

Testimony before the U.S. House of Representatives
Committee on Financial Services
Subcommittee on Oversight and Investigations

“Investigation of HUD Lobbying Activities”



Testimony of
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Chairman McHenry, Ranking Member Green, and Members of the Subcommittee, I am David A. Montoya, Inspector General of the U.S. Department of Housing and Urban Development (HUD). Thank you for the opportunity to testify regarding our investigation of HUD lobbying activities.

The HUD Office of Inspector General (OIG) is one of the original 12 Inspectors General authorized under the Inspector General Act of 1978. The OIG strives to make a difference in HUD's performance and accountability. The OIG is committed to its statutory mission of detecting waste, fraud, abuse, and mismanagement as well as promoting the effectiveness and efficiency of government operations. While organizationally located within the Department, the OIG operates independently with separate budget authority. This independence and our impartiality are imperative and allow for clear and objective reporting to the Secretary and to the Congress.

The HUD-OIG received a request dated August 28, 2013 from Representative Patrick McHenry, Chairman, U.S. House of Representatives, Committee on Financial Services, Subcommittee on Oversight and Investigations (Subcommittee) regarding an e-mail communication sent by former HUD Deputy Secretary Maurice Jones on July 31, 2013. The e-mail communication was addressed to "friends and colleagues" and called on the recipients to contact specific U.S. Senators and encourage them to vote in favor of procedural motions to advance Senate consideration of S. 1243, legislation making appropriations for fiscal year 2014 for the Department of Transportation, HUD, and Related Agencies. At the time, this matter was pending before Congress. The e-mail communication urged recipients to oppose certain amendments and suggested that recipients encourage named Senators to support final passage of the bill. The Subcommittee asked HUD-OIG to thoroughly investigate this matter and advise the Subcommittee whether HUD's actions violated any federal law.

Also on August 28, 2013, the Subcommittee sent a letter to the Government Accountability Office (GAO), requesting that GAO's Office of the General Counsel investigate the sending of the above referenced e-mail communication and determine if any appropriations laws were violated. The Subcommittee requested GAO issue a formal opinion on this matter. GAO deferred action on that request, pending completion of the HUD-OIG investigation. Accordingly, we have forwarded our completed investigation to GAO for their use in responding to the Subcommittee's request. Therefore, our conclusions with respect to HUD's compliance with federal appropriations laws are preliminary, pending GAO's review and determination.

The facts of our investigation were reviewed with the Department of Justice (DOJ). DOJ declined to open a criminal investigation into this matter and deferred to HUD-OIG to refer the matter to the Department for any administrative action it deemed appropriate.

Legal Restrictions and HUD's Anti-Lobbying Policy

The primary statute pertaining to lobbying by federal employees is commonly known as the Anti-Lobbying Act. This Act restricts career federal officials from lobbying Congress, particularly with respect to engaging in grass roots activities aimed at influencing pending legislation. This law does not apply to the lobbying activities undertaken by the President, his aides and assistants within the Executive Office of the President, the Vice President, cabinet

members within their areas of responsibility, and other Presidentially Appointed, Senate Confirmed (PAS) officials.

In addition to the Anti-Lobbying Act, there are additional areas of restrictions on lobbying Congress by federal personnel, as well as by non-federal personnel who work for organizations that receive federal funds. Congress generally includes riders to the annual appropriations bills that prohibit federal personnel from engaging in certain types of lobbying activities, and that generally apply as well to non-federal entities that receive federally appropriated funds. The riders typically include language that restricts the use of appropriated funds for publicity or propaganda purposes directed at legislation pending before Congress. As an appropriations measure, these provisions are subject to interpretation and enforcement by GAO. The Comptroller General has interpreted these restrictions to apply primarily to expenditures involving direct appeals addressed to the public suggesting that they contact their elected representatives and indicate their support of or opposition to pending legislation, i.e., appeals to members of the public urging them to contact their representatives to vote in a particular manner.

At the time the July 31, 2013 e-mail was drafted and sent, HUD's internal policy and guidance as contained in Restrictions on Lobbying by Federal Employees, dated July 6, 2011, prohibited any HUD employee (including PAS officials) from encouraging anyone to contact Congress in support of or in opposition to pending legislation. This policy, approved by HUD's Office of General Counsel (OGC) and published on HUD-OGC's internal webpage, stated:

PAS employees may not organize or encourage "grass roots" lobbying campaigns designed to urge others to pressure Members of Congress to support or oppose any pending legislation or appropriation. (Emphasis included).

The prohibition is raised again in the policy where it addresses permissible on-duty activities:

The anti-lobbying statute does not prohibit Department communications designed to inform the public about Administration or HUD positions, or to promote those positions, as long as the communication does not solicit pressure on Congress. (Emphasis added).

The Department may send unsolicited materials, such as press releases, fact sheets, copies of speeches, and similar materials, to persons and organizations that may be reasonably expected to have an interest in the subject matter. Such materials may not, however, urge the recipients to contact Members of Congress. (Emphasis added).

In addition to the policy in place for all employees, a separate memo from HUD's General Counsel Helen Kanovsky was addressed to PAS employees on June 21, 2011 regarding restrictions that PAS employees are subject to. It should be noted that our investigation determined Elliot Minberg (Minberg), then a Senior Counsel in HUD-OGC, helped to draft this policy. Specifically, the memo stated that Federal employees, including PAS employees are prohibited by the Consolidated Appropriations Act, 2010 from using appropriated funds to encourage anyone to contact Congress in support of or in opposition to pending legislation. The memo went on to discuss the types of activities that, permissible before legislation is introduced, would be prohibited after legislation is introduced. While this memo was written to caution PAS

employees while advocating for the HOME Investment Partnerships Program, the prohibitions described clearly pertained to any legislation.

HUD's Interest in Fiscal Year 2014 Funding Bills

HUD's internal policies regarding lobbying were long-standing and designed to create not only the appearance of ethical behavior but included actual guidelines to ensure ethical behavior with regard to lobbying by all employees of the Department including PAS officials. In spite of clear Departmental policies, which were rooted in statutory provisions, our investigation disclosed there was an interest on the part of Minberg, who at this time was HUD's General Deputy Assistant Secretary for Congressional and Intergovernmental Relations, for HUD to be "more aggressive" in its lobbying activities. In the events leading up to the July 31, 2013 e-mail, HUD was particularly focused on the ongoing Congressional deliberations regarding HUD's fiscal year 2014 appropriations bills. The Administration was "strongly" supporting the Senate funding bill (S. 1243) and "strongly" opposing the House bill (H.R. 2610), as reflected in two statements of policy issued by the Office of Management and Budget on July 22 and 23, 2013. It was this backdrop that appeared to motivate this employee to advocate a "more aggressive" lobbying posture. HUD's interest in this legislation is reflected in the July 31, 2013 e-mail in question which states in part:

The difference between the House and Senate 'marks' could not be more stark. The Senate bill provides over six billion dollars more in budget authority to HUD and its programs than the House bill H.R. 2610, which was also voted out of Committee on June 27. Put simply, the Senate bill supports HUD's core rental assistance, homeless, and block grant programs and makes key investments in critical, newer initiatives, including Choice Neighborhoods and the Sustainable Communities Initiative. In contrast, the House bill puts the vulnerable HUD assistance recipients at risk and eliminates ladders of opportunity for middle class Americans.

Our investigation disclosed that the decision to send the July 31, 2013 e-mail was a continuation of a series of "stakeholder calls" that Deputy Secretary Jones' office had been conducting. The Deputy Secretary in interviews described the e-mail as part of the process of informing stakeholders (individuals such as public and elected officials and others with an interest in HUD programs) about the status of HUD's appropriations and about current developments. Before the e-mail was sent, Minberg approached HUD's chief ethics attorney, Associate General Counsel, Office of the Deputy General Counsel for Ethics, Appeals and Personnel Law, Peter Constantine (Constantine) and generally discussed an interest in preparing correspondence in the area of lobbying that would be "more aggressive." While Constantine told Minberg that there was a "basis to do it," and that certain activities may be undertaken by individuals who occupy PAS positions, he also cautioned Minberg about prohibitions against certain activities by individuals in PAS positions where an appropriation is involved. Constantine stated that Minberg never mentioned the correspondence that was being contemplated was an e-mail communication, nor did HUD's general counsel review the actual e-mail before it was sent.

HUD Officials' Actions Created the Appearance of Impropriety

While our investigation did not result in criminal prosecution, it did discern an institutional failure to follow HUD's existing internal policies. HUD's actions display the appearance of impropriety and of ethical regressions. There were breakdowns in communication and in responsibility and a failure to adhere to existing policies and procedures. This led to placing the Department and its second highest ranking official, the Deputy Secretary, into an embarrassing situation, one that leaves an impression of lapses in judgment and in ethical decision-making.

As an action that involved adherence to statutorily defined prescriptions, the decision to send the e-mail should have been more fully vetted along with a more thorough review of its content and its list of recipients. For example, the Chief Ethics Attorney, Constantine was not sufficiently engaged in the process. We determined that Constantine had two short conversations with Mincborg, including one in a hallway, about Mincborg's desire to "be more aggressive in lobbying efforts." While Mincborg claimed these meetings to have been substantive, he did not produce specific correspondence to be reviewed. Mincborg stated that during these meetings he received approval from Constantine to "...be more aggressive in lobbying efforts." As an attorney who had previously been assigned to HUD-OGC, Mincborg should have been aware that brief general discussions do not equate to a legal review and should have been more diligent in following up with Constantine.

Constantine's version of the meetings differed from Mincborg's. Constantine stated he advised Mincborg that there was a "basis to do it," but not that it should be done. Constantine described this difference in interpretation as a confluence of misunderstanding and miscommunication as well as nuances within the Anti-Lobbying Act. Constantine's position was that his and Mincborg's understanding of earlier conversations were "not exactly the same." He surmised that Mincborg believed he had said "they could send" the correspondence, as opposed to there was a "basis to send" the correspondence. For his part, Constantine should have been aware that his informal advice could be misconstrued and should have asked Mincborg to request a more thorough legal review.

When he did see the e-mail after the fact, Constantine described being "taken aback" and struck by two things; first that the e-mail was certainly lobbying pending an appropriation and second, the e-mail was sent on behalf of the Deputy Secretary and not by the Deputy Secretary himself. According to Constantine, this was inappropriate and it should not have been sent by anyone other than the Deputy Secretary. Had a legal review of the e-mail been performed before it was sent, it may have prevented the violations reported in our investigation.

The lack of proper vetting was particularly evident when one examines the types of organizations represented on the list of e-mail recipients. During our investigation, witnesses consistently told us that the recipient list was a compilation of pre-existing e-mail lists maintained by different HUD officials and that the resulting merged list of recipients was not vetted or changed. As a result, the e-mail was also sent to 46 HUD employees. While we have no evidence that HUD employees were part of the targeted audience, the fact remains that HUD employees received an e-mail sent on behalf of the Deputy Secretary, asking in specific terms that they contact certain Senators to support S.1243. While evidence from our investigation indicates this was inadvertent on the part of the Deputy Secretary, the lack of due diligence by Mincborg, Constantine and

those preparing the recipient list may have caused the Deputy Secretary to commit a prohibited personnel practice and to violate federal law prohibiting an official from coercing a federal employee's political activities.

Finally, and equally problematic, was the fact that the e-mail was sent to individuals at organizations which receive HUD funding. Such organizations are generally prohibited from using federal funds to carry out certain lobbying activities. The e-mail asked these individuals to engage in activities that could violate federal law if federal funds were used to carry them out. The e-mail should have cautioned the recipients not to use any federal funds. Particularly noteworthy was the fact that one of the recipients, a large public housing authority, had recently been found by HUD-OIG to have violated federal requirements by using federal funds to carry out lobbying activities.

The Appearance that HUD Officials Changed Existing Policy in an Attempt to Legitimize Their Actions

As noted previously, HUD's anti-lobbying policy in effect at the time the July 31, 2013 e-mail was drafted and dispatched, did not allow PAS officials to suggest to client organizations that they urge or pressure members of Congress regarding any pending legislation or appropriation.

A separate policy memorandum to PAS employees addressed restrictions from using appropriated funds to encourage anyone to contact Congress in support of or in opposition to pending legislation. These restrictions for PAS employees were removed from the revised policy and replaced with a word of caution regarding grass-roots lobbying activity and a requirement that written materials proposed to be distributed as part of grass-roots lobbying activities be cleared by HUD-OGC in advance.

After receipt of a Subcommittee on Investigations and Oversight request to HUD for answers to a list of questions regarding the propriety of the e-mail transmission, Minberg leaves the impression that he took steps to conceal or cloud the fact that the July 31st e-mail violated HUD's existing internal anti-lobbying policy when he spearheaded the removal of that policy from HUD's internal web site a week after receiving the Subcommittee's letter. During our investigation, Minberg characterized his involvement in the removal and rewrite of the policy as "not a lot" and stated he was "not the author of the new policy." Minberg stated the rewrite of the policy was HUD-OGC's responsibility and the drafting of the new policy was done by HUD-OGC.

While the policy revision was a HUD-OGC responsibility, other witnesses indicated significant involvement on the part of Minberg in softening the previous policy in contrast to Minberg's recollection. Moreover, according to witnesses involved in this redraft effort, the HUD-OGC initially produced revisions to the policy that would have retained language restricting the use of appropriated funds to carry out grassroots lobbying activities. Witnesses consistently told HUD-OIG investigators that it was Minberg who insisted that HUD's policy should more closely reflect opinions issued in the past by other federal agencies, which have suggested that the appropriation riders do not apply to PAS officials, despite the fact that HUD had not chosen previously to endorse this perspective. The new policy was ultimately approved by HUD's General Counsel Helen Kanovsky.

Impediments to HUD-OIG's Investigation

During the course of our work, Minberg interfered with the HUD-OIG investigation by interrupting and inserting himself into an on-going witness interview, threatening to terminate the interview, and not allowing the witness to provide documentation as requested by investigators. In particular, Minberg said that before he would allow the release of the e-mail recipient list, he wanted assurance that HUD-OIG would not voluntarily turn over the list to Congress, unless, or until it was subpoenaed. He told the investigators that he had an institutional concern that Congress was trying to use its relationship with an Inspector General in an attempt to make an "end run" around HUD's administration, and Minberg did not want the names of the e-mail recipients disclosed to Congress. After being informed that his actions could potentially constitute obstruction of justice and/or interference in an official HUD-OIG investigation, Minberg threatened the investigating agents that he (Minberg) would ensure the agents were charged as a result of their inappropriate actions. Minberg never identified to the agents what those were.

Minberg also attempted to impede HUD-OIG's investigation when he contacted HUD-OGC employees, prior to their interviews by investigators, to discuss anti-lobbying and their collective recollection of events. Minberg was also less than forthcoming in regard to his involvement in the preparation and dissemination of the July 31st e-mail communication, his knowledge of the Anti-Lobbying Act, and his knowledge of HUD's internal policy governing the restrictions on lobbying by federal employees.

Finally, the investigation disclosed that Constantine was less than forthcoming by failing to clarify the specifics of the action discussed between he and Minberg prior to the dispatch of the e-mail communication and withholding information pertinent to the investigation when questioned during multiple interviews with HUD-OIG investigators.

Conclusion

This series of events illustrate what may happen when senior government officials veer from the course of ethical decision-making, skirt the edges, and act in a manner that is not in the government's best interest. In particular, Minberg's conduct resulted in the Deputy Secretary being misled, embarrassed and ill-served as well as his own staff. Minberg's obligation to exercise sound ethical judgment and avoid violating well established departmental policy was mitigated by his interest in being "more aggressive" in regards to lobbying. More troubling was that Minberg and other senior leaders, in actions shortly after receipt of the Congressional inquiry, chose to not only change the rules they appear to have violated but to also water them down when they realized the rules contradicted the path they wanted to pursue.