



B-329373

July 26, 2018

The Honorable Frank Pallone, Jr.
Ranking Member
Committee on Energy and Commerce
House of Representatives

Subject: *U.S. Department of Energy—Tweet Concerning the Secretary of Energy’s Guest Column on Health Care*

On July 25, 2017, the U.S. Department of Energy (Energy) issued a tweet concerning a guest column by the Secretary of Energy on health care.¹ The next day, you asked us whether Energy violated any appropriations laws by “us[ing] agency resources on matters well beyond [its] jurisdiction.”² We analyzed whether Energy violated the purpose statute, 31 U.S.C. § 1301, and applicable appropriations law prohibitions on using appropriations for grassroots lobbying or for publicity or propaganda. We find that Energy violated the purpose statute when it tweeted about the Secretary’s column because Energy did not show that its appropriation is available for the purpose of informing the public about health care legislation.³ As explained below, we also find that Energy did not violate the prohibitions on using appropriations for grassroots lobbying or for publicity or propaganda.

¹ Umair Irfan, *Perry enters Obamacare debate using official Twitter account*, E&E News, July 25, 2017, available at www.eenews.net/eenewspm/2017/07/25/stories/1060057885 (last visited July 16, 2018) (E&E News Article).

² Letter from Ranking Member, House of Representatives Committee on Energy and Commerce, to Comptroller General (July 26, 2017) (Request Letter).

³ Our opinion focuses solely on Energy’s use of appropriations for the tweet, not on the Secretary’s decision to serve as a guest columnist or on the position the Secretary took in his column.

BACKGROUND

The Office of Digital Strategy and Communications in the Office of Public Affairs leads Energy's social media efforts.⁴ Energy uses social media to “expand[] the conversation on energy issues and uphold[] open government principles of transparency, participation and collaboration.”⁵ Energy maintains official accounts on Twitter, Facebook, Instagram, and YouTube, among others.⁶

On July 25, 2017, cleveland.com published the Secretary's column on health care.⁷ In the column, the Secretary criticized “Obamacare,” a common reference to the Patient Protection and Affordable Care Act (PPACA),⁸ and advocated for the enactment of “patient-centered reform” that “empower[s] the states.”⁹ The Secretary wrote that “[m]illions of Americans are depending on their representatives to repeal this crushing law and can benefit from the common-sense solutions being considered in the Senate.”¹⁰ He added that the Better Care Reconciliation Act,¹¹ then pending in the Senate, included “many positive reforms to Medicaid” and “would give states more control to deliver better care at lower costs for those in need.”¹²

⁴ Energy, *Social Media*, available at <https://energy.gov/about-us/web-policies/social-media> (last visited July 16, 2018).

⁵ *Id.*

⁶ *Id.*

⁷ Secretary of Energy, *Time to discard the burdens and costs of Obamacare: Rick Perry (Opinion)*, cleveland.com, July 25, 2017, available at www.cleveland.com/opinion/index.ssf/2017/07/time_to_discard_the_burdens_an.html (last visited July 16, 2018) (Guest Column).

⁸ Pub. L. No. 111-148, 124 Stat. 119 (Mar. 23, 2010), as amended by Pub. L. No. 111-152, 124 Stat. 1029 (Mar. 30, 2010).

⁹ Guest Column.

¹⁰ *Id.*

¹¹ The Better Care Reconciliation Act of 2017 was a proposed Senate amendment in the nature of a substitute to a House-passed bill, the American Health Care Act of 2017. H.R. 1628, 115th Cong. (2017). See Committee on the Budget, United States Senate, *Discussion Draft – Better Care Reconciliation Act (BCRA)*, available at www.budget.senate.gov/bettercare (last visited July 16, 2018). To date, Congress has not passed the American Health Care Act of 2017.

¹² Guest Column.

Energy's Office of Public Affairs issued a tweet concerning the column that same day. @EnergyPressSec tweeted: "Time to discard the burdens and costs of Obamacare: @SecretaryPerry" and linked to the Secretary's column in cleveland.com.¹³ E&E News reported that Energy deleted the tweet later in the day.¹⁴ Energy acknowledged that the tweet occurred.¹⁵

Energy obligates amounts for the expenses of its Office of Public Affairs from its Departmental Administration appropriation.¹⁶ See, e.g., Pub. L. No. 115-31, div. D, title III, 131 Stat. 135, 313–14 (May 5, 2017); 163 Cong. Rec. H3327, H3753, 3762 (2017) (noting that Energy's Office of Public Affairs is funded from the Departmental Administration account.)

DISCUSSION

We consider two issues here: (1) whether Energy's appropriation was available for the purpose of tweeting about the Secretary's column on health care; and (2) whether Energy's tweet violated the prohibitions on using appropriated funds for grassroots lobbying or for publicity or propaganda.

1. Availability as to Purpose

The purpose statute, 31 U.S.C. § 1301, provides that appropriations are only available for the purpose for which Congress has provided. In order to interpret the purpose of an appropriation, we turn to its statutory language.

The Departmental Administration appropriation is a lump-sum appropriation¹⁷ that is broadly available for "salaries and expenses of the Department of Energy necessary

¹³ E&E News Article. Energy's Office of Public Affairs now tweets from @EnergyPress. [Energy] Press Staff, @EnergyPress, *available at* <https://twitter.com/energypress> (last visited July 16, 2018).

¹⁴ *Id.*

¹⁵ In accordance with our regular practice, we contacted Energy to seek facts and its legal views on this matter. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/products/GAO-06-1064SP. Energy responded with additional information and its legal views. Letter from Acting General Counsel, Energy, to Managing Associate General Counsel, GAO (Nov. 17, 2017) (Energy Letter).

¹⁶ Energy Letter.

¹⁷ A lump-sum appropriation is available for a wide array of purposes and leaves it to the recipient agency "to distribute the funds among some or all of the permissible
(continued...)

for departmental administration in carrying out the purposes of the Department of Energy Organization Act (42 U.S.C. 7101 et seq.)” Pub. L. No. 115-31, 131 Stat. at 313–14. The Department of Energy Organization Act, in turn, authorizes Energy to carry out various energy programs. Because neither the appropriation nor the authorization plainly makes amounts available for the purpose of informing the public about health care, we apply the “necessary expense” rule and first consider whether Energy’s expenditure bears a reasonable and logical relationship to the purpose of this appropriation.¹⁸ B-321788, Aug. 8, 2011. We generally look to the agency to determine whether an expenditure is reasonably related to accomplishing its statutory mission, but the relationship must not be “so attenuated as to take it beyond that range” of permissible discretion. B-223608, Dec. 19, 1988. *See also United States Department of the Navy v. FLRA*, 665 F.3d 1339, 1349 (D.C. Cir. 2012).

Energy told us that it obligates its Departmental Administration appropriation for the Office of Public Affairs, which “facilitate[s] the dissemination of information *relevant to the agency and administration*.” Energy Letter, at 1 (emphasis added). With regard to whether Energy’s appropriation is available to disseminate information “relevant to the agency,” we agree that an agency’s appropriations are generally available to communicate with the public about agency activities. *See, e.g.*, B-329368, Dec. 13, 2017. In its congressional budget justification for fiscal year (FY) 2017, Energy explains that the mission of its Office of Public Affairs is to “communicate information about DOE’s work in a timely, accurate, and accessible way to the news media and the general public.”¹⁹ Here, however, Energy did not provide any explanation or make any particularized showing that communicating about health care is part of its work or is related to accomplishing its statutory mission.

With regard to whether Energy’s appropriation is available to disseminate information “relevant to the . . . administration,” we cannot find support for the notion that agencies may use appropriated funds to communicate with the public about *any*

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objects.” *International Union, UAW v. Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984). *See also Lincoln v. Vigil*, 508 U.S. 182, 192 (1993); B-193282, Dec. 21, 1978.

¹⁸ The necessary expense rule is a three-part test: (1) the expenditure must be reasonably and logically related to the object of the appropriation; (2) the expenditure must not be prohibited by law; and (3) the expenditure must not be provided for by another appropriation. B-306748, July 6, 2006.

¹⁹ Energy, *FY 2017 Congressional Budget Request*, vol. 2, at 168 (Feb. 2016), available at www.energy.gov/sites/prod/files/2016/02/f30/FY2017BudgetVolume2.pdf (last visited July 16, 2018).

issue, even one outside of its purview, just because it is important to the current administration. To support its view, Energy points out that we once noted that we “have long held that the President and his Cabinet and other subordinates have a duty to inform the public on government policies, and, traditionally, policy-making officials have utilized government resources [for that purpose].” B-194776, June 4, 1979. There, we discussed the availability of the White House’s appropriation for certain promotional activities. The President is certainly authorized to use appropriations to inform the public about a wide range of executive branch activities. However, an agency’s authority to use its appropriations to communicate with the public about any administration priority must be firmly rooted in the language of the appropriation or the agency’s enabling or authorizing legislation.

We recognize that executive branch agencies do and should coordinate to implement laws passed by Congress. Executive branch agencies operate under the direction and supervision of one President. U.S. Const. art. II, § 1, cl. 1 (Executive Power Clause); U.S. Const. art. II, § 3 (Take Care Clause). The U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) noted that “government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive. Single mission agencies do not always have the answers to complex regulatory problems [and need] to know the arguments and ideas of policymakers in other agencies as well as in the White House.” *Sierra Club v. Costle*, 657 F.2d 298, 406 (D.C. Cir. 1981).

Those agencies, however, must have some shared concern in the policy matter, other than just being agencies in the executive branch. For instance, the D.C. Circuit upheld an enhanced coordination process between the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) on Clean Water Act permits for mining projects. *National Mining Ass’n v. McCarthy*, 758 F.3d 243 (2014). Both EPA and USACE played a statutory role in the permitting process. *Id.* at 247–48. In another case, the D.C. Circuit stated that it was “sensible” for the Department of the Treasury’s Office of Foreign Assets Control to consult with the Department of State on whether, given the Cuban embargo, a Cuban company could pay a fee to renew a trademark. *Empresa Cubana Exportadora de Alimentos y Productos Varios v. United States Department of the Treasury*, 638 F.3d 794, 803 (D.C. Cir. 2011). The court explained that the Department of State is an “active participant in the Nation’s foreign policy, and the Cuban embargo is of course a tool of foreign policy.” *Id.* The court noted that it declined to interpret the law in a way that would deter one executive agency from consulting another about a matter of “shared concern.” *Id.*

Here, however, Energy merely asserted—with no further explanation or support—that its Departmental Administration appropriation was available for disseminating information important to the administration. Energy Letter, at 1. As explained above, in order to use this appropriation, Energy would have to show a reasonable and logical relationship between tweeting about health care and the purposes of its Departmental Administration appropriation. Energy did not make this connection. In

other words, Energy did not meet the requirements of the necessary expense rule because it did not show that the tweet was reasonably and logically related to the purpose of its appropriation. Therefore, we find that Energy violated the purpose statute, 31 U.S.C. § 1301.

2. Statutory Prohibitions on Agency Communications

Congress has placed restrictions on agency communications with the public. Two such restrictions are the annual governmentwide prohibitions on using appropriated funds for grassroots lobbying and for publicity or propaganda. These prohibitions require us to look carefully at the content of government speech. Because an agency generally adopts the content of third-party speech when it links to that content, we look not only at the content of Energy's tweet, but also at the content of the Secretary's column. B-329368, Dec. 13, 2017; B-326944, Dec. 14, 2015. The Supreme Court and federal courts have recognized that the government's decision to include third-party speech within its own communication channels is an expressive act and can be one that associates itself with the third-party message.²⁰ *Pleasant Grove City v. Summum*, 555 U.S. 460, 473–74 (2009) (city accepted and placed privately funded displays, including a Ten Commandments monument, in a public park); *Sutcliffe v. Epping School Dist.*, 584 F.3d 314, 331–33 (1st Cir. 2009) (town website included link to a third-party website).

a. Grassroots Lobbying

In fiscal year 2017, Energy was subject to section 715 of the Financial Services and General Government Appropriations Act, 2017, which provides:

“No part of any funds appropriated in this or any other Act shall be used by an agency of the executive branch, other than for normal and recognized executive-legislative relationships, for publicity or propaganda purposes, and for the preparation, distribution or use of any kit, pamphlet, booklet, publication, radio, television, or film presentation designed to support or defeat legislation pending before the Congress, except in presentation to the Congress itself.”

Pub. L. No. 115-31, div. E, title VII, § 715. We have long construed such language as prohibiting indirect or grassroots lobbying, that is, a clear appeal to the public to contact Members of Congress in support of or in opposition to pending legislation.

²⁰ An agency could disclaim the contents of a linked external website or otherwise take sufficient steps to disassociate itself from the message. *Page v. Lexington County School District One*, 531 F.3d 275, 278 (4th Cir. 2008) (school district linked to external websites of two organizations, but included a disclaimer stating that the school district did not “endorse, approve, certify or control these external Web addresses”). Those facts are not present in this case.

See, e.g., B-329368; B-326944, at 17–26; B-325248, Sept. 9, 2014; B-192658, Sept. 1, 1978. We have historically required a “clear appeal” to be overt or explicit. B-304715, Apr. 27, 2005; B-270875, July 5, 1996.

Energy’s tweet does not contain such a clear appeal. The tweet refers to PPACA—“Time to discard the burdens and costs of Obamacare”—but does not directly appeal to the public to contact Members of Congress in support of pending legislation, such as the American Health Care Act, or any other bill. The linked column, in turn, also does not contain such a clear appeal. While the Secretary specifically praised the Better Care Reconciliation Act, which was being considered in Senate at that time, he never directly urged readers to lobby their legislators to pass that act.²¹ Therefore, Energy did not violate an applicable prohibition on grassroots lobbying in FY 2017.

b. Publicity or Propaganda

In fiscal year 2017, Energy was subject to section 718 of the Financial Services and General Government Appropriations Act, 2017, which provides:

“No part of any appropriation contained in this or any other Act shall be used directly or indirectly, including by private contractor, for publicity or propaganda purposes within the United States not heretofore authorized by Congress.”

Pub. L. No. 115-31, div. E, title VII, § 718. Our case law makes clear that the statute does not prohibit an agency’s legitimate informational activities. B-302992, Sept. 10, 2004; B-302504, Mar. 10, 2004; B-284226.2, Aug. 17, 2000; 31 Comp. Gen. 311 (1952); B-223098.2, Oct. 10, 1986. Three categories of communications go past that line and fall within the prohibition: purely partisan activities, covert propaganda, and self-aggrandizement.

Communications are considered purely partisan in nature if they were designed to aid a political candidate or party. B-304228, Sept. 30, 2005 (Department of Education asked a public relations firm to evaluate media perception of whether a particular political party is committed to education). The prohibition does not “bar materials that may have some political content or express support for a particular view.” B-322882, Nov. 8, 2012. Here, the tweet and the Secretary’s column to which it linked certainly advocate for Congress to enact health care legislation, but neither the tweet nor the column seek to gather information or garner support for a

²¹ You also asked us whether Energy violated the Anti-Lobbying Act, 18 U.S.C. § 1913, a law distinct from the annual restrictions on grassroots lobbying in appropriations acts. B-270875, July 5, 1996, at 1–3 (distinguishing between anti-lobbying provisions). The interpretation and enforcement of section 1913 is the responsibility of the Department of Justice, so we do not opine here on whether Energy violated section 1913.

political candidate or party. Therefore, Energy did not produce purely partisan materials.

Communications are considered covert propaganda if they fail to disclose the agency's role as the source of information. B-305368, Sept. 30, 2005 (Department of Education contracted for a political commentator to comment regularly on the No Child Left Behind Act without assuring that the agency's role was disclosed to the targeted audiences); B-302710, May 19, 2004 (Center for Medicare and Medicaid Services paid for production and distribution of prepackaged news stories that were not attributed to the agency). Here, the sources for both the tweet and the Secretary's column are identified. Energy identifies itself as the author of the Twitter account through its Twitter handle. See, e.g., B-329368 (@EPAWater handle identified EPA as the source of the information). The Secretary's column identifies the Secretary as the author. Therefore, Energy did not produce covert propaganda.

Finally, communications are considered self-aggrandizement if the materials solely emphasize the importance of the agency or one of its officials. B-302504. For example, a presidential advisory committee, the sole function of which was to advise the President, violated the law when it set up a public affairs program and hired a publicity expert. B-222758, June 25, 1986. Here, neither the tweet nor the Secretary's column to which it linked stresses the significance of Energy or the Secretary. Therefore, Energy did not engage in self-aggrandizement.

For the reasons stated above, Energy did not violate an applicable prohibition on publicity or propaganda in FY 2017.

CONCLUSION

Energy violated the purpose statute, 31 U.S.C. § 1301, when it tweeted about the Secretary's column on health care. Energy has not shown that its appropriation is available for the purpose of informing the public about health care.

Energy did not violate the prohibition on using appropriated funds for grassroots lobbying or for publicity or propaganda. Neither the tweet nor the Secretary's column to which it linked contained a clear appeal to the public to contact Members of Congress about pending legislation. In addition, neither the tweet nor the column constituted covert propaganda, purely partisan communications, or self-aggrandizement.

If you have any questions, please contact Julia C. Matta, Managing Associate General Counsel, at (202) 512-4023, or Omari Norman, Assistant General Counsel for Appropriations Law, at (202) 512-8272.

Sincerely,

A handwritten signature in cursive script that reads "Thomas H. Armstrong". The signature is written in black ink and is positioned above the printed name.

Thomas H. Armstrong
General Counsel