



OFFICE OF
INSPECTOR GENERAL
U.S. DEPARTMENT OF THE INTERIOR

Former Secretary's Alleged Lobbying Disclosure Act Violation Before Joining the U.S. Department of the Interior as Deputy Secretary

This is a revised version of the report prepared for public release.



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REPORT OF INVESTIGATION

I. EXECUTIVE SUMMARY

We investigated allegations that former U.S. Department of the Interior (DOI) Secretary David Bernhardt violated the Lobbying Disclosure Act of 1995 (LDA) before joining the DOI as Deputy Secretary in 2017.¹

The LDA requires lobbyists to be registered with the Secretary of the Senate and the Clerk of the U.S. House of Representatives, and it further provides that a person may be subject to civil or criminal penalties for failing to do so. To meet the definition of a “lobbyist” under the LDA, an individual must satisfy three elements—namely, that (1) he or she is employed or retained by a client for compensation for services, (2) the services provided must include more than one “lobbying contact” with a covered U.S. Government official, and (3) at least 20 percent of the individual’s time over a 3-month period must involve “lobbying activities” for the client.²

Before his appointment as DOI Deputy Secretary in August 2017, Mr. Bernhardt was a shareholder at a law firm (the Law Firm). As part of his practice at the Law Firm, Mr. Bernhardt represented a Water District (WD) in litigation and in lobbying Congress and the Federal Government on various water issues. Mr. Bernhardt was registered and acted as a lobbyist for the WD until he deregistered on November 18, 2016.

The evidence established that, following his deregistration as a lobbyist for the WD, Mr. Bernhardt continued to advise WD officials on their interactions with the legislative branch. The evidence also suggested that he joined at least one conference call with congressional staff and expressed his availability to participate in other interactions. Accordingly, a crucial issue in this matter was whether Mr. Bernhardt communicated with legislative personnel on behalf of his client and engaged in “lobbying contacts” within the meaning of the LDA. Based on the evidence we obtained, we concluded that the conduct we identified, standing alone, did not show that Mr. Bernhardt acted as a lobbyist within the meaning of the statute after deregistration.

In arriving at this conclusion, however, we encountered a number of limits to our ability to obtain information. After he left the DOI in January 2021, Mr. Bernhardt declined to participate in a voluntary interview with our office without special conditions that were not consistent with our interviewing policies and practices. In addition, various current and former congressional staff declined

¹ Mr. Bernhardt was nominated as Deputy Secretary on April 28, 2017, and he became Deputy Secretary on August 1, 2017. The events discussed in this report occurred before Mr. Bernhardt joined the DOI as Deputy Secretary and before he was appointed as DOI Secretary.

² The registration requirement is also subject to a “de minimis” exemption, not applicable here, for lobbying activities on behalf of a client that involves income below \$2,500 (as adjusted for inflation). 2 U.S.C. § 1603(a)(3)(A)(i).

our requests for interviews.³ As a result, we were unable to obtain sufficient evidence to determine whether Mr. Bernhardt engaged in more than one “lobbying contact” as that term is defined by the LDA. Accordingly, we could not draw conclusions as to whether he complied with the LDA.

We note that the allegations also included claims that Mr. Bernhardt made inaccurate statements to Congress related to lobbying activities in the context of his nomination as Deputy Secretary. In particular, Mr. Bernhardt testified in his hearing for Deputy Secretary that he had “not engaged in regulated lobbying on behalf of [the WD] after November 18, 2016.” For the same reasons that we could draw only limited conclusions regarding Mr. Bernhardt’s compliance with the LDA, we could not meaningfully assess the accuracy of this statement.

During our investigation, we consulted with the U.S. Department of Justice in accordance with governing rules and policies. We are providing this report to the Secretary of the Interior for any action deemed appropriate.

II. BACKGROUND

Generally, the LDA requires a “lobbyist” to be registered with the Secretary of the Senate and the Clerk of the U.S. House of Representatives no later than 45 days after the lobbyist first makes a lobbying contact or is employed or retained to make a lobbying contact.⁴ A failure to register may result in civil penalties for a person who knowingly fails to comply and criminal penalties if such failure occurs knowingly and corruptly.⁵

The LDA defines “lobbyist” as an individual employed or retained by a client for compensation for services that include more than one lobbying contact, except when lobbying activities constitute less than 20 percent of the time engaged in the services provided to that client over a 3-month period.⁶ These criteria must be met for the individual to be required to register as a lobbyist.

The LDA distinguishes “lobbying contacts” from the more broadly defined term “lobbying activities.” A “lobbying contact” is a communication to a covered Government official, such as a member of Congress or his or her staff, on behalf of a client regarding matters such as Federal legislation, regulations, or policies.⁷ The definition is subject to 19 exceptions, including for example, exceptions for a communication involving a request for a meeting or similar administrative request that does not include an attempt to influence a covered official and communications in response to requests for information from covered Government officials.⁸

The term “lobbying activities” includes lobbying contacts as defined above as well as “efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the

³ Like most offices of inspectors general, the DOI OIG does not have authority to compel witness testimony through testimonial subpoenas.

⁴ 2 U.S.C. § 1603(a)(1).

⁵ *Id.* § 1606.

⁶ *Id.* § 1602(10). The registration requirement is also subject to a “de minimis” exemption that is not applicable here because Mr. Bernhardt received more than \$2,500 in total income from his client. *See id.* § 1603(a)(3)(A)(i).

⁷ *Id.* § 1602(8)(A).

⁸ *Id.* § 1602(8)(B)(v), (viii).

lobbying activities of others.”⁹ The statutory language makes clear that the LDA’s registration requirement is not triggered if an individual engages in only “lobbying activities” that do not include more than one lobbying contact. We therefore focused our inquiries on whether Mr. Bernhardt engaged in any lobbying contacts from November 18, 2016, the date he deregistered as a lobbyist, through April 28, 2017, the date he was nominated as DOI Deputy Secretary.¹⁰

III. RESULTS OF INVESTIGATION

We investigated allegations that Mr. Bernhardt continued to work on legislative matters for the WD after he deregistered as a lobbyist on November 18, 2016. The information we obtained, however, did not establish that he made any communications to legislative branch personnel that would meet the definition of “lobbying contact” after his deregistration date, a necessary element in the definition of “lobbyist” under the LDA.

We faced certain investigative limitations, however, that affected our ability to draw a conclusion as to whether Mr. Bernhardt violated the LDA. We issued Inspector General subpoenas to and obtained records from the WD and the Law Firm. WD officials and other individuals associated with the water industry also consented to voluntary interviews with our office. Mr. Bernhardt initially agreed to be interviewed but canceled that interview the evening before the agreed-upon date. Over the next 4 months, we attempted to reschedule the interview, but Mr. Bernhardt ultimately declined our request through his attorney, objecting to the proposed length of the interview and instead asking our office to submit written questions to which he would respond in writing. We declined this proposal, explaining that such an approach is not an adequate substitute for an interview and that it was inconsistent with our investigative policies and practices.

We also requested interviews with current and former legislative branch employees, but these individuals either declined to be interviewed or did not respond to our requests.

A. Facts

1. *Mr. Bernhardt’s Work Representing the WD as a Lobbyist*

Before his appointment as DOI Deputy Secretary in August 2017, Mr. Bernhardt was a shareholder at the Law Firm. As part of his practice at the Law Firm, Mr. Bernhardt represented the WD in litigation and in lobbying Congress and the Federal Government on various water issues.

While Mr. Bernhardt was working in this capacity, the Law Firm filed reports with the Secretary of the Senate and the Clerk of the U.S. House of Representatives as required under the LDA reflecting that Mr. Bernhardt acted as a lobbyist on behalf of the WD. On November 18, 2016, the Law Firm filed notice terminating Mr. Bernhardt’s registration as a lobbyist.

2. *Mr. Bernhardt’s Work for the WD After He Deregistered as a Lobbyist*

The key question in this matter was whether Mr. Bernhardt continued acting as a lobbyist after November 18, 2016. “Lobbying contacts” is an element of the LDA’s definition of “lobbyist.” Accordingly, as a threshold matter, we focused our investigation on the nature and extent of

⁹ *Id.* § 1602(7).

¹⁰ The appendix includes a timeline of the events discussed in this report.

Mr. Bernhardt's continued interactions with WD officials and whether, during these interactions, Mr. Bernhardt made any communications to congressional members, staff, or other covered officials after he deregistered as a lobbyist that might have constituted "lobbying contacts."

a. Mr. Bernhardt's Work With the WD Related to Legislative Matters

As described in more detail below, we obtained approximately 100 electronic communications between Mr. Bernhardt and WD officials that discussed legislative matters, including some communications in which WD personnel forwarded their communications with congressional staff to Mr. Bernhardt. We did not, however, identify exchanges in which Mr. Bernhardt himself communicated directly with covered legislative officials.

After Mr. Bernhardt deregistered on November 18, 2016, WD officials and Mr. Bernhardt continued to communicate with each other regarding legislative matters. For example, in a November 22, 2016 email to a WD official (WD Official 1), Mr. Bernhardt commented on proposed changes to draft legislative language related to the water industry and requested that WD Official 1 call him before speaking with a legislative staff official.

In another November 22, 2016 email, WD Official 1 asked if Mr. Bernhardt would be available that day for a conference call with the WD and the offices of two U.S. Representatives to discuss upcoming legislative efforts, to which Mr. Bernhardt responded, "Yes." In an email later that day, a congressional staff member (Congressional Staff Member 1) emailed WD Official 1 and other WD officials and congressional staff, thanking them for "taking the time this morning to discuss legislative opportunities going into the next Congress." Mr. Bernhardt was not a recipient of the latter email, and the email did not provide information regarding whether he attended the conference call on November 22. When we asked the WD officials if Mr. Bernhardt attended the conference call, WD Official 1 told us he did not recall, and another WD official (WD Official 2) told us he had no knowledge of the conference call or whether Mr. Bernhardt participated in it. Other recipients of the emails described above told us that they did not recall the emails and did not know if Mr. Bernhardt participated in the conference call on November 22 or if he communicated with legislative branch personnel in any way. As a result, we were unable to determine whether Mr. Bernhardt participated in the conference call or had any communications with those legislative officials.

In a November 30, 2016 email, WD Official 1 again requested that Mr. Bernhardt participate in a conference call that day with Congressional Staff Member 1, and other emails suggested that Mr. Bernhardt did join that call. Other recipients of the emails described above, however, told us they did not recall the emails and that they did not know if Mr. Bernhardt participated in the conference call. Again, based on the evidence available to us, we were unable to determine the extent of Mr. Bernhardt's participation in the conference call, including whether he made any communications with covered officials that could be considered "lobbying contacts" as that term is defined under the LDA.

In a December 13, 2016 email, WD Official 1 forwarded draft legislation and asked Mr. Bernhardt to review it. The email forwarded another email of the same date with the subject line "CONFIDENTIAL: . . . Water Legislation Follow Up" from a congressional staff member (Congressional Staff Member 2) to various U.S. House of Representatives staff and other water industry officials requesting comments or questions on the pending legislation. As stated above, we attempted to obtain more evidence regarding Mr. Bernhardt's participation by seeking interviews with him and with congressional staff regarding this matter. Mr. Bernhardt and at least one congressional

staff member declined to be interviewed, and the remaining individuals did not respond to our requests. In addition, WD Official 1 told us that he did not recall the email or Mr. Bernhardt's role in the matter. WD Official 1 further stated that Mr. Bernhardt was serving as a consultant, and WD Official 1 believed Mr. Bernhardt "would not interface" with legislative branch personnel directly. As with the other exchanges, the evidence we obtained did not provide sufficient information on the nature or extent of Mr. Bernhardt's participation in this matter.

In another email dated January 2, 2017, Mr. Bernhardt sent WD Officials 1 and 2 and others a proposed draft letter addressed to a Member of Congress that expressed appreciation for the opportunity to review a proposed bill and commented on the need for the legislation. Subsequently, in an email dated January 3, 2017, WD Official 2 requested that WD Official 1 send the letter to the Member of Congress. We were not able to determine whether the letter was actually sent or whether Mr. Bernhardt had any further involvement in the matter.

WD Official 1 told us that Mr. Bernhardt acted as a consultant after he deregistered in November 2016. This individual also made statements during our interview that reflected an awareness that there was a distinction between "consulting" and "lobbying." WD Official 1 also said that a different employee at the Law Firm took over lobbying on behalf of the WD after Mr. Bernhardt deregistered. In addition, WD Official 2 stated that he was "not aware of any direct communication between David Bernhardt and members of Congress or congressional staff on behalf of [the WD] after he deregistered as a lobbyist." The other five individuals we interviewed told us that they could not remember specific details related to the conference calls or emails discussed above.

We found no emails or other evidence from the materials we obtained from the WD and the Law Firm showing that Mr. Bernhardt communicated directly with personnel in the legislative branch after deregistering in November 2016.

b. The March 8, 2017 Invoice

In response to our subpoena, we obtained an invoice from the Law Firm dated March 8, 2017, with the subject line, "Federal Lobbying." This invoice billed more than \$25,000 to the WD for "Federal Lobbying" services provided by Mr. Bernhardt in February 2017, including travel expenses related to a WD trip. The invoice itself did not provide any additional information on the nature of the matter or exactly what services Mr. Bernhardt provided beyond general references to a "conference call." Approximately 4 months later, on July 18, 2017, Mr. Bernhardt sent an email to WD Official 1 regarding this invoice, stating that the reference to Federal lobbying was "my error" and that once he deregistered, "the matter name on the invoice should have been modified to more accurately reflect the scope of the activities, and not simply say Federal Lobbying." Mr. Bernhardt's email went on to state that he "should have had the matter description changed." We were unable to ask Mr. Bernhardt what prompted him to send WD Official 1 this email 4 months after the invoice was sent. We note, however, that Mr. Bernhardt sent this message on the same day that a news article reported that Mr. Bernhardt may have continued to perform lobbying work for the WD after he deregistered and testified to Congress that he had "not engaged in regulated lobbying."

Notwithstanding questions about the timing of Mr. Bernhardt's email, its content is consistent with information WD Official 1 provided us. When we asked about this invoice, WD Official 1 said that Mr. Bernhardt did not conduct "lobbying" for the WD after deregistering in November 2016 despite the March 2017 invoice. WD Official 1 stated that after Mr. Bernhardt deregistered in November 2016, the Law Firm did not adjust the language in the invoices to reflect the change in the nature of the

services Mr. Bernhardt was providing to the WD. WD Official 1 told us that he continued to talk with and email Mr. Bernhardt after Mr. Bernhardt deregistered in November 2016 but that Mr. Bernhardt served as a consultant after deregistering. WD Official 1 also stated that, to his knowledge, Mr. Bernhardt did not communicate with congressional officials on behalf of the WD after deregistering, which in his view, would have constituted “lobbying.”

B. Analysis

The evidence we obtained did not establish that Mr. Bernhardt violated the LDA. We were, however, unable to obtain sufficient evidence to determine whether Mr. Bernhardt made more than one “lobbying contact” as that term is defined under the LDA and accordingly cannot draw firm conclusions on this issue.

To establish a violation of the LDA, the evidence must show, among other elements, that Mr. Bernhardt met the definition of “lobbyist,” including that (1) he was retained and compensated by the WD for services, (2) the services Mr. Bernhardt provided included more than one “lobbying contact,” and (3) at least 20 percent of Mr. Bernhardt’s time over a 3-month period involved lobbying activities for the WD.¹¹ As discussed below, we found that Mr. Bernhardt was retained and compensated by the WD for services in support of the WD’s own interactions with legislative officials. We did not, however, obtain evidence that Mr. Bernhardt engaged in more than one lobbying contact on behalf of the WD and, as a result, did not conclude that Mr. Bernhardt violated the LDA.¹²

The term “lobbying contact” means an oral or written communication, including an electronic communication, to a covered official on behalf of a client regarding legislation or certain other matters, subject to 19 exceptions.¹³ The term “covered legislative branch official” includes Members of Congress, their employees, and other legislative branch personnel.¹⁴ What constitutes a “lobbying contact” is further informed by the LDA’s definition of “lobbying activities,” which more broadly includes “lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others.”¹⁵ Taken together, these definitions make clear that evidence of actual communication to a covered official, beyond mere preparation of information in support of lobbying contacts, is required to establish a lobbying contact under the LDA. In other words, the statutory language shows that an individual does not engage in a lobbying contact if

¹¹ Other statutory requirements include meeting an intent standard—“knowingly” for civil liability and “knowingly and corruptly” for criminal liability—an issue that we do not discuss in this report. *See* 2 U.S.C. § 1606(a) and (b) (civil and criminal penalties under the LDA).

¹² Similarly, we were unable to draw conclusions as to the accuracy of Mr. Bernhardt’s representations to the U.S. Senate Committee on Energy and Natural Resources on May 18, 2017. In response to a written question that asked whether he “lobb[ie]d or otherwise advise[d] on any legislative language pertaining to the operation of [a project] or any related Biological Opinions on behalf of the [WD] in 2016,” he answered, “I was a registered lobbyist for [the WD] until November 2016. I was one of many attorneys . . . who responded to technical drafting requests made by offices in the U.S. House of Representatives and U.S. Senate from members of both political parties. In that capacity, and upon their request, I provided technical drafting assistance.” Nomination of David Bernhardt to be the Deputy Secretary of the Interior: Hr’g Before the Comm. on Energy and Nat’l Res., 115th Cong. (2017). When asked at the hearing whether he “advise[d] any Members of Congress or their staff on such language after November 18, 2016,” he answered that he had “not engaged in regulated lobbying on behalf of [the WD] after November 18th, 2016.” *Id.*

¹³ 2 U.S.C. § 1602(8).

¹⁴ *Id.* § 1602(4). Also, a “covered executive branch official” includes the President, Vice President, and certain other executives and employees of the executive branch. *Id.* § 1602(3).

¹⁵ *Id.* § 1602(7).

he only advises or provides information to another individual who then uses it in communications to a legislative official.

The evidence—including electronic communications, other documents, and witness interviews—showed that after deregistering, Mr. Bernhardt continued to collaborate with and advise the WD on matters related to legislation. However, we did not obtain evidence establishing that Mr. Bernhardt engaged in any “lobbying contacts” or that he communicated, orally or in writing, with any covered officials on behalf of the WD after he deregistered. The emails that we were able to obtain that Mr. Bernhardt sent to WD officials and other non-Federal Government personnel do not constitute lobbying contacts because the recipients were not covered officials within the meaning of the statute. Mr. Bernhardt also sent emails to WD officials in which he provided advice on legislative matters, including advice on proposed statutory language and, in one email, a proposed draft letter addressed to a Member of Congress. The text of these emails made clear that Mr. Bernhardt was providing guidance to others for their communications with legislative officials. We accordingly concluded that Mr. Bernhardt engaged in “efforts in support of [lobbying] contacts” and “work that [wa]s intended, at the time it [wa]s performed, for use in contacts.” The LDA distinguishes these efforts from the defined term “lobbying contact.” Accordingly, because our investigation did not identify any electronic, written, or oral communications by Mr. Bernhardt himself to covered officials, we did not conclude that Mr. Bernhardt violated the LDA.

In two emails discussed above, dated November 22, 2016, and November 30, 2016, Mr. Bernhardt expressed a willingness to participate in conference calls involving legislative branch officials. This evidence was insufficient, however, for us to conclude that Mr. Bernhardt engaged in two or more “lobbying contacts” as that term is defined under the LDA. This is because we found no evidence establishing that Mr. Bernhardt communicated, orally or in writing, with legislative branch officials. As noted, we did identify evidence that suggested, in one case, that Mr. Bernhardt joined a conference call with legislative staff, specifically, the November 30, 2016 telephone conference with WD Official 1 and Congressional Staff Member 1. Even for this call, however, we were unable to obtain further information regarding the topic or content of the call or whether Mr. Bernhardt ever spoke or otherwise communicated with Congressional Staff Member 1 during the call regarding matters that would constitute a “lobbying contact” under the LDA.¹⁶

Interviews with the WD officials and other recipients of the emails discussed above likewise did not establish lobbying contacts. Most of the witnesses we interviewed told us that they did not recall the email exchanges at issue or whether Mr. Bernhardt communicated with legislative officials. WD Official 1 acknowledged that Mr. Bernhardt continued to work with the WD on legislative matters, but he also said he was not aware of communications between Mr. Bernhardt and legislative branch officials after Mr. Bernhardt deregistered. WD Official 2 told us that, after deregistering, Mr. Bernhardt’s role was limited to providing legal advice to the WD, advising on legislative and legal matters, and strategizing with the WD. Accordingly, we could not draw any conclusions from the evidence we obtained as to whether Mr. Bernhardt engaged in “lobbying contacts” as that term is defined under the LDA.

We also concluded that the March 2017 invoice from the Law Firm to the WD was insufficient to establish that Mr. Bernhardt acted as a lobbyist. This invoice confirmed that Mr. Bernhardt continued providing professional services to the WD in February 2017, and the invoice’s subject line was

¹⁶ Even if we had been able to determine that Mr. Bernhardt made a lobbying contact during this call, there would not be a violation of the LDA unless there was at least one additional lobbying contact.

“Federal Lobbying.” The invoice itself, however, provided no further details regarding the nature of the matter or Mr. Bernhardt’s participation beyond a “conference call”; it did not, for example, identify who participated in those calls or the topics of those discussions. Moreover, WD Officials 1 and 2 disputed the invoice’s characterization of Mr. Bernhardt’s services as “Federal Lobbying,” stating that they were consultative in nature and that after he deregistered, Mr. Bernhardt no longer conducted “lobbying” or otherwise reached out to legislative officials on behalf of the WD.¹⁷ In sum, the invoice’s characterization of Mr. Bernhardt’s services as “Federal Lobbying” does not, on its own, establish a sufficient basis on which to conclude that Mr. Bernhardt communicated with covered officials.

Taken together, the evidence suggested that Mr. Bernhardt had opportunities to engage in “lobbying contacts,” but, due to the limitations on our ability to collect further evidence, we can draw no additional conclusions.

IV. SUBJECT

David Bernhardt, former DOI Secretary.

V. DISPOSITION

We consulted with the U.S. Department of Justice during our investigation in accordance with governing rules and policies. We are providing this report to the Secretary of the Interior for any action deemed appropriate.

¹⁷ We also acknowledge that, in the email Mr. Bernhardt sent to the WD in July 2017, he stated that the reference to “Federal Lobbying” was his error. Notwithstanding questions about the timing of that communication, it is consistent with the information from WD Official 1.

Appendix: Timeline of Events

2016

Pre-November 18	David Bernhardt is a shareholder at a Law Firm and represents a Water District (WD) as a lawyer and lobbyist.
November 18	Mr. Bernhardt deregisters as a lobbyist.
November 22	Mr. Bernhardt and WD Official 1 exchange emails discussing draft legislation and Mr. Bernhardt's attendance on a conference call with legislative staff.
November 30	Mr. Bernhardt receives an email from WD Official 1 asking Mr. Bernhardt to participate in a conference call that day with WD Official 1 and Congressional Staff Member 1. Other emails show that Mr. Bernhardt joins the call.
December 13	Mr. Bernhardt receives an email from WD Official 1 forwarding draft legislation and asking Mr. Bernhardt to review it.

2017

January 2	Mr. Bernhardt sends WD Officials 1 and 2 a proposed draft letter addressed to a Member of Congress that expresses appreciation for the opportunity to review a proposed bill and that comments on the need for the legislation.
March 8	The Law Firm invoices the WD more than \$25,000 for "Federal Lobbying" services Mr. Bernhardt provided in February 2017.
April 28	Mr. Bernhardt is nominated as U.S. Department of the Interior (DOI) Deputy Secretary.
May 18	Mr. Bernhardt testifies before the U.S. Senate Committee on Energy and Natural Resources during his nomination hearing and states in written answers to questions for the record that he had "not engaged in regulated lobbying on behalf of [the WD] after November 18th, 2016."
July 18	Mr. Bernhardt emails WD Official 1 and states that the reference to Federal lobbying services in the March 2017 invoice was "my error" and that he "should have had the matter description changed."
August 1	Mr. Bernhardt becomes DOI Deputy Secretary.

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