



B-325124.2

April 5, 2016

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate

The Honorable Jason Chaffetz
Chairman
Committee on Oversight and Government Reform
House of Representatives

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
House of Representatives

Subject: *Department of Housing and Urban Development—Application of
Section 713 of the Financial Services and General Government
Appropriations Act, 2012 (Reconsideration)*

This responds to your April 27, 2015, letter requesting that we reconsider our opinion in B-325124, June 19, 2014. In that opinion, we concluded that an Associate General Counsel of the Department of Housing and Urban Development (HUD) did not prohibit or prevent, or attempt or threaten to prohibit or prevent, a HUD Regional Director from communicating with Congress. Since that time, you have provided additional factual information that was not previously placed before us.

Based on the information available to us at that time, our June 19, 2014, opinion focused on an April 8, 2013, email from the Associate General Counsel advising that the Regional Director “not communicate with the Committee directly.” Standing alone, we concluded that the email did not violate the prohibition, but instead informed the Regional Director that HUD and the committees were negotiating the request and otherwise reflected HUD’s process for handling congressional requests. B-325124. In reaching our conclusion, we emphasized that the opinion was based on the April 8 email, examined in light of the communication between HUD and the committee known to us at that time. Our opinion here, relying on the facts set out below, including the additional information you subsequently provided our office, reaches a different conclusion.

We considered information and documents from a number of sources in reaching our legal conclusion. Your staff provided new information and documents related to the issues that were not before us in our prior opinion. Our practice when rendering decisions is to obtain the views of the relevant agency to establish a factual record and the agency's legal position on the subject matter of the request. 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. Accordingly, our office again requested and received the legal views of HUD's General Counsel regarding whether HUD's actions were in compliance with section 713. Letter from General Counsel, HUD, to Managing Associate General Counsel, GAO (Aug. 14, 2015). In addition to the information provided by your staff and HUD, we also reviewed the documents from the HUD Office of Inspector General's (OIG) investigation of the issues, including statements made under oath by various HUD officials.

For the reasons given below, after evaluating the new information and the agency's views, we conclude that HUD's General Deputy Assistant Secretary for Congressional and Intergovernmental Relations (General Deputy Assistant Secretary) and the Associate General Counsel prevented the Regional Director from being interviewed by the committee from April 8 to April 23, 2013. In our view, the General Deputy Assistant Secretary's communications with the committee during that period do not reflect a continuing negotiation of mutual accommodation with the committee to reach resolution of its request. Rather, these communications demonstrate that the negotiation had ended and the delay, in effect, became a denial to make the Regional Director available for interview. Furthermore, those communications now demonstrate that the Associate General Counsel was not simply informing the Regional Director of negotiations between HUD and the committee staff; instead, it reflected HUD's attempts to prevent the Regional Director from being interviewed.

Under section 713 of the Financial Services and General Government Appropriations Act, 2012, HUD's appropriation was not available to pay the salary of a federal officer or employee who prevents another federal officer or employee from communicating directly with any member, committee, or subcommittee of Congress.¹ Therefore, HUD's appropriation was not available to pay the salaries of the General Deputy Assistant Secretary and the Associate General Counsel while they prevented or attempted to prevent the Regional Director from being interviewed by

¹ Pub. L. No. 112-74, div. C, title VII, § 713, 125 Stat. 786, 884, 931-32 (Dec. 23, 2011). Section 713 was carried forward into fiscal year 2013 by the Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, div. F, title I, §§ 1101(a)(2), 1105, 127 Stat. 198, 412-13 (Mar. 26, 2013).

the committees. HUD should consider these salary payments improper and seek to recover the payments as required by 31 U.S.C. § 3711.

BACKGROUND

The events at issue took place over several months beginning in October 2012. The communications bolded in the following chronology were not made available to us in their entirety prior to the issuance of our previous opinion.

On October 26, 2012, the Chairman of the House Oversight and Government Reform Committee, Chairman of the House Subcommittee on TARP, Financial Services, and Bailouts of Public and Private Programs, Chairman of the House Judiciary Committee, and Ranking Member of the Senate Judiciary Committee, sent a letter to then-HUD Secretary Shaun Donovan as part of a congressional investigation into the circumstances of certain federal court litigation and requested copies of a number of HUD documents. They also requested that HUD make four officials available for transcribed interviews: the General Counsel; the Deputy Assistant Secretary for Enforcement and Programs; the Associate General Counsel, Office of Program Enforcement; and the Regional Director of Fair Housing and Equal Opportunity, Region V. *Id.*

On December 17, 2012, a HUD Assistant Secretary provided documents to the committees and offered a staff briefing and *in camera* review of additional documents. Subsequently, a Principal Deputy Assistant Secretary and a Principal Deputy General Counsel provided a staff briefing.

On February 4, 2013, Chairmen Issa and Goodlatte sent a letter to Secretary Donovan. The letter stated that the Chairmen were “disappointed that HUD has not fully complied” with the requests of the October 26, 2012, letter and, accordingly, “[they] therefore write to renew the requests.” The letter acknowledged the documents and staff briefing and that the committees had accepted the HUD Assistant Secretary’s offer as a first step for information gathering without waiving the right to production of all responsive documents and transcribed interviews. However, the letter stated that “the staff briefing and *in camera* review of documents have failed to adequately clarify HUD’s role” in the matter under investigation and that the individuals who provided the briefing “were unable to answer several basic factual questions about the timeline of events and the actions of HUD officials.” The letter concluded that if “HUD does not produce the requested documents and schedule the requested interviews by February 13, 2013, the committees will be forced to consider use of compulsory process.”

By March 13, 2013, none of the requested transcribed interviews had been scheduled. On that day, Chairmen Issa and Goodlatte sent a letter directly to the Regional Director. The letter recounted the requests for a transcribed interview that the Chairmen had previously made by letters dated October 26, 2012, and February 4, 2013. It stated that “[t]hus far, HUD has refused to make you available

for a transcribed interview. If HUD continues to decline to make you available for a transcribed interview, the Oversight Committee will be forced to use compulsory process." The letter asked the Regional Director to contact committee staff by March 18, 2013, to make the necessary arrangements for the interview.

On April 8, 2013, the Regional Director still had not appeared for a transcribed interview. On that day, committee staff emailed the General Deputy Assistant Secretary, stating that the committee had outstanding requests to interview two individuals, including the Regional Director. The emails stated that it was "imperative" to interview these individuals and that the committee wished to schedule the interviews "preferably this week." Committee staff also contacted the Regional Director about the request. The Regional Director forwarded this email to the Associate General Counsel and requested: "[P]lease advise." Later that afternoon, the Associate General Counsel replied: "We are in regular consultation with the [c]ommittee about these requested interviews. Please do not communicate with the [c]ommittee directly. If necessary, refer requests/questions back to [the General Deputy Assistant Secretary]."

On April 9, 2013, the General Deputy Assistant Secretary emailed committee staff, stating that HUD had made "significant accommodations" to the committees with respect to the matter, including making the General Counsel and Deputy Assistant Secretary for Enforcement and Programs available for transcribed interviews the prior week. The email further stated that HUD did not agree with the committees' "characterization of [the] testimony with respect to the [other two requested interviewees], but because of the extensive work this week on the release of the 2014 budget and the first HUD budget hearing on Thursday, we will not be able to respond this week to your request. We do expect to discuss your email and your request as soon as possible and to respond next week." The email further stated that the two HUD employees requested for interviews had forwarded correspondence to him and that the committee staff would receive a single response from HUD to their request.

On April 10, 2013, committee staff replied to the General Deputy Assistant Secretary: "HUD's continual refusal to make [the Regional Director and another HUD employee] available for transcribed interviews is unacceptable." The email further stated that "at your request the [c]ommittee refrained from issuing subpoenas for depositions for [the Regional Director and another HUD employee] based on your personal assurance that HUD would entertain the [c]ommittee's request if the [c]ommittee felt that it still needed to speak with [the Regional Director and another HUD employee] after speaking with [two other HUD employees]." The email also stated that "[w]e must insist on interviewing [the Regional Director and another HUD employee] no later than next week. Please contact me as soon as possible to schedule the interviews."

Later that same day, the General Deputy Assistant Secretary replied: “Respectfully, we indicated that we would be willing to consider (or entertain as you put it) the request re [the Regional Director and another HUD employee] but NOT that we would or could immediately agree, particularly since we are literally now involved in budget rollout and a budget hearing tomorrow, so I do NOT believe we are acting either disingenuously or in bad faith. As I stated in the previous email, we will discuss your email and your request as soon as possible and will respond next week.”

On April 11, 2013, committee staff replied: “I’m trying to work with you here, but you are offering excuses that fly in the face of the facts—namely, that we have been requesting these interviews since October of last year and you should have had every expectation per our agreement that you would need to discuss our request for the [two] interviews following the conclusion of [the other two interviews]. Given that your budget hearing will be over after today, is there any reason why we could not talk tomorrow to schedule the interviews?”

On April 17, 2013, committee staff emailed again: “[Y]ou did not respond to my email from last Thursday. It is now Wednesday, and despite your assurances you have not contacted me to schedule the transcribed interviews. Again, we need to schedule the transcribed interviews of [the Regional Director and another HUD employee] as soon as possible. When are they available?”

On April 18, 2013, the General Deputy Assistant Secretary replied:

“As you know, HUD has made extensive efforts to accommodate the [c]ommittee’s requests concerning [the federal court litigation], including providing more than 2200 pages of HUD documents and making both [the General Counsel and Deputy Assistant Secretary] available for transcribed interviews. As [the General Counsel] explained, she was the OGC official who made the decisions with respect to recommendations on intervention in the [federal] cases. [The General Counsel] answered all questions asked about the basis for her decisions relating to those cases . . . and about her communications with others on the subject. [The Deputy Assistant Secretary] was the FHEO official who provided information to OGC about [the matter].

We have considered again your requests to interview [the Regional Director and another HUD official], two veteran career HUD employees. In light of the extensive information the agency has provided during this investigation, in particular the voluntary interviews of those HUD officials who communicated directly with [a government official] and participated as described above in the

decision-making process, we do not believe the [c]ommittee has shown a particularized need for the additional interviews sufficient to overcome the long-standing institutional concerns raised by such questioning of career line employees.”

We also note that neither [the General Counsel nor the Deputy Assistant Secretary] was given the opportunity to review and submit possible corrections to the transcript of their interviews, as you and [another congressional staffer] had represented would occur and is in accord with [c]ommittee procedures. Quotes from both unreviewed transcripts are contained in the report you released on Monday. We hope that you will make the transcripts available for review as soon as possible.”

On April 19, 2013, committee staff replied: “I will advise the Chairman of your continued refusal to make [the Regional Director and another HUD employee] available for transcribed interviews.” The email further stated that officials who had been interviewed or their representatives at HUD were welcome to review their respective transcripts at the [c]ommittee’s offices at any time and submit proposed corrections which would be included as part of the permanent record.

Later that day, the General Deputy Assistant Secretary replied: “My understanding was that we were to be told by [c]ommittee staff precisely when the transcripts were complete and would be available for review, but we did not receive such notification. Now that we have, we will get in touch with you and [another individual] promptly on Monday and arrange such a review.”

On April 23, 2013, committee staff contacted the Regional Director directly. The email stated that the Chairman of the House Committee on Oversight and Government Reform had authorized the issuance of a subpoena to compel his appearance and they were going to serve it that day. The email asked if the Regional Director would accept service of the subpoena by email; otherwise, they would make alternative arrangements for service. The email stated that if the Regional Director had hired personal counsel to represent him, to have the personal counsel contact the committee as soon as possible that day.

Later that day, the Associate General Counsel emailed committee staff: “I just left you a voicemail. I am prepared to engage with you on the withdrawal of the deposition subpoena in exchange for an agreement for transcribed interviews. Please give me a call Thanks.” Later that day, the Associate General Counsel and congressional staff made arrangements for the Regional Director to sit for a transcribed interview on May 2, 2013, more than six months after the Chairmen sent their first letter requesting the interviews.

On May 2, the Regional Director met with the committee staff for a transcribed interview.² During the interview, the Regional Director was asked about the committees' requests to interview him beginning on October 26, 2012:

“Q [The] committees first wrote to Secretary Donovan October 26, 2012, to request you be made available for a transcribed interview. Were you aware of this request at this time?

A Yes.

Q. Were you willing to speak with the committees at this time?

A. Yes.

Q. Why didn't you speak with the committees at that time?

A. On the advice of HUD's counsel, I was instructed not to.

Q. The committee again wrote to Secretary Donovan on February 4th of 2013 reiterating the request. Were you aware of the request at that time?

A. Yes.

Q. And were you willing to speak with the committees at that time?

A. Yes.

...

Q. [O]n March 13, 2013, the committees wrote again directly to you this time reiterating the request for an interview. Did you receive this letter?

A. Yes.

...

² The quotes below are excerpted from the congressional request letter for our prior opinion in B-325124, June 19, 2014. Letter from Ranking Member of the Committee on the Judiciary, United States Senate, Chairman of the Committee on Oversight and Government Reform, House of Representatives, and Chairman of the Committee on the Judiciary, House of Representatives, to the General Counsel, GAO (Aug. 1, 2013), at 2–3. GAO did not receive the full transcript of the interview.

Q. Were you willing to speak with the committees at that time?

A. Yes.

Q. And on April 8, 2013, staff of the Oversight Committee emailed you requesting that you schedule an interview. Did you receive this email?

A. Yes, sir.

Q. And were you willing to speak with the committees at that time?

A. Yes.

Q. April 23, 2013, staff of the Oversight Committee emailed you, again seeking to schedule an interview. Did you receive this email?

A. Yes.

Q. And were you willing to speak with the committees at that time?

A. Yes."

In statements provided under oath to the HUD OIG, the Regional Director stated that "he was never told '[n]ot to testify' by anyone." He said he was told by the Associate General Counsel that "it was not normal agency practice to have lower level bureaucrats testify" and that the Associate General Counsel was negotiating with the committee as to the Regional Director's testimony's relevance and extent.

In statements provided under oath to the HUD OIG, the General Deputy Assistant Secretary stated that while "it was acceptable to request political appointees . . . [to be interviewed], . . . career employees, such as [the Regional Director] were not normal." The General Deputy Assistant Secretary also stated that "the [c]ommittee continued to push for . . . [the Regional Director], although [the General Deputy Assistant Secretary] did not think that was appropriate." He further stated that "the [c]ommittee did not significantly justify why the [c]ommittee wanted career HUD employees to appear." Referring to the HUD career employees, the General Deputy Assistant Secretary also stated that "no one ever told them . . . don't go talk to [the committee]."

In statements provided under oath to the HUD IG, the Associate General Counsel stated that he "advised the witnesses that his office was negotiating with the [c]ommittee and their testimony may not be required." He further stated that he "objected to the relevance of the individuals requested by the [c]ommittee and that the [c]ommittee never clarified why the specific individual's testimony was needed."

The Associate General Counsel stated that HUD officials and the committee “were negotiating which testimony, witnesses and documents were going to be acceptable to both parties.” He further noted that “this was a normal course of business for these types of hearings, although he thought this one went a bit further because of the subpoena threat.”

DISCUSSION

The issue here is whether HUD, through the actions of the General Deputy Assistant Secretary and the Associate General Counsel, prohibited or prevented, or attempted or threatened to prohibit or prevent, the Regional Director from participating in the requested transcribed interview. If so, then HUD’s appropriation was unavailable to pay the salaries of those persons who prohibited or prevented, or attempted or threatened to prohibit or prevent, such communications. Section 713 provides as follows:

“No part of any appropriation contained in this or any other Act shall be available for the payment of the salary of any officer or employee of the Federal Government, who . . . prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress in connection with any matter pertaining to the employment of such other officer or employee or pertaining to the department or agency of such other officer or employee in any way, irrespective of whether such communication or contact is at the initiative of such other officer or employee or in response to the request or inquiry of such Member, committee, or subcommittee.”

Pub. L. No. 112-74, § 713.

This provision has its antecedents in several older pieces of legislation, including the Treasury Department Appropriation Act of 1972, the Lloyd-La Follette Act of 1912, and the Civil Service Reform Act of 1978. B-302911, Sept. 7, 2004, at 4–9. The legislative history of these antecedents informs our analysis because of the similarity of wording of these provisions and the references that the sponsors of later provisions made to earlier acts. We do not repeat all of the history detailed in our 2004 opinion, but there are a few key references that we emphasize.

In several of the floor debates, hearings and committee reports underlying these various provisions, it is clear that Congress intended to advance two goals in enacting the governmentwide prohibition, with one being to preserve the First Amendment rights of federal employees and the other being to ensure that Congress had access to programmatic information from frontline employees. *Id.*, at 9. It is the latter that is of importance here.

For example, while much of the debate on the Lloyd-La Follette Act of 1912, enacted in response to executive orders by Presidents Theodore Roosevelt and Howard Taft restricting federal employees' communications with Congress, focused on preserving the constitutional rights of federal employees, Members of Congress also raised concerns that the executive orders would foreclose an important source of information for Congress.

There were similar debates in Congress when considering a prohibition contained in the Treasury Department Appropriation Act of 1972, which involved a Postal Service directive stating that the Congressional Liaison Office was to be the sole voice of the Postal Service in communicating with Congress in order to avoid incorrect information and misinterpretation and that postal employees must cease direct or indirect contacts with congressional offices on matters involving the Postal Service. 117 Cong. Rec. 151 (1971). Members complained that the Postal Service's directive interfered with the right of Members of Congress to inquire directly to a regional office or local postmaster and obtain an answer because now questions would be referred to Washington and unnecessary delays would ensue. B-302911, at 6.

Congress expressed many of these same concerns during the debate surrounding whistleblower provisions in the Civil Service Reform Act. *Id.*, at 8. The Senate Committee on Governmental Affairs noted:

“Federal employees are often the source of information about agency operations suppressed by their superiors. Since they are much closer to the actual working situation than top agency officials, they have testified before Congress, spoken to reporters, and informed the public Mid-level employees provide much of the information Congress needs to evaluate programs, budgets, and overall agency performance.”

Senate Comm. on Governmental Affairs, 95th Cong., *The Whistleblowers*, 40 (Comm. Print 1978). These concerns led to the enactment of the first whistleblower protections and the codification of the Lloyd-La Follette Act. Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, 1114, 1217 (Oct. 13, 1978), *codified at* 5 U.S.C. §§ 2302, 7211.

In this case, we address the Regional Director's statement on May 2, 2013, that he was instructed not to speak to the committees. We also address the actions and communications of the HUD officials involved in responding to the committees' requests.

To address the statement made by the Regional Director on May 2, 2013, that he was instructed not to speak to the committees, we reviewed the timeline and communications provided to us between the committees' first request to interview HUD officials and the date that the officials were ultimately interviewed. The committees first requested documents and interviews of several HUD officials by

letter dated October 26, 2012. As described above, the record shows that HUD officials provided access to documents and provided a staff briefing in mid- to late December 2012. Thereafter, on February 4, 2013, the Chairmen sent a letter to HUD acknowledging the documents and staff briefing and that the committees had accepted the HUD Assistant Secretary's offer as a first step for information gathering without waiving the right to production of all responsive documents and transcribed interviews. However, the committees stated that the staff briefing and *in camera* review of documents had failed to adequately clarify HUD's role and reiterated their previous requests for documents that had not been provided and the transcribed interviews of HUD officials.

Later communications between HUD and the committee staff also demonstrate continued negotiations between them regarding the interviews of two HUD officials, without resolving the interviews of the Regional Director and a remaining HUD official.

On April 8, we find an instruction by HUD to the Regional Director to not communicate with committee staff. Although the Regional Director stated during his transcribed interview that he was willing to speak to the committee at the time of the October 26 letter and was instructed by HUD counsel not to do so, in sworn statements provided to the HUD OIG, he provided further explanation. In his sworn statement, the Regional Director stated that "he was never told '[n]ot to testify' by anyone." He said he was told by the Associate General Counsel that "it was not normal agency practice to have lower level bureaucrats testify" and that the Associate General Counsel was negotiating with the Committee as to the Regional Director's testimony's relevance and extent. The communications between the Committees and HUD between October 26 and February 4 demonstrate that there were indeed ongoing negotiations between the parties on the documents and interviews HUD would provide. This is underscored by the February 4 letter from the committee that acknowledged HUD had provided documents and a staff briefing, and that the committees had accepted the HUD Assistant Secretary's offer as a first step for information gathering. Further, communications between the committee and HUD between February 4 and April 8 resulted in the additional production of HUD officials for interviews, although not the interview of the Regional Director.

Based on the record before us, there were two HUD officials who played key roles in responding to the committees' request to interview the Regional Director: the General Deputy Assistant Secretary for Congressional and Intergovernmental Relations and the Associate General Counsel. The General Deputy Assistant Secretary acted as the primary liaison between Congress and HUD. In that role, he acted as HUD's official representative to respond to the committees' request for interviews, carrying out extensive email exchanges with congressional staff and communicating HUD's decisions and views. For example, after receiving an email on April 8 from the committee requesting a transcribed interview as soon as possible, the Regional Director forwarded the email to the Associate General Counsel stating "Please advise," but did not reply to the committee staff himself, nor

did he make arrangements for or present himself for an interview as specifically requested by the committee. Rather, it was General Deputy Assistant Secretary that communicated with the committee about what HUD would, and would not, do in response to the April 8 email from the committee. Therefore, it is important to examine the statements and actions of the General Deputy Assistant Secretary to determine whether he prevented or attempted to prevent the Regional Director from being interviewed by committee staff.

The Associate General Counsel also participated in the communications with the committee and within HUD regarding the agency's response to the requests from the committee. The Associate General Counsel communicated with HUD officials, including the Regional Director, to obtain documents and information to respond the committees' October 26, 2012, request. The Associate General Counsel participated in providing a briefing to committee staff in December 2012. The Associate General Counsel communicated with committee staff regarding HUD's position regarding making the Regional Director available for interview by the committee. Therefore, we also examine the statements and actions of the Associate General Counsel to determine whether he prevented or attempted to prevent the Regional Director from being interviewed by committee staff.

The facts in this case are in contrast to those we examined in B-325124, our earlier opinion on this issue. What was put before us, and we addressed, was the extent to which a single email, sent on April 8 from the Associate General Counsel to the Regional Director, violated section 713. This email, which we examined in the context of facts investigated and documented in four memoranda prepared by the HUD OIG, requested that the Regional Director "[p]lease . . . not communicate with the [c]ommittee directly" and refer requests back to the General Deputy Assistant Secretary. We concluded that the Associate General Counsel's email was informing the Regional Director of the status of HUD's ongoing discussions with the congressional requesters regarding such interviews, and we noted that the Regional Director himself understood that the Associate General Counsel was discussing and negotiating with the congressional requesters as to the relevance and extent of the Regional Director's testimony.

In this reconsideration, we now have additional communications between the General Deputy Assistant Secretary and the committee, and it is important to read the Associate General Counsel's email in this context. As we explain below, these communications demonstrate a documented pattern of delay and refusal to schedule the transcribed interview in question because in the view of the General Deputy Assistant Secretary and the Associate General Counsel, the Committee had not justified its need for the testimony. The Associate General Counsel's April 8 email viewed in light of these more recently provided communications, indicates that the Associate General Counsel was joining in and advancing the General Deputy Assistant Secretary's efforts of delay and refusal to schedule the transcribed interview in question.

Communications subsequent to April 8 underscore patterns apparent in earlier emails of delay and implicate the General Deputy Assistant Secretary. In response to an April 10 email from the committee insisting that the Regional Director and another HUD employee be interviewed no later than the following week, and requesting that the General Deputy Assistant Secretary contact them to schedule the meeting, the General Deputy Assistant Secretary stated that in prior negotiations HUD was “willing to consider” the request “but NOT that we would or could immediately agree” Here, the communication reveals that the General Deputy Assistant Secretary, on behalf of HUD, was not negotiating the logistics surrounding scheduling the interviews, such as the time, date, or circumstances of the interview; rather, the General Deputy Assistant Secretary stated that HUD had *not* agreed to provide the witnesses at all at that point.

Similarly, the General Deputy Assistant Secretary failed to reply to an April 11 committee email asking in part whether there was “any reason why we could not talk tomorrow to schedule the interviews” until April 18. The General Deputy Assistant Secretary’s reply to this email occurred after having received another email from the committee on April 17 specifically noting his lack of reply and again stating that the transcribed interviews need to be scheduled as soon as possible. The General Deputy Assistant Secretary replied on April 18: “[W]e do not believe the [c]ommittee has shown a particularized need for the additional interviews sufficient to overcome the long-standing institutional concerns raised by such questioning of career line employees.”

It is clear to us that the obstacle here was not additional time needed to arrange for the logistics of the request, but rather HUD’s view that the committee’s request does not warrant HUD’s production of the employees for an interview. Here, again, the General Deputy Assistant Secretary was not attempting to reach resolution of the requests of Members and their staff, but rather denying the committee’s request. Further evidencing this denial is the fact that, even when committee characterizes General Deputy Assistant Secretary’s April 17 email as a “continued refusal” to make the employees available, the General Deputy Assistant Secretary does not attempt to recharacterize what the committee has deemed a refusal in his reply to the committee, nor does he schedule such interviews.

In fact, HUD did not agree to provide access to the Regional Director until the committee stated that it planned to use its subpoena power. The Associate General Counsel’s email to the committee on April 23 stating the willingness at that time to “engage with you on the withdrawal of the deposition subpoena in exchange for an agreement for transcribed interviews” evidences an offer to allow the Regional Director to appear for a transcribed interview in exchange for the withdrawal of the subpoena. It was not the result of ongoing negotiations between HUD and the committee regarding the logistics of the time and place of the interview.

An implied or overt consequence is strong evidence of an attempt to prevent or prohibit an employee from communicating with Congress. B-302911 (Chief Actuary

had been warned that there would be “extremely severe” consequences should the Chief Actuary communicate with Congress, and that the Chief Actuary had interpreted this warning to mean that his employment would be terminated if he were to communicate with Congress as Congress had requested). However, it is not the only circumstance under which an agency may violate the section 713 prohibition. The section 713 prohibition goes to the fact of denial—not whether the employee felt threatened. Here it was the General Deputy Assistant Secretary’s pattern of delay and refusal and the Associate General Counsel’s April 8 message to the Regional Director that effectively blocked the committee’s access to the Regional Director.

HUD’s position is that the additional emails and other information provided to us do not contradict the facts or legal analysis of our prior opinion in B-325124. HUD further emphasizes that it sought to accommodate the congressional requests in accordance with law and its regular practice by seeking responsive documents, making them available for *in camera* review, providing a staff briefing and making witnesses available for interview. In his interview with the OIG, the Associate General Counsel emphasized that their discussions were part of a mutual accommodation process between HUD and the committee and that the committee did not justify or clarify why the Regional Director’s testimony was needed. HUD emphasizes that the Regional Director was, in fact, eventually interviewed by the committee.

We agree that HUD and the committee engaged in a mutual accommodation process for a period of time. This mutual accommodation process in fact took place over the preceding months. However, there reached a point where the process had ended and the delay, in effect, became a denial to make the Regional Director available for interview. HUD’s continued insistence that the committee justify its need after months of the committee stating its need to interview the Regional Director, prevented the Regional Director from testifying. HUD’s position fails to recognize that the totality of the circumstances and communications between the General Deputy Assistant Secretary and the committee staff demonstrate that HUD officials, the General Deputy Assistant Secretary and the Associate General Counsel, over the time period of two weeks, were attempting to prevent and did prevent the Regional Director from being interviewed because HUD did not agree that the committee had shown the need for the interview. It was not until the committee was prepared to serve a subpoena that HUD officials agreed to and scheduled the interview of the Regional Director.

We conclude that General Deputy Assistant Secretary and the Associate General Counsel prevented the Regional Director from having direct communications with the committees from April 8 to April 23, 2013, in violation of the section 713 prohibition. We recognize that executive agencies have the right to designate official spokesmen for the agency and institute policies and procedures for the release of agency information and positions to Congress and the public. B-302911, at 11. We are not concluding that an agency cannot communicate its views to Congress regarding congressional requests or attempt to work out accommodations with

respect to information, documents or testimony sought by congressional committees, including identifying the officials or employees the agency believes are in the best position to answer questions or provide information to Congress. However, here the agency went further than negotiating with the committee on the appropriate employees or officials to answer the questions posed by the committee. Once the committee had interviewed the officials and reviewed the documents provided by HUD, the committee determined the information provided was not sufficient and continued to request interviews of other HUD employees. On the basis of the particular facts put before us, the agency reached a point at which it told the committee that it had not shown, to the agency's satisfaction, that it had a need to interview the Regional Director. At this point, the delay became something more: the agency prevented or attempted to prevent an employee from communicating with Congress in violation of section 713.

CONCLUSION

The General Deputy Assistant Secretary and the Associate General Counsel prevented the Regional Director from having direct communications with the committees from April 8 to April 23, 2013, in violation of section 713. The General Deputy Assistant Secretary's communications with the committee during that period do not reflect a continuing negotiation of mutual accommodation with the committee to reach resolution of its request. Rather, the communications demonstrate that the delay became a denial to make the Regional Director available for interview. The communications also demonstrate that the Associate General Counsel was not simply informing the Regional Director of negotiations between HUD and the committee; instead, it also reflected HUD's attempts to prevent the Regional Director from being interviewed. HUD's appropriation was not available to pay the salaries of these employees from the point in time that the delay became a refusal until the time HUD agreed to schedule the interview with the Regional Director. HUD should consider these salary payments improper. Therefore, we recommend that HUD seek to recover these payments, as required by 31 U.S.C. § 3711.

If you have any questions, please contact Edda Emmanuelli Perez, Managing Associate General Counsel, at (202) 512-2853 or Katherine Lenane, Assistant General Counsel, at (202) 512-2792.

Sincerely yours,



Susan A. Poling
General Counsel