

MEMORANDUM TO THE REGENTS OF THE SMITHSONIAN INSTITUTION

The Smithsonian Institution's Rejection of Transparency Principles in Directive 807

Introduction

Although the Smithsonian Institution (“Smithsonian”) and its Board of Regents (“Regents”) have committed to conducting business in an open and transparent manner, the recently adopted policy, Request for Smithsonian Institution Records, Smithsonian Directive 807 (“Directive 807”), indicates otherwise. The Smithsonian should rescind Directive 807 and replace it with a policy that is consistent with principles of openness.

I. Smithsonian and the Regents Have Committed to Openness and Transparency

In recent years, the Smithsonian Business Ventures’ (“SBV”) initiatives have raised substantial concerns about the nature and extent of the obligations undertaken by the Smithsonian, the exclusive, preferential or priority rights granted to private parties, the reasonableness of certain commercial contracts, and their effect on the Smithsonian mission. In response to the criticisms it faced for this and its own determination to advance the best interests of the Smithsonian, the Regents appear to be pursuing reform efforts and committing to accessibility and openness.

1. Smithsonian Adopted the Governance Committee’s Recommendation to Conduct Business “Within an Ethos of Transparency”

The Governance Committee (“the Committee”), which was created to comprehensively review the Smithsonian’s policies and practices and how the Regents oversees the Institution, submitted a report to the Regents last year making a series of recommendations to “reinforce the foundation of integrity and responsibility” and “strengthen the culture of accountability.”¹ Among its recommendations, the Committee noted that “the Smithsonian must be mindful that it is a public trust operating on behalf of the American public and the United States government to carry out its mission to increase and diffuse knowledge.”² Similarly, the Committee observed:

The Smithsonian Institution is committed to operating in a culture marked by openness, accessibility, and robust communication. All Smithsonian stakeholders should have access to appropriate and accurate information regarding the finances, operations, and activities of the Smithsonian Institution. Effective transparency also requires open and reliable communication between the Board, management, and other stakeholders to support informed decision-making. The Smithsonian is dedicated to using every reasonable

¹ The Board of Regents, Governance Committee, *Report of the Governance Committee to the Board of Regents* (June 14, 2007), at 6.

² *Id.*

method to foster the effective transparency that will support its mission to increase and diffuse knowledge.³

In embracing a spirit of increased openness, the Regents agreed to establish mechanisms for public input into Smithsonian activities, including a “communication plan to ensure that all constituencies are routinely informed of important decisions and current issues and have opportunities to provide comments or information to the Board and management.”⁴ The Smithsonian further, according to the Committee, committed to promoting confidence in the integrity of its business activities by developing a contracting policy that includes “principles and practices to ensure that all Smithsonian contracting activities are conducted with integrity, fairness, and openness and in a manner that will best achieve Smithsonian mission requirements.”⁵ We are pleased that the Smithsonian is attempting to follow the Committee’s recommendations, and we support those dealing with transparency.

2. Smithsonian Has Accepted the Disclosure Principles of the Freedom of Information Act

Although courts have found that the Smithsonian is not technically an “agency” as defined by the Privacy Act, which borrows its definition from the Freedom of Information Act (“FOIA”),⁶ the Smithsonian embraced the principles of disclosure reflected in the FOIA and committed to “follow[ing] its spirit in considering public requests for information.”⁷ Given that the Smithsonian receives extensive federal funding, operates under a federal charter granted by Congress, submits annual statements of its expenditures to Congress, is subject to the audit and reporting requirements of the Government Accountability Office (“GAO”), receives representation from the Department of Justice,⁸ is referred to as “America’s museum,” and guards some of the Nation’s most valued treasures, it is more than appropriate for the Smithsonian to accept the responsibilities of an “agency” and follow the spirit of the FOIA. Unfortunately, Directive 807 does not do so.

3. The Regents and Secretary Have a Fiduciary Duty to Ensure Openness

Federal law vests in the Regents the legal responsibility for managing and overseeing the Smithsonian, a trust instrumentality of the United States.⁹ As fiduciaries, the Regents and the Secretary owe a duty to the Smithsonian – and to the American public. Accordingly, they must oversee and operate the Smithsonian in an open and transparent manner.

³ *Id.* at 7.

⁴ *Id.* at 11.

⁵ *Id.* at A-30.

⁶ *Dong v. Smithsonian, Inst.*, 125 F.3d 877 (D.C. Cir. 1997), *cert. denied* 524 U.S. 992 (1998).

⁷ *Id.* at 12; *see also* Directive 807.

⁸ *Dong*, 125 F.3d at 880.

⁹ Independent Review Committee, *A Report to the Board of Regents of the Smithsonian Institution* (June 18, 2007), at 28-31

The Smithsonian depends on the Government for nearly 80 percent of its funding. With taxpayer dollars accounting for the lion's share of the organization's funding, we believe that there is no justification for withholding from the public information regarding the finances and activities of the Institution.

II. Directive 807 Hinders Openness, Transparency, and Accountability

On November 30, 2007, the Smithsonian issued Directive 807, which lists an extensive series of records that the Smithsonian will not provide to the public, including commercial and financial information, information about Smithsonian financial investments, records created during the Regents' meetings, and information about collections and exhibits.¹⁰ Directive 807 must be replaced because it violates the principles of openness and transparency.

1. Directive 807 Does Not Comport with the Governance Committee's Recommendations

Directive 807 directly violates the Committee's recommendations to operate in a transparent and accessible manner by withholding valuable and pertinent information from the public. It is not only inconsistent with the Smithsonian's commitments to openness and transparency and its obligations to the American public, but also will hinder the ability of the Smithsonian's beneficiaries to hold the Institution accountable for its past and future business activities, including those undertaken by the SBV unit. Failure to comply with the Committee's recommendations likely will result in a return to the Smithsonian's turbulent past.

2. Directive 807 Does Not Follow The Spirit of the FOIA

While the FOIA generally exempts government agencies from public disclosure certain limited confidential and proprietary information of a private party, the FOIA does *not* exempt entire contracts from public disclosure. To the contrary, agency contracts revealing how the government is spending public dollars have historically been presumed to be publicly accessible. By analogy and spirit, Smithsonian contracts should be treated no differently.

Though Directive 807 claims that it is "consistent with principles of disclosure under the FOIA,"¹¹ absent the voluntary disclosure by the Smithsonian (which has not historically been the case), Directive 807 will prevent disclosure and public scrutiny of most of Smithsonian's commercial activities and contracts. The Smithsonian claims an ability to withhold "commercial and financial information which, if released, could cause substantial competitive harm to the Smithsonian's business activities."¹² It is inexplicable why the Smithsonian, with its fiduciary obligations to the public, would contemplate withholding from the public information on its own commercial-type activities; government agencies are certainly not allowed to do so. Of course,

¹⁰ Smithsonian Directive 807 (Request for Smithsonian Institution Records) (November 30, 2007), at 2.

¹¹ *Id.*

¹² *Id.* We note the focus on competitive harm *to* the Smithsonian reverse the traditional FOIA exemption for information whose release might harm the private party, *not* the government agency.

the Smithsonian is not expected to provide disclosure during negotiations, to eliminate confidential bidding in all circumstances, nor to disclose trade secrets. However, some form of RFP or other public disclosure of the subject matter of each proposed contract should be made public at the beginning of the process, and, once contracts are entered into, the substantive provisions of the contract as well as its financial terms should be fully disclosed (allowing for protection of trade secrets). Additionally, where there is broad public interest in the subject matter, at least a summary of the terms of the proposed agreement should be disclosed before the contract is finally executed.

3. Directive 807 Attempts to Circumvent Disclosure Requirements Through Confidentiality Agreements

Directive 807 exempts, in essence, from disclosure all previously entered SBV contracts by exempting certain prior contracts entered into with an *expectation* that their terms would remain confidential. Subjective expectation of confidentiality should not govern what is disclosed, nor should the Smithsonian be able to circumvent traditional disclosure requirements through private confidentiality agreements. The passage of time should make it more, not less likely that contracts would be disclosed. With Directive 807, the Smithsonian simply sweeps under the rug the prior contracts, even without regard to competitive impact. This kind of approach, even beyond flying in the face of principle, opens the door to corruption and cover-up.

4. Directive 807 Affects the Smithsonian's Collections

Though by its terms, Directive 807 does not apply to all Smithsonian documents and materials, such as the Smithsonian collections,¹³ Smithsonian business activities frequently involve the commercialization of the Smithsonian collections or access to Smithsonian researchers and scientists. Directive 807 thus discourages the disclosure of the precise types of activities that affect the Smithsonian collections and mission and that warrant the greatest level of openness and transparency. Directive 807 is simply ripe for abuse.¹⁴

Conclusion

By retarding rather than advancing openness and transparency, Directive 807 hinders the public's ability to hold the Smithsonian accountable. The Smithsonian, a quasi-government agency impressed with an important public trust, must honor its commitments and obligations to the American public to be open and transparent in all of its activities, including its commercial activities. Directive 807 must be rescinded and replaced promptly with a new policy that is consistent, in fact, with the Committee's recommendations, the spirit of the FOIA, the Smithsonian's obligations to the American public, and its own commitments.

¹³ See Smithsonian Directive 600 (Collections Management).

¹⁴ We take no position on the privacy protection elements of Directive 807.