



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 19, 2015

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

This responds to your letter to the Attorney General dated January 21, 2015, inquiring about the application of the Federal Advisory Committee Act ("FACA") to Clemency Project 2014.

As we explained in our January 30, 2015 letter, Clemency Project 2014 is an independent collaboration of five legal associations—the American Bar Association (ABA), the National Association of Criminal Defense Lawyers, the Federal Defenders, Families Against Mandatory Minimums, and the American Civil Liberties Union—that provide *pro bono* assistance to federal prisoners seeking clemency. These associations provide advice and assistance to the prisoners who they represent, and not to the Department of Justice (the Department), and their representation of those prisoners is subject to the ethical rules governing attorney-client relationships and other attorney conduct. Such assistance to prisoners is consistent with the Department's long-standing policy that a petitioner for executive clemency has the right to be represented by counsel.

As explained in our prior letter, a petition submitted by Clemency Project 2014 lawyers receives no deference or special treatment on the merits. Instead, petitions submitted by Clemency Project 2014 lawyers are prioritized for review based on the completeness of the submissions and clarity in addressing the criteria for clemency. These cases are prioritized because the Department's Office of the Pardon Attorney (OPA) can often review these petitions more quickly given the inclusion of all the necessary documentation that OPA would otherwise need to research and the attention in the petition to the Clemency Initiative criteria. OPA reviews these petitions, along with other clemency petitions it receives, and provides recommendations in the course of assisting the President in exercising his constitutional authority to "grant Reprieves and Pardons for Offences against the United States." U.S. Const. art. II, § 2, cl. 1.

As should be clear from this description of Clemency Project 2014's work, FACA does not apply to Clemency Project 2014. FACA defines an "advisory committee" as "any committee, board, commission, council, conference, panel, task force, or other similar group . . . which is . . . established or utilized by the President, or . . . established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more

agencies or officers of the Federal Government.” 5 U.S.C. App. 2 § 3(2). As an independent collaboration of private legal associations, Clemency Project 2014 was not “established” by the President or any agency. And because neither the President nor any agency exercises management or control over Clemency Project 2014, it has not been “utilized” within the meaning of FACA. *Ctr. for Arms Control & Non-Proliferation v. Pray*, 531 F.3d 836, 840 (D.C. Cir. 2008) (“[A] committee is ‘utilized’ by the Executive for purposes of § 3 [of FACA] only if it is ‘amenable to . . . strict management by’ the Executive.” (quoting *Public Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 457 (1989))); *see also Public Citizen* 491 U.S. at 453 (rejecting possibility that FACA “was intended to cover every formal and informal consultation between the President or an Executive agency and a group rendering advice”); 41 C.F.R. § 102-3.25 (defining “utilized” to mean that “the President or a Federal office or agency exercises actual management or control over [a committee’s] operation”). Consequently, Clemency Project 2014 is not an “advisory committee” under FACA.

Rather, Clemency Project 2014 is an association of lawyers who represent as clients inmates seeking clemency, and who have an ethical obligation to advocate such clients’ positions zealously before the federal government and to maintain attorney-client confidences. Every lawyer who advocates before the federal government in some sense “advises” or “recommends” that federal officials make decisions that benefit their client, but this is plainly an entirely different relationship with federal officials than that contemplated for federal advisory committees, which are established or utilized to foster joint deliberations among informed members of the committee, and then to provide collective policy advice to federal officials.

Your letter also references possible consultations with member groups of Clemency Project 2014, and suggests that the fact that groups that are part of Clemency Project 2014 have their own policy views and have, on some occasions, publicly expressed such views (for instance, by urging the federal government to expand the use of the clemency power) may implicate FACA. Of course, private individuals and entities always have the right to: express their views, whether publicly or privately; make recommendations to federal officials; and urge the federal government to adopt the policies that they support. Doing so does not, without more, convert such a private group into a federal advisory committee, as your letter seems to suggest. FACA would not apply to consultations between the Department and a private group associated with Clemency Project 2014 unless, as discussed above, the group or the Project was “established” or “utilized” by the President or any agency within the meaning of FACA, and provided collective advice to the President or an agency. Where the Department simply solicits views from a private group, FACA does not apply. *See Public Citizen*, 491 U.S. at 467 (holding FACA inapplicable to the Department of Justice’s solicitation of confidential advice from the ABA).

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We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Peter J. Kadzik", written in a cursive style.

Peter J. Kadzik
Assistant Attorney General

cc: The Honorable Patrick J. Leahy
Ranking Member