Peer review : compliance with the privacy act and federal advisory committee act : report to the chairman, Committee on Governmental Affairs, U.S. Senate / U.S. General Accounting Office.

GAO

United States General Accounting Office

Report to the Chairman, Committee on Governmental Affairs, U.S. Senate

April 1991

PEER REVIEW

Compliance With the Privacy Act and Federal Advisory Committee Act

GAO/GGD-91-48

GAO

United States
General Accounting Office
Washington, D.C. 20548

General Government Division

B-240931

April 17, 1991

The Honorable John Glenn
Chairman, Committee on Governmental Affairs
United States Senate

Dear Mr. Chairman:

This report is part of a broader study of federal peer review programs in response to your January 8, 1990, request. As agreed with the Committee, we made a limited assessment of compliance with selected provisions of the Privacy Act and the Federal Advisory Committee Act (FACA) in the peer review process at six agencies.

Federal agencies that fund external grant programs in the sciences, arts, and humanities frequently use outside experts or professional "peers" to review grant applications and help the agency decide which proposed projects to fund. The purpose of peer review is to obtain independent, outside advice by qualified experts.

Both the Privacy Act and FACA provide a legal basis to ensure the confidentiality of the peer review process. The Privacy Act provides the basis to protect the written records kept in individual applicant files from public disclosure. FACA provides the basis for closing peer review panel meetings to the public and protecting any personal information in the minutes of panel meetings from public disclosure.

Objectives, Scope, and Methodology

In determining compliance with the Privacy Act and FACA, our objectives were to (1) determine how peer review records were kept and whether applicants had access to their records; (2) identify peer review records that may have been misclassified as being subject to, or exempt from, the Privacy Act; and (3) determine whether peer review panels were chartered and operated as advisory committees in compliance with FACA.

Because our initial work showed there was limited potential for findings in this area, we curtailed our planned work at the completion of our initial survey, with the Committee's agreement. As a result, we limited the number of grant application files we reviewed, peer review panel meetings we attended, and agencies we included in our scope.

As agreed with the Committee, we initially selected 6 of the more than 12 agencies with grant programs that use outside experts in the peer review process. We selected agencies that would give us a mix of the

humanities and the physical, medical, and social sciences. We did our work at the National Science Foundation (NSF), National Institutes of Health (NIH) of the Department of Health and Human Services, Department of Energy (DOE), Department of Veterans Affairs (VA),[1] National Oceanic and Atmospheric Administration (NOAA) of the Department of Commerce, and National Endowment for the Humanities (NEH).

At each of the six agencies, we interviewed those officials who administered the peer review process and asked them to describe their peer review procedures, including what records were maintained, whether the records contained personal information, and whether the records were classified as Privacy Act records. We asked officials whether individuals had access to the information in their files and what type of access was provided. Finally, we asked the officials whether they used peer review panels, whether the panels were chartered as advisory committees under FACA, and how the panels were operated.

We also reviewed written agency procedures governing the peer review process, the Privacy Act, and FACA, at each of the six agencies. We also interviewed each agency's Privacy Act and FACA management officers and officials in their General Counsel and Inspector General offices to determine their involvement in the agency's peer review program.

Through an examination of agency files, we did limited tests of each agency's compliance with Privacy Act procedures regarding the (1) retrieval of records by name or other personal identifying information (termed personal identifiers), (2) inclusion of personal information in the files, and (3) extent to which applicants had access to their records. Because DOE and NOAA did not classify their peer review records as Privacy Act records, we also tested to determine if these agencies were using other means, such as an automated grant application tracking system, to retrieve peer review records by name or by a personal identifier. Examples of personal identifiers include social security numbers, fingerprints, or photographs.

We tested compliance with FACA provisions on the preparation of panel minutes or summaries. To do this, we reviewed 215 peer review files selected from among the 6 agencies' active grant application files. Active files generally included those applications that were peer-reviewed

[1]VA funds medical research by VA staff physicians and research scientists through an external peer review program. Although the awards are not grants, the VA program is operated in a similar manner to research grant programs in other agencies.

within the last 1 to 3 years. We reviewed between 26 and 46 files in each agency and selected consecutive files from 1 or more file drawers in each office. Although there was no known bias in our selection process, the samples were not randomly selected.

We also observed five peer review panel meetings in four agencies—VA, NEH, NIH, and NSF—to determine if they were generally functioning as agency officials described them. We did not attempt to determine if the agencies, whose panels were not chartered under FACA, were seeking consensus advice from the panels, as opposed to seeking the advice of each panel member separately, or if agency officials used the panel results as a source of consensus. Seeking consensus or using panel results as a source of consensus is a factor in determining whether a meeting of outside experts is governed by FACA.

We did our work in one or more of each agency's major grant awarding program offices at Washington, D.C., headquarters locations. We did our work from January 1990 to October 1990 in accordance with generally accepted government auditing standards.

Results in Brief

Peer review records in four agencies—VA, NEH, NSF, and NIH—were properly classified as Privacy Act records because they contained personal information and were retrieved by the agencies through the individual's name or some other personal identifier. DOE and NOAA said they did not retrieve their peer review records by individual name or personal identifier and therefore were not required to classify them as Privacy Act records. We discovered, however, that DOE retrieved records on three occasions using the name of the applicant and therefore should have been complying with the Privacy Act. NOAA installed a new computer system in October 1990 that was also capable of retrieving records through the name of the applicant. Because this information is easily accessible through use of a personal identifier, we believe that both DOE and NOAA should establish their peer review records as Privacy Act records.

All six agencies maintained similar files documenting the peer review process, including separate files for each application. Also, we did not discover any irrelevant personal information concerning applicants in the files we reviewed. With regard to applicants' right to access their records under the Privacy Act, we discovered only a few requests for such records. However, all six agencies routinely provided feedback to applicants on the results of the peer review. Our review of 215 files

showed no instances where such feedback of evaluative information on the peer review process was denied or appeared to be incomplete.

Four of the six agencies—VA, NEH, NSF, and NIH—chartered or were chartering their peer review panels as FACA advisory committees. DOE and NOAA did not charter any of their panels under FACA: they did not believe that their panels met the FACA criteria for advisory committees because the two agencies did not seek consensus advice from their panels. NIH chartered 140 panels under FACA but had about 30 unchartered panels during fiscal year 1990. NIH also did not believe that their unchartered panels met the FACA criteria because the agency did not seek consensus advice from its panels. Although we did not test to determine if actual operation of these panels was in violation of FACA, we believe that agency and public interest would be best served by chartering these panels under FACA. Chartering would provide such benefits as public notice of panel meetings, and allowing the agencies to more fully use the panels to obtain consensus advice.

Background

Peer review has been used by the federal government to review research proposals since the National Advisory Cancer Council was established in 1937. Today, more than a dozen agencies have grant programs that use outside experts in the peer review process. The six agencies we reviewed award about $3.7 billion annually in grants, many of which are subject to peer review.

In a peer review, each grant application is assessed by experts for funding on the basis of one or more factors. These factors may include scientific, technical, or artistic merit; the significance of the proposed project; the qualifications of the applicant; and the adequacy of the proposed methodology.

Agencies generally manage peer reviews by one of the following methods: (1) bringing a group of peer reviewers together as a panel at one location to provide oral and written comments, or (2) obtaining individual written comments from peer reviewers through the mail. Agencies may also use a combination of panel meetings and mail-in reviews.

The peer review process is kept confidential to protect both the applicant and the reviewers. The applicant is protected from public disclosure of personal information. Confidentiality also helps ensure that peer reviewers will give candid comments on grant applications by protecting reviewers from possible reprisal by applicants. Both the Privacy Act

and FACA provide a legal basis to ensure the confidentiality of the peer review process. The Privacy Act provides agencies the authority to protect the written records kept in individual applicant files from public disclosure. FACA provides agencies the authority for closing panel meetings to the public and protecting any personal information in the minutes of panel meetings from public disclosure.

We have issued three reports that deal with the awarding of grant funding. In 1987 we issued two reports on the role of the peer review process in university funding,[2] and in 1986 we reported on discretionary grant awards.[3]

Compliance With the Privacy Act

The Privacy Act provides a statutory framework for controlling the collection, maintenance, dissemination, and use of personal information about individual citizens. It requires agencies to protect personal information from unauthorized disclosure and to publish descriptions of the existence and nature of such records. It also gives individuals a right of access to review and copy the information and to secure the correction of any information that is not accurate, relevant, complete, or timely.

Most of the provisions of the Privacy Act, however, apply only to federal agency records that are maintained as a "system of records." In order for records to be classified as a system of records they must (1) be under the agency's control; (2) contain personal information, such as education, financial, medical, or employment history; and (3) be part of a group of agency records that are retrieved by the name of the individual or by another personal identifier. To establish a Privacy Act system of records, an agency must publish a notice in the Federal Register that describes the records, the types of individuals on whom the records are maintained, and for what purpose the data will be used. Agencies must also report to the Office of Management and Budget (OMB) when they establish or substantially alter systems of records.

Under the Privacy Act, each agency that maintains a system of records must include only such information about an individual that is relevant and necessary to accomplish a purpose of the agency required by statute

[2]University Funding: Patterns of Distribution of Federal Research Funds to Universities (GAO/RCED-87-67BR, Feb. 5, 1987); and University Funding: Information on the Role of Peer Review at NSF and NIH (GAO/RCED-87-87FS, March 26, 1987).

[3]Discretionary Grants: Opportunities to Improve Federal Discretionary Award Practices (GAO/HRD-86-108, Sept. 15, 1986).

or executive order. Further, the act requires that records be maintained with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to ensure fairness to the individual.

The Privacy Act requires that if an agency maintains or retrieves records by the use of a personal identifier, the records must be set up as a Privacy Act system of records. However, the act does not require an agency to maintain or retrieve its records by a personal identifier, even where the records may contain personal information. Consequently, agencies that maintain and retrieve such records through other means, such as an assigned application or grant number or the name of the employing institution, are not required to comply with the requirements of the act. However, by establishing peer review records under the Privacy Act, an agency can ensure that individuals will benefit from the protections provided by the act.

Applicability of the Privacy Act

Four agencies—VA, NEH, NSF, and NIH—retrieved peer review records by a personal identifier and therefore designated their peer review records as Privacy Act systems of records. We verified that notices of these systems of records were published in the Federal Register as required by the Privacy Act.

The other two agencies—DOE and NOAA—normally retrieved their records either by organization name—usually a university or other institution—or by an application number that the agency assigned. In addition to paper files, both agencies have automated application tracking systems that allow the agencies to search for and retrieve files by the name of the applicant. The paper files normally contain personal information about the applicant.

We discovered, however, that the DOE official responsible for the tracking system had retrieved individual proposal files several times during fiscal year 1990 by searching the automated system for the applicant's name. An official of DOE's Office of the General Counsel said this practice would constitute retrieval of records by a personal identifier, as defined in the Privacy Act, therefore making the records subject to the act. We agree with this position.

NOAA's automated tracking system did not contain information on the applicant before October 1, 1990. On that date, NOAA implemented a redesigned system that added the applicant's name to each record and now gives NOAA the capability to retrieve records using the applicant's

name. NOAA officials said that for grant management purposes, they would like to retrieve records by a personal identifier, which would mean they would have to comply with the Privacy Act.

Relevancy of Information in Peer Review Records

The six agencies generally maintained similar records of the grant award process. The peer review records we reviewed generally included

- the original grant application and proposal;
- correspondence between the applicant and the agency, including feedback on the peer review;
- copies or summaries of peer review comments, including written reviews and summaries of panel discussions; and
- award/rejection letters for grant funding.

The records were maintained either by an individual agency project officer or in central files for each division or program. The records were generally the same whether they were classified as Privacy Act records or not.

We did not find any information in the 215 grant application files we reviewed that dealt with irrelevant personal activities of the applicant or was otherwise unrelated to a review of the merits of the application. Further, agency officials said they virtually never received such information, and if they did, they would not place it in peer review files or allow it to be considered during peer review deliberations.

Access to Records by Applicants

In response to our request, agency Privacy Act officials reviewed their records to determine if any applicants had submitted a request for access to their peer review records under authority of the Privacy Act. Officials at two agencies said that they had received Privacy Act requests. Privacy Act officials said that the Division of Research Grants in NIH receives fewer than 10 such requests a year, and NEH received 2 individual Privacy Act requests during 1987 and 1988. The NIH Privacy Act official said that requesters usually ask for copies of the written reviews. However, most of the requesters drop their requests when they are told that they will automatically receive a summary of both panel and written comments. If an applicant persists, the Privacy Act official will forward copies of the written reviews to the applicant if they are available.

The two NEH requests were treated as both Privacy Act and Freedom of Information Act requests. In response, NEH provided copies of the panelists' written comments, panel summaries, and other information, such as lists of panel and National Council members. Citing the Freedom of Information Act, Privacy Act, and implementing regulations, NEH removed the peer reviewers' names from the written comments.

While we were able to discover only a few instances in which access was requested under the Privacy Act, we found many other instances in which applicants were provided feedback on the peer review process, which may explain the small number of Privacy Act requests. Feedback to applicants was provided automatically by NIH, NSF, and VA and upon written or oral request by NEH, DOE, and NOAA. For example, NEH provided feedback by letter upon request. The letter, depending on the wording of the request, included (1) the reasons for NEH's actions and (2) a critique of the proposed project. The feedback was based on both written reviews and notes taken by NEH staff during panel discussions. NSF automatically provided applicants with copies of written reviews and panel summaries for proposals reviewed by peer review panels.

On the basis of our discussions with agency officials and the documents in the 215 files we reviewed, it appeared that applicants were provided information from their files in the form of an official notice of acceptance or rejection for grant funding. In addition, the agencies generally provided an explanation of the reasons for their decisions and copies or summaries of peer review comments. To protect the identity of peer reviewers, their names were not provided on the copies or the summaries of the peer review comments that were sent to the applicant. Further, our review of the documents in the 215 files revealed no instances where feedback of evaluative information on a project or individual was denied or appeared to be incomplete.

Minor Privacy Act Violations

We noted several minor Privacy Act violations at NEH and VA. NEH did not adequately safeguard inactive Privacy Act files, and VA improperly maintained a small system of records that should have been classified as Privacy Act records but were not. At both agencies the "routine use statements," which describe the purposes for which records can be released, did not indicate that these records were used in the peer review process.

Safeguarding Privacy Act Files

The Privacy Act requires federal agencies to protect Privacy Act files from improper disclosure. NEH did not adequately protect inactive grant files that were in the process of being transferred to storage. We noted open boxes of grant proposal files in the corridor of NEH offices, which could allow unauthorized people to gain access to the files.

An NEH official said that because of space limitations, inactive files are moved to the corridor, where they are to be promptly picked up for storage. Through oversight, the files we observed were not picked up promptly. However, after we brought this matter to NEH's attention, officials had them transferred to storage and assured us that in the future records would be sent to storage in a timely manner.

Files Not Properly Designated as a System of Records Under the Privacy Act

A VA official had files on six cases of scientific misconduct that were being investigated by VA. Although the files were not peer review files, they contained personal information and were retrieved by the name of the researcher involved, which would qualify the files as Privacy Act records.

At our request, a VA Privacy Act official reviewed these files and determined that they qualified as Privacy Act records but were not recognized as such. Another VA official said that the files were informational and did not contain original investigative records. The original investigation records were maintained at the medical centers that conducted the investigations, according to VA. In order to resolve the issue, VA officials decided that rather than set up a Privacy Act system of records, the records that contained the personal information would be transferred to the office's medical center files. The medical center files are not retrieved by name or personal identifier and thus are not Privacy Act records.

Routine Use Statements Were Incomplete

The Privacy Act defines routine use as the disclosure of a Privacy Act record only for a purpose compatible with the purpose for which the data were collected. The routine uses for each Privacy Act record are required to be described in its Privacy Act notice in the Federal Register.

Routine use statements for NEH and VA grant application files did not include peer review as a routine use for the information in the files. For example, NEH's routine use statement for its grant application files describes the following routine uses for the data:

"General administration of grant review process; statistical research; congressional oversight and analysis of trends; disclosure may be made to a congressional office from the record of an individual in response to an inquiry from the congressional office made at the request of the individual about whom the record is maintained."

NEH and VA officials agreed that Privacy Act routine use statements for grant application files did not indicate that these records would be used in the peer review process. Officials also said that they would revise the routine use statements to include the peer review process. NEH's revised routine use statement was published in the September 13, 1990, Federal Register and VA's was published in the December 24, 1990, Federal Register.

Compliance With FACA

FACA governs the establishment and operation of committees that provide advice or recommendations to federal agencies or officials. The act requires that each federal advisory committee have a charter that specifies, among other things, the committee's objectives, duties, number and frequency of meetings, and establishment and termination dates. A committee is considered chartered if it is under FACA and unchartered if it is not under FACA.

Applicability of FACA

FACA defines an advisory committee as any committee, board, panel, or other similar group that includes at least one nonfederal employee and that makes recommendations. An example of an advisory meeting or group not covered by FACA is any meeting initiated by a federal official(s) with more than one individual for the purpose of obtaining the advice of individual attendees and not for the purpose of using the group to obtain consensus advice or recommendations. However, FACA regulations state that such a group would be covered by FACA if an agency accepts the group's deliberations as a source of consensus advice or recommendations.

As shown in table 1, the six agencies used about 469 peer review panels to review grant proposals during fiscal year 1990. About 428 (90 percent) of those panels were chartered and 41 were unchartered.

Table 1: Peer Review Panels Used by Each Agency During Fiscal Year 1990

Agency	Panels chartered under FACA	Unchartered panels
NEH	200	
VA	17	
NSF	71	Unknown
NIH	140	30
DOE		5
NOAA		6
Total	**428**	**41**

Two agencies—NEH and VA—chartered all of their panels. At the end of the fiscal year, NSF had chartered 71 panels and expected to charter another 12 to 14 panels that would meet in fiscal year 1991.[4]

NIH formed unchartered panels if there were too many proposals for a chartered panel to review during a normal meeting or to prevent a possible conflict of interest if a member of a chartered panel submitted a proposal to be reviewed. The chartered panels reviewed about 98 percent of NIH's proposals while the unchartered panels reviewed the remaining 2 percent.

Agency officials at DOE, NIH, and NOAA said that their unchartered panels were not considered advisory committees under FACA because they did not seek consensus advice from those panels, which they generally considered to be temporary.

For example, DOE officials said that although most of their grants are reviewed by reviewers who mail in their comments, they had established unchartered, temporary panels for five grant programs during fiscal year 1990. The panels usually consisted of 12 to 18 members. One or two panel members were normally responsible for preparing written reviews of each proposal and leading the panel discussion of the proposal. At the conclusion of the discussion, each panel member rated the proposal on a 10-point scale. The ratings were done on an individual

[4]NSF officials said that as a result of an internal study, they had decided to charter virtually all proposal review panels. According to the officials, this action would (1) ensure compliance with FACA and (2) provide greater flexibility in using panels to achieve a consensus.

NSF decided to charter about 35 new panels. Twenty-two panels were chartered during fiscal year 1990. The remaining 12 to 14 panels will be chartered during fiscal year 1991. The 35 panels were in programs such as the Presidential Young Investigator Program and the Small Business Innovation Program. Officials said proposals in these programs were previously reviewed by mail or by previously unchartered panels.

basis, and according to DOE officials, there was no attempt to obtain panel consensus.

However, we did not do tests to determine whether DOE, NOAA, and NIH accepted the deliberations of their unchartered panels as a source of consensus advice or recommendations. While we recognize that agencies may legally use unchartered committees by not seeking consensus advice, we believe this activity puts limitations on the amount and type of information agencies can obtain from the panels. We also believe that unchartered committees require agency officials to provide careful, day-to-day vigilance of individual panel meetings to ensure that panels do not provide consensus or that the agency does not use the panel results as a source of consensus advice—either of which would violate FACA. Furthermore, establishing panels outside the scope of FACA limits the benefits the act is intended to provide. While the proceedings of peer review panel meetings are normally closed to the public, FACA requires a public notice of the existence of the panels and when and where they meet. FACA also requires that summary minutes of the panel meetings be made available to the public.

Panel Meetings

Generally, FACA requires that (1) advisory committee meetings be open to the public and (2) minutes be kept and promptly made available for public inspection. However, if an advisory committee meeting is likely to disclose personal, privileged, or confidential information, FACA provides authority for the agency to close the meeting to the public and protect the minutes from public disclosure. Chartered peer review panel meetings in NIH, VA, NEH, and NSF were closed to the public for the above reasons when grant applications were being discussed and ranked. Minutes, which were available for public inspection, were prepared but contained only brief agenda-type information, such as schedule and attendance.

However, agency officials said that because of the sensitive nature of the material discussed—personal, privileged, and confidential—the detailed summaries of the panels' discussions were placed only in individual applicant files. These summaries were made available only to agency personnel, peer review panel members, and the applicants. Although we did not test the agencies' compliance with these procedures, we believe that, if followed, such procedures would comply with FACA requirements.

Agency officials said unchartered peer review panel meetings in NIH, DOE, and NOAA were also closed to the public to protect the privacy of

grant applicants and peer reviewers. The unchartered panels did not keep minutes but did prepare detailed summaries or notes for the panel sessions. Similarly, these agency officials said that the detailed summaries of the panels' discussions were placed in individual applicant files and made available only to agency personnel, peer review panel members, and the applicants. However, we did not test to determine if the agencies were complying with these procedures.

DOE officials said their authorizing legislation generally prohibits closing advisory committee meetings on research and development, unless the closing is due to national security reasons or the protection of privileged information. However, this legislation does not allow the closing of panel meetings to protect personal information. Consequently, DOE believes that if it charters its peer review panels under FACA it would not be able to close the meetings to prevent the disclosure of personal information. Although we agree with this position, we believe that as a matter of public policy, DOE should make every effort to bring its peer review panels under FACA.

Conclusions

Because DOE used its automated tracking system to retrieve applications by a personal identifier, it should have set up its peer review records as Privacy Act records. At the time of our review, NOAA was not in violation of the Privacy Act. However, on October 1, 1990, it became capable of retrieving application files by name or personal identifier. This capability, along with NOAA's stated desire to use this capability, indicates that it would be appropriate for NOAA to establish a Privacy Act system of records for its automated and manual peer review records.

The Privacy Act violations noted at VA and NEH do not appear to be systemic. In both cases, agency officials took prompt steps to correct the violations. As a result we are not making any recommendations to VA or NEH.

Although we did not note any violations of FACA, we believe that the general interests of the public in disclosure of governmental affairs would best be served by chartering the peer review panels at NIH, DOE, and NOAA, as is done at the other agencies we reviewed. In addition, the agencies would benefit from the additional flexibility that FACA allows in the use of advisory committees to obtain consensus advice. Such coverage would remove the need for agency officials to provide day-to-day policing of meetings to avoid FACA violations. Consequently, we believe that NOAA and NIH should charter all of their peer review panels. We

believe the same rationale applies to DOE, but we recognize the dilemma that its authorizing legislation imposes on the closing of meetings.

Recommendations

We recommend the following:

- The Secretary of Energy and Secretary of Commerce should establish their peer review files and automated grant application tracking systems as Privacy Act systems of records.
- The Secretary of Commerce and Secretary of Health and Human Services should charter their respective department's peer review panels.
- The Secretary of Energy should seek an amendment to its authorizing legislation that would allow Energy to charter its peer review panels but still protect the privacy of the grant applicants and peer reviewers. Following that change, we recommend the Secretary charter Energy's peer review panels.

Agency Comments

We obtained comments on this report from the six agencies we reviewed. We also obtained comments from OMB, which has an overall policy responsibility for the Privacy Act. Comments received from DOE, the Department of Commerce on behalf of NOAA, the Department of Health and Human Services on behalf of NIH, and OMB are printed in full in appendixes I through IV. We also discussed our findings with NEH, VA, and NSF. All six agencies reviewed agreed with the facts in the report and several agencies suggested technical changes to the material, which were incorporated as appropriate.

DOE and NOAA both concurred in the recommendation to establish their peer review records as Privacy Act systems of records. However, DOE, NOAA, and NIH did not concur in the recommendation to charter their peer review panels under FACA. All three agencies referred to their panels as ad hoc or temporary and said that they seek only the individual advice of panel members, not consensus advice. Further, DOE pointed out that we did not find any peer review panels to be in violation of FACA.

FACA regulations do not recognize ad hoc or temporary panels as justification for exemption from chartering and other FACA requirements. Further, while agencies seeking only individual advice could exempt a panel from FACA's chartering and other requirements, we believe, as we pointed out previously, that the general interests of the public in disclosure of governmental affairs would best be served by chartering the

peer review panels at DOE and NOAA, as is done at the other agencies we reviewed. Because of the public policy benefits, we believe that the agencies should have compelling reasons for structuring their panels so that they would not be subject to FACA. We do not believe that DOE or NOAA presented compelling reasons for not chartering their peer review panels. Although DOE correctly pointed out that we did not find any peer review panels in violation of FACA, it should be noted that we did not do any tests to determine whether unchartered panels were used improperly.

In addition, DOE said that it concurred in our recommendation that it seek ways to amend its authorizing legislation regarding departmental advisory committees. Our recommendation, however, was much more specific: we recommended that the Secretary of Energy seek an amendment that would allow DOE to close peer review panel meetings, specifically to protect the privacy of grant applicants and peer reviewers. Following that change, we recommended that the Secretary charter DOE's peer review panels.

DOE's suggestion in its comments that it would seek to amend its authorizing legislation to cover advisory committees other than peer review panels goes beyond our recommendation. We cannot comment on the advisability of amending DOE's authorizing legislation to cover other advisory committees. Furthermore, DOE's proposal to amend its legislation without the intention of chartering its peer review panels is not consistent with our recommendation.

NIH stated that it agreed in principle that panels should be chartered and agreed to take steps to charter ad hoc panels that provide consensus advice. However, NIH stated that it was not practical to charter committees that only meet one time. While we recognize that chartering panels that meet one time may be an administrative burden, FACA does not recognize this as a reason for not chartering those panels. NIH may have to streamline its chartering process or consider other options such as chartering several generic panels which can have differing membership each time they meet. This approach is used by NEH and NSF.

In addition, NIH stated that the Public Health Service Act (section 492(a)(2)) might be interpreted as directing NIH to continue using unchartered panels in these situations. We could not find any language that would indicate that it was Congress' intent that NIH continue to use

unchartered panels. Unless NIH can produce a clear indication of congressional intent to the contrary, we believe that NIH should charter all peer review panels, including one-time panels.

OMB suggested two changes in the report. In response to their suggestions, we added a reference making it clear that agencies must also report to OMB when they establish or substantially alter systems or records. In addition, OMB suggested a change that had to do with agency procedures for withholding information that might disclose the identity of individual peer reviewers. In order to withhold this information, an agency must publish Privacy Act regulations stating their intention to use one of the Privacy Act exemptions. In the context of peer review, exemption (k)(5), has been used by agencies to withhold the names of peer reviewers.

OMB noted that it was unclear from the discussion in the report whether agencies were withholding information requested from records based upon a properly taken exemption from the Privacy Act. Although we did not discuss this issue in the report, we found that NSF and NEH had issued Privacy Act regulations stating their intention to exempt from the access provision of the act any material that would disclose the identity of individual peer reviewers, based on the Privacy Act exemption in paragraph (k)(5). We believe the existence of these regulations is responsive to OMB's concerns.

NIH and VA did not issue Privacy Act regulations indicating their intention to exempt their records from the disclosure provisions of the act. However, we believe such regulations would not be necessary for these agencies because NIH's peer review records do not contain the names of the peer reviewers, and VA said that it does not intend to invoke Privacy Act exemption (k)(5). As noted earlier, DOE and NOAA did not set up their peer review records as Privacy Act systems of records, but now that they have expressed an intention to do so, they should be aware of OMB's concern.

As agreed with the Committee, we are sending copies of this report to the heads of the six agencies where we did our work, the Director of the Office of Management and Budget, and other interested parties.

The major contributors to this report are listed in appendix V. If you have any questions about this report, please call me at (202) 275-8676.

Sincerely yours,

L. Nye Stevens

L. Nye Stevens
Director, Government Business
Operations Issues

Contents

Abbreviations

FACA	Federal Advisory Committee Act
NSF	National Science Foundation
NIH	National Institutes of Health
DOE	Department of Energy
VA	Department of Veterans Affairs
NOAA	National Oceanic and Atmospheric Administration
NEH	National Endowment for the Humanities
OMB	Office of Management and Budget

Comments From the Office of Management and Budget

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

JAN 17 '99

Mr. James F. Bouck
Evaluator
General Government Division
General Accounting Office
441 G Street, N.W.; Room 3826
Washington, D.C. 20548

Dear Mr. Bouck:

We have reviewed your draft report entitled "Peer Review - Compliance with the Privacy Act and Federal Advisory Committee Act." In general, it appears that the agencies surveyed are complying with the provisions of both Acts, albeit with minor deviations. We offer the following specific comments:

Now on p. 5.

o Page 9, paragraph beginning "Most...used." We recommend that for completeness, you should add the following sentence at the end of the paragraph: "Agencies must also report to the Office of Management and Budget when they establish or substantially alter systems of records."

Now on p. 16.

o Pages 13 and 14. Agencies reported deleting the names of panelists when responding to first party requesters citing the Privacy Act. We are troubled by this practice. It does not appear to be consistent with the Privacy Act which permits withholding records only under very specific circumstances, i.e., when the agency has exempted the system under one of the general or specific exemption provisions of the Act. Only one of those provisions appear to be valid for purposes of exempting records relating to the peer review process, and it is unclear from the discussion whether the agencies were withholding records based upon a properly taken exemption. We recommend you examine this practice more closely to determine whether it is, in fact, proper.

Sincerely,

James B. MacRae, Jr.

James B. MacRae, Jr.
Acting Administrator and
Deputy Administrator
Office of Information and
Regulatory Affairs

Comments From the Department of Commerce

UNITED STATES DEPARTMENT OF COMMERCE
The Assistant Secretary for Administration
Washington, D.C. 20230

22 JAN 91

Mr. Richard Fogel
Assistant Comptroller General
General Accounting Office
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Fogel:

Thank you for your letter requesting comments on the draft report entitled, "Peer Review: Compliance with the Privacy Act and Federal Advisory Committee Act."

We have reviewed the enclosed comments of the Under Secretary for Oceans and Atmosphere and believe they are responsive to the matters discussed in the report. The Department supports the strengthening of NOAA's environmental data management archival program and is committed in helping NOAA accomplish this task.

Sincerely,

Thomas J. Collamore
Assistant Secretary
for Administration

Enclosure

UNITED STATES DEPARTMENT OF COMMERCE
The Deputy Under Secretary for
Oceans and Atmosphere
Washington, D.C. 20230

JAN 15 1991

Mr. Richard L. Fogel
Assistant Comptroller General
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Fogel:

Thank you for your letter to Secretary Mosbacher regarding the GAO draft report, "Compliance with the Privacy Act and Federal Advisory Committee Act" (GAO assignment code 240017).

Now on p. 5.

The report recommends that NOAA peer review files and automated grant application tracking system files be established as "Privacy Act systems of records." To be classified in this manner the records must be retrievable by an individual name or by some identifying number or symbol assigned to an individual (page 9). Currently, NOAA's peer review files cannot be retrieved in this manner. Therefore, we do not intend to pursue Privacy Act coverage for these records. However, since our new automated grant application tracking system can retrieve records based on the name of the principal investigator, we agree that we should establish our automated tracking system as a "Privacy Act system of records." We intend to take appropriate action to do so.

The report also recommends that NOAA charter its peer review panels. The Federal Advisory Committee Act (FACA) covers panels when an agency uses a panel to obtain advice or recommendations when group consensus is obtained or sought. Since NOAA panels are almost always temporary, since NOAA program offices often send out applications for individual (rather than group) peer review, and since the value in NOAA of such panels resides in individual evaluations and recommendations, we do not intend to charter our panels under FACA.

I want to compliment you and your staff for a thorough job on two complex issues. Thank you for the opportunity to comment.

Sincerely,

Gray Castle

Comments From the Department of Energy

The Under Secretary of Energy
Washington, DC 20585

January 11, 1991

Mr. Richard L. Fogel
Assistant Comptroller General
General Government Division
U.S. General Accounting Office
Washington, DC 20548

Dear Mr. Fogel:

The Department of Energy (DOE) appreciates the opportunity to review and comment on the General Accounting Office (GAO) draft report entitled "Peer Review: Compliance with the Privacy Act and Federal Advisory Committee Act." The GAO review assessed compliance with selected provisions of the Privacy Act and the Federal Advisory Committee Act in the peer review process at six agencies. The draft report contains two recommendations addressed to the Department of Energy.

The first recommendation is that the Secretary of Energy establish the Department's peer review files and automated grant application tracking systems as Privacy Act systems of records. We concur in that recommendation and will proceed to establish the subject systems of records for the Office of Energy Research's automated systems.

The second recommendation contains two parts. The first part recommends that the Secretary of Energy seek an amendment to the Department's authorizing legislation regarding Departmental advisory committees. Such an amendment would allow the Department to close advisory committee meetings on research and development for reasons other than national security and the protection of privileged, but not including personal, information. The second part of the recommendation is that, following the amendment of the Department's authorizing legislation, the Secretary charter the Department's ad hoc peer review panels.

The Department's authorizing legislation places unique restrictions on DOE advisory committees. We know of no other Federal agency funding scientific and technological research that is required to have its advisory committees discuss personal information, including the merits of the scientific ideas and research performance of individuals, in open public session. The recommended amendment would provide the Department with the same flexibility in the use of advisory committees that other Federal agencies currently have. For this reason, the Department concurs with this part of the recommendation and will consider all of the implications, as well as the ways to propose such a change to its authorizing legislation.

With regard to the recommendation to charter peer review panels, the Department nonconcurs. It should be noted that the GAO, in its review of the procedures described by the Department for the conduct of its ad hoc peer review panels, did not find them to be in violation of FACA. These ad hoc panels are used under special circumstances, such as when there are an unusually large volume of proposals or the time for review is exceedingly short. These ad hoc panels are a mechanism to obtain the advice of a number of individuals, as individuals. They are not used by Department officials to obtain consensus advice and thus are not advisory committees under the GSA regulation.

DOE grant and contract regulations, along with such legislation as the Privacy Act and Freedom of Information Act, recognize that there are legitimate exemptions from public disclosure, including those cited in the Freedom of Information Act relating to pre-decisional matters. We believe that the Department's ad hoc peer review panels operate effectively in support of the procurement and assistance process and in compliance with Departmental and statutory requirements. We will continue to be vigilant about the operations of our ad hoc peer review panels. As a part of that effort, written procedures will be developed and implemented immediately. The procedures will set forth the peer review panel process and will be provided to all reviewers in advance. A DOE official is always in attendance at these panel meetings, and it will be the responsibility of that individual to ensure compliance with the procedures.

In summary, the Department does not believe that GAO has provided a compelling rationale based on law or existing regulation for its recommendation to charter peer review panels. Adopting this part of the GAO recommendation would deprive the Department of an effective legal tool for meeting demands on its peer review system.

We hope that the comments will be helpful to GAO in its preparation of the final report, and would be happy to discuss them with you.

Sincerely,

John C. Tuck

John C. Tuck

Comments From the Department of Health and Human Services

Note: GAO comments supplementing those in the report text appear at the end of this appendix.

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of Inspector General

Washington, D.C. 20201

FEB 7 1991

Mr. Richard L. Fogel
Assistant Comptroller General
United States General
Accounting Office
Washington, D.C. 20548

Dear Mr. Fogel:

Enclosed are the Department's comments on your draft report, "Peer Review: Compliance with the Privacy Act and Federal Advisory Committee Act." The comments represent the tentative position of the Department and are subject to reevaluation when the final version of this report is received.

The Department appreciates the opportunity to comment on this draft report before its publication.

Sincerely yours,

Richard P. Kusserow
Inspector General

Enclosure

COMMENTS OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES ON THE GENERAL ACCOUNTING OFFICE'S DRAFT REPORT, "PEER REVIEW: COMPLIANCE WITH THE PRIVACY ACT AND THE FEDERAL ADVISORY COMMITTEE ACT," REPORT NO, GAO.GGD-91-UNDATED

General Comments

As part of its limited assessment of compliance with the Privacy Act and the Federal Advisory Committee Act (FACA), the General Accounting Office (GAO) noted that the National Institutes of Health (NIH) utilized some unchartered panels in its peer review processes during Fiscal Year 1990.

The NIH operates a tightly scheduled review of grant applications three times per year. It schedules the meetings far in advance in order to ensure that the majority of regular panel members will be present. However, NIH is not able to determine the number of applications that each chartered panel will review. This is particularly difficult in newly emerging areas of science such as AIDS and biotechnology or where highly sophisticated and innovative technologies are proposed in established areas of science. In addition, when (1) a member of a particular review panel, or (2) someone with whom that member has a close professional relationship submits a grant application that normally would be reviewed by that panel, to avoid any conflict of interest, arrangements are made to provide for technical evaluation of that application by another group, frequently an ad hoc panel.

Thus, the NIH employs ad hoc panels in response to unpredictable situations. The Agency uses ad hoc panels in more predictable situations as well, such as when the NIH requests applications for investigation of a particular area of science. The NIH selects ad hoc panels to review those grant applications because they are one-time situations and the reviewing group must be tailor-made to fit that solicitation.

Section 492(a)(2) of the Public Health Service Act states that peer review regulations promulgated by the NIH shall require that the review of applications for grants, contracts, and cooperative agreements be conducted, to the extent practicable, in a manner consistent with the system for technical and scientific peer review applicable on the date of enactment of the Health Research Extension Act of 1985, i.e., November 20, 1985. The NIH today is operating ad hoc review groups in the same manner that it was on November 20, 1985. A strong argument could be made that the intent of the Congress was that these committees continue operating without being subject to the FACA. In light of the above, the NIH has continued to operate in this fashion for the last several years.

While the GAO findings applicable to the Department of Health and Human Services (DHHS) in the draft report are limited to NIH, they have implications for the Alcohol, Drug Abuse, and Mental Health Administration (ADAMHA) as well as other DHHS agencies. In that regard, ADAMHA also uses ad hoc peer review committees to review applications received in response to Requests for Applications proposing projects in highly specialized areas (where expertise is not available on any one particular ongoing chartered peer review committee) and for conflict of interest situations with regular review committee members.

The following comments are provided on the recommendation.

GAO Recommendation

The Secretary of Commerce and the Secretary of Health and Human Services charter their respective department's peer review panels.

Department Comment

We agree in principle that the peer review panels should be chartered whenever possible. However, from the text of the report, it is evident that the intent of this recommendation is directed primarily to ad hoc review panels. In that regard, while we support the notion that committees should be chartered, this simply is not practical for committees which are truly one time only.

There are legitimate needs for one time review groups such as when programs are being started, when time frames are short and for special situations such as conflict of interest, for which chartering, formal appointments, and the other requirements of FACA are neither practical nor cost effective. However, every effort will be made to ensure that ad hoc committees are used only for one time and conflict of interest situations.

In selected instances, a minimal but continuing need exists to use ad hoc consultants in situations that do not require group actions or consensus advice and, thus, would fall outside the FACA. Such ad hoc consultants are an important complement to the Department's peer review system, the cornerstone of many agency's operations in fulfilling their mission.

Technical Comments

Now on p. 12.
See comment 1.

On pages 6 and 24 of the draft report, the statement is made that chartering would provide benefits such as ". . .removing the need for day-to-day policing of panel meetings by agency officials to avoid FACA violations." The FACA states [Sec.

10(e)] that a Federal official must be present at all committee meetings, so this is an incorrect statement.

Now on p. 8.
See comment 2.

On page 14, the third sentence in the first full paragraph could be misconstrued. It states: "To protect the identity of peer reviewers, their names were deleted from the copies or the summaries of the peer review comments that were sent to the applicant." The intent may have been to state that the summaries were written in such a manner that specific comments could not be attributed to a specific reviewer, which is correct. However, it should be noted that the complete rosters of all reviewers (members, Reviewers Reserve members, and ad hoc consultants) are provided with the summary statements so that the applicant is informed of the names of the entire group that reviewed his/her application(s).

Now on p. 11.

Page 20 of the draft report states that "Agency officials at DOE, NIH, and NOAA said that their unchartered panels were not considered advisory committees under FACA because they did not seek consensus advice from those panels, which they generally considered to be temporary." This statement is true at the NIH for the operation of all ad hoc panels that review contract proposals and for the operation of some ad hoc panels that review grant and cooperative agreement applications. The NIH will take steps to charter ad hoc committees that provide consensus advice.

The following are GAO's comments on the Department of Health and Human Services letter dated February 7, 1991.

GAO Comments

1. The statement from page 6 of the draft report (now page 4) was deleted. The wording on p. 24 of the draft report (now p. 12) was revised to reflect a distinction between having a federal employee present during panel meetings and having that employee monitor the proceedings to ensure that the panel does not reach consensus or that the agency does not use the panel's results as a source of consensus advice.

2. The statement was reworded to indicate that the names of the peer reviewers were not provided on the copies of the review comments sent to the applicant.

Major Contributors to This Report

General Government Division, Washington D.C.	Larry A. Herrmann, Assistant Director, Government Business Operations Issues James F. Bouck, Evaluator-in-Charge Adrian Barber, Evaluator
Office of the General Counsel	Jill Poses Sayre, Attorney-Adviser

Major Contributors to This Report

General Government Division, Washington, D.C.	Cleve A. Herrmann, Assistant Director, Government Business Operations Issues James F. Jones, Jr., Evaluator-in-Charge Adrian Barber, Evaluator
Office of the General Counsel	Ann Peak Segre, Attorney-Advisor

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