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U.S. DEPARTMENT OF CONGRESSIONAL RELATIONS

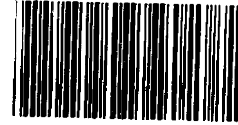
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DECEMBER 31, 1980

The Honorable Richardson Preyer  
Chairman, Subcommittee on  
Government Information and  
Individual Rights  
Committee on Government Operations  
House of Representatives



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Dear Mr. Chairman:

Subject: The National Endowments for the Arts and Humanities Compliance with the Freedom of Information Act and the Federal Advisory Committee Act (GGD-81-34)

As you requested, we have reviewed compliance by the National Endowment for the Arts and the National Endowment for the Humanities with certain provisions of the Freedom of Information Act (FOIA) (5 U.S.C. 552) and Federal Advisory Committee Act (FACA) (5 U.S.C. App. I). (See enc. I.) In accordance with discussions with your office, we concentrated on the timeliness of replies to FOIA requests, propriety of attendees at advisory committee meetings, and adequacy of meeting minutes.

The FOIA gives the public certain access rights to Government records and requires agencies which deny such access to advise requestors of the legal basis for the denial and the appeal procedures available. Among other things, the FACA sets forth procedures for announcing scheduled meetings, meeting attendance, and compiling and certifying minutes of meetings.

To achieve their legislative objectives, each Endowment Chairman awards grants to a variety of individuals and institutions on the recommendations of a national council and supporting panels which are advisory committees under the FACA. Many FOIA requests concern the deliberations of each Endowment's council and panels in the grant evaluation process. The FACA provides for recording these deliberations.

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We interviewed officials generally responsible for the overall administration of the FOIA and FACA at each Endowment. These included General Counsel office officials, Advisory Committee Management officers, and Program and Division personnel. We reviewed FOIA records maintained by the General Counsels and correspondence for the period January 1979 through June 1980. In reviewing compliance with the FACA, we reviewed 1979 and 1980 council meeting minutes. In view of the numerous Endowment panel meetings, for instance 102 by the Arts Endowment and 178 by the Humanities Endowment in 1979, we reviewed minutes and other records for a sample of panel meetings in 1979 and 1980 for each Endowment. We discussed the results of our review with officials at both Endowments and considered their comments in the preparation of this report.

In most instances the National Endowment for the Arts has provided the information requested under the FOIA. However, administrative control of FOIA requests was not adequate. Responses were not always sent in accordance with FOIA timeliness requirements. In those instances when requested information was denied, the requestor was usually not advised of the appeal procedures available. Most of the panel meeting minutes we reviewed did not meet Federal Advisory Committee Act requirements for completeness and certification. Details are contained in enclosure II.

In a number of instances, the National Endowment for the Humanities withheld information from requestors based on FOIA disclosure exemptions. Often, the requestor was not advised of the basis for the denial or the appeal procedures available in accordance with FOIA procedural requirements. FOIA records were inadequate to determine if timely responses were made. Most of the council and panel meeting minutes we reviewed did not meet Federal Advisory Committee Act requirements for completeness and/or certification. Details are contained in enclosure III.

The General Services Administration has issued proposed procedures for implementing the Federal Advisory Committee Act. These procedures include: public notice requirements; public participation requirements; requirements for closing

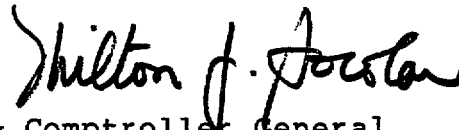
meetings; and requirements for minutes of meetings, including what information the minutes should contain.

We are making no recommendations in view of planned actions by the National Endowment for the Arts and the National Endowment for the Humanities to

- assure compliance with FOIA procedural requirements,
- strengthen administrative control of FOIA requests,  
and
- improve minutes of committee meetings.

As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 10 days from the date of the report. At that time we will send copies to interested parties and make copies available to others upon request.

Sincerely yours,



Acting Comptroller General  
of the United States

Enclosures - 3

GERALD R. NEYER, M.C., CHAIRMAN  
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 225-2741

NINETY-SIXTH CONGRESS  
**Congress of the United States**  
**House of Representatives**

GOVERNMENT INFORMATION AND INDIVIDUAL RIGHTS  
 SUBCOMMITTEE

OF THE

COMMITTEE ON GOVERNMENT OPERATIONS

RAYBURN HOUSE OFFICE BUILDING, ROOM B-349-B-C  
 WASHINGTON, D.C. 20515

May 8, 1980

Honorable Elmer B. Staats  
 Comptroller General  
 General Accounting Office  
 441 G Street, NW  
 Washington, DC 20548

Dear Mr. Comptroller General:

I am writing to request that the General Accounting Office conduct an audit of compliance by the National Endowment for the Arts and the National Endowment for the Humanities with the provisions of the Freedom of Information and Federal Advisory Committee Acts. The subcommittee's interest in this matter arises out of the receipt of several specific complaints alleging violations of these statutes and from information from agency annual reports filed pursuant to these laws. Some examples are:

The Humanities Endowment initially submitted an FOIA annual report indicating that no citizen had been denied access to records during 1979. When queried by the subcommittee staff, which was aware of two FOIA request denials, the Endowment filed a revised report indicating a total of five such denials. It appears from the revised report that most of these denials were made by employees not authorized to do so. In addition, a consultant's report prepared in 1977, which was recently withheld in its entirety from a requester, was found to contain copies of a public speech and a publication. The material had been withheld by the Endowment as an intra-agency predeliberative document. No attempt had been made to make available portions of the report that clearly were subject to release.

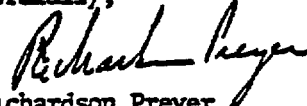
At the Arts Endowment, one recent incident involved a request for minutes of a closed advisory panel meeting. The requester was given a "summary" of minutes. The summary, which was provided by the secretary to the General Counsel, showed that the meeting in question had been selectively closed; that, the Arts Endowment allowed certain individuals who were neither agency employees nor advisory panel members to remain in attendance, while excluding others. The Humanities Endowment advised the subcommittee that it does not follow this practice of selective exclusion of the public. However, it has the distinction of having closed in their entirety a higher

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percentage of meetings during 1979 than any other agency.

The subcommittee is ready to assist in this review by making available to GAO what documents it has. Should you have questions concerning this request, please contact Ed Gleiman of the subcommittee staff at 225-3741.

Cordially,



Richardson Preyer  
Chairman

NATIONAL ENDOWMENT FOR THE ARTS

The National Endowment for the Arts was established in 1965 to foster the excellence of the arts in America. For this purpose, the Endowment provides grants to a wide variety of individuals and institutions. Generally the grant award process involves a review by a panel and then a review by the National Council. Both the panels and the Council are advisory committees under the Federal Advisory Committee Act. Grants are awarded by the Endowment Chairman on the basis of the recommendations of the Council, panels, the endowment staff, and other professionals who review and evaluate grant applications. In 1979, Endowment panels reviewed over 22,000 grant applications totaling over \$350 million.

ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT CAN BE IMPROVED

The Endowment for the Arts has in most instances provided the information requested under the FOIA. However, responses were not always made in accordance with FOIA timeliness requirements. FOIA also requires that requestors be advised of available appeal procedures when information is denied. In most cases, the requestor was not so advised.

According to Endowment records we reviewed, the Endowment received 24 FOIA requests from January 1979 through June 1980, including 3 instances where requests were resubmitted before the information requested was completely provided. In four instances, at least some information requested was denied.

The Endowment procedures for complying with the FOIA are published in Title 45 part 1100 of the Code of Federal Regulations. The Endowment did not always comply fully with these procedures or the FOIA. Although 5 U.S.C. 552 (a)(6)(A)(1) requires the agency to inform FOIA requestors of the reasons for denying information and the requestor's right to appeal, this was not always done. No reason was cited in one of the four denials, while on three occasions the requestor was not advised of appeal rights. Agency officials offered no reason for these omissions.

The FOIA also requires that an agency respond to an FOIA request within 10 business days of receipt. Although the Endowment generally responded within the required time for the majority of requests, response was delayed in five instances. One possible reason for the delays is apparent inadequate central control of FOIA requests. Although most FOIA requests are addressed or referred to the Endowment's General Counsel, responsibility to reply was often delegated to various Endowment personnel. No single person was responsible for ensuring that replies are sent within 10 days.

During 1980, the General Counsel's office began maintaining a log of all correspondence, which should provide a basis for improved administrative control over FOIA requests.

FEDERAL ADVISORY COMMITTEE ACT  
COMPLIANCE CAN BE STRENGTHENED

Although the Endowment has generally complied with the act's procedures concerning notice of scheduled meetings and attendees requirements, improvements are needed in compiling and certifying minutes of advisory committee meetings.

Closed meetings may be open  
to selected individuals

Under the Federal Advisory Committee Act, advisory committee meetings or portions thereof may be closed to the public. However, the law does not prohibit inviting others to closed meetings in addition to agency staff who routinely attend. As a result, from time to time Endowment officials have invited selected individuals outside the Endowment staff to attend advisory committee meetings, including panel meetings. Additional attendees generally have been consultants or representatives of activities funding the same or similar projects.

According to Endowment officials, consultants provide additional views on grant applications which are useful to the Endowment panel members. Representatives of other funding agencies also provide information and coordination concerning potential grants in which the Endowment shares a mutual interest with other funding agencies. Examples include the Corporation for Public Broadcasting, Folk Art Division of the Library of Congress, and the Smithsonian Institution's Division of Performing Arts. The Endowment has not established a written policy specifying the circumstances under which "outsiders" are permitted to attend Council meetings.

Minutes of panel meetings can be improved

The Federal Advisory Committee Act requires that detailed minutes of each advisory committee meeting be kept and that the accuracy of all minutes be certified by the committee chairman. Minutes should be a primary source of explaining the basis for committee decisions to interested parties, including unsuccessful applicants.

Detailed minutes of Endowment panel meetings are not always prepared and/or certified by advisory committee chairmen. We reviewed minutes that were taken in various forms, including notes by staff members, annotated grant application

books, or annotated grant application lists. In some instances panel meetings are tape recorded. However, notes and annotations, which are often brief, are not always transcribed. Even when they are transcribed they are not always certified for accuracy. One reason for this cited by Endowment officials is unfamiliarity with Federal Advisory Committee Act requirements, partially due to continuing changes in Endowment staff responsible for the minutes

The Deputy Chairman for Programs, in June 1980, advised the Program Directors that it would be desirable that all panel meetings be tape recorded to satisfy Federal regulations for "detailed minutes." She recognized however, that it was not technically possible to record panel subcommittee meetings in different parts of a room. Therefore, notes must be relied on for panel subcommittee meetings.

The Endowment plans to take actions to

- assure compliance with FOIA procedural requirements,
- strengthen controls over FOIA requests, and
- improve minutes of committee meetings.

These actions should eliminate the compliance problems we found.



NATIONAL ENDOWMENT FOR THE HUMANITIES

The National Endowment for the Humanities was established in 1965 to further the study and enhance the appreciation of the humanities in the United States. In the 10 months ending July 31, 1980, the Endowment received almost 8,800 grant applications requesting about \$577 million.

Grants are made by the Endowment Chairman on the basis of advice provided by the National Council on the Humanities. The Council is supported by the Humanities Panel selected from about 20,000 eligible members who are convened into small groups to consider specific groups of grant applications. Endowment staff and other professionals also sometimes review grant applications. The Council and the Humanities Panel are the Endowment's Federal advisory committees.

ADMINISTRATION OF FREEDOM OF INFORMATION ACT CAN BE IMPROVED

The National Endowment for the Humanities has in a number of instances withheld information from requestors under the FOIA's disclosure exemptions. FOIA requires that requestors be advised of the basis for denial and available appeal procedures when information is denied. In many cases, the requestor was not so advised. FOIA records were inadequate to determine if timely responses were made.

Based on Endowment records we reviewed, 67 FOIA requests were received between January 1, 1979, and June 30, 1980. In 18 instances the Endowment withheld information requested. The FOIA (5 USC 552 (a)(6)(A)(1)) requires an agency to notify requestors why the information was denied, citing exemptions in the act and what appeal rights are available. In denying the information, the Endowment did not cite the basis for the denial in 11 of 18 instances and did not inform the requestor of appeal procedures in 15 instances. Agency officials did not explain the noncompliance with FOIA procedural requirements.

Incompleteness and lack of records cloud determination of FOIA compliance

Due to incompleteness and lack of records concerning FOIA requests, we could not determine the timeliness of replies to FOIA requests. This also made it difficult for the Endowment to prepare its annual FOIA activity report to the Congress.

The FOIA requires that an agency respond to an FOIA request within 10 business days of receipt. The Endowment considers this to mean 10 days from receipt by the Deputy Chairman or the Endowment or the General Counsel's office. We were unable

to determine the timeliness of replies because the records were not adequate. Often, the request or response was not on file, or the specific date the request was received by the General Counsel's office was not available.

The FOIA (5 USC 552(d)) requires an agency to submit an annual report to the Congress including the number of denials for information requested under the FOIA. The question of the number of denials for 1979 is clouded because the Endowment did not systematically keep track of denials made. A determination of total denials made during the year therefore requires analyzing each request and reply. Initially the Endowment reported no denials to the Congress for 1979. Subsequently, the Endowment, defining denials as any refusal to release any requested record in the Endowment's possession, amended its report to five denials. Our review of the Endowment's records using the same denial definition showed 11 denials for 1979.

Since April 1980, the General Counsel's office has been maintaining a log of FOIA requests. This log is a step in the right direction since it can control timeliness of replies by showing when requests are received and answered. However, it does not provide information on denials of information. Adding information to the log about denials would aid the Endowment in preparing its annual report to the Congress.

Improvement needed in uniformly  
implementing FOIA

Confusion has existed at the Endowment over what information should be released under the FOIA. This is because of changing policies concerning what to release and by divided responsibilities for determining what information to release in response to specific requests. This confusion is illustrated in two examples.

Under the FOIA, segregable portions of records not falling under FOIA exemptions shall be provided to requestors of information. During 1980, the Endowment received two independent requests for the same report. In one instance, an Endowment official initially denied the requestor the report citing exemption 5 of the FOIA concerning intra-agency memoranda. The second requestor was provided the report with certain sections of the report deleted. Another Endowment official indicated these report sections were withheld because the report contained interviews on personnel matters and other opinions to assist the Endowment in reaching decisions.

The Chairman's intended policy since August 1979 was to release to any requestor, reviewer and panelist comments on successful proposals without identifying the author. However,

other Endowment officials followed a policy of releasing these comments only to the applicants themselves. Subsequently, the Chairman has ruled that decisions on releasing reviewer and panelist comments to third parties will be at the Endowment's discretion.

In August 1980, the Endowment drafted proposed guidelines concerning compliance with requirements of the FOIA. Implementing these procedures should enable the Endowment to correct the confusion concerning release of information.

FEDERAL ADVISORY COMMITTEE ACT  
COMPLIANCE CAN BE STRENGTHENED

Although the Endowment has generally complied with procedures concerning notice of scheduled meetings and has established criteria for attendance at committee meetings, it needs to improve the way minutes of advisory committee meetings are compiled and certified.

Outside attendance at meetings  
may be appropriate

Under the Federal Advisory Committee Act, advisory committee meetings or portions thereof may be closed to the public. However, the law does not prohibit inviting certain individuals to closed meetings in addition to agency staff who routinely attend. As a result, Endowment officials have procedures to invite selected individuals outside the Endowment staff to attend advisory committee meetings when deemed desirable or necessary. Attendees at specific meetings cannot be determined since the minutes do not list Endowment staff or outside attendees.

Minutes of advisory committee  
meetings can be improved

The Federal Advisory Committee Act requires that detailed minutes of each advisory committee meeting be kept and that the accuracy of all minutes be certified by the committee chairman. Minutes should be a primary source of explaining the basis for committee decisions to interested parties, including unsuccessful applicants. Detailed minutes of Endowment committee meetings are not always complete and/or certified by advisory committee chairmen. As a result, it can be difficult for the Endowment to advise grant applicants of the reasons why their applications were not approved.

Minutes often do not state why grant applications were not approved or list who attended committee meetings. At panel meetings, some notes are taken describing why applications are recommended or not recommended for funding. However,

because of limited staff, often only notes on the applications recommended for funding are written up in minute form, while minutes of the deliberations on the other applications are normally not prepared. Therefore, if a grant applicant requests comments on why an application was not recommended for approval, only sketchy notes may be available. Minutes of the Council subcommittees (Council members grouped according to grant subject area) are included as part of Council minutes. However, no record is shown in the Council minutes of subcommittee discussions or of recommendations concerning individual grant applications. Also, no list of attendees is prepared.

The compliance problems we found should be eliminated by the Endowments' planned actions to

- assure compliance with FOIA procedural requirements,
- strengthen administrative controls over FOIA requests,  
and
- improve minutes of committee meetings.