needed by OCIA in support of responding to these questions.

b. Congressional Research Service inquiries. All inquiries from the Congressional Research Service (CRS) for an official GSA position must be directed to the Associate Administrator for Congressional and Intergovernmental Affairs or his/her designee. OCIA is responsible for coordinating all responses back to CRS.

c. Congressional Budget Office inquiries. All inquiries from the Congressional Budget Office (CBO) for an official GSA position must be directed to the Associate Administrator for Congressional and Intergovernmental Affairs or his/her designee. OCIA is responsible for coordinating all responses back to CBO.

d. Statement of views on legislation. The Office of Management and Budget (OMB) frequently requests GSA’s views on legislative matters. The Associate Administrator for Congressional and Intergovernmental Affairs or his/her designee will coordinate

responses to these requests and deadlines must be met to ensure a timely and accurate characterization of the Administrator's views.

e. Meetings with foreign entities. GSA receives regular requests from foreign entities to meet with GSA officials or have GSA officials participate in a meeting or conference in a foreign country. Any request received by a GSA office or employee must be immediately forwarded to the Associate Administrator for Congressional and Intergovernmental Affairs or his/her designee. OCIA will then coordinate with the Department of State and GSA's Office of Mission Assurance to make a determination on whether or not to proceed with the meeting or trip.

f. Services for Native American Tribes. Any inquiry received by a GSA office or employee from a tribe concerning GSA actions and policies that affect tribes should be forwarded to the Associate Administrator for Congressional and Intergovernmental Affairs or his/her designee. OCIA will coordinate with the relevant GSA office(s) and respond with the appropriate information.

g. State and local Governments. OCIA plays the primary role in coordinating outreach to State and local governments, in coordination with partner Federal agencies and the White House Office of Intergovernmental Affairs. Therefore, communications to State and local governments, while not always requiring the same level of clearance as communications to Congress, should be reported to the Associate Administrator for Congressional and Intergovernmental Affairs.

6. Applicability. This Order is applicable to all GSA employees.

7. Whistleblower Protection. This Order does not abrogate or interfere with any rights or protections extended to GSA employees by the Whistleblower Protection Act of 1989 (WPA) as amended by the Whistleblower Protection Enhancement Act of 2012 (WPEA).

8. Exceptions, waivers and questions.

a. Exceptions. The Heads of Services, Staff Offices, Regional Administrators and Regional Special Assistants to Regional Administrators may personally and directly respond to incoming telephone inquiries regarding GSA's official position regarding issues in their areas of responsibility that are public information of a highly technical nature and not specific to legislation pending in Congress; however, the Associate Administrator for Congressional and Intergovernmental Affairs or his/her designee must be notified of the conversation as soon as practical.

b. Waivers. Conditional waivers may be granted on a case-by-case basis by the Associate Administrator or his/her designee.

c. Questions. Questions about whether this Order is applicable to a particular situation or how this Order should be applied, should be directed to the Associate Administrator for Congressional and Intergovernmental Affairs or his/her designee, who will decide if OCIA is the office responsible for GSA's response.

9. Signature.

A handwritten signature in blue ink that reads "Timothy O. Horne". The signature is written in a cursive style and is positioned above a horizontal line.

TIMOTHY O. HORNE
Acting Administrator

EXHIBIT

2

THE WHITE HOUSE

WASHINGTON

July 20, 2017

The Honorable Charles E. Grassley
Chairman
United States Senate Committee on the Judiciary
Washington, D.C. 20510

Dear Chairman Grassley:

I write in response to your letter of June 7, 2017, to the President regarding Executive Branch responses to inquiries from the Legislative Branch. Thank you for the opportunities you have provided to discuss this issue further. At the outset, let me assure you that this Administration views congressional oversight of the Executive Branch as an important and necessary means for Congress to evaluate the performance of all Executive Branch agencies, departments, programs, and personnel.

The Administration understands and respects the concerns you have raised regarding the Office of Legal Counsel Letter Opinion dated May 1, 2017 (“OLC Letter”), and looks forward to working with you and others in Congress to accommodate requests consistent with the constitutional roles and obligations of both the Legislative and Executive Branches.

Although media reports describe the OLC Letter as a policy of the White House, please know the OLC Letter does not set forth Administration policy. Instead, it provides legal advice consistent with the research of the Congressional Research Service:

[N]o House or committee rules authorize either ranking minority Members or individual Members on their own to institute official committee investigations, hold hearings, or issue subpoenas. Although individual Members may seek the voluntary cooperation of agency officials or private persons, no judicial precedent has directly recognized an individual Member’s right, other than a committee chair, to exercise the committee’s oversight authority without the permission of a majority of the committee or its chair.

Alissa M. Dolan *et al.*, Cong. Research Serv., RL30240, *Congressional Oversight Manual* 65 (Dec. 19, 2014) (footnote omitted). In addition, the OLC Letter describes certain historic practices of the Executive Branch in responding to requests for information from individual Members of Congress.

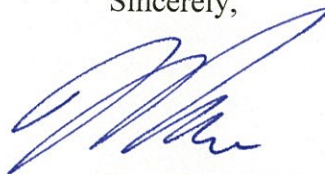
We understand your disagreement with the OLC Letter on the question whether requests for information from individual Members of Congress are best described as “oversight” requests that the Executive Branch should attempt to “accommodate.” At the same time, your letter suggests, and our recent meeting confirmed, several critically important points of agreement. In particular, we agree that the Executive Branch has greater obligations in responding to requests from a Committee, acting through its Chairman, Chairman and Ranking Member, or through a majority

of its Members, than it does in responding to requests from individual Members. We also agree that the Executive Branch should voluntarily release information to individual Members where possible, even though individual Members cannot by themselves legally compel such release. Finally, we agree that the Executive Branch, in responding to requests for information from the Legislative Branch, should prioritize those coming from a Chairman of a Committee or a majority of its Members.

Please be assured that the OLC Letter was not intended to provide, and did not purport to provide, a statement of Administration policy. The Administration's policy is to respect the rights of all individual Members, regardless of party affiliation, to request information about Executive Branch policies and programs. The Administration will use its best efforts to be as timely and responsive as possible in answering such requests consistent with the need to prioritize requests from congressional Committees, with applicable resource constraints, and with any legitimate confidentiality or other institutional interest of the Executive Branch. Moreover, this policy will also apply to other matters on which individual Members may have an interest, whether it be considering possible legislation, evaluating nominees for confirmation, or providing service to constituents.

I hope this clarifies the Administration's position. Please do not hesitate to contact me with any questions or concerns if you believe our Administration is not complying with the Legislative Branch's oversight function.

Sincerely,

A handwritten signature in blue ink, appearing to read 'M. Short', written over a horizontal line.

Marc Short
Director of Legislative Affairs

cc: Senator Dianne Feinstein, Ranking Member, Committee on the Judiciary