

From: [Shelley K. Finlayson](#)
To: [Director of OGE](#)
Cc: [Diana Veilleux](#)
Subject: FW: Ethics Letter to Admin Pruitt
Date: Wednesday, May 17, 2017 10:06:20 AM
Attachments: [2017-05-16 Elizabeth Tate Bennett Ethics Letter.pdf](#)

Attachment released below

From: Enderle, Emily (Whitehouse) [mailto:(b) (6)]
Sent: Wednesday, May 17, 2017 9:54 AM
To: Shelley K. Finlayson
Cc: Gaeta, Joe (Whitehouse)
Subject: Ethics Letter to Admin Pruitt

Attachment released below

Shelley,

Attached, please find an ethics letter to Administrator Pruitt from Senators Whitehouse and Merkley regarding an EPA appointee, Elizabeth "Tate" Bennett, who lobbied on a long list of EPA matters for the National Rural Electric Cooperative Association for the past two years.

Emily

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Emily Enderle

Chief Environmental Policy Advisor
Office of Senator Sheldon Whitehouse

Direct: (b) (6)

(b) (6)

United States Senate

WASHINGTON, DC 20510

May 16, 2017

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Dear Administrator Pruitt:

We write with concerns over your decision to appoint Elizabeth “Tate” Bennett as Deputy Associate Administrator for Intergovernmental Relations in the Environmental Protection Agency (EPA) Office of Congressional and Intergovernmental Relations (OCIR). It is not apparent how Ms. Bennett can serve in this position consistent with the requirements of Executive Order 13770, “Ethics Commitments by Executive Branch Employees.”

Executive Order 13770 requires “[e]very appointee in every executive agency appointed on or after January 20, 2017” to sign and be “contractually committed to” an “Ethics Pledge.”¹ The Ethics Pledge prevents appointees from “participat[ing] in any particular matter involving specific parties that is directly and substantially related to [their] former employer or former clients” for the first two years after their appointment.² Appointees who were registered lobbyists during the two years before the date of their appointment are prohibited from “participat[ing] in any particular matter on which [they] lobbied within the 2 years before the date of [their] appointment or participate in the specific issue area in which that particular matter falls.”³

According to the Office of Government Ethics (OGE), “specific issue area” as used in the E.O. 13770 is a “particular matter of general applicability” which requires an appointee to be recused from all aspects of a matter on which he or she previously lobbied.⁴ For example:

An appointee was a registered lobbyist during the two-year period before she entered government. In that capacity, she lobbied her agency against a proposed regulation focused on a specific industry. Her lobbying was limited to a specific section of the regulation affecting her client. Her recusal obligation as an appointee is not limited to the section of the regulation on which she lobbied, nor is it limited to the application of the regulation to her former client. Instead, she must recuse for two years from development and implementation of the entire regulation, subsequent interpretation of the regulation, and application of the regulation in individual cases.⁵

¹ Executive Order 13,770: Ethics Commitments by Executive Branch Appointees, January 28, 2017.

² *Id.*

³ *Id.*

⁴ Office of Government Ethics, Legal Advisory 17-03, March 20, 2017.

⁵ *Id.* at 2.

You have appointed Ms. Bennett as Deputy Associate Administrator for Intergovernmental Relations in EPA's OCIR. According to EPA's website, OCIR "serves as EPA's principal point of contact with Congress, states and local governments."⁶ OCIR personnel are often the public face of EPA, and are expected to be able to communicate about a range of EPA issues to Congress and state and local governments. According to EPA's website, staff at OCIR:

- Assists, develops and implements the legislative agenda for the agency, including legislative initiatives and proposals;
- Leads EPA in the review of legislation; coordinates EPA's formal positions and technical assistance to Congress; and monitors all relevant legislative actions (e.g., bills, reports, regulations) related to EPA programs;
- Facilitates communication of the agency's priorities and policies to Congress;
- Coordinates agency appearances at Congressional hearings and manages associated testimony;
- Leads the development and implementation of the National Environmental Performance Partnership System between EPA and the states;
- Manages and monitors environmental issues with both national associations and individual state and local governments;
- Manages the agency's congressional and gubernatorial correspondence process;
- Monitors resources and coordinates policy for the agency's Regional science and technology (RS&T) organizations;
- Coordinates and maintains the Lead Region Process, which enhances Regional participation in agency decision-making; and
- Coordinates logistics, agendas, and subject matter for routine, special, and "hot issue" meetings and conference calls of EPA and Regional senior leaders.⁷

Prior to being appointed, Ms. Bennett was Senior Principal for Government Affairs at the National Rural Electric Cooperative Association (NRECA) where she was a registered lobbyist for the past eight quarters, including the first quarter of 2017. NRECA has a long track record of opposing EPA's health and environmental protections including those Ms. Bennett covered as a lobbyist. NRECA has been involved in at least seven EPA cases and commented on dozens of rules since 2007 (*see* Appendix A). During the eight quarters that Ms. Bennett worked for NRECA, it spent over \$5.3 million on lobbying activities. Ms. Bennett specifically lobbied on a broad set of EPA matters, including EPA's Clean Power Plan and New Source Performance Standard, Clean Water Rule, ozone standard, EPA enforcement, pesticides bills, budget resolutions, and appropriations bills (*see* Appendix B).

We do not see how Ms. Bennett can perform her job consistent with the limitations of the Ethics Pledge. Because of her activities as a registered federal lobbyist, she cannot work on legislation, communicate with Congress, or coordinate and monitor regional, state and local responses to a wide-range of major issues faced by EPA. Even if EPA were to determine some small subset of issues from which Ms. Bennett's prior lobbying does not disqualify her, installing someone who

⁶ <https://www.epa.gov/aboutepa/about-office-congressional-and-intergovernmental-relations-ocir> (accessed May 2, 2017).

⁷ *Id.*

has lobbied for an organization that has attacked EPA's efforts under both Republican and Democratic administrations as a public liaison for EPA suggests you have little regard for EPA's standing and reputation before Congress or the communities in which it works to protect public health.

Considering NRECA and Ms. Bennett's engagement with EPA has been so extensive, we respectfully request the following information about Ms. Bennett by Friday, June 2:

- Ms. Bennett's Executive Branch Personnel Public Financial Disclosure Report, other OGE Form 201 Covered Records, and any supplemental material.
- Lists of all issues Ms. Bennett has worked on, is permitted to work on, and is prohibited from working on.
- Any ethics agreements, recusals, waivers, or other documentation pertaining to which issues Ms. Bennett can and cannot work on.
- Ms. Bennett's counseling notes, emails, and any other communication between Ms. Bennett and EPA's Ethics Office and OGE.
- Names and title of all employees Ms. Bennett supervises and a list of the issues they work on.
- A copy of Ms. Bennet's signed "Ethics Pledge."

Sincerely,



Sheldon Whitehouse
United States Senator



Jeffrey A. Merkley
United States Senator

Appendix A

EPA cases in which NRECA has been involved since 2007

1. *Environmental Defense v. Duke Energy Corp* (2007): filed an amicus brief arguing that new source review (NSR) permitting is not required for repairs that do not increase a facility's achievable hourly emissions rate and the EPA's interpretation of "modification" in its regulations governing the new source performance standards (NSPS) that did not define "modification" based on hourly or annual emissions rates was consistent with the Clean Air Act.
2. *National Resources Defense Council v. EPA* (D.C. Cir. 2007): filed an amicus brief in favor of the EPA's regulation applying a narrow definition of "solid waste incineration unit."
3. *Arizona v. EPA* (9th Cir. 2013): filed an amicus brief arguing that the EPA's disapproval of Arizona's regional SIP undermines the purpose of the Rural Electrification Act and the EPA violated the language and Congressional intent of the Clean Air Act by requiring two units in Arizona to adhere to BART (best available retrofit technology) guidelines.
4. *EPA v. EME Homer City Generation* (2014): filed an amicus brief arguing that the EPA's transport rule violated the agency's statutory authority.
5. *Delaware Department of Natural Resources v. EPA* (D.C. Cir. 2014): filed an amicus brief in support of plaintiff challenging an EPA rule setting national emissions standards for hazardous air pollutants for reciprocating internal combustion engines.
6. *American Petroleum Institute v. EPA* (D.C. Cir. 2015): filed an amicus brief in support of plaintiff challenging an EPA regulation deregulating many hazardous secondary materials under the Resource Conservation and Recovery Act (RCRA) on the grounds that the EPA erred by not deregulating a category of secondary material called spent refinery catalysts generated by petroleum refining.
7. *North Dakota v. EPA* (D.C. Cir. 2016): filed an amicus brief in support of a plaintiff challenging the EPA's 111(b) carbon pollution standards for new and modified sources.

EPA Rules on which NRECA has commented since 2007

1. 2007: NRECA opposed Oil Pollution Prevention; Non-Transportation Related Onshore Facilities
2. 2007: NRECA opposed Prevention of Significant Deterioration and Non-attainment New Source Review: Emission Increases for Electric Generating Units
3. 2007: NRECA opposed Disposal of Coal Combustion Wastes in Landfills and Surface Impoundments
4. 2008: NRECA opposed Proposed Federal Requirements Under the Underground Injection Control (UIC) Program for Carbon Dioxide Geologic Segregation (GS) Wells
5. 2008: NRECA opposed Regulating Greenhouse Gas Emissions Under the Clean Air Act
6. 2009: NRECA opposed Efficient Limitations Guidelines and Standards for the Construction and Development Point Source Category
7. 2009: NRECA opposed Oil Pollution Prevention: Non-Transportation Related Onshore Facilities; Spill Prevention, Control, and Countermeasure Rule-Final Amendments
8. 2009: NRECA opposed Mandatory Reporting of Greenhouse Gases

9. 2009: NRECA opposed Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act
10. 2009: NRECA opposed Waste Energy Recovery Registry
11. 2009: NRECA opposed Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards
12. 2009: NRECA opposed Prevention of Significant Deterioration (PSD)
13. 2009: NRECA opposed Title V Greenhouse Gas Tailoring Rule
14. 2010: NRECA opposed Identification of Additional Classes of Facilities for Development of Financial Responsibility Requirements under CERCLA Section 108(b)
15. 2010: NRECA opposed Primary National Ambient Air Quality Standard for Sulfur Dioxide
16. 2010: NRECA opposed National Ambient Air Quality Standards for Ozone
17. 2010: NRECA opposed Steam Electric Power Generating Efficient Guidelines
18. 2010: NRECA opposed Mandatory Reporting of Greenhouse Gases: Additional Sources of Fluorinated GHGs
19. 2010: NRECA opposed Polychlorinated Biphenyls (PCBs) Reassignment of Use Authorizations
20. 2010: NRECA opposed Draft National Pollutant Discharge Elimination System Pesticide General Permit Point Source Discharges from the Application of Pesticides
21. 2010: NRECA opposed Identification of Non-Hazardous Secondary Materials that are Solid Waste
22. 2010: NRECA opposed National Emissions Standards for Hazardous Air Pollutants for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers
23. 2010: NRECA opposed Standards of Performance for Stationary Compression Ignition and Spark Ignition Internal Combustion Engines
24. 2010: NRECA opposed Hazardous and Solid Waste Management System: Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals from Electric Utilities
25. 2010: NRECA opposed Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone
26. 2011: NRECA opposed National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines
27. 2011: NRECA opposed Deferral for CO₂ Emissions from Bioenergy and Other Biogenic Sources Under the Prevention of Significant Deterioration (PSD) and Title V Programs
28. 2011: NRECA opposed Draft National Pollutant Discharge Elimination System (NPDES) General Permit for Stormwater Discharges from Construction Activities
29. 2011: NRECA opposed EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act
30. 2012: NRECA opposed Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units
31. 2012: NRECA opposed National Pollutant Discharge Elimination System-Proposed Regulations to Establish Requirements for Cooling Water Intake Structures at Existing Facilities
32. 2012: NRECA opposed Standards of Performance for Stationary Gas Turbines

33. 2013: NRECA opposed Reconsideration of Certain Startup Shutdown Issues: National Emissions Standards for Hazardous Air Pollutants from Coal and Oil Fired Electric Utility Steam Generating Unit
34. 2013: NRECA opposed Steam Electric Power Generating Point Source Category: Effluent Limitations Guidelines and Standards
35. 2014: NRECA supported Designation of Coal Ash as Non-Hazardous Waste
36. 2014: NRECA opposed Redefinition of Waters of the United States (WOTUS)
37. 2014: NRECA opposed New Carbon Dioxide Limits on Power Plants
38. 2014: NRECA opposed Guidelines for Wastewater Discharges from Coal Generation
39. 2015: NRECA opposed Carbon Pollution Emissions Guidelines: Existing Stationary Sources in Indian Country and U.S. Territories: Multi-Jurisdictional Partnerships
40. 2015: NRECA opposed Federal Plan Requirements: Greenhouse Gas Emissions from Electric Utility Generating Units Constructed on or before January 8, 2014
41. 2015: NRECA opposed Additional Ozone Standards
42. 2016: NRECA opposed Protection of Visibility: Amendments to Requirements to State Plans
43. 2016: NRECA opposed Clean Energy Incentive Program
44. 2016: NRECA opposed Effluent Limitations Guidelines and Standards for Electric Generation
45. 2017: NRECA opposed TSCA Reporting and Record Keeping Requirements: Standards for Small Manufacturers and Processors

Appendix B

EPA matters on which Ms. Bennett has lobbied

Q1 2017

1. Issues related to the federal budget and funding levels for agencies and programs.
2. Issues associated with the Administration's rulemaking of the Waters of the U.S. regulatory proposal.
3. Issues related to electric sector security including reliability, supply chain, public/private and cross sector partnerships, roles, responsibilities, information sharing, education, engagement, assessments, threats, gaps and security postures.
4. H.R. 806: the Ozone Standards Implementation Act of 2017 – the bill would impact air quality standards for ozone. For instance, the bill would stretch the Clean Air Act's mandatory timetable for revisiting air quality standards for ozone and other criteria pollutants from once every 5 years to once every 10 years.

Q4 2016

1. Issues related to the potential impact of the Administration's rulemaking on the Clean Power Plan on the Rural Utilities Service loan portfolio.
2. Issues pertaining to limited language on any changes to the definition of waters under federal control, which includes the Waters of the U.S. rule.
3. Issues related to the EPA's final coal combustion residuals regulation.
4. Issues related to the Administration's rulemaking on the "Clean Power Plan" and its potential impact on the RUS loan portfolio.
5. Issues related to the Administration's proposal to lower the National Ambient Air Quality Standards (NAAQS) for Ozone pursuant to the Clean Air Act.
6. Issues related to Clean Air Act enforcement relating to GHG regulations and new source performance standards for power plants.
7. Issues associated with the Administrations rulemaking on the Waters of the U.S. regulatory proposal.
8. Issues related to Clean Water Act Enforcement.
9. S. 612: Water Infrastructure Improvements for the Nation Act (WIIN)
10. Issues related to the Administration's proposal to lower the National Ambient Air Quality Standards (NAAQS) for Ozone pursuant to the Clean Air Act.
11. S. 1645: Department of the Interior, Environment, and Related Agencies Appropriations Act, 2016.
12. Funding restrictions for EPA for enforcing its carbon pollution proposal under 111 (d) of the Clean Air Act on states that have failed to submit a state plan under the Clean Power Plan (Sec. 417); EPAs Waters of the U.S. Proposal (Section 421).
13. H.R. 5303, S. 2848, S. 612: Water Resource Development Act; Water Infrastructure Improvements for the Nation Act (WIIN Act).

Q3 2016

1. Issues related to the potential impact of the Administration's rulemaking on the Clean Power Plan on the Rural Utilities Service loan portfolio.
2. Energy and Water Development and Related Agencies Appropriations Act.

3. Issues pertaining to limitation language on any changes to the definition of waters under federal control, which includes the Waters of the U.S. rule.
4. Issues related to the potential impact of the Administration's rulemaking on the Clean Power Plan on the Rural Utilities Services loan portfolio.
5. Issues related to the EPA's final coal combustion residuals regulation.
6. Issues related to the Administration's rulemaking on the "Clean Power Plan" and its potential impact on the RUS loan portfolio.
7. Issues related to the Administration's proposal to power the National Ambient Air Quality Standards (NAAQS) for Ozone pursuant to the Clean Air Act.
8. Issues related to S. 2446, the Improving Coal Combustion Residuals Act of 2016 & H.R. 1734, The Improving Coal Combustion Residuals Act of 2015.
9. Issues related to Clean Air Act enforcement relating to GHG regulations and new source performance standards for power plants.
10. Issues associated with the Administration's rulemaking on the Waters of the U.S. regulatory proposal.
11. Issues related to Clean Water Act enforcement.
12. S. 2446: The Improving Coal Combustion Residuals Regulation Act of 2015.
13. Issues related to the Administration's proposal to lower the National Ambient Air Quality Standards (NAAQS) for Ozone pursuant to the Clean Air Act.

Q2 2016

1. Issues related to the potential impact of the Administration's rulemaking on the Clean Power Plan on the Rural Utilities Services loan portfolio.
2. Issues related to the EPA's final coal combustion residuals regulation.
3. Issues related to the Administration's rulemaking on the Clean Power Plan and its potential impact on the RUS loan portfolio.
4. Issues related to the Administration's proposal to lower the National Ambient Air Quality Standards (NAAQS) for Ozone pursuant to the Clean Air Act.
5. Issues related to S. 2446, the Improving Coal Combustion Residuals Act of 2016 & H.R. 1734, The Improving Coal Combustion Residuals Act of 2015.
6. Issues related to Clean Air Act enforcement relating to GHG regulations and new source performance standards for power plants.
7. Issues associated with the Administration's rulemaking on the Waters of the U.S. regulatory proposal.
8. Issues related to Clean Water Act enforcement.
9. S. 2446: The Improving Coal Combustion Residuals Regulation Act of 2015.
10. H.R. 2576: The TSCA Modernization Act of 2015.
11. S. 697: Frank R. Lautenberg Chemical Safety for the 21st Century Act.
12. Issues related to the Administration's proposal to lower the National Ambient Air Quality Standards (NAAQS) for Ozone pursuant to the Clean Air Act.
13. H.R. 2822: Department of the Interior, Environment, and Related Agencies Appropriations Act, 2016.
14. S. 1645: Department of the Interior, Environment, and Related Agencies Appropriations Act, 2016 – Lobbied funding restrictions for EPA for enforcing its carbon pollution proposal under 111 (d) of the Clean Air Act on states that have failed to submit a state

plan under the Clean Power Plan (Sec. 417); EPA's Waters of the U.S. Proposal (section 421).

Q1 2016

1. Issues related to the potential impact of the Administration's rulemaking on the Clean Power Plan on the Rural Utilities Services loan portfolio.
2. Issues related to the EPA's final coal combustion residuals regulation.
3. Issues related to the Administration's rulemaking on the Clean Power Plan and its potential impact on the RUS loan portfolio.
4. Issues related to the Administration's proposal to lower the National Ambient Air Quality Standards (NAAQS) for Ozone pursuant to the Clean Air Act.
5. Issues related to S. 2446, the Improving Coal Combustion Residuals Act of 2016 & H.R. 1734, The Improving Coal Combustion Residuals Act of 2015.
6. Issues related to Clean Air Act enforcement relating to GHG regulations and new source performance standards for power plants.
7. Issues associated with the Administration's rulemaking on the Waters of the U.S. regulatory proposal.
8. Issues related to Clean Water Act enforcement.
9. S. 2446: The Improving Coal Combustion Residuals Regulation Act of 2015
10. H.R. 2576: The TSCA Modernization Act of 2015.
11. S. 697: Frank R. Lautenberg Chemical Safety for the 21st Century Act
12. Issues related to the Administration's proposal to lower the National Ambient Air Quality Standards (NAAQS) for Ozone pursuant to the Clean Air Act.
13. S. 1645: Department of the Interior, Environment, and Related Agencies Appropriations Act, 2016 – Lobbied funding restrictions for EPA for enforcing its carbon pollution proposal under 111 (d) of the Clean Air Act on states that have failed to submit a state plan under the Clean Power Plan (Sec. 417); EPA's Waters of the U.S. Proposal (section 421).

Q4 2015

1. Issues related to the potential impact of the Administration's rulemaking on the Clean Power Plan on the Rural Utilities Services loan portfolio.
2. The Inclusion of modified language for H.R. 1734, the Improving Coal Combustion Residuals Regulation Act of 2015.
3. Issues related to the EPA's final coal combustion residuals regulation.
4. Issues related to the Administration's rulemaking on the "Clean Power Plan".
5. Issues related to the Administration's proposal to lower the National Ambient Air Quality Standards (NAAQS) for Ozone pursuant to the Clean Air Act.
6. H.R. 1734, S. 1803: the Improving Coal Combustion Residuals Regulation Act of 2015 – Legislation to provide nonhazardous regulation of coal combustion residuals.
7. H.R. 2576: The TSCA Modernization Act of 2015 – Provision to permit continued use of existing electrical transformers.
8. S. 697: Frank R. Lautenberg Chemical Safety for the 21st Century Act – A bill to amend the Toxic Substance Control Act.
9. Issues related to the Administration's proposal to lower the National Ambient Air Quality Standards (NAAQS) for Ozone pursuant to the Clean Air Act.

10. S.1645: Department of the Interior, Environment, and Related Agencies Appropriations Act, 2016 – Lobbied funding restrictions for EPA for enforcing its carbon pollution proposal under 111 (d) of the Clean Air Act on states that have failed to submit a state plan under the Clean Power Plan (Sec. 417); EPA's Waters of the U.S. Proposal (section 421).

Q3 2015

1. Issues related to the potential impact of the Administration's rulemaking on the Clean Power Plan on the Rural Utilities Services loan portfolio.
2. H.R. 1732: Regulatory Integrity Protection Act – To require EPA and Army Corps to withdraw the proposed Water of the US rule.
3. S. 1140: Federal Water Quality Protection Act – A bill to require the Army Corps and the EPA to propose a regulation revising the definition of the term Waters of the United States.
4. S. 1500: Sensible Environmental Protection Act of 2015 – Preventing duplicate regulation of pesticide applications.
5. Issues related to Clean Air Act enforcement relating to GHG regulations and new source performance standards for power plants.
6. Issues associated with the Administration's rulemaking on the Waters of the U.S. regulatory proposal.
7. Issues related to Clean Water Act enforcement.
8. H.R. 897: Reducing Regulatory Burdens Act of 2015 – Preventing duplicate regulation of pesticide application.
9. S.1645: Department of the Interior, Environment, and Related Agencies Appropriations Act, 2016 – Lobbied funding restrictions for EPA for enforcing its carbon pollution proposal under 111 (d) of the Clean Air Act on states that have failed to submit a state plan under the Clean Power Plan (Sec. 417); EPA's Waters of the U.S. Proposal (section 421).
10. Issues related to the Administration's rulemaking on Waters of the U.S. and its effects on small business.
11. Issues related to the Clean Air Act enforcement relating to the GHG regulations and their effects on small business.

Q2 2015

1. H.Con.Res.27, S.Con.Res.11: Establishing the budget for the United States Government for fiscal year 2016 and setting forth appropriate budgetary levels for fiscal years 2017 through 2025.
2. H.R. 897; Reducing Regulatory Burdens Act of 2015 – Preventing duplicative regulation of pesticide application.
3. S. 848: Resolving Environmental and Grid Reliability Conflicts Act – The bill would protect electric utilities from liability associated from the EPA penalties and third party lawsuits where the Department of Energy issues an emergency, must-run order and voluntary or mandatory compliance with the order results in Clean Air Act or other environmental law violations.

From: [Shelley K. Finlayson](#)
To: [Director of OGE](#)
Cc: [Diana Veilleux](#)
Subject: FW: Letter from Sens. Warren, Markey, Whitehouse, and Hirono
Date: Wednesday, May 17, 2017 10:58:25 AM
Attachments: [2017.05.17 Letter to OGE re Bannon.pdf](#)

Attachment released below

From: Savage, Susannah (Warren) [mailto:(b) (6)]
Sent: Wednesday, May 17, 2017 8:35 AM
To: Shelley K. Finlayson
Cc: Horan, Jeremy (Hirono); Cohen, Brian (Warren); Cohen, Andrew (Markey); Gaeta, Joe (Whitehouse)
Subject: Letter from Sens. Warren, Markey, Whitehouse, and Hirono

Hi Shelley,

Please see the attached letter from Senators Warren, Whitehouse, Markey, and Hirono.

Best,

Susannah Savage

Special Assistant for Oversight and Investigations
Office of Senator Elizabeth Warren

(b) (6)

United States Senate

WASHINGTON, DC 20510

May 17, 2017

Walter Shaub
Director
Office of Government Ethics
1201 New York Avenue NW, Suite 500
Washington, D.C. 20005

Dear Director Shaub,

We write today to request information about the ethics rules that President Trump's Chief Strategist and Senior Counselor, Stephen Bannon, is required to follow with regard to communications with his former employer, Breitbart News Network. We also request your assistance with understanding the role your office and other federal offices will play in ensuring Mr. Bannon's compliance with these rules.

On April 20, 2017, we sent letters to Mr. Bannon and to Stefan Passantino, Deputy Counsel to the President, raising questions about Mr. Bannon's recent communications with Breitbart News Network ("Breitbart").¹ Mr. Bannon formerly served as Breitbart's Executive Chairman.² On February 14, 2017, Breitbart published what has been described as "an extensive attack" on Reince Priebus, President Trump's Chief of Staff.³ Mr. Bannon told news outlets that he "went ballistic" on a phone call with Breitbart's Washington political editor, Matthew Boyle, to protest this article.⁴ Later that week, Mr. Bannon reportedly "instructed [Boyle] not to publish additional articles critical of Priebus," an act that spurred the White House to offer Boyle "access to key staffers," including Press Secretary Sean Spicer, Deputy Chief of Staff Katie Walsh, and

¹ See Senator Elizabeth Warren, "Senators Question Steve Bannon, White House Ethics Official on Violations of Trump Ethics Pledge (press release)" (April 20, 2017) (online at https://www.warren.senate.gov/?p=press_release&id=1560).

² David Folkenflik, "Ex-Breitbart Executive Brings Alt-Right Ties To The White House," *NPR* (November 15, 2016) (online at <http://www.npr.org/2016/11/15/502165973/ex-breitbart-executive-brings-alt-right-ties-to-the-white-house>); Hadas Gold, "Breitbart's bid for congressional pass put off," *Politico* (March 27, 2017) (online at <http://www.politico.com/story/2017/03/breitbart-capitol-hill-credentials-merciers-236547>).

³ Jonathan Swan, "Steve Bannon privately unloaded on Breitbart reporter," *Axios* (February 15, 2017) (online at <https://www.axios.com/steve-bannon-privately-unloads-on-breitbart-2263308411.html>).

⁴ Lloyd Grove, "Steve Bannon: I Didn't Order Breitbart Hit on Reince Priebus," *The Daily Beast* (February 15, 2017) (online at <http://www.thedailybeast.com/articles/2017/02/15/steve-bannon-i-didn-t-order-breitbart-hit-on-reince-priebus.html>).

President Trump himself.⁵ In March, Breitbart's Editor in Chief, Alex Marlow, told reporters that Mr. Bannon "reach[es] out" to him "every so often."⁶

In our letters to Mr. Bannon and Mr. Passantino, we expressed our concern that Mr. Bannon's actions were in violation of Executive Order 13770. President Trump signed Executive Order 13770 on January 28, 2017.⁷ The order requires "[e]very appointee in every executive agency appointed on or after January 20, 2017" to sign and "be contractually committed to" an "Ethics Pledge."⁸ Among other provisions, the Ethics Pledge prevents appointees from "participat[ing] in any particular matter involving specific parties that is directly and substantially related to [their] former employer or former clients" for the first two years after their appointment.⁹ The Executive Order states that a "particular matter involving specific parties" includes "any meeting or other communication relating to the performance of one's official duties with a former employer or former client."¹⁰ It appears that Mr. Bannon's communications with Breitbart may be in violation of the Ethics Pledge.

Our letters also indicated that Mr. Bannon's communications may have violated requirements that executive branch officials "maintain the appearance of impartiality" regarding former employers. Office of Government Ethics ("OGE") regulations require executive branch employees to "avoid an appearance of loss of impartiality in the performance of... official duties."¹¹ To maintain the appearance of impartiality, executive branch employees are prohibited by 5 C.F.R. § 2635.502 from "participat[ing] in a particular matter" if they "know that a person with whom [they have] a covered relationship is or represents a party." Executive branch employees are considered to be in a "covered relationship" with individuals "for whom the employee, within the last year, served as officer, director, trustee, general partner, agent,

⁵ Oliver Darcy, "'There are no sacred cows': Breitbart's honeymoon with establishment win of Trump White House may be over," *Business Insider* (March 8, 2017) (online at <http://www.businessinsider.com/breitbart-establishment-trump-this-is-war-obamacare-2017-3>).

⁶ Lachlan Markay, "Bannon May Have Violated Ethics Pledge by Communicating with Breitbart," *Daily Beast* (March 30, 2017) (online at <http://www.thedailybeast.com/articles/2017/03/30/bannon-may-have-violated-ethics-pledge-by-communicating-with-breitbart.html>); Breitbart TV, "Watch: Breitbart Editor-in-Chief Alex Marlow Interviewed by NBC's 'Today,'" *Breitbart* (March 17, 2017) (online at <http://www.breitbart.com/video/2017/03/17/watch-breitbart-editor-chief-alex-marlow-interviewed-nbcs-today/>).

⁷ President Donald J. Trump, "Executive Order 13770," *WhiteHouse.gov* (January 28, 2017) (online at <https://www.whitehouse.gov/the-press-office/2017/01/28/executive-order-ethics-commitments-executive-branch-appointees>).

⁸ President Donald J. Trump, "Executive Order 13770," *WhiteHouse.gov* (January 28, 2017) (online at <https://www.whitehouse.gov/the-press-office/2017/01/28/executive-order-ethics-commitments-executive-branch-appointees>).

⁹ *Id.*

¹⁰ 5 U.S.C. § 2641.201 (h) defines a "particular matter involving a specific party or parties" as "a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case" (online at <https://www.law.cornell.edu/cfr/text/5/2641.201>); President Donald J. Trump, "Executive Order 13770," *WhiteHouse.gov* (January 28, 2017) (online at <https://www.whitehouse.gov/the-press-office/2017/01/28/executive-order-ethics-commitments-executive-branch-appointees>).

¹¹ 5 C.F.R. § 2635.501 (online at <https://www.law.cornell.edu/cfr/text/5/2635.501>).

attorney, consultant, contractor or employee.”¹² Mr. Bannon’s public financial disclosures clearly list Breitbart News Network, LLC, as one of Mr. Bannon’s employers in 2016.¹³

Neither Mr. Bannon nor Mr. Passantino has responded to our April 20th letters. We therefore ask your office to provide us with answers to the following questions no later than June 5, 2017. To the extent that any of our questions raise privilege or confidentiality concerns, we would be happy to discuss our request further to clarify the information we hope OGE will provide:

1. Please provide an overview of relevant laws, precedents, executive orders, and legal opinions applicable to Mr. Bannon’s role as Chief Strategist and Senior Counselor to the President and his relationship and communications with Breitbart News.
2. If Mr. Bannon communicated with Breitbart News, would those communications comply with any of these relevant laws, executive orders, precedents, and legal opinions?
 - a. Would these communications with Breitbart appear to be in violation of Executive Order 13770 and 5 C.F.R. § 2635.502?
 - b. Are you aware of whether the White House provided Mr. Bannon with a waiver from Executive Order 13770, or an authorization under 5 C.F.R. § 2635.502, to allow him to communicate with Breitbart News?
3. If Mr. Bannon is not complying with relevant laws, executive order, precedents, and legal opinions, what are the potential consequences for him? Which government officials in the White House or elsewhere are responsible for determining if Mr. Bannon is complying, and enforcing these consequences if he is not?
4. Has Mr. Bannon discussed his conflicts of interest and recusal requirements related to Breitbart News with the Office of Government Ethics?
 - a. If so, when, and what was the nature of the discussion?
 - b. Did OGE provide Mr. Bannon with any advice, and did he follow this advice?
 - c. Should Mr. Bannon violate this guidance, what disciplinary actions could OGE or the Designated Agency Ethics Official in the White House Counsel take?

¹² 5 C.F.R. § 2635.502 (online <https://www.law.cornell.edu/cfr/text/5/2635.502>).

¹³ OGE Form 278e for Steve Bannon, Assistant to the President and Chief Strategist, White House (updated March 31, 2017).

5. Have any other White House officials discussed Mr. Bannon's conflicts of interest and recusal requirements related to Breitbart News with the Office of Government Ethics?
- If so, when, and what was the nature of the discussion?
 - Did OGE provide these individuals with any advice, and was this advice followed by the White House and Mr. Bannon?

Please do not hesitate to reach out to Brian Cohen of Senator Warren's staff at 202-224-2245, Joe Gaeta of Senator Whitehouse's staff at 202-224-2921, Andrew Cohen of Senator Markey's staff at 202-224-2742, and Jeremy Horan of Senator Hirono's staff at 202-224-6361.

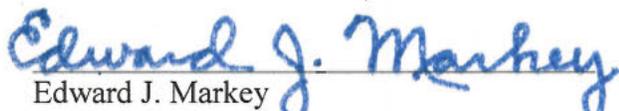
Sincerely,



Elizabeth Warren
United States Senator



Sheldon Whitehouse
United States Senator



Edward J. Markey
United States Senator



Mazie Hirono
United States Senator

From: [Wendy G. Pond](#)
To: [Director of OGE](#); [Shelley K. Finlayson](#); [Dale A. Christopher](#)
Subject: RE: Visit request : Learning trip 2017 Master in Law and Business Ethics (Paris-France)
Date: Wednesday, May 17, 2017 11:19:32 AM

International Team will take care of this request.

From: Director of OGE
Sent: Wednesday, May 17, 2017 11:01 AM
To: Shelley K. Finlayson <skfinlay@oge.gov>; Dale A. Christopher <dachrist@oge.gov>; Wendy G. Pond <wgpond@oge.gov>
Subject: FW: Visit request : Learning trip 2017 Master in Law and Business Ethics (Paris-France)

From: Contact OGE
Sent: Wednesday, May 17, 2017 10:05 AM
To: International Team
Cc: Director of OGE; Dale A. Christopher
Subject: FW: Visit request : Learning trip 2017 Master in Law and Business Ethics (Paris-France)

2 page attachment withheld in full - (b)(5)

FYI

Kehli Cage
Government Ethics Specialist
U.S. Office of Government Ethics
1201 New York Ave NW
Suite #500
Washington, D.C. 20005
Ph: 202-482-9279
kehli.cage@oge.gov

Visit OGE's website: www.oge.gov
Follow OGE on Twitter: @OfficeGovEthics



From: Roxana Family [<mailto:>(b) (6)]
Sent: Tuesday, May 16, 2017 5:57 PM
To: Contact OGE
Subject: Visit request : Learning trip 2017 Master in Law and Business Ethics (Paris-France)

Dear Sirs,

Attachment released below

Please find attached a request letter to the attention of Mr. Walter M. Shaub, Jr and Mr. Dale Christopher.

The purpose of the letter is to organize a new visit and meeting with the OGE for our futur graduates.

I would also be very glad to introduce our initiatives in Research and Higher education in Ethics and Compliance.

Looking forward to reading you,

Best regards

Roxana FAMILY

Chair of Excellence in Law and Business Ethics
Director of Master in Law and Business Ethics
Executive VP for international development
University of Cergy-Pontoise – Paris-Seine
Member of the National Council of Law

Tél : (b) (6)

Mob : (b) (6)



School of Law



To:
Walter M. Shaub, Jr.
Dale Christopher
U.S. Office of Government Ethics
1201 New York Avenue, N.W., Suite 500
Washington, DC 20005

From:
Roxana FAMILY
Chair of Excellence in Law and Business Ethics
Director of Master in Law and Business Ethics
Executive VP for international development
University of Cergy-Pontoise – Paris-Seine
Member of the National Council of Law
roxana.family@u-cergy.fr

Paris, May 14th 2017

Dear Sirs,

The Master in Law and Business Ethics is organizing its annual learning trip to the United-States to help our future graduates from the School of Law to meet with experts of Ethics and Compliance and develop their knowledge and skills in a cross cultural perspective. Our future graduates and myself would be delighted if a new meeting with the Office of Government Ethics could be organized to share your expertise in the executive branch ethics program.

The Master was launched in 2008 under the umbrella of the Chair of excellence in Law and Business Ethics. It is the first academic initiative in France to assemble researchers and professionals alike to promote research and education related to business ethics, compliance, corporate social responsibility and sustainability.

The Master in Law and Business Ethics offers over 700 teaching hours dedicated to Corporate Governance, Ethics, Compliance and CSR. Its purpose is to students to appreciate business ethics comprehensively and effectively while setting in a European framework and training a young and promising generation of future Compliance officers. One of the core subjects of the program is the fight against corruption with a significant focus on the FCPA enforcement. During their Master degree, all our students also follow an intensive 12 months internship within Ethics and Compliance departments or directorates of different corporations in the financial, industrial, or health care sectors. Classes are also delivered by US professors in corporate governance, anti-corruption, whistleblowing and financial market protection.

The work of the Chair and the School of Law at UCP is supported by a network of organizations such as the Organization of Economic Cooperation and Development (OECD), the ECOA and Keith Darcy, the Conference Board, the Institute of Business Ethics, le Cercle d'éthique des

affaires and university partners such as Fordham Law School, University of Illinois, Washington University at Saint-Louis...

The Master program has been ranked among the top ten best Master and MBA programs in France by Eduniversal.

The learning trip is aimed to provide students with firsthand knowledge and exposure to international ethics, compliance, and business conduct programs. The trip includes 30 hours of seminars and conferences with ethics and compliance professionals from multi-national organizations and based in the United-States.

In the past, the learning trip has offered our graduates the opportunity to meet with multiple corporations and organizations in Washington DC, Chicago, New York and Boston such as FBI, United-Nations, UNICEF, US Department of Interior, Google, Booz Allen, IMF, World Bank, Siemens, Office of Government Ethics, PCAOB, Federal Reserve Bank of New York, l'Oréal, Google, Novartis, Lockheed Martin, US Sentencing Commission, DOJ, New York State Supreme Court, Booz, Assurant,...

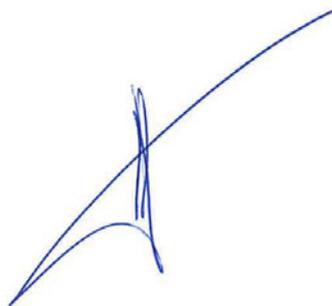
In 2012 we had met with the OGE (Joseph Gangloff, Matt Cross and Trish Zemple).

The group would be in Washington DC on June 20th and able to visit the OGE during the morning from 9:30 am to 12:30 pm.

A work session with the OGE would be of the highest value to our graduates whom are trained to be future engaged Ethics and Compliance professionals. Your expertise and insights on the executive branch ethics and compliance programs would help our students gain a precise and high level knowledge in their field of studies and before they graduate from the School of Law in October as they also work on implementing Ethics and Compliance programs within their intensive 12 months internship in Corporations as Ethics and Compliance officer trainees.

Looking forward to this opportunity, should you need any further information I would be very happy to assist,

Yours sincerely

A handwritten signature in blue ink, appearing to be 'Roxana Family', written in a cursive style.

Roxana Family
Chair of Excellence in Law and Business Ethics
Director of Master in Law and Business Ethics
Executive VP for international development
University of Cergy-Pontoise – Paris-Seine
Member of the National Council of Law

Referral to CIGIE



From: [Michael Hanson](#)
To: [Douglas L. Chapman](#)
Cc: [Director of OGE](#); [Michelle M. Walker](#); [Daniel L. Skalla](#); [Lori Kelly](#)
Subject: Certification of Ethics Agreement Compliance ready to go
Date: Wednesday, May 17, 2017 3:59:09 PM
Attachments: [image001.png](#)

Hello Doug,

I made the design changes in FDTs and the 201 system so when you upload a new "Certification of Ethics Agreement Compliance" it should publish and be available on our 201 site the following morning.

Please let me know when you add the first few entries so I can track them through the publication cycle. I will be out of the office until Monday, in Monday and Tuesday, then out again till after the holiday.

Call me if I'm not x221 or (b) (6).

I expect everything (most things) to work perfectly, but there are a dozen things that got edited so I can get an A (90%) but still have some clean-up work.

Thanks,

Mike

A | B | C | D | E | F | G | H | J | K | L | M | N | O | P | R | S |
Simulation

▼ Archuleta, Katherine L Office Of Personnel Managemen



[Termination](#)



[Annual \(2015\)](#)



[Nominee 278 \(06/09/2013\)](#)



[Ethics Agreement](#)



[Certification of Ethics Agreement Compliance](#)

▼ Babbitt, Jerome R Department Of Transportation, Adm

Michael Hanson
(202) 482-9221
Office of Government Ethics

Visit us at www.oge.gov

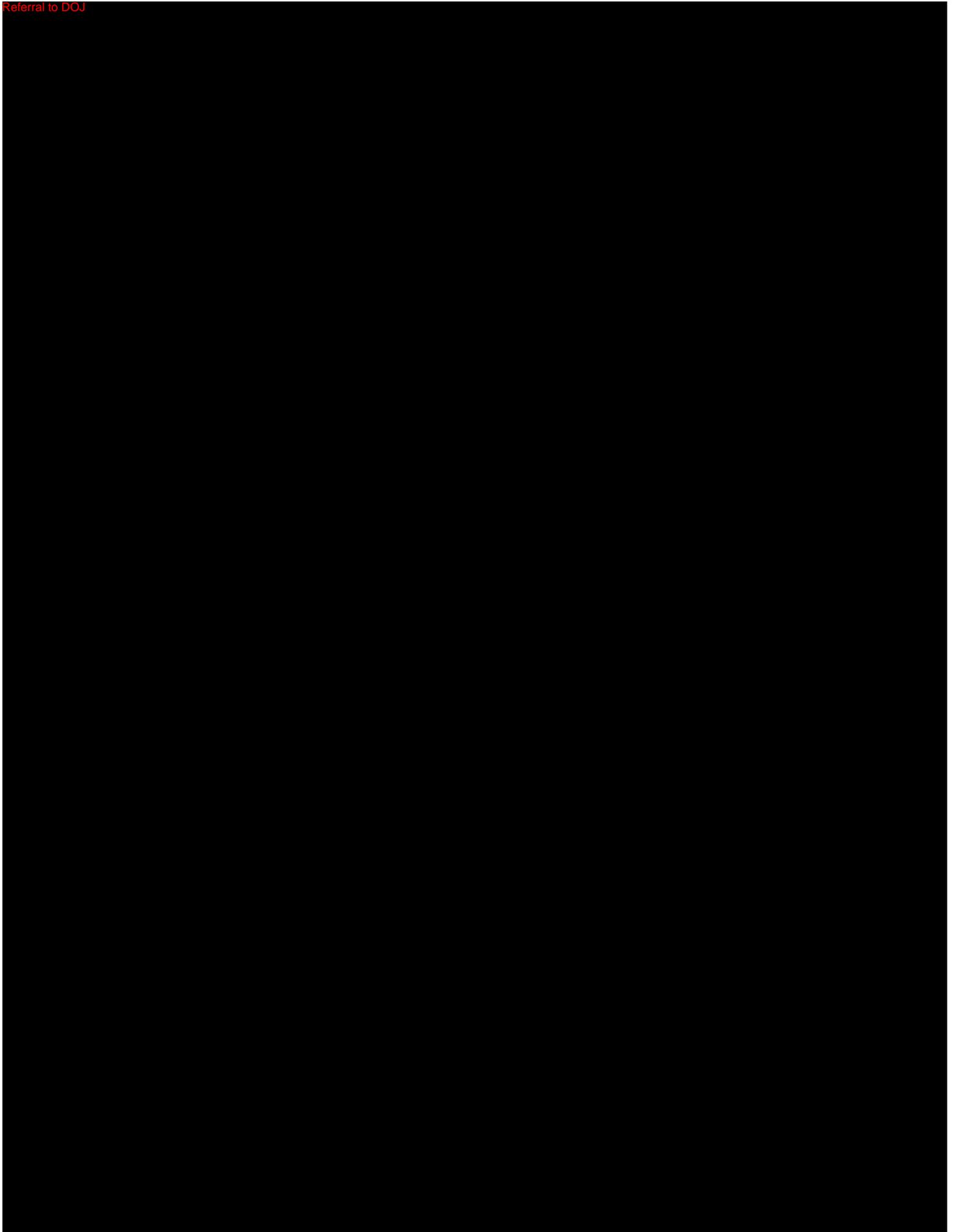
From: [Director of OGE](#)
To: [Shelley K. Finlayson](#); [Diana Veilleux](#)
Subject: FW: Legislation Committee Newsletter - May 2017
Date: Wednesday, May 17, 2017 6:02:33 PM
Attachments: [Legislation Committee Newsletter May 2017.pdf](#)

3 page attachment referred to CIGIE

Walter M. Shaub, Jr.
Director
U.S. Office of Government Ethics
1201 New York Avenue, NW, Suite 500
Washington, DC 20005-3917

Telephone: 202.482.9292
Email: walter.shaub@oge.gov

Referral to CIGIE



Referral to OSC

From: Walter M. Shaub [mailto:wmschaub@oge.gov]
Sent: Thursday, May 18, 2017 8:45 AM
To: Lerner, Carolyn <(b) (6)>
Subject: quick question

Carolyn,

Do you have time for a quick question about OSC's authorities?

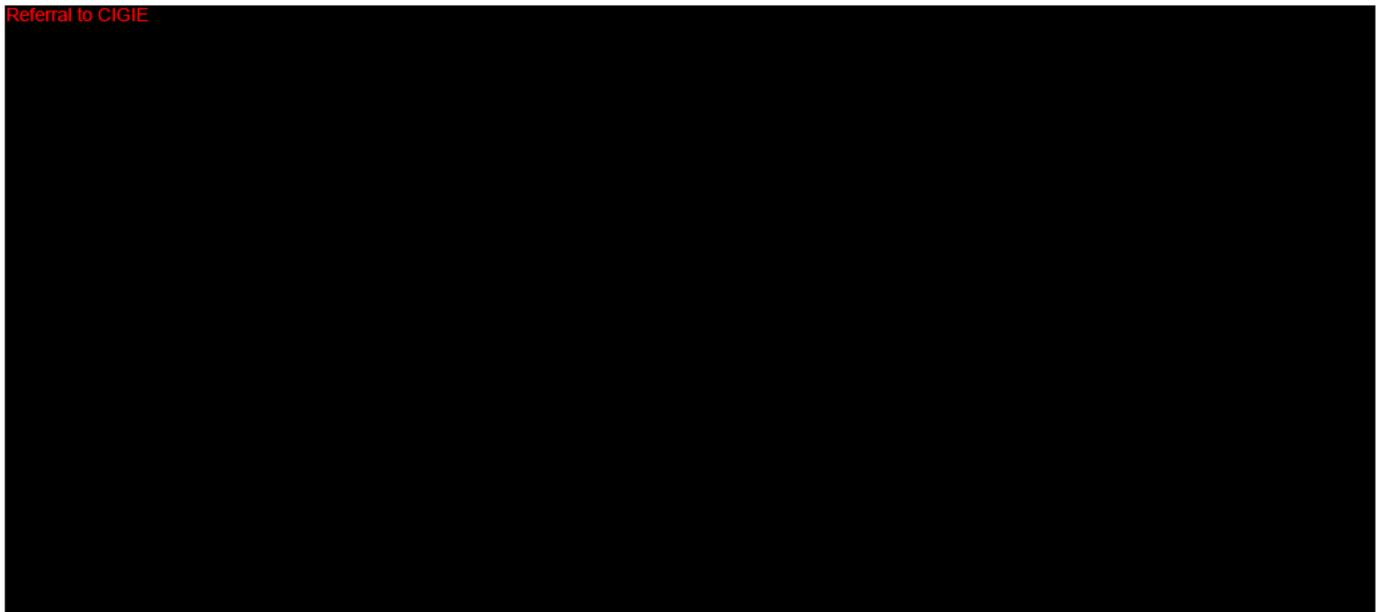
Walt

Walter M. Shaub, Jr.
Director
U.S. Office of Government Ethics
1201 New York Avenue, NW, Suite 500
Washington, DC 20005-3917

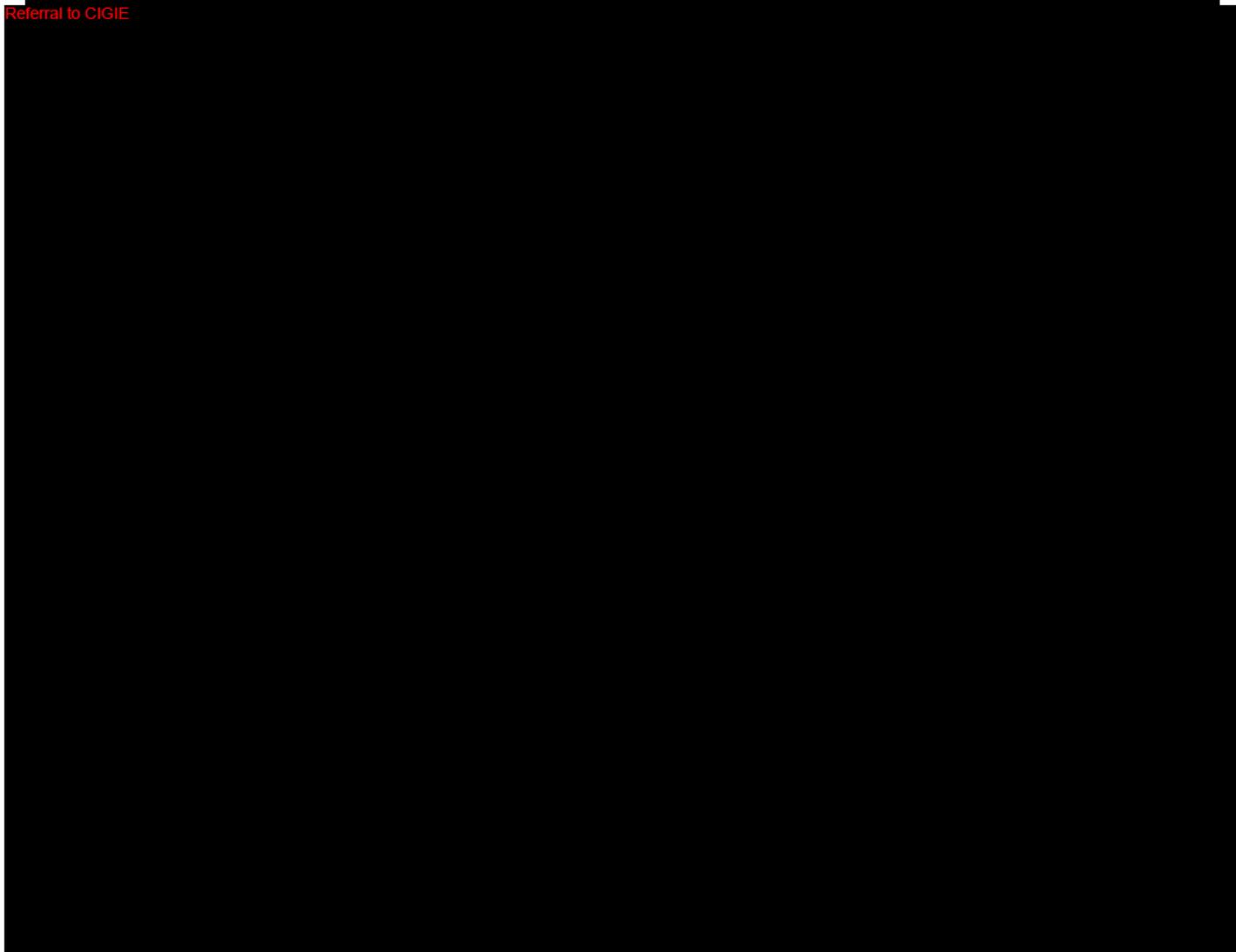
Telephone: 202.482.9292
Email: walter.shaub@oge.gov

OGE Confidential Notice: This message contains Controlled Unclassified Information (CUI) that requires safeguarding or dissemination control under applicable law, regulation, or Government-wide policy. This email, including all attachments, may constitute a Federal record or other Government property that is intended only for the use of the individual or entity to which it is addressed. If you are not the intended recipient or the employee or agent responsible for delivering the transmission to the intended recipient, you are hereby notified that any dissemination, distribution, copying or use of this email or its contents is strictly prohibited. If you have received this email in error, please notify the sender by responding to the email and then immediately delete the email.

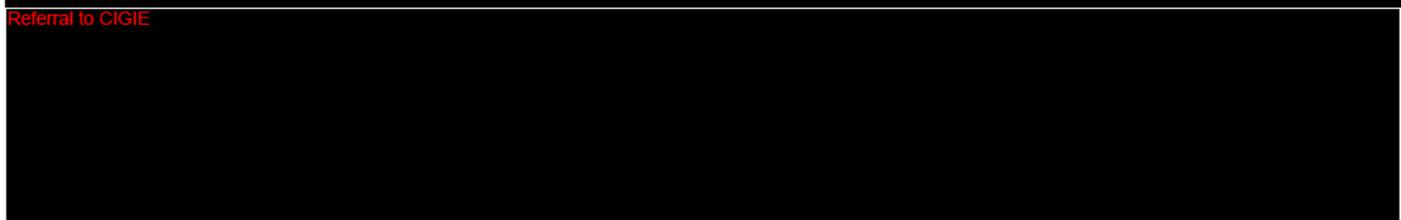
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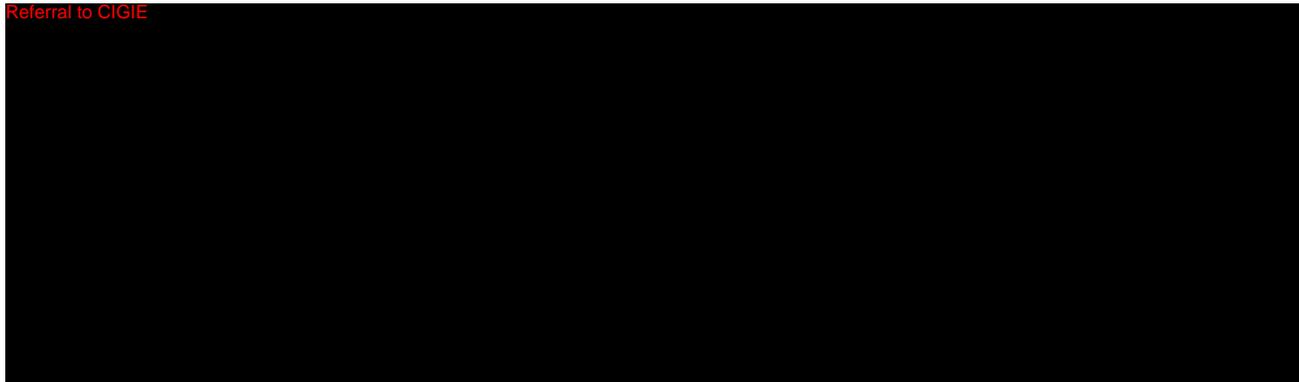
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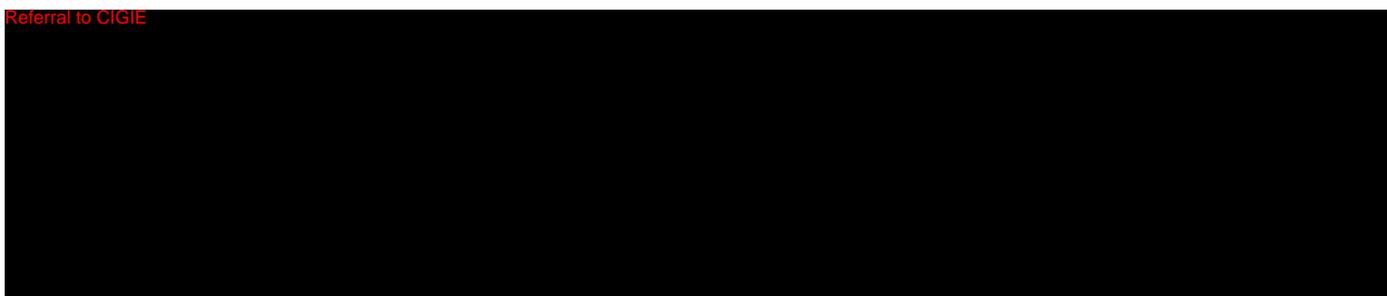
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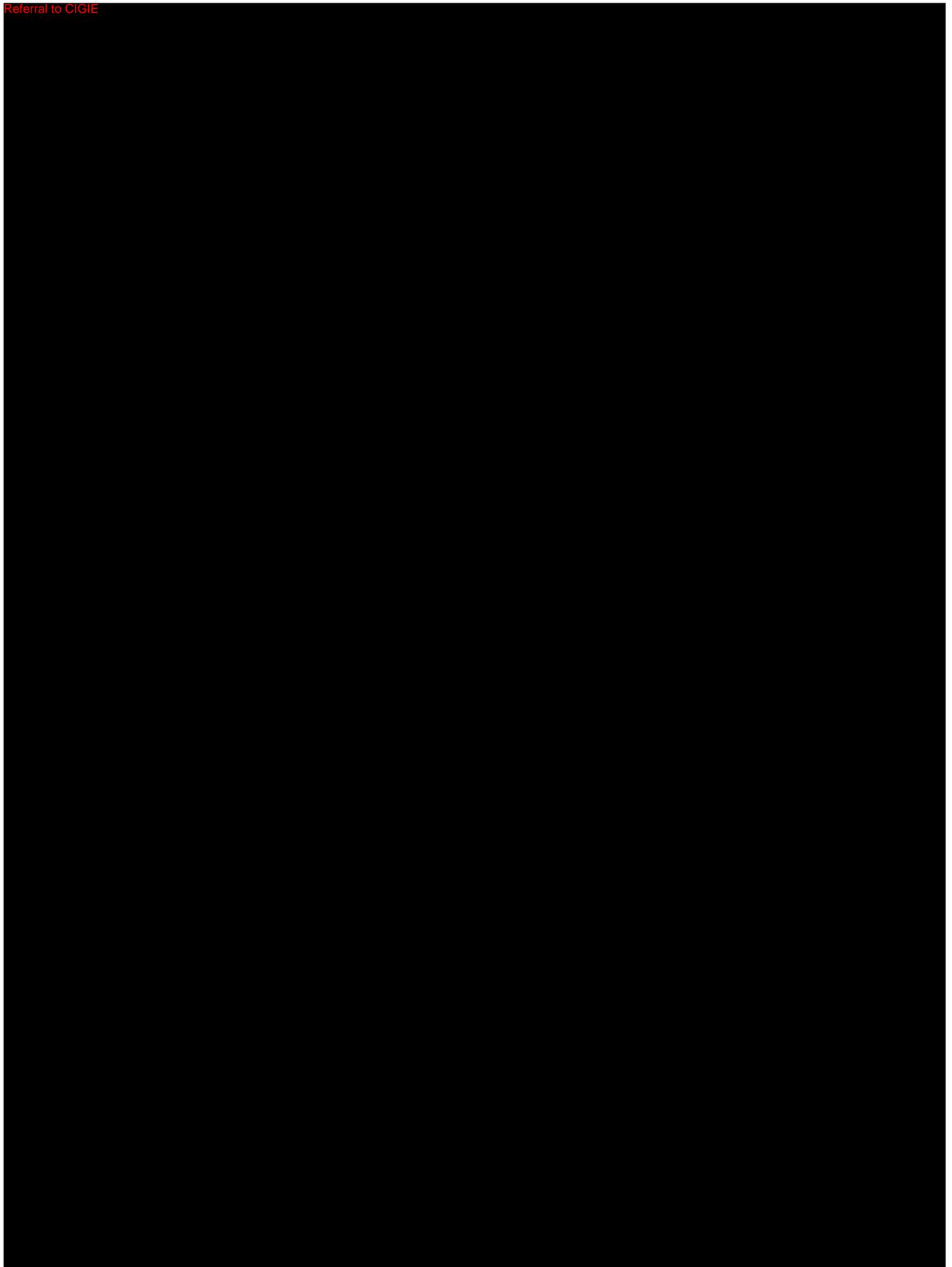


Referral to CIGIE



Referral to CIGIE





Referral to CIGIE



From: [Shelley K. Finlayson](#)
To: [Walter M. Shaub](#)
Subject: link
Date: Thursday, May 18, 2017 10:05:37 AM

<https://www.oge.gov/web/oge.nsf/Special+Reports>

It is the first report on the page

Referral to CIGIE



From: [Shelley K. Finlayson](#)
To: [Director of OGE](#)
Cc: [Diana Veilleux](#)
Subject: Fw: Letter to Director Shaub
Date: Friday, May 19, 2017 11:18:58 AM
Attachments: [2017-05-19.EEC et al to Shaub-OGE re Ethics Waivers release.pdf](#)

Attachment released below

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

From: Boyd, Krista (b) (6)
Sent: Friday, May 19, 2017 11:03 AM
To: Shelley K. Finlayson
Cc: LaNier, Elisa; McCulloch, Nicholas
Subject: Letter to Director Shaub

Shelley,

Attachment released below

Attached please find a letter from Ranking Member Cummings and 17 other Members of the Oversight Committee.

Thank you,
Krista

Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5074

MINORITY (202) 225-5051

<http://oversight.house.gov>

May 19, 2017

The Honorable Walter M. Shaub, Jr.
Director
Office of Government Ethics
1201 New York Avenue NW, Suite 500
Washington, D.C. 20005

Dear Director Shaub:

We are writing to underscore how important it is that the Office of Government Ethics (OGE) publicly release ethics waivers and authorizations issued under President Donald Trump as soon as practicable after your office receives them from the White House and agencies. We understand that your office recently requested these waivers and authorizations and that you have committed to posting them on your website.¹ We fully support this effort because the American people have a right to know which Trump Administration officials have been authorized to avoid ethics requirements.

On January 28, 2017, President Trump repealed the executive order issued by President Obama that had established robust ethics requirements for political appointees.² As a replacement, President Trump issued his own executive order. As you have noted, the new executive order “lacks a transparency provision” that was in President Obama’s executive order.³ Specifically, President Obama had required OGE to collect data on compliance with the ethics pledge requirements; President Trump eliminated this requirement and failed to include a

¹ Letter from Walter M. Shaub, Jr., Director, Office of Government Ethics, to Ranking Member Claire McCaskill, Senate Committee on Homeland Security and Governmental Affairs (Apr. 27, 2017) (online at [www.oge.gov/web/OGE.nsf/Congressional%20Correspondence/16631CA4E1823227852581130052BE5E/\\$FILE/Letter%20to%20Ranking%20Member%20McCaskill.pdf?open](http://www.oge.gov/web/OGE.nsf/Congressional%20Correspondence/16631CA4E1823227852581130052BE5E/$FILE/Letter%20to%20Ranking%20Member%20McCaskill.pdf?open)).

² Exec. Order No. 13770, 82 Fed. Reg. 9333 (Feb. 3, 2017) (online at www.whitehouse.gov/the-press-office/2017/01/28/executive-order-ethics-commitments-executive-branch-appointees).

³ Letter from Walter M. Shaub, Jr., Director, Office of Government Ethics, to Ranking Member Claire McCaskill, Senate Committee on Homeland Security and Governmental Affairs (Apr. 27, 2017) (online at [www.oge.gov/web/OGE.nsf/Congressional%20Correspondence/16631CA4E1823227852581130052BE5E/\\$FILE/Letter%20to%20Ranking%20Member%20McCaskill.pdf?open](http://www.oge.gov/web/OGE.nsf/Congressional%20Correspondence/16631CA4E1823227852581130052BE5E/$FILE/Letter%20to%20Ranking%20Member%20McCaskill.pdf?open)).

comparable system for tracking compliance by his appointees.

Despite the President's decision to remove this transparency requirement from his executive order, as the Director of the Office of Government Ethics, you have a statutory obligation to provide "overall direction of executive branch policies relating to preventing conflicts of interest on the part of officers and employees of any executive agency" and to require "such reports from executive agencies" as you deem necessary.⁴ It is critical that you and your office make transparent how the individuals serving in the Trump Administration are complying, or failing to comply, with President Trump's executive order and other ethics requirements. Your role is particularly important because the White House itself is keeping much of this information secret.

Under the Obama Administration, OGE posted on its website waivers of the ethics pledge issued to White House and agency appointees. On April 27, 2017, you noted in a letter to Senator Claire McCaskill that "the current Administration has not adopted the previous Administration's practice of automatically providing OGE with copies for contemporaneous posting on OGE's website."⁵ The page on the White House website for ethics pledge waivers also does not contain a single waiver.⁶

Members of Congress have sent numerous document requests to the White House and federal agencies requesting information about potential conflicts of interest of President Trump's appointees and whether those advisors have received waivers from President Trump's executive order or other conflict of interest laws or are recused from certain matters.⁷ These letters have

⁴ 5 U.S.C. app. § 402.

⁵ Letter from Walter M. Shaub, Jr., Director, Office of Government Ethics, to Ranking Member Claire McCaskill, Senate Committee on Homeland Security and Governmental Affairs (Apr. 27, 2017) (online at [www.oge.gov/web/OGE.nsf/Congressional%20Correspondence/16631CA4E1823227852581130052BE5E/\\$FILE/Letter%20to%20Ranking%20Member%20McCaskill.pdf?open](http://www.oge.gov/web/OGE.nsf/Congressional%20Correspondence/16631CA4E1823227852581130052BE5E/$FILE/Letter%20to%20Ranking%20Member%20McCaskill.pdf?open)).

⁶ The White House, *Ethics Pledge Waivers Released by the White House* (online at www.whitehouse.gov/briefing-room/disclosures/ethics-pledge-waivers) (accessed May 13, 2017).

⁷ See, e.g., Letter from Senators Elizabeth Warren, Sheldon Whitehouse, Thomas R. Carper, Patrick Leahy, and Ranking Member Elijah E. Cummings to Stefan C. Passantino, Deputy Counsel to the President (Apr. 21, 2017) (online at www.warren.senate.gov/files/documents/2017_04_21_%20Passantino_Letter_on_Icahn.pdf); Letter from Senator Elizabeth Warren, Senator Tom Carper, and Ranking Member Elijah E. Cummings to Stefan C. Passantino, Deputy Counsel to the President (Mar. 8, 2017) (online at https://www.warren.senate.gov/files/documents/2017_03_08_Letter_on_Kushner_Recusals.pdf); Letter from Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform, to Dr. Huban Gowadia, Acting Administrator, Transportation Security Administration (May 3, 2017) (online at

received no response. The White House has also never responded to a letter from Ranking Member Cummings requesting an explanation for the strange assertion made to you by Stefan Passantino, the Designated Agency Ethics Official for the White House, that “many regulations promulgated by the Office of Government Ethics (OGE) do not apply to the employees of the Executive Office of the President.”⁸

If the Trump Administration’s compliance or lack of compliance with ethics requirements is shrouded in secrecy, the American people cannot hold to account the Administration officials who participate in matters in which they have conflicts of interest. The role of the Office of Government Ethics is more vital than ever. Thank you for your commitment to oversight and transparency in the Executive Branch.

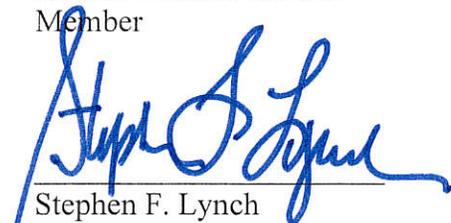
Sincerely,


Elijah E. Cummings
Ranking Member


Carolyn B. Maloney
Member

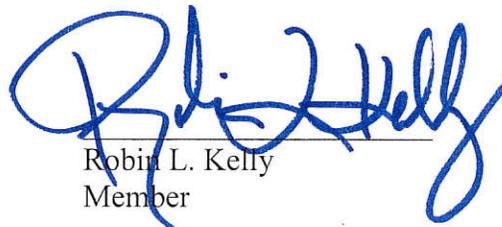

Eleanor Holmes Norton
Member


Wm. Lacy Clay
Member


Stephen F. Lynch
Member

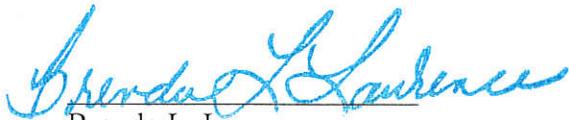

Jim Cooper
Member


Gerald E. Connolly
Vice Ranking Member


Robin L. Kelly
Member

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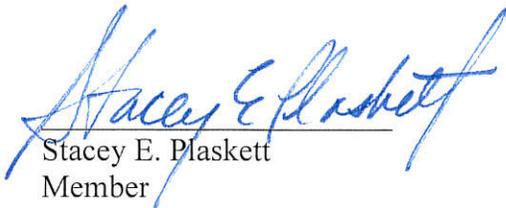
⁸ Letter from Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform to Donald F. McGahn II, White House Counsel (Mar. 9, 2017) (https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2017-03-09.EEC%20to%20WH%20Counsel%20re.OGE__0.pdf).



Brenda L. Lawrence
Member



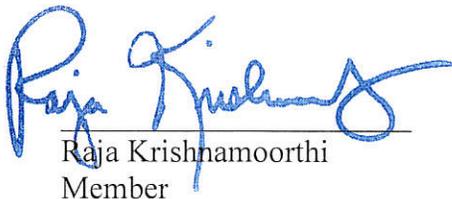
Bonnie Watson Coleman
Member



Stacey E. Plaskett
Member



Val Butler Demings
Member



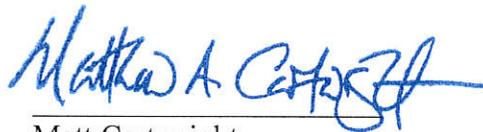
Raja Krishnamoorthi
Member



Jamie Raskin
Member



Peter Welch
Member



Matt Cartwright
Member



Mark DeSaulnier
Member



John Sarbanes
Member

From: Gorelick, Jamie
To: [Walter M. Shaub](mailto:Walter.M.Shaub)
Subject: RE: question
Date: Sunday, May 21, 2017 1:53:54 PM

My cell - (b) (6)

From: Walter M. Shaub [<mailto:wmschaub@oge.gov>]
Sent: Sunday, May 21, 2017 1:07 PM
To: Gorelick, Jamie
Subject: RE: question

I just realized that my message sounded unnecessarily mysterious. I'm happy to call if you'll let me know what's the best number to call.

Walter M. Shaub, Jr.
Director
U.S. Office of Government Ethics
1201 New York Avenue, NW, Suite 500
Washington, DC 20005-3917

Telephone: 202.482.9292
Email: walter.schaub@oge.gov

From: Gorelick, Jamie [<mailto:Jamie.Gorelick@wilmerhale.com>]
Sent: Sunday, May 21, 2017 1:03 PM
To: Walter M. Shaub
Subject: RE: question

You sure? Happy to talk. (b) (6)

Call any time, Walt. It is always my pleasure to talk with you –

Jamie

From: Walter M. Shaub [<mailto:wmschaub@oge.gov>]
Sent: Sunday, May 21, 2017 12:45 PM
To: Gorelick, Jamie
Subject: RE: question

Jamie, I'm sorry for bothering you. It turns out that my question has been overtaken by events (b) (6)

Walt

Walter M. Shaub, Jr.
Director
U.S. Office of Government Ethics
1201 New York Avenue, NW, Suite 500
Washington, DC 20005-3917

Telephone: 202.482.9292
Email: walter.shaub@oge.gov

From: Gorelick, Jamie [<mailto:Jamie.Gorelick@wilmerhale.com>]
Sent: Sunday, May 21, 2017 12:39 PM
To: Walter M. Shaub
Subject: RE: question

Walt –

I am around today and available to talk. What would be convenient for you?

Jamie

From: Walter M. Shaub [<mailto:wmschaub@oge.gov>]
Sent: Saturday, May 20, 2017 12:03 PM
To: Gorelick, Jamie
Subject: RE: question

Yikes! Of course. It can wait until Monday. (b) (6)

Walt

Walter M. Shaub, Jr.
Director
U.S. Office of Government Ethics
1201 New York Avenue, NW, Suite 500
Washington, DC 20005-3917

Telephone: 202.482.9292
Email: walter.shaub@oge.gov

From: Gorelick, Jamie [<mailto:Jamie.Gorelick@wilmerhale.com>]
Sent: Saturday, May 20, 2017 12:00 PM
To: Walter M. Shaub
Subject: Re: question

(b) (6). May I call you tomorrow?

Sent from my iPad

On May 20, 2017, at 11:45 AM, Walter M. Shaub <wshaub@oge.gov> wrote:

Jamie,

If you have any time this weekend or next week, could you give me a call? I have a question that shouldn't take long to answer.

Walt

Walter M. Shaub, Jr.
Director
U.S. Office of Government Ethics
1201 New York Avenue, NW, Suite 500
Washington, DC 20005-3917

Telephone: 202.482.9292
Email: walter.shaub@oge.gov

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From: [Diana Veilleux](#)
To: [Director of OGE](#)
Subject: Memo to File.docx
Date: Sunday, May 21, 2017 10:18:48 PM
Attachments: [Memo to File.docx](#)

2 page attachment withheld in full - (b)
(5)

From: [Diana Veilleux](#)
To: [Director of OGE](#)
Subject: RE: memo
Date: Sunday, May 21, 2017 10:20:09 PM

Sent. Took me awhile to get logged in for some reason.

Diana J. Veilleux

Diana J. Veilleux

Chief

Legal, External Affairs and Performance Branch

Program Counsel Division

Office of Government Ethics

(202) 482-9203

Diana.veilleux@oge.gov

Visit OGE's website at: www.oge.gov

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From: Director of OGE
Sent: Sunday, May 21, 2017 9:03 PM
To: Diana Veilleux
Subject: memo

Diana,

I don't know if you got my voicemails. Could you forward me the memo from Brandon if you get this message tonight?

Walt

From: Brandon A. Steele
To: [Director of OGE](#)
Subject: FW: Memo to the File
Date: Sunday, May 21, 2017 10:59:59 PM
Attachments: [Memo to File.docx](#)

2 page attachment withheld in full - (b)(5)

From: Brandon A. Steele
Sent: Thursday, May 18, 2017 8:58 PM
To: Diana Veilleux
Subject: Memo to the File

Best regards,

Brandon A. Steele
Attorney Advisor
U.S. Office of Government Ethics
1201 New York Ave NW
Suite #500
Washington, D.C. 20005
Ph: 202-482-9209
bastele@oge.gov

Visit OGE's website: www.oge.gov
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From: [Shelley K. Finlayson](#)
To: [Director of OGE](#)
Cc: [Diana Veilleux](#)
Subject: FW: Letter for Director Schaub
Date: Monday, May 22, 2017 8:36:32 AM
Attachments: [052217 - Schaub - Pensions and Emoluments.pdf](#)

Attachment released below

From: Rush, Carly (HELP Committee) [mailto:(b) (6)]
Sent: Monday, May 22, 2017 8:33 AM
To: Shelley K. Finlayson
Cc: Isaacson, Kendra (HELP Committee)
Subject: Letter for Director Schaub

Attachment released below

Hi Shelley,

Attached find a letter to Director Schaub from Senator Murray regarding President Trump's investments and potential conflicts with the domestic emoluments clause. Please let me know if you have any questions.

Thanks!

Carly

Carly Rush
Deputy General Counsel, Minority Staff
U.S. Senate Committee on Health, Education, Labor, and Pensions
Phone: (b) (6)
Email: (b) (6)

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United States Senate

COMMITTEE ON HEALTH, EDUCATION,
LABOR, AND PENSIONS

WASHINGTON, DC 20510-6300

DAVID P. CLEARY, STAFF DIRECTOR
EVAN SCHATZ, DEMOCRATIC STAFF DIRECTOR

<http://help.senate.gov>

May 22, 2017

The Honorable Walter M. Schaub, Jr.
Director
Office of Government Ethics
1201 New York Avenue, NW, Suite 500
Washington, DC 20005

Dear Director Schaub:

I write to you today regarding the income President Trump receives as owner of Trump International Hotels Management LLC, part of which appears to come through the CIM Group from public pension funds in violation of the constitutional prohibition on domestic emoluments. A recent *Reuters* investigation revealed that payments from several public pension funds in at least seven states can be traced to The Trump Organization, meaning that President Trump may be profiting from the retirement plans of millions of our nation's public servants. I request that you investigate the flow of these investments from public pension funds to the company owned by President Trump to assess whether this arrangement violates federal prohibitions on conflicts of interest or the Constitution.

As you know, Article II, Section 1, Clause 7 of the United States Constitution prohibits the President from receiving any emolument "from the United States, or any of them." This "domestic emoluments clause" prohibits the President from receiving a payment or profit from any state or the federal government outside of a fixed salary. Unlike the foreign emoluments clause, which allows Congress to permit the President to accept a favor from a foreign entity, the prohibition on domestic emoluments is absolute. The President may never receive a benefit other than his salary from a state or federal government. This provision serves as an anti-corruption measure to ensure the President is never in a position to use the power of the office to line his own pockets and that federal, state, or local government officials cannot be pressured to provide the President with favors or payments in order to gain influence.

The *Reuters* investigation found that public pension funds in Arizona, California, Michigan, Missouri, Montana, New York, and Texas pay millions of dollars every quarter to the CIM Group to manage their investments.^[1] One of the real estate funds operated by the CIM Group owns Trump SoHo Hotel and Condominium. The CIM Group pays Trump International Hotels Management LLC 5.75 percent of the SoHo Hotel's revenue, which amounted to about \$3 million in 2015, to manage and market the hotel.^[2] Trump International Hotels Management LLC is controlled by the Donald J. Trump Revocable Trust, which is managed by President

^[1] Julia Harte, Exclusive: A New York hotel deal shows how some public pension funds help to enrich Trump, *Reuters*, (4/26/17) <http://www.reuters.com/article/us-usa-trump-hotel-exclusive-idUSKBN17S13Q>.

^[2] *Id.*

Trump's sons Donald Jr. and Eric Trump, who can distribute income from the trust to the President at his request or whenever the trustees deem appropriate. Furthermore, while President Trump ceded management of The Trump Organization to his sons in January, he continues to own businesses in The Trump Organization, including Trump International Hotels Management LLC.

It therefore appears that the public pension funds from several cities and states are paying millions of dollars to an investment fund, which in turn pays millions of dollars to Trump International Hotels Management LLC, from which President Trump profits. This looks like exactly the type of monetary flow prohibited by the Constitution. President Trump's decision to disregard the examples of past Presidents who ensured they scrupulously complied with federal conflicts of interest laws, and instead to remain the owner of The Trump Organization and its associated businesses, puts him in potential violation of the Constitution's domestic emoluments clause.

In your role as Director of the Office of Government Ethics (OGE), I request that you assess:

- 1) Whether the flow of funds from public pension funds to President Trump violates the domestic emoluments clause;
- 2) Whether the flow of funds from public pension funds to President Trump violates federal law; and
- 3) What steps the President can take to ensure he is in compliance with constitutional prohibitions on domestic emoluments and federal ethics requirements.

I would appreciate a response to this request no later than June 12th. If you have any questions about the request, please contact Elizabeth Letter or Kendra Isaacson with the Committee on Health, Education, Labor, and Pensions at 202-224-0767.

Sincerely,



Patty Murray
United States Senator
Ranking Member, Senate Health, Education, Labor,
and Pensions Committee

From: [Shelley K. Finlayson](#)
To: [Director of OGE](#)
Subject: FW: New Public Accountability on Ethics Agreements
Date: Monday, May 22, 2017 10:11:26 AM

-----Original Message-----

From: Robert Rutkowski [[mailto:\(b\) \(6\)](#)]
Sent: Thursday, May 18, 2017 6:56 PM
To: Contact OGE
Subject: New Public Accountability on Ethics Agreements

Hon. Walter M. Shaub, Jr., Director
U.S. Office of Government Ethics
1201 New York Avenue, N.W., Suite 500
Washington, DC 20005
Email: ContactOGE@oge.gov

Re: New Public Accountability on Ethics Agreements

Dear Director:

The Office of Government Ethics (OGE) established a new certification that tracks presidential appointees' ethics compliance. The compliance certifications will be posted online. Both the new format and proactive disclosure should create greater accountability when it comes to appointees' ethics commitments.

Dale Christopher, Deputy Director of OGE, issued an explanatory memo and the new compliance form to all Designated Agency Ethics Officials (DAEO) on May 11. The memo explains that all Senate approved presidential appointees will now be required to submit the new form to certify that they have complied with each aspect of their ethics agreement.

Presidential appointees sign specific ethics agreements that lay out actions the individual must take to limit any potential conflicts of interest or other ethical issues associated with their new position. The steps can include completing trainings, divesting from certain investments, resigning from boards and other positions, and recusing themselves from involvement in issues related to companies that would cause conflicts of interest. Appointees typically have 90 days to comply with the ethics requirements.

In the past DAEOs would provide OGE with documentation that each appointee was in compliance with the terms of their ethics agreements.

But OGE noticed that the format and content of the compliance reporting from ethics officials varied between agencies. The new form should ensure that all major areas are clearly addressed by every appointee and will provide those reviewing the responses with better baseline data to then identify outliers and unusual responses.

Most of the questions on the certification require a yes or no answer (or NA if the issue isn't a part of the requirements in the appointee's ethics agreement). This approach makes it clear to appointees that compliance is an absolute: either the requirement has been met completely or it hasn't. The certification form also drives home the seriousness of accurate answers by including a statement that false or misleading responses are illegal and punishable by fine, imprisonment, or both.

Another significant step toward accountability is that the OGE has announced the completed certifications will be posted on their website for public review. Previously, people had to file a Freedom of Information Act (FOIA) request to obtain copies of ethics compliance documentation. By making access to the records easier, OGE is essentially ensuring greater use of the collected data by Congressional staff, reporters, researchers, nonprofits, and others.

This effort to better document and disclose ethics compliance fits with other OGE activities to improve the quality and accessibility of OGE's data. The office recently issued a call for data from the administration on waivers and authorizations issued to appointees. OGE also reported to the Project On Government Oversight that it will soon begin electronically posting all records released through FOIA, rather than waiting for multiple requests. This echoes the "release to one, release to all" approach the Department of Justice requested public input on last December. Support is expressed for the approach but note that building in a modest delay before public posting could help ensure that FOIA remains a useful tool for investigative journalists.

Thank you for the opportunity to bring this POGO post to your attention.

Yours sincerely,

Robert E. Rutkowski, Esq.

cc: House Democratic Whip Office

(b) (6)

(b) (6)

P/F: (b) (6)

E-mail (b) (6)

Referral to CIGIE

From: [Patrick J. Lightfoot](#)
To: [Director of OGE](#)
Subject: RE: ready
Date: Monday, May 22, 2017 3:38:50 PM

I've done another review and made a few edits to the citations. Should be all set!

--Patrick

From: Director of OGE
Sent: Monday, May 22, 2017 3:11 PM
To: Patrick J. Lightfoot
Subject: ready

Ok. It's ready for you to double check. "Third Version"

From: Matthew A. Marinec
To: [Walter M. Shaub](#)
Subject: Letter to OMB Director Mulvaney 22 May 2017
Date: Monday, May 22, 2017 4:54:00 PM
Attachments: [Letter to OMB Director Mulvaney 22 May 2017.pdf](#)

Attachment released below

Attached.



May 22, 2017

The Honorable John M. Mulvaney
Director
Office of Management and Budget
Executive Office of the President
725 17th Street, NW
Washington, DC 20503

Dear Director Mulvaney:

I am in receipt of your May 16, 2017, letter¹ requesting that the U.S. Office of Government Ethics (OGE) suspend its inquiry into the practices of agency ethics programs and, separately, the activities of individual appointees.² Specifically, you ask OGE to stay a directive issued in an April 28, 2017, Program Advisory requiring executive branch officials to produce information and records pertaining to ethics waivers and authorizations.³

Despite the highly unusual nature and distribution of your letter,⁴ I have provided for your convenience the following discussion of OGE's plenary authority to collect the information and records sought, as well as evidence of the longstanding history of compliance with such collections, which obviate any need to request an opinion from the Department of Justice's Office of Legal Counsel (OLC). The unusual nature of your letter highlights OGE's responsibility to lead the executive branch ethics program with independence, free from political pressure. Accordingly, OGE declines your request to suspend its ethics inquiry and reiterates its expectation that agencies will fully comply with its directive by June 1, 2017. Public confidence in the integrity of government decisionmaking demands no less.

By law, OGE is the "supervising ethics office" for the executive branch.⁵ Under the Ethics in Government Act of 1978 (EIGA), as amended, OGE has plenary authority to collect all information and records that "the Director may determine to be necessary for the performance of his duties," as well as such reports "as the Director deems necessary," except to the extent prohibited by law.⁶

¹ See Attachment 13.

² Recent news reports, which OGE has neither validated nor conclusively invalidated, raise questions as to whether some appointees are participating in matters from which they may be required to recuse if they have not received waivers. See Eric Lipton, Ben Protess & Andrew Lehen, *With Trump Appointees, a Raft of Potential Conflicts and 'No Transparency,'* N.Y. TIMES, Apr. 15, 2017, <https://goo.gl/pq2V5Z>; Editorial Board, *Trump is Issuing Secret Waivers to his Own Ethics Rules. So Much for Draining the Swamp,* WASH. POST, May 6, 2017, <https://goo.gl/hdcTXA>.

³ See Attachment 14.

⁴ You sent copies of your letter to hundreds of General Counsels and Designated Agency Ethics Officials.

⁵ 5 U.S.C. app. § 109(18).

⁶ 5 U.S.C. app. §§ 402(b)(10), 403(a)(2).



Congress has firmly articulated the need for OGE to have access to needed information and records, as the report of one House committee clearly states:

The Committee believes that it is not possible for OGE to ensure the effective and efficient operation of the executive branch ethics program as a whole without having up-to-date information on how agency programs are structured and without having important management data. This data would indicate, for example, the number of individuals who have and haven't filed SF-278s; the number and type of corrective actions required of agency employees (divestitures, **waivers**, disqualifications); and the number of employees alleged or found to have violated employees' standards of conduct or conflict of interest laws, rules, and regulations.⁷

A Senate committee report similarly observes that, "[F]or purposes of performing his responsibilities, [OGE's Director] will require access to relevant files and records of agency ethics counselors and other agency materials, information, and documentation necessary to monitor compliance with this statute and related conflict of interest laws and regulations."⁸

Agency ethics officials are well aware of their legal obligation to produce information and records subject to OGE's directives.⁹ In fact, dozens of agencies have already complied with OGE's current directive well in advance of the June 1, 2017, deadline. In addition, your own agency has a solid record of compliance with OGE's information and records production directives. OMB recently complied with a directive to produce an extensive array of information and records that OGE needed for a thorough evaluation of OMB's ethics program.¹⁰ OMB regularly responds to other OGE directives to produce information and records.¹¹ Most recently, OMB provided OGE with notice¹² of your own efforts to comply with the ethics agreement that you signed on January 10, 2017.¹³

Additional examples of agency compliance with OGE directives to produce information and records are abundant. Among other items, the most obvious examples include: notifications filed by Inspectors General and agency ethics officials related to criminal referrals for prosecution;¹⁴ criminal conflict of interest waivers;¹⁵ responses to executive branch-wide

⁷ See H.R. REP. NO. 100-1017, at 19-20 (1988) (emphasis added).

⁸ See S. REP. NO. 95-170, at 150 (1977).

⁹ See 5 U.S.C. app. §§ 402(b)(10), 403(a)(2); 5 C.F.R. §§ 2638.104(c)(3), 2638.202.

¹⁰ See Attachment 6.

¹¹ See, e.g., Office of Mgmt. and Budget, *Response to Annual Agency Ethics Program Questionnaire for CY 2015*, U.S. OFF. GOV'T ETHICS, <https://goo.gl/Vg4neA> (last visited May 22, 2017).

¹² Attachment 10.

¹³ Ethics Agreement of John M. Mulvaney (Jan. 10, 2017), <https://goo.gl/5v8ZWJ>.

¹⁴ See 5 C.F.R. § 2638.206; see also OGE Form 202, <https://goo.gl/SflA23>.

¹⁵ See Exec. Order No. 12,731, § 301(d) (Oct. 17, 1990); 5 C.F.R. § 2640.303.

directives for information and records;¹⁶ responses to directives to produce information and records in connection with multi-agency special issue reviews;¹⁷ responses to agency-specific directives in connection with oversight of individual agency ethics programs;¹⁸ directives to produce annually designations of separate agency components;¹⁹ responses to a standing directive to produce delegations of authority to Designated Agency Ethics Officials;²⁰ reports of agencies' acceptance of outside reimbursement for official travel;²¹ responses to requests for information regarding conflict of interest prosecutions;²² and responses to the annual Agency Ethics Program Questionnaire.²³

Just last year, the Government Accountability Office issued a report recommending that the Director of OGE collect data from Designated Agency Ethics Officials and determine whether executive branch agencies are experiencing challenges related to the reliability of data on the executive branch's use of special government employees.²⁴ GAO's report followed an inquiry that it conducted at the request of Senate Judiciary Committee Chairman Charles E. Grassley.²⁵ Thereafter, OGE issued an executive branch-wide directive requiring production of information through a "compulsory survey" of 135 agencies, including OMB, and achieved a 100% response rate.²⁶

Compliance on the part of agencies with these OGE directives to produce information and records is entirely commonplace;²⁷ however, I am aware of the views of the White House's current Designated Agency Ethics Official. In a letter dated February 28, 2017, he asserted that Presidential appointees serving in the White House Office are beyond the reach of basic ethics requirements universally applicable to millions of executive branch employees.²⁸ As I explained

¹⁶ See, e.g., OGE Program Advisory PA-15-01 (2015), <https://goo.gl/hcg9lz>; Memo from Dale Christopher, Assoc. Dir., Program Servs. Div., U.S. Office of Gov't Ethics, to Designated Agency Ethics Officials, *Notifying the United States Office of Government Ethics of Filing Extensions*, DO-10-011 (2010), <https://goo.gl/AjjGmi>.

¹⁷ *Post-Election Readiness Review*, U.S. OFF. GOV'T ETHICS, (Sept. 1, 2012), <https://goo.gl/qR4h9L>.

¹⁸ See Attachment 5.

¹⁹ See 5 C.F.R. § 2641.302(e)(2)(ii).

²⁰ See Attachment 9.

²¹ WHITE HOUSE OFFICE, SEMI-ANNUAL REPORT OF PAYMENTS ACCEPTED FROM A NON-FEDERAL SOURCE (Sept. 30, 2016), <https://goo.gl/oMIIPA>.

²² See *Conflict of Interest Prosecution Surveys Index (by Statute)*, U.S. OFF. GOV'T ETHICS, <https://goo.gl/rMgtA8> (last visited May 22, 2017); see also Attachment 12.

²³ *Annual Agency Ethics Program Questionnaire Responses (CY14)*, U.S. OFF. GOV'T ETHICS (Jul. 1, 2015), <https://goo.gl/dQYpHP>.

²⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-548, FEDERAL WORKFORCE: OPPORTUNITIES EXIST TO IMPROVE DATA ON SELECTED GROUPS OF SPECIAL GOVERNMENT EMPLOYEES (2016), <https://goo.gl/1cqA0y>.

²⁵ See Press Release, Sen. Charles E. Grassley, Special Government Employee Report Released, Outlines Problems Managing Designation (Aug. 15, 2016), <https://goo.gl/Ps15A4> ("Grassley asked the Government Accountability Office (GAO) to study the Special Government Employee designation to see whether it works as intended to serve taxpayers.").

²⁶ U.S. OFFICE OF GOV'T ETHICS, SPECIAL GOVERNMENT EMPLOYEES NOT SERVING ON FEDERAL BOARDS (2017), <https://goo.gl/Neg03V>.

²⁷ See, e.g., Attachments 3, 5-6, 8-12.

²⁸ See Letter from Stefan C. Passantino, Designated Agency Ethics Official, White House Office, to Walter M. Shaub, Jr., Director, U.S. Office of Gov't Ethics (Feb. 28, 2017), <https://goo.gl/JoZVpS>. Note, however, that Mr. Passantino's letter also stands as an example of the White House Office's compliance with exercises of OGE's

The Honorable John M. Mulvaney

Director

Page 4

in my response, the theory underlying his position has not been applied in the context of government ethics.²⁹ Contrary to the Designated Agency Ethics Official's assertion, the White House Office has routinely complied with OGE's directives to produce information and records.³⁰ For your edification, I have enclosed a sampling of materials that illustrate the exercise of OGE's authority to collect information and records from the White House Office during every Presidential administration since the enactment of the Ethics in Government Act in 1978, including the Obama, Bush, Clinton, Bush, Reagan, and Carter Administrations.³¹ As you will observe when you review these materials, the compliance of the White House Office has not previously been in doubt.³²

Irrespective of the views expressed by the White House's Designated Agency Ethics Official, OGE's authority is sufficiently clear that consultation with OLC is unnecessary. Nevertheless, you may find it helpful to know that OLC recently approved OGE's issuance of a regulation that establishes the following mandate:³³

Acting directly or through other officials, the DAEO is responsible for taking actions authorized or required under this subchapter, including the following: . . . Promptly and timely furnishing the Office of Government Ethics with all documents and information requested or required under subpart B of this part

statutory authority to compel the production of information and records because, notwithstanding his stated objection, the letter includes the information OGE required him to produce.

²⁹ The underlying theory is that the White House Office is not an "executive agency" for certain limited purposes under 5 U.S.C. § 105, which is referenced in OGE's organic statute. For example, the White House has been found not to be an "executive agency" for purposes of a certain employment discrimination law. *See Haddon v. Walters*, 43 F.3d 1488 (D.C. Cir. 1995) (per curiam). In contrast, the White House has been found to be an "executive agency" for purposes of 18 U.S.C. § 603. *Application of 18 U.S.C. § 603 to Contributions to the President's Re-Election Committee*, 27 Op. O.L.C. 118, 119 (2003) (Office of Legal Counsel opinion finding that, under the statutory scheme of the Hatch Act Reform Amendments, the White House Office should be treated as an "executive agency" under title 5, notwithstanding *Haddon*). In addition, the White House has routinely relied on a certain statutory authority available only to an "executive agency" that authorizes acceptance of outside reimbursements for official travel. *See* 31 U.S.C. § 1353(c)(1) (restricting authority to accept such reimbursements only to an "executive agency" as defined under 5 U.S.C. § 105); *see also* WHITE HOUSE OFFICE, SEMIANNUAL REPORT OF PAYMENTS ACCEPTED FROM A NON-FEDERAL SOURCE (Sept. 30, 2016), <https://goo.gl/BTUpBw>. Thus, the White House is an "executive agency" for some purposes and arguably not for others. However, its status as an "executive agency" for purposes of the Ethics in Government Act is not in doubt. To the contrary, the attached materials include examples of the successful exercise of OGE's authority to require the White House Office to produce information and records over the years since enactment of the Ethics in Government Act. *See* Attachment 8; *see also Office of Government Ethics Jurisdiction Over the Smithsonian Institution*, 32 Op. O.L.C. 56, 63-64 (2008) (OLC opinion finding historical practice relevant to its analysis of the scope of OGE's authority).

³⁰ As part of the current White House's unusual assertions with regard to ethics compliance, I note that a White House official contacted a staff-level OGE employee a few hours before I received your letter in order to challenge an OGE directive to produce information and records that OGE issues every year. In connection with this challenge, the caller demanded that the employee certify that his statement that the Bush Administration had complied with the directive was a "true and correct statement." The White House caller also asked several questions about the collection of information from the National Security Council. *See* Attachment 1.

³¹ *See* Attachment 8.

³² *See id.*

³³ *See* Attachment 7.

The agency head is responsible for, and will exercise personal leadership in, establishing and maintaining an effective agency ethics program and fostering an ethical culture in the agency. The agency head is also responsible for: . . . Requiring agency officials to provide the DAEO with the information, support, and cooperation necessary for the accomplishment of the DAEO's responsibilities

Consistent with sections 402 and 403 of the Act, each agency must furnish to the Director all information and records in its possession which the Director deems necessary to the performance of the Director's duties, except to the extent prohibited by law. All such information and records must be provided to the Office of Government Ethics in a complete and timely manner.³⁴

OLC approved the promulgation of this regulation pursuant to a statutory requirement that OGE coordinate with the Department of Justice before issuing certain regulations.³⁵ In addition to this statutorily required consultation with OLC, OGE consulted with OMB and a broad range of other stakeholders through the ordinary regulatory process.³⁶

The recent issuance of this regulation did not significantly change the regulatory framework for requiring the submission of information and records in the executive branch to OGE. The above-quoted language is similar to the language of an earlier regulation that OGE issued 27 years ago in consultation with the Department of Justice.³⁷ A former OGE Director, who was appointed by President Bush and later reappointed by President Clinton, emphasized that compliance with the regulation has never been optional:

The first point to remember is that every executive agency has a statutory obligation to furnish OGE with "all information and records in its possession which the Director may determine to be necessary for the performance of his duties." 5 U.S.C. app. § 403(a). This statutory obligation is independent of, and serves many purposes in addition to,

³⁴ Executive Branch Ethics Program Amendments, 81 Fed. Reg. 76,271, 76,274, 76,276-77 (Nov. 2, 2016) (codified at 5 C.F.R. §§ 2638.104, 2638.107, 2638.202).

³⁵ 5 U.S.C. app. § 402(b)(1).

³⁶ See Executive Branch Ethics Program Amendments, 81 Fed. Reg. at 76,271 ("These amendments, which are described in the preamble to the proposed rule, draw upon the collective experience of agency ethics officials across the executive branch and OGE as the supervising ethics office. They reflect extensive input from the executive branch ethics community and the inspector general community, as well as OGE's consultation with the Department of Justice (DOJ) and the Office of Personnel Management pursuant to 5 U.S.C. app. 402(b)(1). In short, they present a comprehensive picture of the executive branch ethics program, its responsibilities and its procedures, as reflected through nearly 40 years of interpreting and implementing the Ethics in Government Act of 1978, as amended (the Act), as well as other applicable statutes, regulations, Executive orders, and authorities.").

³⁷ Implementation of the Office of Government Ethics Reauthorization Act of 1988, 55 Fed. Reg. 1665 (1990); Corrective Action and Reporting Requirements Relating to Executive Agency Ethics Programs: Implementation of the Office of Government Ethics Reauthorization Act of 1988, 55 Fed. Reg. 21,845 (1990); see also 5 U.S.C. app. § 402(b)(1).

the scheme for agency review and OGE certification of certain financial disclosure statements. *See* 5 U.S.C. app. § 402 (listing broad range of statutory authorities and functions)... Furthermore, as [the Designated Agency Ethics Official (DAEO)] acknowledges, OGE's implementing regulations provide that the DAEO "shall ensure" that information requested by OGE "is provided in a complete and timely manner." 5 C.F.R. § 2638.203(a)(14).

...

By statute, OGE is charged with providing "overall direction of executive branch policies related to preventing conflicts of interest." 5 U.S.C. app. § 402(a). Among other things, OGE is given specific statutory authority to promulgate rules, interpret those rules, and monitor compliance with financial disclosure requirements. 5 U.S.C. app. § 402(b).

...

Unless and until OGE's interpretation had been overruled by a judicial opinion or otherwise modified by OGE through the usual process of executive branch deliberations, the DAEO had no ground to hold out a contrary interpretation as a lawful option for the filer. Should any future disagreements arise between the DAEO and OGE as to legal issues within OGE's primary jurisdiction, we expect that the DAEO will be careful not to make any statements that might reasonably be construed by [agency] employees as giving them the option to disregard the interpretation of OGE in favor of a contrary interpretation rendered by the DAEO.³⁸

The Director's opinion accurately reflects the common understanding in the executive branch that compliance is mandatory.³⁹

In light of OGE's clear authority and the long history of agencies' compliance, your letter requesting a stay of OGE's pending directive for production of information and records copied to hundreds of other executive branch officials is highly unusual. For OGE to fulfill its mission of

³⁸ OGE Informal Advisory Opinion 00 x 2 at 1-4 (2000).

³⁹ *See Reauthorization of the Office of Government Ethics: Hearing Before the Subcomm. on the Fed. Workforce and Agency Org. of the H. Comm. on Gov't Reform*, 109th Cong. 109-211, at 19 (2006) (statement of Marilyn Glynn, Acting Director, Office of Government Ethics), <https://goo.gl/22vffk> ("We do have currently so-called corrective action authority that allows us to actually hold a hearing if an agency or an individual at an agency refuses to comply on an ongoing basis with some direction in effect that we have given them, and we have never had to use it. I think we have a little bit of the power of the bully pulpit. We can call very high level folks at the agency, all the way up to a Secretary's office or an Administrator's office, and say, so and so on your staff is doing thus and such and it needs to stop. And it stops immediately. We do not find pushback from agencies. So I am not sure that there is a need to particularly strengthen our role.").

preventing conflicts of interest and monitoring compliance with the ethics laws by agencies and officials, the Director must be able to act independently and free from political pressure. Congress created OGE as an institutional check to monitor the ethics program and to prevent conflicts of interest in the executive branch. OGE can effectively perform this role only if it can act objectively and without fear of reprisal.⁴⁰

In this context, it bears emphasizing that OGE has the authority to institute corrective action proceedings against agencies that fail to comply, or against individuals who improperly prevent agency ethics officials from complying, with the Ethics in Government Act.⁴¹ Likewise the Inspectors General and the U.S. Office of Special Counsel have authority to investigate allegations of retaliation against ethics officials for complying with the legal requirement to provide OGE with the information and records subject to this directive.⁴²

OGE is exercising its authority and independence appropriately. OGE's April 28, 2017, directive is supported by ample legal authority and compliant with applicable procedures. Consistent with the applicable legal standard, the directive includes a determination of necessity.⁴³ Although not required to do so, OGE has also limited the scope of the directive to information and records that lie at the heart of the executive branch ethics program.⁴⁴ OGE has also afforded executive branch officials a full month to produce information and records that are routinely maintained and readily accessible by any well-run agency ethics program.

This directive supports a key aspect of OGE's mission, which is to ensure public confidence in the integrity of executive branch-wide decisionmaking. The vital national interest in disclosure of such information and records was most eloquently expressed in a letter that Chairman of the Senate Committee on the Judiciary Charles E. Grassley sent to OGE:

⁴⁰ See S. REP. NO. 98-59 at 20 (1983) ("A major issue discussed at the Oversight Subcommittee's hearing was the independence of the OGE. In many instances, the Office must rule on sensitive issues involving political appointees and other high-ranking officials. For the OGE to perform its role of preventing conflicts of interest and monitoring compliance with the ethics laws by agencies and officials, it is crucial that the Director act independently and free from political pressure. . . . The Congress created the OGE as an institutional check to monitor the ethics program and to prevent conflicts of interest in the Executive Branch. This institutional check is effective only when the Office can act objectively and without fear of reprisal."); see also Attachment 4 (Senate Homeland Security and Government Affairs Committee Questionnaire for Walter M. Shaub, Jr., Question 26: "Some believe that the Director of OGE must be insulated from political pressure, to ensure the Director is not forced to compromise on necessary action or encouraged to deviate from the normal application of ethical requirements with respect to a particular individual. Do you agree that the Director of OGE must act independently and free from political pressure? If so, how would you, if confirmed, maintain this independence and freedom from pressure?").

⁴¹ 5 U.S.C. app. § 402(b)(9), (f); 5 C.F.R. pt. 2638, subpts. D, E.

⁴² See 5 U.S.C. app. §§ 2(1), 4(a)(1) (Inspector General Act of 1978, as amended); see also 5 U.S.C.

§§ 2302(b)(9)(D), (b)(12).

⁴³ See OGE Program Advisory PA-17-02 at 1 (2017); see also 5 U.S.C. app. §§ 402(b)(10), 403; 5 C.F.R.

§§ 2638.104(c)(3), 2638.202.

⁴⁴ In your letter, you refer to what you characterize as the "uniqueness" of this directive to produce information and records, but there is nothing unique about OGE collecting records central to the program it oversees. As the enclosed samples illustrate, OGE's staff has engaged in either the collection or review of agency ethics program records on each working day since OGE's establishment in 1978. See, e.g., Attachments 3, 5-6, 8-12.

The work of the Government is the work of the people and it should be public and available for all to see. It has been said that sunlight is the best disinfectant and that opening up the business of the Government will ensure that the public trust is not lost. As a senior member of the United States Senate, I have consistently worked to ensure that the business of the Government is done in as open and transparent manner as possible.

...

I am concerned that Section 3 could be used to gut the ethical heart of the [Executive] Order. Each day, new nominees to key Government positions are reported. Many of these nominees have been nominated despite the fact that they have previously served as lobbyists or in a manner that would preclude their participation under the Order absent a Section 3 waiver.

...

[T]he Ethics in Government Act provides the Director of OGE a number of authorities to bring sunlight upon Section 3 waivers issued by DAEOs. Specifically, the Act explicitly provides the Director of OGE the authority to, among other things, "interpret rules and regulations issued by the President or the Director governing conflict of interest and ethical problems and the filing of financial statements." The Act also provides the Director of OGE the authority to require "such reports from executive agencies as the Director deems necessary." Further, the Act authorizes the Director to prescribe regulations that require each executive agency to submit to OGE a report containing "any other information that the Director may require in order to carry out the responsibilities of the Director under this title." Finally, the Act is clear that when the Director makes a request to an executive agency, the agency shall furnish "all information and records in its possession which the Director may determine to be necessary for the performance of his duties."

Based upon these existing statutory authorities you have the authority to require each DAEO to provide OGE with an accounting of all waivers and recusals issued.

...

The American people deserve a full accounting of all waivers and recusals to better understand who is running the government and whether the Administration is adhering to its promise to be open,

The Honorable John M. Mulvaney
Director
Page 9

transparent, and accountable. I urge you to take immediate action to make any waivers and recusals public⁴⁵

Following its receipt of Chairman Grassley's letter and the development of the necessary technological means, OGE began posting ethics pledge waivers on its official website.⁴⁶ However, the current Administration has not been complying with this established practice.

In closing, I want to assure you that a request from the Director of the Office of Management and Budget is not something that I decline lightly. For the foregoing reasons, however, OGE is not granting your request to stay the pending directive to produce information and records. Please take all necessary steps to ensure that OMB's response is submitted by the June 1, 2017, deadline.⁴⁷

Sincerely,

A handwritten signature in blue ink, appearing to read "Walter M. Shaub, Jr.", with a stylized flourish at the end.

Walter M. Shaub, Jr.
Director

Attachments (15)

⁴⁵ See Attachment 2.

⁴⁶ *Executive Branch Agency Ethics Pledge Waivers*, U.S. OFF. GOV'T ETHICS, <https://goo.gl/Yw16wQ> (last visited May 22, 2017).

⁴⁷ See Attachment 15.

cc. Designated Agency Ethics Officials

General Counsels

Inspectors General

The Honorable Carolyn N. Lerner
U.S. Office of Special Counsel
1730 M Street, NW, Suite 218
Washington, DC 20036-4505

The Honorable Jason E. Chaffetz
Chairman
Committee on Oversight and
Government Reform
United States House of Representatives
2157 Rayburn House Office Building
Washington, DC 20515

The Honorable Elijah E. Cummings
Ranking Member
Committee on Oversight and
Government Reform
United States House of Representatives
2471 Rayburn House Office Building
Washington, DC 20515

The Honorable Ronald H. Johnson
Chairman
Committee on Homeland Security and
Governmental Affairs
United States Senate
340 Dirksen Senate Office Building
Washington, DC, 20510

The Honorable Claire C. McCaskill
Ranking Member
Committee on Homeland Security and
Governmental Affairs
United States Senate
340 Dirksen Senate Office Building
Washington, DC, 20510

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510-6050

The Honorable Dianne G. B. Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510-6050

From: Matthew A. Marinec
To: [Walter M. Shaub](#)
Subject: Letter to Members of Congress 22 May 2017
Date: Monday, May 22, 2017 5:41:17 PM
Attachments: [Letter to Members of Congress 22 May 2017.pdf](#)

Attachment released below

Attached.

UNITED STATES OFFICE OF
GOVERNMENT ETHICS



May 22, 2017

The Honorable Jason E. Chaffetz
Chairman
Committee on Oversight and
Government Reform
United States House of Representatives
2157 Rayburn House Office Building
Washington, DC 20515

The Honorable Elijah E. Cummings
Ranking Member
Committee on Oversight and
Government Reform
United States House of Representatives
2471 Rayburn House Office Building
Washington, DC 20515

The Honorable Bob Goodlatte
Chairman
Committee on Judiciary
United States House of Representatives
2309 Rayburn House Office Building
Washington, DC 20515

The Honorable John Conyers
Ranking Member
Committee on Judiciary
United States House of Representatives
2426 Rayburn House Office Building
Washington, DC 20515

The Honorable Ronald H. Johnson
Chairman
Committee on Homeland Security and
Governmental Affairs
United States Senate
340 Dirksen Senate Office Building
Washington, DC, 20510

The Honorable Claire C. McCaskill
Ranking Member
Committee on Homeland Security and
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United States Senate
340 Dirksen Senate Office Building
Washington, DC, 20510

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510-6050

The Honorable Dianne G. B. Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510-6050

Dear Members of Congress:

Enclosed please find a letter from the U.S. Office of Government Ethics (OGE) in response to a letter dated May 17, 2017, from John M. Mulvaney, Director of the Office of Management and Budget. In his letter, Director Mulvaney questions OGE's authority to collect ethics information and records from executive branch officials, specifically ethics waivers and Standards of Conduct authorizations. As discussed in the enclosed letter, OGE is fully authorized to collect such information and records, and agencies have a long history of compliance. OGE's ability to fulfill its mission depends on its statutory authority to collect such information and records. I trust that you will find the enclosed response informative. Please do not hesitate to contact OGE's Chief of Staff, Shelley K. Finlayson, should you have any questions or require further information.

Sincerely,

Walter M. Shaub, Jr.
Director

Enclosure



From: [Walter M. Shaub](#)
To: [Director of OGE](#)
Subject: FW: Letter from Director Mulvaney re: Data Call
Date: Monday, May 22, 2017 6:04:09 PM
Attachments: [OMB Letter re OGE Data Call 5-17-17.pdf](#)

Attachment released below

From: Miller, Julie L. EOP/OMB [mailto:(b) (6)]
Sent: Wednesday, May 17, 2017 6:22 PM
To: Walter M. Shaub
Subject: Letter from Director Mulvaney re: Data Call

Director Shaub,

Please see the attached letter from OMB Director Mulvaney regarding the Office of Government Ethics data call.

Julie Miller
Executive Secretary
Office of Management and Budget



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

THE DIRECTOR

May 17, 2017

Walter Shaub
Director
Office of Government Ethics
1201 New York Avenue N.W. Suite 500
Washington, D.C. 20005

Dear Director Shaub:

On April 28, 2017, pursuant to a Program Advisory, the Office of Government Ethics (“OGE”) requested copies of certain waivers and authorizations of appointees in Federal agencies and the White House.¹ Agencies have made inquiries to the Executive Office of the President regarding this request, and the Office of Management and Budget is seeking to provide them with appropriate guidance on the matter. In particular, this data call appears to raise legal questions regarding the scope of OGE’s authorities.

Due to the uniqueness of OGE’s request and potential legal questions that may exist, the Office of Legal Counsel at the Department of Justice may need to be consulted pursuant to 28 U.S.C. § 512 on the scope of the authorities underlying OGE’s data call.

I therefore request that you stay the data call until these questions are resolved.

Sincerely,

Mick Mulvaney
Director

cc: Agency General Counsels and Designated Agency Ethics Officials

¹ U.S. Office of Government Ethics, PA-17-02, Memorandum, Walter M. Shaub, Jr., Director, to Chief of Staff to the President, Agency Heads, Designated Agency Ethics Officials, Inspectors General, and Appointees, Re: Data Call for Certain Waivers and Authorizations (Apr. 28, 2017), <https://goo.gl/XzMWN6>.

From: [Walter M. Shaub](#)
To: [Agency Wide](#)
Subject: Letter from OGE's Director, Walter M. Shaub, Jr.
Date: Monday, May 22, 2017 6:50:13 PM
Attachments: [Letter to Members of Congress 22 May 2017.pdf](#)
[OGE Letter to OMB Director Mulvaney 22 May 2017.pdf](#)

Attachments released below

All,

I am sharing with you OGE's response to a recent communication from OMB Director John M. Mulvaney questioning the scope of OGE's statutory authorities. (The attachments to the letter to Director Mulvaney are too large to include in an email but can be accessed online at the following address: <https://goo.gl/OTFAib>.)

The work you do every day is vitally important to our nation. The legal authorities discussed in these letters are central to that work. As a congressional committee I quote in one of these letters wrote, OGE is an institutional check to monitor the ethics program and to prevent conflicts of interest in the Executive Branch. In many instances, OGE must rule on sensitive issues involving political appointees and other high-ranking officials. For OGE to perform its role of preventing conflicts of interest and monitoring compliance with the ethics laws by agencies and officials, it is crucial that we are able to act independently and free from political pressure. These letters are intended to preserve that independence and ensure that you are able to continue serving your country effectively by carrying out this work in the same way that you and your predecessors have carried it out for nearly four decades.

I thank you for your service. I will continue to support your work in any way I can.

Walt

UNITED STATES OFFICE OF
GOVERNMENT ETHICS



May 22, 2017

The Honorable Jason E. Chaffetz
Chairman
Committee on Oversight and
Government Reform
United States House of Representatives
2157 Rayburn House Office Building
Washington, DC 20515

The Honorable Elijah E. Cummings
Ranking Member
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The Honorable John Conyers
Ranking Member
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The Honorable Ronald H. Johnson
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United States Senate
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The Honorable Dianne G. B. Feinstein
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Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510-6050

Dear Members of Congress:

Enclosed please find a letter from the U.S. Office of Government Ethics (OGE) in response to a letter dated May 17, 2017, from John M. Mulvaney, Director of the Office of Management and Budget. In his letter, Director Mulvaney questions OGE's authority to collect ethics information and records from executive branch officials, specifically ethics waivers and Standards of Conduct authorizations. As discussed in the enclosed letter, OGE is fully authorized to collect such information and records, and agencies have a long history of compliance. OGE's ability to fulfill its mission depends on its statutory authority to collect such information and records. I trust that you will find the enclosed response informative. Please do not hesitate to contact OGE's Chief of Staff, Shelley K. Finlayson, should you have any questions or require further information.

Sincerely,

Walter M. Shaub, Jr.
Director

Enclosure





May 22, 2017

The Honorable John M. Mulvaney
Director
Office of Management and Budget
Executive Office of the President
725 17th Street, NW
Washington, DC 20503

Dear Director Mulvaney:

I am in receipt of your May 16, 2017, letter¹ requesting that the U.S. Office of Government Ethics (OGE) suspend its inquiry into the practices of agency ethics programs and, separately, the activities of individual appointees.² Specifically, you ask OGE to stay a directive issued in an April 28, 2017, Program Advisory requiring executive branch officials to produce information and records pertaining to ethics waivers and authorizations.³

Despite the highly unusual nature and distribution of your letter,⁴ I have provided for your convenience the following discussion of OGE's plenary authority to collect the information and records sought, as well as evidence of the longstanding history of compliance with such collections, which obviate any need to request an opinion from the Department of Justice's Office of Legal Counsel (OLC). The unusual nature of your letter highlights OGE's responsibility to lead the executive branch ethics program with independence, free from political pressure. Accordingly, OGE declines your request to suspend its ethics inquiry and reiterates its expectation that agencies will fully comply with its directive by June 1, 2017. Public confidence in the integrity of government decisionmaking demands no less.

By law, OGE is the "supervising ethics office" for the executive branch.⁵ Under the Ethics in Government Act of 1978 (EIGA), as amended, OGE has plenary authority to collect all information and records that "the Director may determine to be necessary for the performance of his duties," as well as such reports "as the Director deems necessary," except to the extent prohibited by law.⁶

¹ See Attachment 13.

² Recent news reports, which OGE has neither validated nor conclusively invalidated, raise questions as to whether some appointees are participating in matters from which they may be required to recuse if they have not received waivers. See Eric Lipton, Ben Protess & Andrew Lehen, *With Trump Appointees, a Raft of Potential Conflicts and 'No Transparency,'* N.Y. TIMES, Apr. 15, 2017, <https://goo.gl/pq2V5Z>; Editorial Board, *Trump is Issuing Secret Waivers to his Own Ethics Rules. So Much for Draining the Swamp,* WASH. POST, May 6, 2017, <https://goo.gl/hdcTXA>.

³ See Attachment 14.

⁴ You sent copies of your letter to hundreds of General Counsels and Designated Agency Ethics Officials.

⁵ 5 U.S.C. app. § 109(18).

⁶ 5 U.S.C. app. §§ 402(b)(10), 403(a)(2).



Congress has firmly articulated the need for OGE to have access to needed information and records, as the report of one House committee clearly states:

The Committee believes that it is not possible for OGE to ensure the effective and efficient operation of the executive branch ethics program as a whole without having up-to-date information on how agency programs are structured and without having important management data. This data would indicate, for example, the number of individuals who have and haven't filed SF-278s; the number and type of corrective actions required of agency employees (divestitures, **waivers**, disqualifications); and the number of employees alleged or found to have violated employees' standards of conduct or conflict of interest laws, rules, and regulations.⁷

A Senate committee report similarly observes that, "[F]or purposes of performing his responsibilities, [OGE's Director] will require access to relevant files and records of agency ethics counselors and other agency materials, information, and documentation necessary to monitor compliance with this statute and related conflict of interest laws and regulations."⁸

Agency ethics officials are well aware of their legal obligation to produce information and records subject to OGE's directives.⁹ In fact, dozens of agencies have already complied with OGE's current directive well in advance of the June 1, 2017, deadline. In addition, your own agency has a solid record of compliance with OGE's information and records production directives. OMB recently complied with a directive to produce an extensive array of information and records that OGE needed for a thorough evaluation of OMB's ethics program.¹⁰ OMB regularly responds to other OGE directives to produce information and records.¹¹ Most recently, OMB provided OGE with notice¹² of your own efforts to comply with the ethics agreement that you signed on January 10, 2017.¹³

Additional examples of agency compliance with OGE directives to produce information and records are abundant. Among other items, the most obvious examples include: notifications filed by Inspectors General and agency ethics officials related to criminal referrals for prosecution;¹⁴ criminal conflict of interest waivers;¹⁵ responses to executive branch-wide

⁷ See H.R. REP. NO. 100-1017, at 19-20 (1988) (emphasis added).

⁸ See S. REP. NO. 95-170, at 150 (1977).

⁹ See 5 U.S.C. app. §§ 402(b)(10), 403(a)(2); 5 C.F.R. §§ 2638.104(c)(3), 2638.202.

¹⁰ See Attachment 6.

¹¹ See, e.g., Office of Mgmt. and Budget, *Response to Annual Agency Ethics Program Questionnaire for CY 2015*, U.S. OFF. GOV'T ETHICS, <https://goo.gl/Vg4neA> (last visited May 22, 2017).

¹² Attachment 10.

¹³ Ethics Agreement of John M. Mulvaney (Jan. 10, 2017), <https://goo.gl/5v8ZWI>.

¹⁴ See 5 C.F.R. § 2638.206; see also OGE Form 202, <https://goo.gl/SflA23>.

¹⁵ See Exec. Order No. 12,731, § 301(d) (Oct. 17, 1990); 5 C.F.R. § 2640.303.

directives for information and records;¹⁶ responses to directives to produce information and records in connection with multi-agency special issue reviews;¹⁷ responses to agency-specific directives in connection with oversight of individual agency ethics programs;¹⁸ directives to produce annually designations of separate agency components;¹⁹ responses to a standing directive to produce delegations of authority to Designated Agency Ethics Officials;²⁰ reports of agencies' acceptance of outside reimbursement for official travel;²¹ responses to requests for information regarding conflict of interest prosecutions;²² and responses to the annual Agency Ethics Program Questionnaire.²³

Just last year, the Government Accountability Office issued a report recommending that the Director of OGE collect data from Designated Agency Ethics Officials and determine whether executive branch agencies are experiencing challenges related to the reliability of data on the executive branch's use of special government employees.²⁴ GAO's report followed an inquiry that it conducted at the request of Senate Judiciary Committee Chairman Charles E. Grassley.²⁵ Thereafter, OGE issued an executive branch-wide directive requiring production of information through a "compulsory survey" of 135 agencies, including OMB, and achieved a 100% response rate.²⁶

Compliance on the part of agencies with these OGE directives to produce information and records is entirely commonplace;²⁷ however, I am aware of the views of the White House's current Designated Agency Ethics Official. In a letter dated February 28, 2017, he asserted that Presidential appointees serving in the White House Office are beyond the reach of basic ethics requirements universally applicable to millions of executive branch employees.²⁸ As I explained

¹⁶ See, e.g., OGE Program Advisory PA-15-01 (2015), <https://goo.gl/hcg9lz>; Memo from Dale Christopher, Assoc. Dir., Program Servs. Div., U.S. Office of Gov't Ethics, to Designated Agency Ethics Officials, *Notifying the United States Office of Government Ethics of Filing Extensions*, DO-10-011 (2010), <https://goo.gl/AjjGmi>.

¹⁷ *Post-Election Readiness Review*, U.S. OFF. GOV'T ETHICS, (Sept. 1, 2012), <https://goo.gl/qR4h9L>.

¹⁸ See Attachment 5.

¹⁹ See 5 C.F.R. § 2641.302(e)(2)(ii).

²⁰ See Attachment 9.

²¹ WHITE HOUSE OFFICE, SEMIANNUAL REPORT OF PAYMENTS ACCEPTED FROM A NON-FEDERAL SOURCE (Sept. 30, 2016), <https://goo.gl/oMI1PA>.

²² See *Conflict of Interest Prosecution Surveys Index (by Statute)*, U.S. OFF. GOV'T ETHICS, <https://goo.gl/rMgtA8> (last visited May 22, 2017); see also Attachment 12.

²³ *Annual Agency Ethics Program Questionnaire Responses (CY14)*, U.S. OFF. GOV'T ETHICS (Jul. 1, 2015), <https://goo.gl/dQYpHP>.

²⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-548, FEDERAL WORKFORCE: OPPORTUNITIES EXIST TO IMPROVE DATA ON SELECTED GROUPS OF SPECIAL GOVERNMENT EMPLOYEES (2016), <https://goo.gl/1cqA0y>.

²⁵ See Press Release, Sen. Charles E. Grassley, Special Government Employee Report Released, Outlines Problems Managing Designation (Aug. 15, 2016), <https://goo.gl/Ps15A4> ("Grassley asked the Government Accountability Office (GAO) to study the Special Government Employee designation to see whether it works as intended to serve taxpayers.").

²⁶ U.S. OFFICE OF GOV'T ETHICS, SPECIAL GOVERNMENT EMPLOYEES NOT SERVING ON FEDERAL BOARDS (2017), <https://goo.gl/Neg03V>.

²⁷ See, e.g., Attachments 3, 5-6, 8-12.

²⁸ See Letter from Stefan C. Passantino, Designated Agency Ethics Official, White House Office, to Walter M. Shaub, Jr., Director, U.S. Office of Gov't Ethics (Feb. 28, 2017), <https://goo.gl/JozVpS>. Note, however, that Mr. Passantino's letter also stands as an example of the White House Office's compliance with exercises of OGE's

in my response, the theory underlying his position has not been applied in the context of government ethics.²⁹ Contrary to the Designated Agency Ethics Official's assertion, the White House Office has routinely complied with OGE's directives to produce information and records.³⁰ For your edification, I have enclosed a sampling of materials that illustrate the exercise of OGE's authority to collect information and records from the White House Office during every Presidential administration since the enactment of the Ethics in Government Act in 1978, including the Obama, Bush, Clinton, Bush, Reagan, and Carter Administrations.³¹ As you will observe when you review these materials, the compliance of the White House Office has not previously been in doubt.³²

Irrespective of the views expressed by the White House's Designated Agency Ethics Official, OGE's authority is sufficiently clear that consultation with OLC is unnecessary. Nevertheless, you may find it helpful to know that OLC recently approved OGE's issuance of a regulation that establishes the following mandate:³³

Acting directly or through other officials, the DAEO is responsible for taking actions authorized or required under this subchapter, including the following: . . . Promptly and timely furnishing the Office of Government Ethics with all documents and information requested or required under subpart B of this part

statutory authority to compel the production of information and records because, notwithstanding his stated objection, the letter includes the information OGE required him to produce.

²⁹ The underlying theory is that the White House Office is not an "executive agency" for certain limited purposes under 5 U.S.C. § 105, which is referenced in OGE's organic statute. For example, the White House has been found not to be an "executive agency" for purposes of a certain employment discrimination law. *See Haddon v. Walters*, 43 F.3d 1488 (D.C. Cir. 1995) (per curiam). In contrast, the White House has been found to be an "executive agency" for purposes of 18 U.S.C. § 603. *Application of 18 U.S.C. § 603 to Contributions to the President's Re-Election Committee*, 27 Op. O.L.C. 118, 119 (2003) (Office of Legal Counsel opinion finding that, under the statutory scheme of the Hatch Act Reform Amendments, the White House Office should be treated as an "executive agency" under title 5, notwithstanding *Haddon*). In addition, the White House has routinely relied on a certain statutory authority available only to an "executive agency" that authorizes acceptance of outside reimbursements for official travel. *See* 31 U.S.C. § 1353(c)(1) (restricting authority to accept such reimbursements only to an "executive agency" as defined under 5 U.S.C. § 105); *see also* WHITE HOUSE OFFICE, SEMIANNUAL REPORT OF PAYMENTS ACCEPTED FROM A NON-FEDERAL SOURCE (Sept. 30, 2016), <https://goo.gl/BTUpBw>. Thus, the White House is an "executive agency" for some purposes and arguably not for others. However, its status as an "executive agency" for purposes of the Ethics in Government Act is not in doubt. To the contrary, the attached materials include examples of the successful exercise of OGE's authority to require the White House Office to produce information and records over the years since enactment of the Ethics in Government Act. *See* Attachment 8; *see also Office of Government Ethics Jurisdiction Over the Smithsonian Institution*, 32 Op. O.L.C. 56, 63-64 (2008) (OLC opinion finding historical practice relevant to its analysis of the scope of OGE's authority).

³⁰ As part of the current White House's unusual assertions with regard to ethics compliance, I note that a White House official contacted a staff-level OGE employee a few hours before I received your letter in order to challenge an OGE directive to produce information and records that OGE issues every year. In connection with this challenge, the caller demanded that the employee certify that his statement that the Bush Administration had complied with the directive was a "true and correct statement." The White House caller also asked several questions about the collection of information from the National Security Council. *See* Attachment 1.

³¹ *See* Attachment 8.

³² *See id.*

³³ *See* Attachment 7.

The agency head is responsible for, and will exercise personal leadership in, establishing and maintaining an effective agency ethics program and fostering an ethical culture in the agency. The agency head is also responsible for: . . . Requiring agency officials to provide the DAEO with the information, support, and cooperation necessary for the accomplishment of the DAEO's responsibilities

Consistent with sections 402 and 403 of the Act, each agency must furnish to the Director all information and records in its possession which the Director deems necessary to the performance of the Director's duties, except to the extent prohibited by law. All such information and records must be provided to the Office of Government Ethics in a complete and timely manner.³⁴

OLC approved the promulgation of this regulation pursuant to a statutory requirement that OGE coordinate with the Department of Justice before issuing certain regulations.³⁵ In addition to this statutorily required consultation with OLC, OGE consulted with OMB and a broad range of other stakeholders through the ordinary regulatory process.³⁶

The recent issuance of this regulation did not significantly change the regulatory framework for requiring the submission of information and records in the executive branch to OGE. The above-quoted language is similar to the language of an earlier regulation that OGE issued 27 years ago in consultation with the Department of Justice.³⁷ A former OGE Director, who was appointed by President Bush and later reappointed by President Clinton, emphasized that compliance with the regulation has never been optional:

The first point to remember is that every executive agency has a statutory obligation to furnish OGE with “all information and records in its possession which the Director may determine to be necessary for the performance of his duties.” 5 U.S.C. app. § 403(a). This statutory obligation is independent of, and serves many purposes in addition to,

³⁴ Executive Branch Ethics Program Amendments, 81 Fed. Reg. 76,271, 76,274, 76,276-77 (Nov. 2, 2016) (codified at 5 C.F.R. §§ 2638.104, 2638.107, 2638.202).

³⁵ 5 U.S.C. app. § 402(b)(1).

³⁶ See Executive Branch Ethics Program Amendments, 81 Fed. Reg. at 76,271 (“These amendments, which are described in the preamble to the proposed rule, draw upon the collective experience of agency ethics officials across the executive branch and OGE as the supervising ethics office. They reflect extensive input from the executive branch ethics community and the inspector general community, as well as OGE’s consultation with the Department of Justice (DOJ) and the Office of Personnel Management pursuant to 5 U.S.C. app. 402(b)(1). In short, they present a comprehensive picture of the executive branch ethics program, its responsibilities and its procedures, as reflected through nearly 40 years of interpreting and implementing the Ethics in Government Act of 1978, as amended (the Act), as well as other applicable statutes, regulations, Executive orders, and authorities.”).

³⁷ Implementation of the Office of Government Ethics Reauthorization Act of 1988, 55 Fed. Reg. 1665 (1990); Corrective Action and Reporting Requirements Relating to Executive Agency Ethics Programs: Implementation of the Office of Government Ethics Reauthorization Act of 1988, 55 Fed. Reg. 21,845 (1990); see also 5 U.S.C. app. § 402(b)(1).

the scheme for agency review and OGE certification of certain financial disclosure statements. *See* 5 U.S.C. app. § 402 (listing broad range of statutory authorities and functions)... Furthermore, as [the Designated Agency Ethics Official (DAEO)] acknowledges, OGE’s implementing regulations provide that the DAEO “shall ensure” that information requested by OGE “is provided in a complete and timely manner.” 5 C.F.R. § 2638.203(a)(14).

...

By statute, OGE is charged with providing “overall direction of executive branch policies related to preventing conflicts of interest.” 5 U.S.C. app. § 402(a). Among other things, OGE is given specific statutory authority to promulgate rules, interpret those rules, and monitor compliance with financial disclosure requirements. 5 U.S.C. app. § 402(b).

...

Unless and until OGE’s interpretation had been overruled by a judicial opinion or otherwise modified by OGE through the usual process of executive branch deliberations, the DAEO had no ground to hold out a contrary interpretation as a lawful option for the filer. Should any future disagreements arise between the DAEO and OGE as to legal issues within OGE’s primary jurisdiction, we expect that the DAEO will be careful not to make any statements that might reasonably be construed by [agency] employees as giving them the option to disregard the interpretation of OGE in favor of a contrary interpretation rendered by the DAEO.³⁸

The Director’s opinion accurately reflects the common understanding in the executive branch that compliance is mandatory.³⁹

In light of OGE’s clear authority and the long history of agencies’ compliance, your letter requesting a stay of OGE’s pending directive for production of information and records copied to hundreds of other executive branch officials is highly unusual. For OGE to fulfill its mission of

³⁸ OGE Informal Advisory Opinion 00 x 2 at 1-4 (2000).

³⁹ *See Reauthorization of the Office of Government Ethics: Hearing Before the Subcomm. on the Fed. Workforce and Agency Org. of the H. Comm. on Gov’t Reform*, 109th Cong. 109-211, at 19 (2006) (statement of Marilyn Glynn, Acting Director, Office of Government Ethics), <https://goo.gl/22vffk> (“We do have currently so-called corrective action authority that allows us to actually hold a hearing if an agency or an individual at an agency refuses to comply on an ongoing basis with some direction in effect that we have given them, and we have never had to use it. I think we have a little bit of the power of the bully pulpit. We can call very high level folks at the agency, all the way up to a Secretary’s office or an Administrator’s office, and say, so and so on your staff is doing thus and such and it needs to stop. And it stops immediately. We do not find pushback from agencies. So I am not sure that there is a need to particularly strengthen our role.”).

preventing conflicts of interest and monitoring compliance with the ethics laws by agencies and officials, the Director must be able to act independently and free from political pressure. Congress created OGE as an institutional check to monitor the ethics program and to prevent conflicts of interest in the executive branch. OGE can effectively perform this role only if it can act objectively and without fear of reprisal.⁴⁰

In this context, it bears emphasizing that OGE has the authority to institute corrective action proceedings against agencies that fail to comply, or against individuals who improperly prevent agency ethics officials from complying, with the Ethics in Government Act.⁴¹ Likewise the Inspectors General and the U.S. Office of Special Counsel have authority to investigate allegations of retaliation against ethics officials for complying with the legal requirement to provide OGE with the information and records subject to this directive.⁴²

OGE is exercising its authority and independence appropriately. OGE's April 28, 2017, directive is supported by ample legal authority and compliant with applicable procedures. Consistent with the applicable legal standard, the directive includes a determination of necessity.⁴³ Although not required to do so, OGE has also limited the scope of the directive to information and records that lie at the heart of the executive branch ethics program.⁴⁴ OGE has also afforded executive branch officials a full month to produce information and records that are routinely maintained and readily accessible by any well-run agency ethics program.

This directive supports a key aspect of OGE's mission, which is to ensure public confidence in the integrity of executive branch-wide decisionmaking. The vital national interest in disclosure of such information and records was most eloquently expressed in a letter that Chairman of the Senate Committee on the Judiciary Charles E. Grassley sent to OGE:

⁴⁰ See S. REP. NO. 98-59 at 20 (1983) ("A major issue discussed at the Oversight Subcommittee's hearing was the independence of the OGE. In many instances, the Office must rule on sensitive issues involving political appointees and other high-ranking officials. For the OGE to perform its role of preventing conflicts of interest and monitoring compliance with the ethics laws by agencies and officials, it is crucial that the Director act independently and free from political pressure. . . . The Congress created the OGE as an institutional check to monitor the ethics program and to prevent conflicts of interest in the Executive Branch. This institutional check is effective only when the Office can act objectively and without fear of reprisal."); *see also* Attachment 4 (Senate Homeland Security and Government Affairs Committee Questionnaire for Walter M. Shaub, Jr., Question 26: "Some believe that the Director of OGE must be insulated from political pressure, to ensure the Director is not forced to compromise on necessary action or encouraged to deviate from the normal application of ethical requirements with respect to a particular individual. Do you agree that the Director of OGE must act independently and free from political pressure? If so, how would you, if confirmed, maintain this independence and freedom from pressure?").

⁴¹ 5 U.S.C. app. § 402(b)(9), (f); 5 C.F.R. pt. 2638, subpts. D, E.

⁴² See 5 U.S.C. app. §§ 2(1), 4(a)(1) (Inspector General Act of 1978, as amended); *see also* 5 U.S.C. §§ 2302(b)(9)(D), (b)(12).

⁴³ See OGE Program Advisory PA-17-02 at 1 (2017); *see also* 5 U.S.C. app. §§ 402(b)(10), 403; 5 C.F.R. §§ 2638.104(c)(3), 2638.202.

⁴⁴ In your letter, you refer to what you characterize as the "uniqueness" of this directive to produce information and records, but there is nothing unique about OGE collecting records central to the program it oversees. As the enclosed samples illustrate, OGE's staff has engaged in either the collection or review of agency ethics program records on each working day since OGE's establishment in 1978. *See, e.g.*, Attachments 3, 5-6, 8-12.

The work of the Government is the work of the people and it should be public and available for all to see. It has been said that sunlight is the best disinfectant and that opening up the business of the Government will ensure that the public trust is not lost. As a senior member of the United States Senate, I have consistently worked to ensure that the business of the Government is done in as open and transparent manner as possible.

...

I am concerned that Section 3 could be used to gut the ethical heart of the [Executive] Order. Each day, new nominees to key Government positions are reported. Many of these nominees have been nominated despite the fact that they have previously served as lobbyists or in a manner that would preclude their participation under the Order absent a Section 3 waiver.

...

[T]he Ethics in Government Act provides the Director of OGE a number of authorities to bring sunlight upon Section 3 waivers issued by DAEOs. Specifically, the Act explicitly provides the Director of OGE the authority to, among other things, “interpret rules and regulations issued by the President or the Director governing conflict of interest and ethical problems and the filing of financial statements.” The Act also provides the Director of OGE the authority to require “such reports from executive agencies as the Director deems necessary.” Further, the Act authorizes the Director to prescribe regulations that require each executive agency to submit to OGE a report containing “any other information that the Director may require in order to carry out the responsibilities of the Director under this title.” Finally, the Act is clear that when the Director makes a request to an executive agency, the agency shall furnish “all information and records in its possession which the Director may determine to be necessary for the performance of his duties.”

Based upon these existing statutory authorities you have the authority to require each DAEO to provide OGE with an accounting of all waivers and recusals issued.

...

The American people deserve a full accounting of all waivers and recusals to better understand who is running the government and whether the Administration is adhering to its promise to be open,

The Honorable John M. Mulvaney
Director
Page 9

transparent, and accountable. I urge you to take immediate action to make any waivers and recusals public⁴⁵

Following its receipt of Chairman Grassley's letter and the development of the necessary technological means, OGE began posting ethics pledge waivers on its official website.⁴⁶ However, the current Administration has not been complying with this established practice.

In closing, I want to assure you that a request from the Director of the Office of Management and Budget is not something that I decline lightly. For the foregoing reasons, however, OGE is not granting your request to stay the pending directive to produce information and records. Please take all necessary steps to ensure that OMB's response is submitted by the June 1, 2017, deadline.⁴⁷

Sincerely,



Walter M. Shaub, Jr.
Director

Attachments (15)

⁴⁵ See Attachment 2.

⁴⁶ *Executive Branch Agency Ethics Pledge Waivers*, U.S. OFF. GOV'T ETHICS, <https://goo.gl/Yw16wQ> (last visited May 22, 2017).

⁴⁷ See Attachment 15.

cc. Designated Agency Ethics Officials

General Counsels

Inspectors General

The Honorable Carolyn N. Lerner
U.S. Office of Special Counsel
1730 M Street, NW, Suite 218
Washington, DC 20036-4505

The Honorable Jason E. Chaffetz
Chairman
Committee on Oversight and
Government Reform
United States House of Representatives
2157 Rayburn House Office Building
Washington, DC 20515

The Honorable Elijah E. Cummings
Ranking Member
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United States House of Representatives
2471 Rayburn House Office Building
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The Honorable Bob Goodlatte
Chairman
Committee on Judiciary
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2309 Rayburn House Office Building
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The Honorable John Conyers
Ranking Member
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The Honorable Ronald H. Johnson
Chairman
Committee on Homeland Security and
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340 Dirksen Senate Office Building
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The Honorable Claire C. McCaskill
Ranking Member
Committee on Homeland Security and
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The Honorable Charles E. Grassley
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Committee on the Judiciary
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The Honorable Dianne G. B. Feinstein
Ranking Member
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From: [Shelley K. Finlayson](#)
To: [Director of OGE](#)
Subject: FW: Letter to ED DAEO from Sen. Warren and Murray
Date: Tuesday, May 23, 2017 7:41:34 AM
Attachments: [2017.05.22 Letter to ED Ethics Official re Eitel.pdf](#)

Attachment released below

From: Savage, Susannah (Warren) [mailto:[\(b\) \(6\)](#)]
Sent: Monday, May 22, 2017 9:25 PM
To: Shelley K. Finlayson
Cc: Delaney, Joshua (Warren)
Subject: Letter to ED DAEO from Sen. Warren and Murray

Hi Shelley,

I wanted to flag this letter that Senators Warren and Murray sent to the DAEO at the Department of Education. Director Shaub is cc-ed on the letter, so we wanted to make sure he had a copy.

Best,

Susannah

United States Senate
WASHINGTON, DC 20510

May 22, 2017

Ms. Marcella Goodridge-Keiller
Designated Agency Ethics Official
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Dear Ms. Goodridge-Keiller:

We are writing in response to your recent reply to an inquiry regarding the U.S. Department of Education's ("Department") employee, Mr. Robert Eitel, and his ability to adhere to federal personnel policies and to perform his new assignment as Senior Counselor to the Secretary without ethical violations.

As you noted in your May 8 letter, Mr. Eitel has resigned from his position at Bridgepoint Education, Inc. ("Bridgepoint") to join the Department in a permanent role. As such, Mr. Eitel must adhere to ethics standards that apply to all federal employees. Every employee, permanent or temporary, must recuse themselves from any particular matter that involves a former employer over the past two years prior to federal employment.

According to Section 6 of President Trump's Executive Order 13770, Ethics Commitments by Executive Branch Employees ("Ethics Pledge"), every appointee in every executive agency appointed on or after January 20, 2017, shall sign a pledge, and upon signing shall be contractually committed to, the following provision to become a federal government appointee:

"I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts."

Your May 8 letter also indicated that, to your knowledge, no Department official, including Mr. Eitel, has received a waiver to this Ethics Pledge, nor has a Department official received a waiver to other federal ethics statutes or regulations, such as 18 U.S.C. § 208 & 5 CFR § 2635.502.

We understand that the U.S. Office of Government Ethics has given the Department and all executive agencies until June 1 to provide waivers issued or approved under the Ethics Pledge and other federal ethics rules, and we are concerned by the Administration's reported attempts to block this legal data request as well as their overall reluctance to share information that should otherwise be public.¹ Regardless of whether a waiver has been or will be issued, it remains unclear why Mr. Eitel is advising the Department on matters pertaining to a pending regulation.

¹ Lipton, Eric. "White House Moves to Block Ethics Inquiry Into Ex-Lobbyists on Payroll." *The New York Times*. May 22, 2017. <https://www.nytimes.com/2017/05/22/us/politics/trump-white-house-government-ethics-lobbyists.html>

Mr. Eitel is reported to be actively working on an issue that is of significant interest to his previous employer, known as the “borrower defense” regulation.² This rule provides the Secretary the ability to forgive and refund the federal student loan debt of borrowers who were misled by their schools or who were the victims of unlawful and abusive practices in higher education. While apparently recusing himself from any current claims made under the 1994 regulation stemming from authority under the Higher Education Act, Mr. Eitel is reported to be still actively working on implementing the revised borrower defense rule that is scheduled to go into effect on July 1, 2017. This regulation creates a new federal standard for borrowers whose loans are disbursed on or after that date.

The borrower defense rule provides student loan borrowers with the potential to have their loans discharged if they are defrauded. The Department may then recoup funds from the school to pay for these discharges and refunds. Mr. Eitel’s former employer is the subject of multiple state and federal investigations and lawsuits that could, in fact, require the company to repay the government under the regulation at issue.

Bridgepoint is currently under investigation by the U.S. Department of Justice, Securities and Exchange Commission, and the state attorneys general of California and Massachusetts. Mr. Eitel’s former employer has also previously been fined more than \$31 million by the Consumer Financial Protection Bureau for allegedly deceiving students about the cost of their private student loans, and has been fined by the Department for incorrect and late refunds. And, a subsidiary of Bridgepoint, known as Ashford University, has provided \$7.25 million in restitution for students and remains subject to monitoring of its practices pursuant to that settlement agreement.³

To further safeguard taxpayers, the borrower defense rule also provides the Secretary tools to ensure colleges are financially responsible, such as requiring a letter of credit in the case of certain state, federal or accrediting agency actions or investigations, as well as significant fluctuations in Direct Loan and Pell Grant funds. Ashford University acquired considerable new student aid revenue by moving from a body of fewer than 1,000 students in 2005, to 77,000 students just five years later, suggesting that Bridgepoint could be subject to these enrollment-related requirements. Finally, the borrower defense rule also bans the practice of inserting clauses for mandatory arbitration and limitations on class action lawsuits into enrollment agreements, a practice known as “forced arbitration.” Bridgepoint regularly uses forced arbitration clauses. In 2015, a federal court held that a class of students suing Bridgepoint Education, Ashford University, and the University of the Rockies for alleged misrepresentations could not be properly certified because it was unclear what share of the schools’ students were bound by its currently-utilized forced arbitration agreements.⁴

Bridgepoint is affected in numerous ways by the borrower defense rule, given a) potentially significant misconduct that could be subject to borrower defense claims, b) potential financial liabilities from the recoupment of loan discharges made under the new borrower defense rule, and c) utilization of an enrollment clause that will soon become prohibited under a pending regulation. The

² Rubin, Jennifer. “Trump does his hires no favors: The ordeal of an ethical public servant.” *The Washington Post*. March 21, 2017. <https://www.washingtonpost.com/blogs/right-turn/wp/2017/03/21/trump-does-his-hires-no-favors-the-ordeal-of-an-ethical-public-servant/>

³ Miller, Tom. Attorney General of Iowa. May 16, 2014. “Ashford University and Parent Company Bridgepoint Education Agree to \$7.25 Million Payment and Major Changes after Miller Alleges Consumer Fraud.” <https://www.iowaattorneygeneral.gov/newsroom/ashford-university-and-parent-company-bridgepoint-education-agree-to-7-25-million-payment-and-major-changes-after-miller-alleges-consumer-fraud/>

⁴ *Guzman v. Bridgepoint Education, Inc.*, 305 F.R.D. 594, 612 (S.D. Cal. 2015).

company admits these interests openly. Little more than three months ago in Securities and Exchange Commission filings, Bridgepoint acknowledged that borrower defense claims under the new rule “could damage our reputation in the industry and have a material adverse effect on enrollments and our revenues, financial condition, cash flows and results of operations” and the company notes an interest in matters involving “delaying the schedule effective date or otherwise affecting the enactment of applicable regulations.”⁵

Thus it would appear that despite his conversion to a full-time government employee, Mr. Eitel remains in direct violation of the Ethics Pledge, and potentially other federal ethics rules. Our March 31 letters asked several questions to address this concern, but we received an incomplete response. As a result, we further request that you provide:

1. A copy of any paperwork submitted by Mr. Eitel to the Department related to financial disclosures, conflicts of interest, or other ethics requirements, including OGE Form 278e and a signed copy of the Ethics Pledge.
2. A description of all policy matters Mr. Eitel has worked on during his time at the Department and all matters he anticipates working on.
3. The date Mr. Eitel was first employed by the Department on any provisional basis and the date Mr. Eitel was hired on a permanent basis.
4. Clarification about the hiring authority used by the Department to hire Mr. Eitel initially, such as the Intergovernmental Personnel Act Mobility Program or as a special government employee pursuant to 18 U.S.C. § 202.

We ask that you provide all copies of requested documents and information no later than close of business on June 5, 2017. If you have any questions related to this request please contact Josh Delaney with the Office of Senator Elizabeth Warren, or Bryce McKibben and Carly Rush of the Minority Staff for the Senate Committee on Health, Education, Labor, and Pensions. We appreciate your assistance with this request.

Sincerely,



ELIZABETH WARREN
United States Senator



PATTY MURRAY
United States Senator

CC: The Honorable Kathleen S. Tighe, Inspector General
The Honorable Walter M. Shaub Jr., Director, United States Office of Government Ethics

⁵ “Form 10-K.” Bridgepoint Education, Inc. *United States Securities and Exchange Commission*. March 7, 2017. <https://www.sec.gov/Archives/edgar/data/1305323/000130532317000016/bpi201610k.htm>

From: Director of OGE [<mailto:director@oge.gov>]

Sent: Monday, May 22, 2017 6:30 PM

To: Mark Jones (b) (6); Atticus Reaser <(b) (6)>

Subject: Letter from OGE's Director, Walter M. Shaub, Jr.

Inspectors General,

Attachment released below

Enclosed please find a letter from OGE's Director, Walter M. Shaub, Jr. The attachments to this letter can be accessed online at the following address: <https://goo.gl/OTFAib>.

Thank You,

Matthew Marinec, M.P.P.
Confidential Assistant to the Director
U.S. Office of Government Ethics
1201 New York Ave., NW, Suite 500
Washington, DC 20005-3917
Tel. 202.482.9286

Visit OGE's website: www.oge.gov
Follow OGE on Twitter: @OfficeGovEthics

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UNITED STATES OFFICE OF
GOVERNMENT ETHICS



May 22, 2017

The Honorable Jason E. Chaffetz
Chairman
Committee on Oversight and
Government Reform
United States House of Representatives
2157 Rayburn House Office Building
Washington, DC 20515

The Honorable Elijah E. Cummings
Ranking Member
Committee on Oversight and
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The Honorable Bob Goodlatte
Chairman
Committee on Judiciary
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The Honorable John Conyers
Ranking Member
Committee on Judiciary
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The Honorable Ronald H. Johnson
Chairman
Committee on Homeland Security and
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United States Senate
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The Honorable Claire C. McCaskill
Ranking Member
Committee on Homeland Security and
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The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
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The Honorable Dianne G. B. Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510-6050

Dear Members of Congress:

Enclosed please find a letter from the U.S. Office of Government Ethics (OGE) in response to a letter dated May 17, 2017, from John M. Mulvaney, Director of the Office of Management and Budget. In his letter, Director Mulvaney questions OGE's authority to collect ethics information and records from executive branch officials, specifically ethics waivers and Standards of Conduct authorizations. As discussed in the enclosed letter, OGE is fully authorized to collect such information and records, and agencies have a long history of compliance. OGE's ability to fulfill its mission depends on its statutory authority to collect such information and records. I trust that you will find the enclosed response informative. Please do not hesitate to contact OGE's Chief of Staff, Shelley K. Finlayson, should you have any questions or require further information.

Sincerely,

Walter M. Shaub, Jr.
Director

Enclosure



prohibited. If you have received this email in error, please notify the sender by responding to the email and then immediately delete the email.



May 22, 2017

The Honorable John M. Mulvaney
Director
Office of Management and Budget
Executive Office of the President
725 17th Street, NW
Washington, DC 20503

Dear Director Mulvaney:

I am in receipt of your May 16, 2017, letter¹ requesting that the U.S. Office of Government Ethics (OGE) suspend its inquiry into the practices of agency ethics programs and, separately, the activities of individual appointees.² Specifically, you ask OGE to stay a directive issued in an April 28, 2017, Program Advisory requiring executive branch officials to produce information and records pertaining to ethics waivers and authorizations.³

Despite the highly unusual nature and distribution of your letter,⁴ I have provided for your convenience the following discussion of OGE's plenary authority to collect the information and records sought, as well as evidence of the longstanding history of compliance with such collections, which obviate any need to request an opinion from the Department of Justice's Office of Legal Counsel (OLC). The unusual nature of your letter highlights OGE's responsibility to lead the executive branch ethics program with independence, free from political pressure. Accordingly, OGE declines your request to suspend its ethics inquiry and reiterates its expectation that agencies will fully comply with its directive by June 1, 2017. Public confidence in the integrity of government decisionmaking demands no less.

By law, OGE is the "supervising ethics office" for the executive branch.⁵ Under the Ethics in Government Act of 1978 (EIGA), as amended, OGE has plenary authority to collect all information and records that "the Director may determine to be necessary for the performance of his duties," as well as such reports "as the Director deems necessary," except to the extent prohibited by law.⁶

¹ See Attachment 13.

² Recent news reports, which OGE has neither validated nor conclusively invalidated, raise questions as to whether some appointees are participating in matters from which they may be required to recuse if they have not received waivers. See Eric Lipton, Ben Protess & Andrew Lehren, *With Trump Appointees, a Raft of Potential Conflicts and 'No Transparency,'* N.Y. TIMES, Apr. 15, 2017, <https://goo.gl/pq2V5Z>; Editorial Board, *Trump is Issuing Secret Waivers to his Own Ethics Rules. So Much for Draining the Swamp,* WASH. POST, May 6, 2017, <https://goo.gl/hdcTXA>.

³ See Attachment 14.

⁴ You sent copies of your letter to hundreds of General Counsels and Designated Agency Ethics Officials.

⁵ 5 U.S.C. app. § 109(18).

⁶ 5 U.S.C. app. §§ 402(b)(10), 403(a)(2).



Congress has firmly articulated the need for OGE to have access to needed information and records, as the report of one House committee clearly states:

The Committee believes that it is not possible for OGE to ensure the effective and efficient operation of the executive branch ethics program as a whole without having up-to-date information on how agency programs are structured and without having important management data. This data would indicate, for example, the number of individuals who have and haven't filed SF-278s; the number and type of corrective actions required of agency employees (divestitures, **waivers**, disqualifications); and the number of employees alleged or found to have violated employees' standards of conduct or conflict of interest laws, rules, and regulations.⁷

A Senate committee report similarly observes that, "[F]or purposes of performing his responsibilities, [OGE's Director] will require access to relevant files and records of agency ethics counselors and other agency materials, information, and documentation necessary to monitor compliance with this statute and related conflict of interest laws and regulations."⁸

Agency ethics officials are well aware of their legal obligation to produce information and records subject to OGE's directives.⁹ In fact, dozens of agencies have already complied with OGE's current directive well in advance of the June 1, 2017, deadline. In addition, your own agency has a solid record of compliance with OGE's information and records production directives. OMB recently complied with a directive to produce an extensive array of information and records that OGE needed for a thorough evaluation of OMB's ethics program.¹⁰ OMB regularly responds to other OGE directives to produce information and records.¹¹ Most recently, OMB provided OGE with notice¹² of your own efforts to comply with the ethics agreement that you signed on January 10, 2017.¹³

Additional examples of agency compliance with OGE directives to produce information and records are abundant. Among other items, the most obvious examples include: notifications filed by Inspectors General and agency ethics officials related to criminal referrals for prosecution;¹⁴ criminal conflict of interest waivers;¹⁵ responses to executive branch-wide

⁷ See H.R. REP. NO. 100-1017, at 19-20 (1988) (emphasis added).

⁸ See S. REP. NO. 95-170, at 150 (1977).

⁹ See 5 U.S.C. app. §§ 402(b)(10), 403(a)(2); 5 C.F.R. §§ 2638.104(c)(3), 2638.202.

¹⁰ See Attachment 6.

¹¹ See, e.g., Office of Mgmt. and Budget, *Response to Annual Agency Ethics Program Questionnaire for CY 2015*, U.S. OFF. GOV'T ETHICS, <https://goo.gl/Vg4neA> (last visited May 22, 2017).

¹² Attachment 10.

¹³ Ethics Agreement of John M. Mulvaney (Jan. 10, 2017), <https://goo.gl/5v8ZWI>.

¹⁴ See 5 C.F.R. § 2638.206; see also OGE Form 202, <https://goo.gl/SflA23>.

¹⁵ See Exec. Order No. 12,731, § 301(d) (Oct. 17, 1990); 5 C.F.R. § 2640.303.

directives for information and records;¹⁶ responses to directives to produce information and records in connection with multi-agency special issue reviews;¹⁷ responses to agency-specific directives in connection with oversight of individual agency ethics programs;¹⁸ directives to produce annually designations of separate agency components;¹⁹ responses to a standing directive to produce delegations of authority to Designated Agency Ethics Officials;²⁰ reports of agencies' acceptance of outside reimbursement for official travel;²¹ responses to requests for information regarding conflict of interest prosecutions;²² and responses to the annual Agency Ethics Program Questionnaire.²³

Just last year, the Government Accountability Office issued a report recommending that the Director of OGE collect data from Designated Agency Ethics Officials and determine whether executive branch agencies are experiencing challenges related to the reliability of data on the executive branch's use of special government employees.²⁴ GAO's report followed an inquiry that it conducted at the request of Senate Judiciary Committee Chairman Charles E. Grassley.²⁵ Thereafter, OGE issued an executive branch-wide directive requiring production of information through a "compulsory survey" of 135 agencies, including OMB, and achieved a 100% response rate.²⁶

Compliance on the part of agencies with these OGE directives to produce information and records is entirely commonplace;²⁷ however, I am aware of the views of the White House's current Designated Agency Ethics Official. In a letter dated February 28, 2017, he asserted that Presidential appointees serving in the White House Office are beyond the reach of basic ethics requirements universally applicable to millions of executive branch employees.²⁸ As I explained

¹⁶ See, e.g., OGE Program Advisory PA-15-01 (2015), <https://goo.gl/hcg9lz>; Memo from Dale Christopher, Assoc. Dir., Program Servs. Div., U.S. Office of Gov't Ethics, to Designated Agency Ethics Officials, *Notifying the United States Office of Government Ethics of Filing Extensions*, DO-10-011 (2010), <https://goo.gl/AjjGmi>.

¹⁷ *Post-Election Readiness Review*, U.S. OFF. GOV'T ETHICS, (Sept. 1, 2012), <https://goo.gl/qR4h9L>.

¹⁸ See Attachment 5.

¹⁹ See 5 C.F.R. § 2641.302(e)(2)(ii).

²⁰ See Attachment 9.

²¹ WHITE HOUSE OFFICE, SEMIANNUAL REPORT OF PAYMENTS ACCEPTED FROM A NON-FEDERAL SOURCE (Sept. 30, 2016), <https://goo.gl/oMI1PA>.

²² See *Conflict of Interest Prosecution Surveys Index (by Statute)*, U.S. OFF. GOV'T ETHICS, <https://goo.gl/rMgtA8> (last visited May 22, 2017); see also Attachment 12.

²³ *Annual Agency Ethics Program Questionnaire Responses (CY14)*, U.S. OFF. GOV'T ETHICS (Jul. 1, 2015), <https://goo.gl/dQYpHP>.

²⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-548, FEDERAL WORKFORCE: OPPORTUNITIES EXIST TO IMPROVE DATA ON SELECTED GROUPS OF SPECIAL GOVERNMENT EMPLOYEES (2016), <https://goo.gl/1cqA0y>.

²⁵ See Press Release, Sen. Charles E. Grassley, Special Government Employee Report Released, Outlines Problems Managing Designation (Aug. 15, 2016), <https://goo.gl/Ps15A4> ("Grassley asked the Government Accountability Office (GAO) to study the Special Government Employee designation to see whether it works as intended to serve taxpayers.").

²⁶ U.S. OFFICE OF GOV'T ETHICS, SPECIAL GOVERNMENT EMPLOYEES NOT SERVING ON FEDERAL BOARDS (2017), <https://goo.gl/Neg03V>.

²⁷ See, e.g., Attachments 3, 5-6, 8-12.

²⁸ See Letter from Stefan C. Passantino, Designated Agency Ethics Official, White House Office, to Walter M. Shaub, Jr., Director, U.S. Office of Gov't Ethics (Feb. 28, 2017), <https://goo.gl/JozVpS>. Note, however, that Mr. Passantino's letter also stands as an example of the White House Office's compliance with exercises of OGE's

in my response, the theory underlying his position has not been applied in the context of government ethics.²⁹ Contrary to the Designated Agency Ethics Official's assertion, the White House Office has routinely complied with OGE's directives to produce information and records.³⁰ For your edification, I have enclosed a sampling of materials that illustrate the exercise of OGE's authority to collect information and records from the White House Office during every Presidential administration since the enactment of the Ethics in Government Act in 1978, including the Obama, Bush, Clinton, Bush, Reagan, and Carter Administrations.³¹ As you will observe when you review these materials, the compliance of the White House Office has not previously been in doubt.³²

Irrespective of the views expressed by the White House's Designated Agency Ethics Official, OGE's authority is sufficiently clear that consultation with OLC is unnecessary. Nevertheless, you may find it helpful to know that OLC recently approved OGE's issuance of a regulation that establishes the following mandate:³³

Acting directly or through other officials, the DAEO is responsible for taking actions authorized or required under this subchapter, including the following: . . . Promptly and timely furnishing the Office of Government Ethics with all documents and information requested or required under subpart B of this part

statutory authority to compel the production of information and records because, notwithstanding his stated objection, the letter includes the information OGE required him to produce.

²⁹ The underlying theory is that the White House Office is not an "executive agency" for certain limited purposes under 5 U.S.C. § 105, which is referenced in OGE's organic statute. For example, the White House has been found not to be an "executive agency" for purposes of a certain employment discrimination law. *See Haddon v. Walters*, 43 F.3d 1488 (D.C. Cir. 1995) (per curiam). In contrast, the White House has been found to be an "executive agency" for purposes of 18 U.S.C. § 603. *Application of 18 U.S.C. § 603 to Contributions to the President's Re-Election Committee*, 27 Op. O.L.C. 118, 119 (2003) (Office of Legal Counsel opinion finding that, under the statutory scheme of the Hatch Act Reform Amendments, the White House Office should be treated as an "executive agency" under title 5, notwithstanding *Haddon*). In addition, the White House has routinely relied on a certain statutory authority available only to an "executive agency" that authorizes acceptance of outside reimbursements for official travel. *See* 31 U.S.C. § 1353(c)(1) (restricting authority to accept such reimbursements only to an "executive agency" as defined under 5 U.S.C. § 105); *see also* WHITE HOUSE OFFICE, SEMIANNUAL REPORT OF PAYMENTS ACCEPTED FROM A NON-FEDERAL SOURCE (Sept. 30, 2016), <https://goo.gl/BTUpBw>. Thus, the White House is an "executive agency" for some purposes and arguably not for others. However, its status as an "executive agency" for purposes of the Ethics in Government Act is not in doubt. To the contrary, the attached materials include examples of the successful exercise of OGE's authority to require the White House Office to produce information and records over the years since enactment of the Ethics in Government Act. *See* Attachment 8; *see also Office of Government Ethics Jurisdiction Over the Smithsonian Institution*, 32 Op. O.L.C. 56, 63-64 (2008) (OLC opinion finding historical practice relevant to its analysis of the scope of OGE's authority).

³⁰ As part of the current White House's unusual assertions with regard to ethics compliance, I note that a White House official contacted a staff-level OGE employee a few hours before I received your letter in order to challenge an OGE directive to produce information and records that OGE issues every year. In connection with this challenge, the caller demanded that the employee certify that his statement that the Bush Administration had complied with the directive was a "true and correct statement." The White House caller also asked several questions about the collection of information from the National Security Council. *See* Attachment 1.

³¹ *See* Attachment 8.

³² *See id.*

³³ *See* Attachment 7.

The agency head is responsible for, and will exercise personal leadership in, establishing and maintaining an effective agency ethics program and fostering an ethical culture in the agency. The agency head is also responsible for: . . . Requiring agency officials to provide the DAEO with the information, support, and cooperation necessary for the accomplishment of the DAEO's responsibilities

Consistent with sections 402 and 403 of the Act, each agency must furnish to the Director all information and records in its possession which the Director deems necessary to the performance of the Director's duties, except to the extent prohibited by law. All such information and records must be provided to the Office of Government Ethics in a complete and timely manner.³⁴

OLC approved the promulgation of this regulation pursuant to a statutory requirement that OGE coordinate with the Department of Justice before issuing certain regulations.³⁵ In addition to this statutorily required consultation with OLC, OGE consulted with OMB and a broad range of other stakeholders through the ordinary regulatory process.³⁶

The recent issuance of this regulation did not significantly change the regulatory framework for requiring the submission of information and records in the executive branch to OGE. The above-quoted language is similar to the language of an earlier regulation that OGE issued 27 years ago in consultation with the Department of Justice.³⁷ A former OGE Director, who was appointed by President Bush and later reappointed by President Clinton, emphasized that compliance with the regulation has never been optional:

The first point to remember is that every executive agency has a statutory obligation to furnish OGE with “all information and records in its possession which the Director may determine to be necessary for the performance of his duties.” 5 U.S.C. app. § 403(a). This statutory obligation is independent of, and serves many purposes in addition to,

³⁴ Executive Branch Ethics Program Amendments, 81 Fed. Reg. 76,271, 76,274, 76,276-77 (Nov. 2, 2016) (codified at 5 C.F.R. §§ 2638.104, 2638.107, 2638.202).

³⁵ 5 U.S.C. app. § 402(b)(1).

³⁶ See Executive Branch Ethics Program Amendments, 81 Fed. Reg. at 76,271 (“These amendments, which are described in the preamble to the proposed rule, draw upon the collective experience of agency ethics officials across the executive branch and OGE as the supervising ethics office. They reflect extensive input from the executive branch ethics community and the inspector general community, as well as OGE’s consultation with the Department of Justice (DOJ) and the Office of Personnel Management pursuant to 5 U.S.C. app. 402(b)(1). In short, they present a comprehensive picture of the executive branch ethics program, its responsibilities and its procedures, as reflected through nearly 40 years of interpreting and implementing the Ethics in Government Act of 1978, as amended (the Act), as well as other applicable statutes, regulations, Executive orders, and authorities.”).

³⁷ Implementation of the Office of Government Ethics Reauthorization Act of 1988, 55 Fed. Reg. 1665 (1990); Corrective Action and Reporting Requirements Relating to Executive Agency Ethics Programs: Implementation of the Office of Government Ethics Reauthorization Act of 1988, 55 Fed. Reg. 21,845 (1990); see also 5 U.S.C. app. § 402(b)(1).

the scheme for agency review and OGE certification of certain financial disclosure statements. *See* 5 U.S.C. app. § 402 (listing broad range of statutory authorities and functions)... Furthermore, as [the Designated Agency Ethics Official (DAEO)] acknowledges, OGE’s implementing regulations provide that the DAEO “shall ensure” that information requested by OGE “is provided in a complete and timely manner.” 5 C.F.R. § 2638.203(a)(14).

...

By statute, OGE is charged with providing “overall direction of executive branch policies related to preventing conflicts of interest.” 5 U.S.C. app. § 402(a). Among other things, OGE is given specific statutory authority to promulgate rules, interpret those rules, and monitor compliance with financial disclosure requirements. 5 U.S.C. app. § 402(b).

...

Unless and until OGE’s interpretation had been overruled by a judicial opinion or otherwise modified by OGE through the usual process of executive branch deliberations, the DAEO had no ground to hold out a contrary interpretation as a lawful option for the filer. Should any future disagreements arise between the DAEO and OGE as to legal issues within OGE’s primary jurisdiction, we expect that the DAEO will be careful not to make any statements that might reasonably be construed by [agency] employees as giving them the option to disregard the interpretation of OGE in favor of a contrary interpretation rendered by the DAEO.³⁸

The Director’s opinion accurately reflects the common understanding in the executive branch that compliance is mandatory.³⁹

In light of OGE’s clear authority and the long history of agencies’ compliance, your letter requesting a stay of OGE’s pending directive for production of information and records copied to hundreds of other executive branch officials is highly unusual. For OGE to fulfill its mission of

³⁸ OGE Informal Advisory Opinion 00 x 2 at 1-4 (2000).

³⁹ *See Reauthorization of the Office of Government Ethics: Hearing Before the Subcomm. on the Fed. Workforce and Agency Org. of the H. Comm. on Gov’t Reform*, 109th Cong. 109-211, at 19 (2006) (statement of Marilyn Glynn, Acting Director, Office of Government Ethics), <https://goo.gl/22vffk> (“We do have currently so-called corrective action authority that allows us to actually hold a hearing if an agency or an individual at an agency refuses to comply on an ongoing basis with some direction in effect that we have given them, and we have never had to use it. I think we have a little bit of the power of the bully pulpit. We can call very high level folks at the agency, all the way up to a Secretary’s office or an Administrator’s office, and say, so and so on your staff is doing thus and such and it needs to stop. And it stops immediately. We do not find pushback from agencies. So I am not sure that there is a need to particularly strengthen our role.”).

preventing conflicts of interest and monitoring compliance with the ethics laws by agencies and officials, the Director must be able to act independently and free from political pressure. Congress created OGE as an institutional check to monitor the ethics program and to prevent conflicts of interest in the executive branch. OGE can effectively perform this role only if it can act objectively and without fear of reprisal.⁴⁰

In this context, it bears emphasizing that OGE has the authority to institute corrective action proceedings against agencies that fail to comply, or against individuals who improperly prevent agency ethics officials from complying, with the Ethics in Government Act.⁴¹ Likewise the Inspectors General and the U.S. Office of Special Counsel have authority to investigate allegations of retaliation against ethics officials for complying with the legal requirement to provide OGE with the information and records subject to this directive.⁴²

OGE is exercising its authority and independence appropriately. OGE's April 28, 2017, directive is supported by ample legal authority and compliant with applicable procedures. Consistent with the applicable legal standard, the directive includes a determination of necessity.⁴³ Although not required to do so, OGE has also limited the scope of the directive to information and records that lie at the heart of the executive branch ethics program.⁴⁴ OGE has also afforded executive branch officials a full month to produce information and records that are routinely maintained and readily accessible by any well-run agency ethics program.

This directive supports a key aspect of OGE's mission, which is to ensure public confidence in the integrity of executive branch-wide decisionmaking. The vital national interest in disclosure of such information and records was most eloquently expressed in a letter that Chairman of the Senate Committee on the Judiciary Charles E. Grassley sent to OGE:

⁴⁰ See S. REP. NO. 98-59 at 20 (1983) ("A major issue discussed at the Oversight Subcommittee's hearing was the independence of the OGE. In many instances, the Office must rule on sensitive issues involving political appointees and other high-ranking officials. For the OGE to perform its role of preventing conflicts of interest and monitoring compliance with the ethics laws by agencies and officials, it is crucial that the Director act independently and free from political pressure. . . . The Congress created the OGE as an institutional check to monitor the ethics program and to prevent conflicts of interest in the Executive Branch. This institutional check is effective only when the Office can act objectively and without fear of reprisal."); *see also* Attachment 4 (Senate Homeland Security and Government Affairs Committee Questionnaire for Walter M. Shaub, Jr., Question 26: "Some believe that the Director of OGE must be insulated from political pressure, to ensure the Director is not forced to compromise on necessary action or encouraged to deviate from the normal application of ethical requirements with respect to a particular individual. Do you agree that the Director of OGE must act independently and free from political pressure? If so, how would you, if confirmed, maintain this independence and freedom from pressure?").

⁴¹ 5 U.S.C. app. § 402(b)(9), (f); 5 C.F.R. pt. 2638, subpts. D, E.

⁴² See 5 U.S.C. app. §§ 2(1), 4(a)(1) (Inspector General Act of 1978, as amended); *see also* 5 U.S.C. §§ 2302(b)(9)(D), (b)(12).

⁴³ See OGE Program Advisory PA-17-02 at 1 (2017); *see also* 5 U.S.C. app. §§ 402(b)(10), 403; 5 C.F.R. §§ 2638.104(c)(3), 2638.202.

⁴⁴ In your letter, you refer to what you characterize as the "uniqueness" of this directive to produce information and records, but there is nothing unique about OGE collecting records central to the program it oversees. As the enclosed samples illustrate, OGE's staff has engaged in either the collection or review of agency ethics program records on each working day since OGE's establishment in 1978. *See, e.g.*, Attachments 3, 5-6, 8-12.

The work of the Government is the work of the people and it should be public and available for all to see. It has been said that sunlight is the best disinfectant and that opening up the business of the Government will ensure that the public trust is not lost. As a senior member of the United States Senate, I have consistently worked to ensure that the business of the Government is done in as open and transparent manner as possible.

...

I am concerned that Section 3 could be used to gut the ethical heart of the [Executive] Order. Each day, new nominees to key Government positions are reported. Many of these nominees have been nominated despite the fact that they have previously served as lobbyists or in a manner that would preclude their participation under the Order absent a Section 3 waiver.

...

[T]he Ethics in Government Act provides the Director of OGE a number of authorities to bring sunlight upon Section 3 waivers issued by DAEOs. Specifically, the Act explicitly provides the Director of OGE the authority to, among other things, “interpret rules and regulations issued by the President or the Director governing conflict of interest and ethical problems and the filing of financial statements.” The Act also provides the Director of OGE the authority to require “such reports from executive agencies as the Director deems necessary.” Further, the Act authorizes the Director to prescribe regulations that require each executive agency to submit to OGE a report containing “any other information that the Director may require in order to carry out the responsibilities of the Director under this title.” Finally, the Act is clear that when the Director makes a request to an executive agency, the agency shall furnish “all information and records in its possession which the Director may determine to be necessary for the performance of his duties.”

Based upon these existing statutory authorities you have the authority to require each DAEO to provide OGE with an accounting of all waivers and recusals issued.

...

The American people deserve a full accounting of all waivers and recusals to better understand who is running the government and whether the Administration is adhering to its promise to be open,

The Honorable John M. Mulvaney
Director
Page 9

transparent, and accountable. I urge you to take immediate action to make any waivers and recusals public⁴⁵

Following its receipt of Chairman Grassley's letter and the development of the necessary technological means, OGE began posting ethics pledge waivers on its official website.⁴⁶ However, the current Administration has not been complying with this established practice.

In closing, I want to assure you that a request from the Director of the Office of Management and Budget is not something that I decline lightly. For the foregoing reasons, however, OGE is not granting your request to stay the pending directive to produce information and records. Please take all necessary steps to ensure that OMB's response is submitted by the June 1, 2017, deadline.⁴⁷

Sincerely,

A handwritten signature in blue ink, appearing to read "Walter M. Shaub, Jr.", with a stylized flourish at the end.

Walter M. Shaub, Jr.
Director

Attachments (15)

⁴⁵ See Attachment 2.

⁴⁶ *Executive Branch Agency Ethics Pledge Waivers*, U.S. OFF. GOV'T ETHICS, <https://goo.gl/Yw16wQ> (last visited May 22, 2017).

⁴⁷ See Attachment 15.

cc. Designated Agency Ethics Officials

General Counsels

Inspectors General

The Honorable Carolyn N. Lerner
U.S. Office of Special Counsel
1730 M Street, NW, Suite 218
Washington, DC 20036-4505

The Honorable Jason E. Chaffetz
Chairman
Committee on Oversight and
Government Reform
United States House of Representatives
2157 Rayburn House Office Building
Washington, DC 20515

The Honorable Elijah E. Cummings
Ranking Member
Committee on Oversight and
Government Reform
United States House of Representatives
2471 Rayburn House Office Building
Washington, DC 20515

The Honorable Bob Goodlatte
Chairman
Committee on Judiciary
United States House of Representatives
2309 Rayburn House Office Building
Washington, DC 20515

The Honorable John Conyers
Ranking Member
Committee on Judiciary
United States House of Representatives
2426 Rayburn House Office Building
Washington, DC 20515

The Honorable Ronald H. Johnson
Chairman
Committee on Homeland Security and
Governmental Affairs
United States Senate
340 Dirksen Senate Office Building
Washington, DC, 20510

The Honorable Claire C. McCaskill
Ranking Member
Committee on Homeland Security and
Governmental Affairs
United States Senate
340 Dirksen Senate Office Building
Washington, DC, 20510

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510-6050

The Honorable Dianne G. B. Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510-6050

From: [Director of OGE](#)
To: (b)(6) - Janelle McClure's email address
Subject: Office of Government Ethics: Congressional Budget Justification, Annual Performance Plan, and Annual Performance Report
Date: Tuesday, May 23, 2017 2:07:28 PM
Attachments: [FINAL_OGE_Congressional_Budget_Justification_APP_and_APR.PDF](#)
[Budget Transmittal Signed.pdf](#)

Signed Budget Transmittal attachment released below - Final OGE Congressional Budget Justification can be found at: [https://www.oge.gov/Web/OGELanding/Pages/20170523/20170523172006198FF/\\$FILE/FINAL_OGE%20Congressional%20Budget%20Justification,%20APP%20and%20APR.pdf](https://www.oge.gov/Web/OGELanding/Pages/20170523/20170523172006198FF/$FILE/FINAL_OGE%20Congressional%20Budget%20Justification,%20APP%20and%20APR.pdf)

Good afternoon,

Attached is a copy OGE's FY18 Congressional Budget Justification, Annual Performance Plan, and Annual Performance Report.

Thank You,

Matthew Marinec, M.P.P.
Confidential Assistant to the Director
U.S. Office of Government Ethics
1201 New York Ave., NW, Suite 500
Washington, DC 20005-3917
Tel. 202.482.9286

Visit OGE's website: www.oge.gov
Follow OGE on Twitter: @OfficeGovEthics

UNITED STATES OFFICE OF
GOVERNMENT ETHICS



MAY 23 2017

The Honorable Thad Cochran
Chairman
Committee on Appropriations
United States Senate
Washington, DC 20510

The Honorable Rodney Frelinghuysen
Chairman
Committee on Appropriations
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairmen:

I am pleased to transmit to you the Congressional Budget Justification, Annual Performance Plan, and Annual Performance Report of the Office of Government Ethics (OGE). The Congressional Justification reflects funding for \$16,439,000 and 70 full-time equivalents, as set forth in the President's fiscal year 2018 budget.

We are available to discuss our request with representatives from your offices. If you need additional information with regard to this request, please contact Shelley Finlayson, Chief of Staff and Program Counsel, at (202) 482-9314.

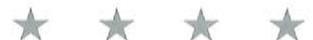
Sincerely,

A handwritten signature in blue ink, appearing to read "Walter M. Shaub, Jr.", written in a cursive style.

Walter M. Shaub, Jr.
Director

Enclosure

cc: The Honorable Patrick Leahy
Ranking Member
Committee on Appropriations
United States Senate
Washington, DC 20510



The Honorable Shelley Moore Capito
Chairwoman
Subcommittee on Financial Services
and General Government
Committee on Appropriations
United States Senate
Washington, DC 20510

The Honorable Christopher Coons
Ranking Member
Subcommittee on Financial Services
and General Government
Committee on Appropriations
United States Senate
Washington, DC 20510

The Honorable Ron Johnson
Chairman
Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, DC 20510

The Honorable Claire McCaskill
Ranking Member
Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, DC 20510

The Honorable Nita M. Lowey
Ranking Member
Committee on Appropriations
United States House of Representatives
Washington, DC 20515

The Honorable Tom Graves
Chairman
Subcommittee on Financial Services
and General Government
Committee on Appropriations
United States House of Representatives
Washington, DC 20515

The Honorable Mike Quigley
Ranking Member
Subcommittee on Financial Services
and General Government
Committee on Appropriations
United States House of Representatives
Washington, DC 20515

The Honorable Jason Chaffetz
Chairman
Committee on Oversight and Government Reform
United States House of Representatives
Washington, DC 20515

The Honorable Elijah E. Cummings
Ranking Member
Committee on Oversight and Government Reform
United States House of Representatives
Washington, DC 20515

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

From: Lipton, Eric
To: [Walter M. Shaub](#)
Subject: Fwd: Schumer, In Call with Director Mulvaney, Urges White House To Provide Secret Lobbyist Waivers to Office of Government Ethics
Date: Tuesday, May 23, 2017 2:21:32 PM

[Eric Lipton](#)
The New York Times
Washington Bureau
(b) (6) office
(b) (6) mobile
(b) (6)

----- Forwarded message -----

From: Communications_Center, Senate_Democratic_Policy (DPCC)
<Senate_Democratic_Policy_Communications_Center@dpcc.senate.gov>
Date: Tue, May 23, 2017 at 9:22 AM
Subject: Schumer, In Call with Director Mulvaney, Urges White House To Provide Secret Lobbyist Waivers to Office of Government Ethics
To: SCHUMER-PRESS@lists.senate.gov



For Immediate Release

Date: May 23, 2017

CONTACT: Matt House, [\[202\] 224-2939](tel:2022242939)

Schumer, In Call with Director Mulvaney, Urges White House To Provide Secret Lobbyist Waivers to Office of Government Ethics

Washington, D.C. – U.S. Senator Charles E. Schumer released the below statement following a phone call with the Office of Management and Budget Director Mick Mulvaney:

"In a call last night, I asked Director Mulvaney to respect the Office of Government Ethics' request to make public copies of waivers given to former lobbyists to work in the Administration. There is absolutely no excuse for the Administration to keep these waivers from the OGE or the American people. I also expressed to Director Mulvaney my deep frustration with President Trump's failure to keep his promise to 'drain the swamp,' and he assured me that he would take my concerns under consideration – I hope they make this change for the good of our country."

###

To unsubscribe from the SCHUMER-PRESS list, please send a blank email to SCHUMER-PRESS-signoff-request@LISTS.SENATE.GOV

From: [Director of OGE](#)
To: [Michael Hanson](#)
Subject: RE: Certification of Ethics Agreement Compliance now enabled
Date: Tuesday, May 23, 2017 2:49:16 PM

Thanks, Mike

Walter M. Shaub, Jr.
Director
U.S. Office of Government Ethics
1201 New York Avenue, NW, Suite 500
Washington, DC 20005-3917

Telephone: 202.482.9292
Email: walter.shaub@oge.gov

From: Michael Hanson
Sent: Monday, May 22, 2017 7:23 PM
To: Director of OGE
Subject: Certification of Ethics Agreement Compliance now enabled

Hello Walt,
I added all the code and edits necessary for the EA Certs to automatically publish from FDTS.

Nice job today, proud to be an OGE'er.
Mike

Michael Hanson
(202) 482-9221
Office of Government Ethics

Visit us at www.oge.gov

From: Fred Wertheimer
To: [Walter M. Shaub](#)
Subject: Democracy 21 letter to OMB Director calling on him to back off of efforts to interfere with OGE overseeing and enforcing ethics rules.
Date: Tuesday, May 23, 2017 3:08:12 PM
Attachments: [Democracy 21 Letter to OMB Director Challenging OMB Letter to OGE 5 23 17.pdf](#)

Dear Director Shaub

Attachment released below

Enclosed for your information is a letter sent today by Democracy 21 to OMB Director Mulvaney that calls on him to withdraw his letter calling for OGE to delay its request for ethics waivers and to stop interfering without any basis for doing so in OGE's efforts to oversee and enforce the Executive Branch ethics rules.

Fred

Fred Wertheimer
Democracy 21
2000 Massachusetts Avenue, NW
Washington, DC 20036
Phone: (b) (6)
Fax: (b) (6)
Follow me on [Twitter](#)
Like Democracy 21 on [Facebook](#)

May 23, 2017

Mick Mulvaney
Director
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Dear Director Mulvaney:

Democracy 21 calls on you to immediately withdraw your May 17 request to Walter Shaub, Director of the Office of Government Ethics (OGE), that he stay his earlier request for executive branch agencies to provide OGE with copies of any waivers that have been issued to permit agency appointees to work on matters that they previously worked on as lobbyists or lawyers in the two years prior to joining the government.

According to a published report in *The New York Times*, “Dozens of former lobbyists and industry lawyers are working in the Trump administration, which has hired them at a much higher rate than the previous administration.”¹

There is no basis for the Office of Management and Budget to interfere with OGE’s efforts to carry out its oversight and enforcement responsibilities for Executive Branch ethics rules, including rules established by an Executive Order issued by President Trump.

President Trump in his 2016 presidential campaign repeatedly attacked the role being played by special interest lobbyists in Washington, D.C. to undermine the interests of the American people. He repeatedly promised “to drain the swamp.”

It appears that OMB’s efforts are now aimed at hiding information from the American people that would tell them whether the lobbyists and lawyers who have been brought into the Trump Administration are violating federal ethics rules -- or have been given a pass by the Trump Administration to ignore those rules.”

Your request to OGE that it should delay, perhaps indefinitely, its ability to collect this information is without any merit and would do great harm to the public’s right to effective and transparent oversight and enforcement of the Executive Branch ethics rules.

¹ E. Lipton, “White House Moves to Block Ethics Inquiry Into Ex-Lobbyists,” *The New York Times* (May 22, 2017).

Your letter of May 17, 2017 to Director Shaub states that his request, sent to all appropriate agency officials in an OGE memorandum dated April 28, 2017, raises “legal questions regarding the scope of OGE’s authorities.” You further state that the Office of Legal Counsel at the Department of Justice may need to be consulted regarding these questions, and that Director Shaub should in the meantime postpone the June 1, 2017 deadline he gave agencies to provide OGE with copies of the waivers.

Contrary to your letter, however, and as made clear in a letter sent to you by Director Shaub on May 22, 2017, OGE has clear legal authority to request the information it has asked for from the agencies.

OGE has a duty to provide “overall direction of executive branch policies relating to preventing conflicts of interest.” 5 U.S.C. app. § 402(a). The statute establishing OGE gives its Director very broad authority to require “such reports from executive agencies as the Director deems necessary.” *Id.* § 402(b)(10).

In addition, the Director has equally broad authority to “conduct investigations and make findings concerning possible violations of any rule, regulation, or Executive Order relating to conflicts of interest. . . .” *Id.* § 402(f)(2)(B)(i). It is indisputable that obtaining copies of waivers issued by the agencies that would alleviate or resolve situations that otherwise might pose such conflicts of interest is within the scope of this power.

The pledge taken by government employees not to “participate in any particular matter on which I lobbied within the 2 years before the date of my appointment” is set forth in Executive Order 13770 (Jan. 28, 2017) at § 1(7); *see also id.* at § 1(6) (the same restriction applies for matters involving former employers and clients). The President “or his designee” may grant a waiver of these restrictions. *Id.* § 3.

Importantly, however, the Executive Order grants OGE authority to adopt rules “or procedures” as “are necessary or appropriate” to carry out its responsibilities to assist agency ethics officers regarding the application of the pledge. *Id.* § 4(c). In addition to the broad statutory authorities provided to Director of OGE that are set forth above, this provision of the Executive Order provides additional authority for the request made here by Mr. Shaub to receive a copy of all waivers issued.

In raising unstated “potential legal questions” as a basis to postpone agency compliance with Director Shaub’s request, you have provided no substantive explanation or basis for seeking such a delay. Thus, your request appears to be simply pretext to delay and perhaps deprive OGE, and the public, of any knowledge about the existence, number, scope and nature of the waivers that have been issued to former lobbyists and others.

If former lobbyists or lawyers who represented special interests with business before certain agencies are now serving as decision-makers for those agencies and are passing judgment on matters on which just a few months ago they represented private clients, the public has a right to know that information. The public also has a right to know whether these employees are doing so under color of what is now a secret waiver from Executive Branch ethics rules.

The Administration has issued an Executive Order that purports to draw certain lines to protect the public against conflicts of interests, and has claimed great credit for this action.

The Administration cannot credibly turn around now and hide from both OGE and the American people vital information that is essential to determining whether President Trump's Executive Order is being effectively implemented and enforced, or whether his Executive Order has turned out to be a sham that is being undermined by the inappropriate issuance of multiple waivers.

You should not be raising unspecified "legal questions" to hide from the American people information they have a right to know.

Democracy 21 strongly urges you to withdraw your letter to Director Shaub and to refrain from any future efforts to interfere with OGE from carrying out its statutory responsibilities to oversee and enforce Executive Branch ethics rules.

Sincerely,

/s/ Fred Wertheimer

Fred Wertheimer
President

From: [Director of OGE](#)
To: (b)(6) - Maggie Gendron's email address
Subject: Office of Government Ethics: Congressional Budget Justification, Annual Performance Plan, and Annual Performance Report
Date: Tuesday, May 23, 2017 4:36:21 PM
Attachments: [President Pro Tempore.pdf](#)
[FINAL_OGE_Congressional_Budget_Justification,_APP_and_APR.PDF](#)

President Pro Tempore attachment released below - Final OGE Congressional Budget Justification can be found at: [https://www.oge.gov/Web/OGEnsi/0720DB9CC37D442D8525812900613BFF/\\$FILE/FINAL_OGE%20Congressional%20Budget%20Justification,%20APP%20and%20APR.pdf](https://www.oge.gov/Web/OGEnsi/0720DB9CC37D442D8525812900613BFF/$FILE/FINAL_OGE%20Congressional%20Budget%20Justification,%20APP%20and%20APR.pdf)

Good afternoon,

Attached is a copy OGE's FY18 Congressional Budget Justification, Annual Performance Plan, and Annual Performance Report.

Thank You,

Matthew Marinec, M.P.P.
Confidential Assistant to the Director
U.S. Office of Government Ethics
1201 New York Ave., NW, Suite 500
Washington, DC 20005-3917
Tel. 202.482.9286

Visit OGE's website: www.oge.gov
Follow OGE on Twitter: @OfficeGovEthics

UNITED STATES OFFICE OF
GOVERNMENT ETHICS



MAY 23 2017

The Honorable Orrin G. Hatch
President Pro Tempore
United States Senate
104 Hart Office Building
Washington, D.C. 20510

Dear President Pro Tempore:

I am pleased to transmit to you the Congressional Budget Justification, Annual Performance Plan, and Annual Performance Report of the Office of Government Ethics (OGE).

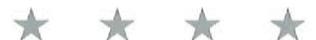
We are available to discuss these documents with representatives from your offices. If you need additional information, please contact Shelley Finlayson at (202) 482-9314.

Sincerely,

A handwritten signature in blue ink, appearing to read "Walter M. Shaub, Jr.", written over a light blue horizontal line.

Walter M. Shaub, Jr.
Director

Enclosure



From: [Shelley K. Finlayson](#)
To: [Director of OGE](#)
Subject: FW: Letter to OMB Director Mulvaney
Date: Tuesday, May 23, 2017 5:05:02 PM
Attachments: [170522 Letter to OMB re OGE data call signed.pdf](#)

Attachment released below

From: Caruolo, David (Judiciary-Dem) [mailto:(b) (6)]
Sent: Tuesday, May 23, 2017 3:00 PM
To: Shelley K. Finlayson
Cc: Gaeta, Joe (Whitehouse); Davidson, Richard (Whitehouse)
Subject: Letter to OMB Director Mulvaney

Attachment released below

Hi Shelley,

Please find attached a letter to OMB Director Mick Mulvaney with a copy to be sent to Office of Government Ethics Director Walter Shaub. A physical copy will be sent by mail as well. Thank you.

Regards,

David Caruolo
Associate Legislative Assistant
Senator Sheldon Whitehouse

(b) (6)

United States Senate

WASHINGTON, DC 20510

May 23, 2017

The Honorable Mick Mulvaney
Director
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Dear Director Mulvaney:

We write to register our concern with your letter of May 17, 2017, requesting that Office of Government Ethics (OGE) Director Walter Shaub “stay” his April 28, 2017 “Data Call for Certain Waivers and Authorizations.” That data call seeks all waivers granted pursuant to section 3 of Executive Order 13770, “Ethics Commitments by Executive Branch Appointees.” OGE is statutorily entitled to obtain and review the waivers. Further, there is a significant public interest in making these waivers available to the public and no reasonable justification to keep them secret.

Regarding the recent data call, the OGE Director has statutory authority to provide “overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and employees of any executive agency.” 5 U.S.C. app. 402(a). The Director is charged with “monitoring and investigating individual and agency compliance with any additional financial reporting and internal review requirements established by law for the executive branch” and “interpreting rules and regulations issued by the President or the Director governing conflict of interest and ethical problems and the filing of financial statements.” *Id.* at 402(a)(5)-(6). To achieve that end, except where prohibited by law, the Director may direct an agency to provide “all information and records in its possession which the Director may determine to be necessary for the performance of his duties.” *Id.* at 403(a)(2).¹ It is also well settled that employees of the Executive Office of the President are subject to the executive branch-wide standards of ethical conduct at 5 CFR part 2635, and the executive branch-wide financial disclosure regulations at 5 CFR part 2634. 3 C.F.R. 100.1. In your letter, you cite no legal basis to the contrary.

As a policy matter, there has never been a dispute over the merits of disclosing waivers to executive branch ethics pledges. Presidents Bill Clinton and Barack Obama made all waivers granted to their respective ethics pledges available for public review. The Obama Administration posted waivers electronically, and the Clinton Administration published waivers

¹ Section 4(c)(2) of the Executive Order gives the Director of OGE certain responsibilities under the Executive Order, including to “in consultation with the Attorney General or Counsel to the President, when appropriate, assist designated agency ethics officers in providing advice to current or former appointees regarding the application of the pledge.” This direction is consistent with OGE’s data call of April 28, 2017.

in the Federal Register. See Executive Order 12834 sec. 3(c). President Trump chose not to include a transparency requirement in his executive order, making the OGE data call necessary for assuring Americans that the Trump Administration is taking its own ethics pledge seriously. A pledge that allows for secret waivers is, quite obviously, meaningless.

On April 20, 2017, several of us wrote to President Trump urging him to make waivers to his ethics pledge public. Your letter of May 17 suggests that rather than working with Congress to ensure the highest ethical standards in the Trump Administration you are willing to take whatever steps you can to hide potential conflicts of interest from view.

We want to make clear that we will use all tools available to us as United States Senators to make waivers to the Trump Ethics Pledge available to the public. If OMB does not stand down from its attempt to prevent Designated Agency Ethics Officials from responding to the OGE data call, we will seek the waivers directly ourselves. The Administration cannot dispute that Congress has the right to this information.

OGE set a deadline of June 1, 2017, for agencies to respond to its request. To ensure agencies have sufficient time to meet that deadline, we request you either withdraw your request for a stay of OGE's data call or provide the legal basis for that request no later than May 25, 2017. We also request that by that date you provide to us the number of waivers that have been granted to Executive Order 13770. There can be no reasonable dispute that the number of waivers granted should be a matter of public record, and because waivers may only be granted by the President or his designee, see Executive Order 13770 sec. 3(a), that number should be readily available to you.

Sincerely,



Sheldon Whitehouse
United States Senator



Tom Udall
United States Senator



Patty Murray
United States Senator



Ron Wyden
United States Senator



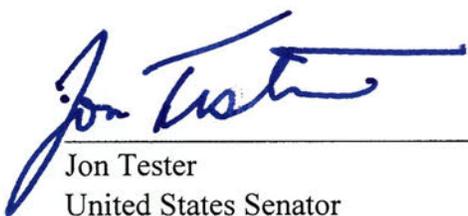
Maria Cantwell
United States Senator



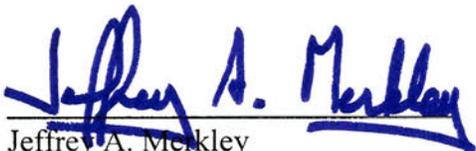
Benjamin L. Cardin
United States Senator



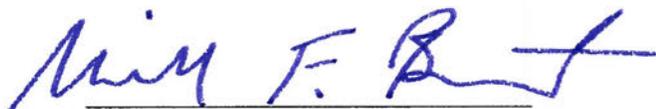
Sherrod Brown
United States Senator



Jon Tester
United States Senator



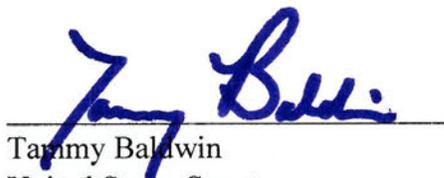
Jeffrey A. Merkley
United States Senator



Michael F. Bennet
United States Senator



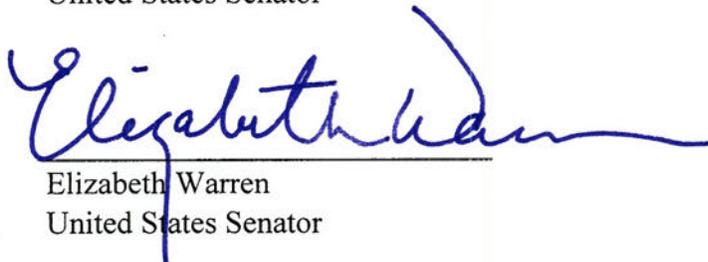
Richard Blumenthal
United States Senator



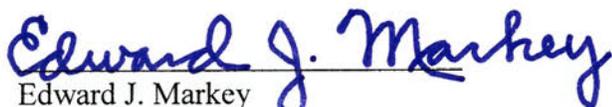
Tammy Baldwin
United States Senator



Mazie Hirono
United States Senator



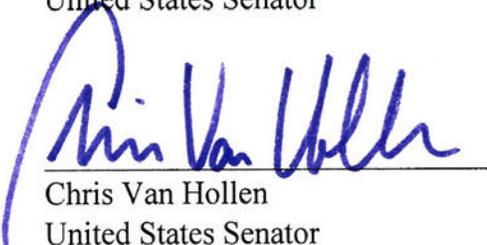
Elizabeth Warren
United States Senator



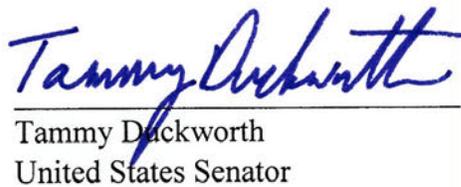
Edward J. Markey
United States Senator



Gary C. Peters
United States Senator



Chris Van Hollen
United States Senator



Tammy Duckworth
United States Senator

cc: Walter M. Shaub, Jr., Director, U.S. Office of Government Ethics

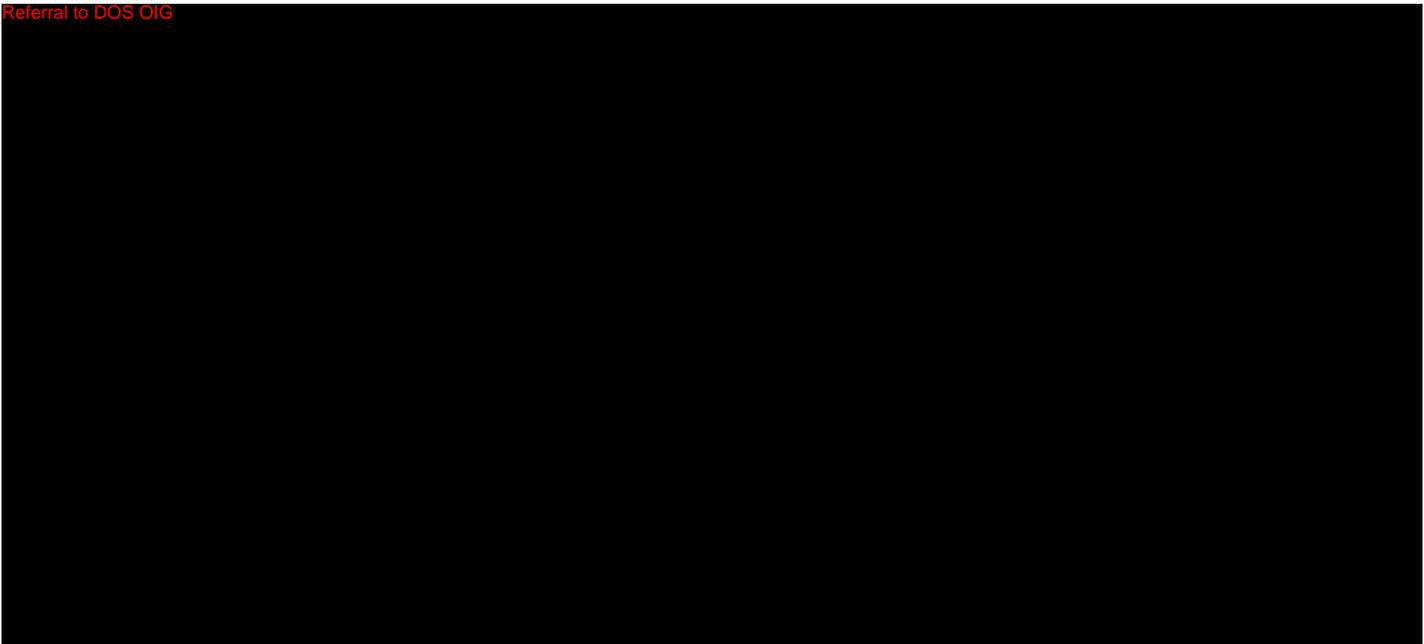
From: [Walter M. Shaub](#)
To: "Steve Linick"
Cc: "Michael Mobbs"
Subject: RE: Draft Letter
Date: Tuesday, May 23, 2017 5:43:38 PM

That works. Thanks, Steve.

Walter M. Shaub, Jr.
Director
U.S. Office of Government Ethics
1201 New York Avenue, NW, Suite 500
Washington, DC 20005-3917

Telephone: 202.482.9292
Email: walter.shaub@oge.gov

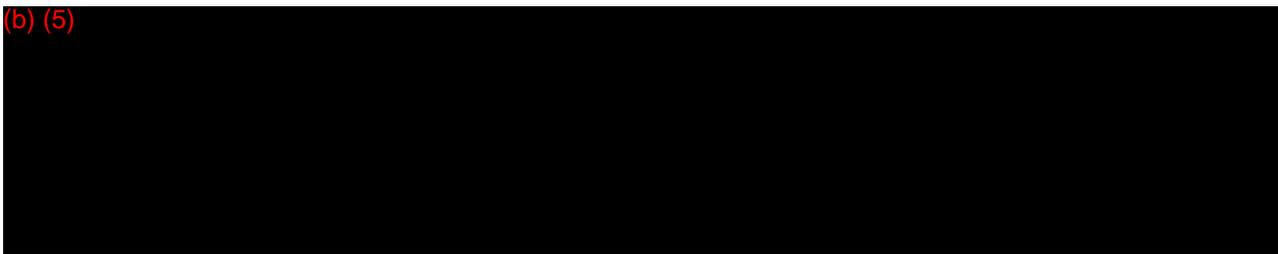
Referral to DOS OIG



From: Walter M. Shaub [<mailto:wmschaub@oge.gov>]
Sent: Tuesday, May 23, 2017 4:58 PM
To: Steve Linick <(b) (6)>
Cc: Shelley K. Finlayson <skfinlay@oge.gov>
Subject: RE: Draft Letter

Steve,

(b) (5)



(b) (5)

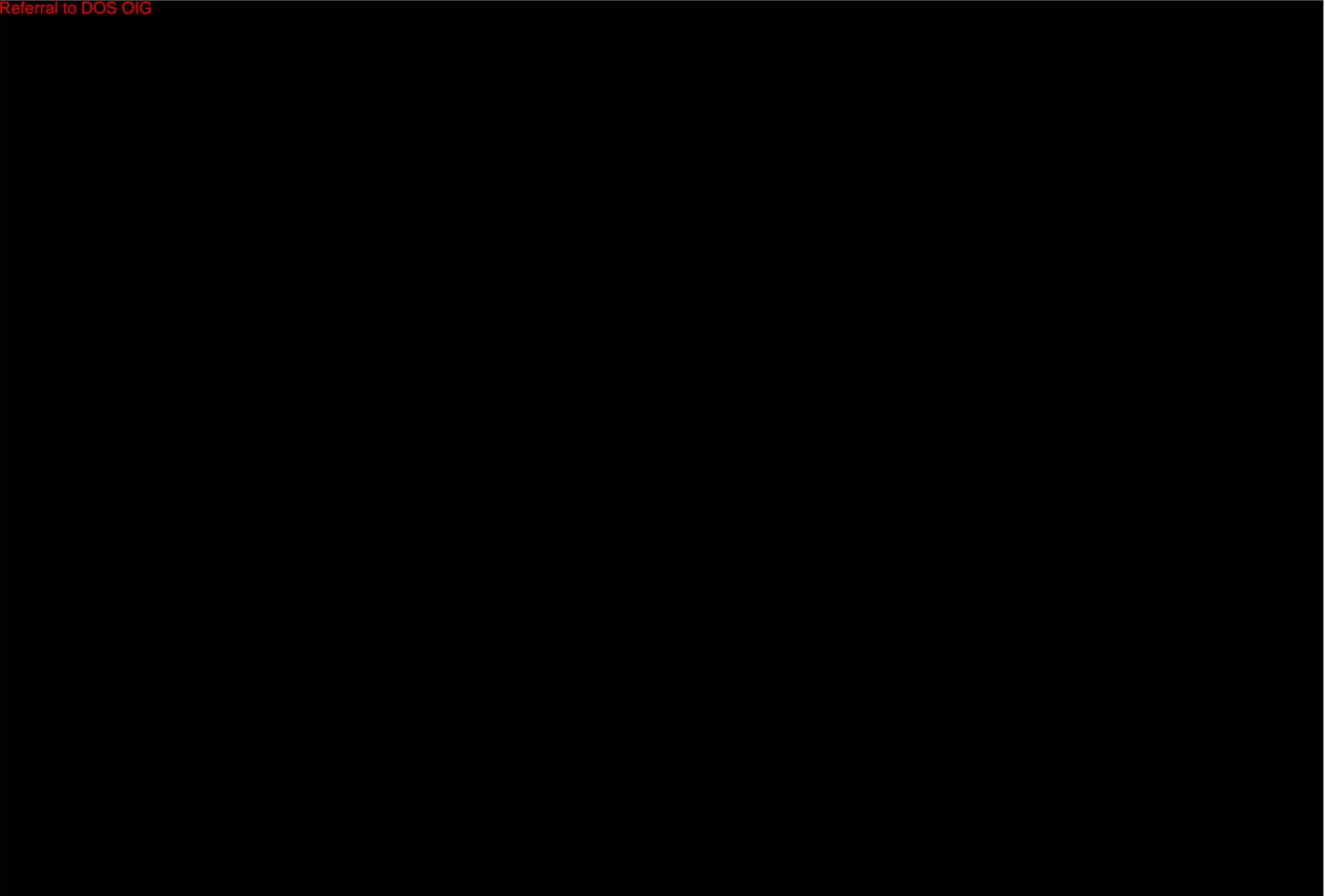


Walt

Walter M. Shaub, Jr.
Director
U.S. Office of Government Ethics
1201 New York Avenue, NW, Suite 500
Washington, DC 20005-3917

Telephone: 202.482.9292
Email: walter.shaub@oge.gov

Referral to DOS OIG



From: [Patrick Shepherd](#)
To: [David J. Apol](#); [Dale A. Christopher](#); [Shelley K. Finlayson](#); [Nelson Cabrera Jr.](#); [Director of OGE](#)
Cc: [Nicole Stein](#)
Subject: OGE ERM Registry
Date: Wednesday, May 24, 2017 1:32:44 PM

Good afternoon,

Thank you for participating in our Enterprise Risk Management discussion yesterday. I have attempted to capture our discussion, and tidy up some of the notes and formatting in a draft risk registry.

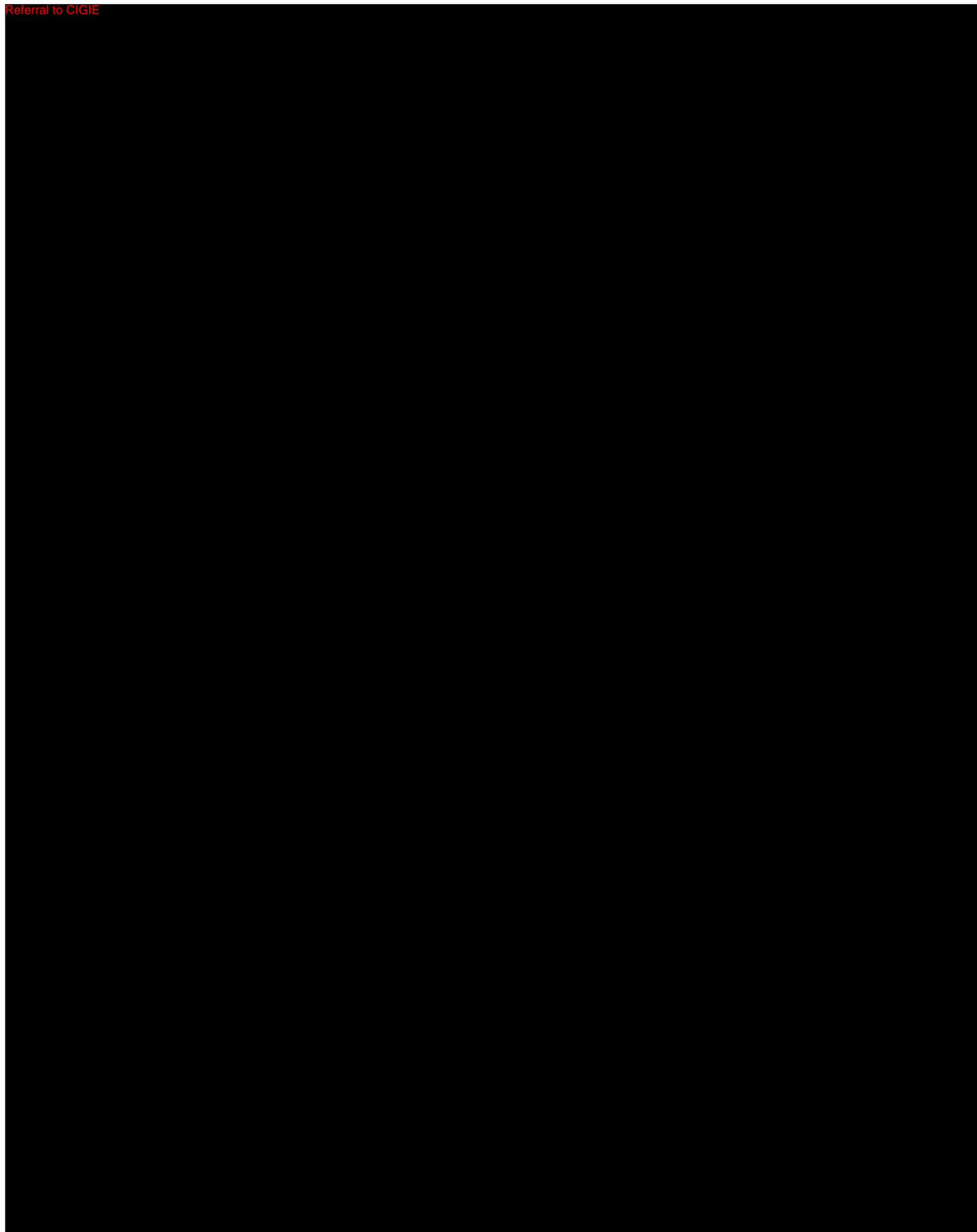
Submitted for your comment is the draft OGE ERM registry. You can find the registry workbook here: H:\Performance Management\Enterprise Risk Management

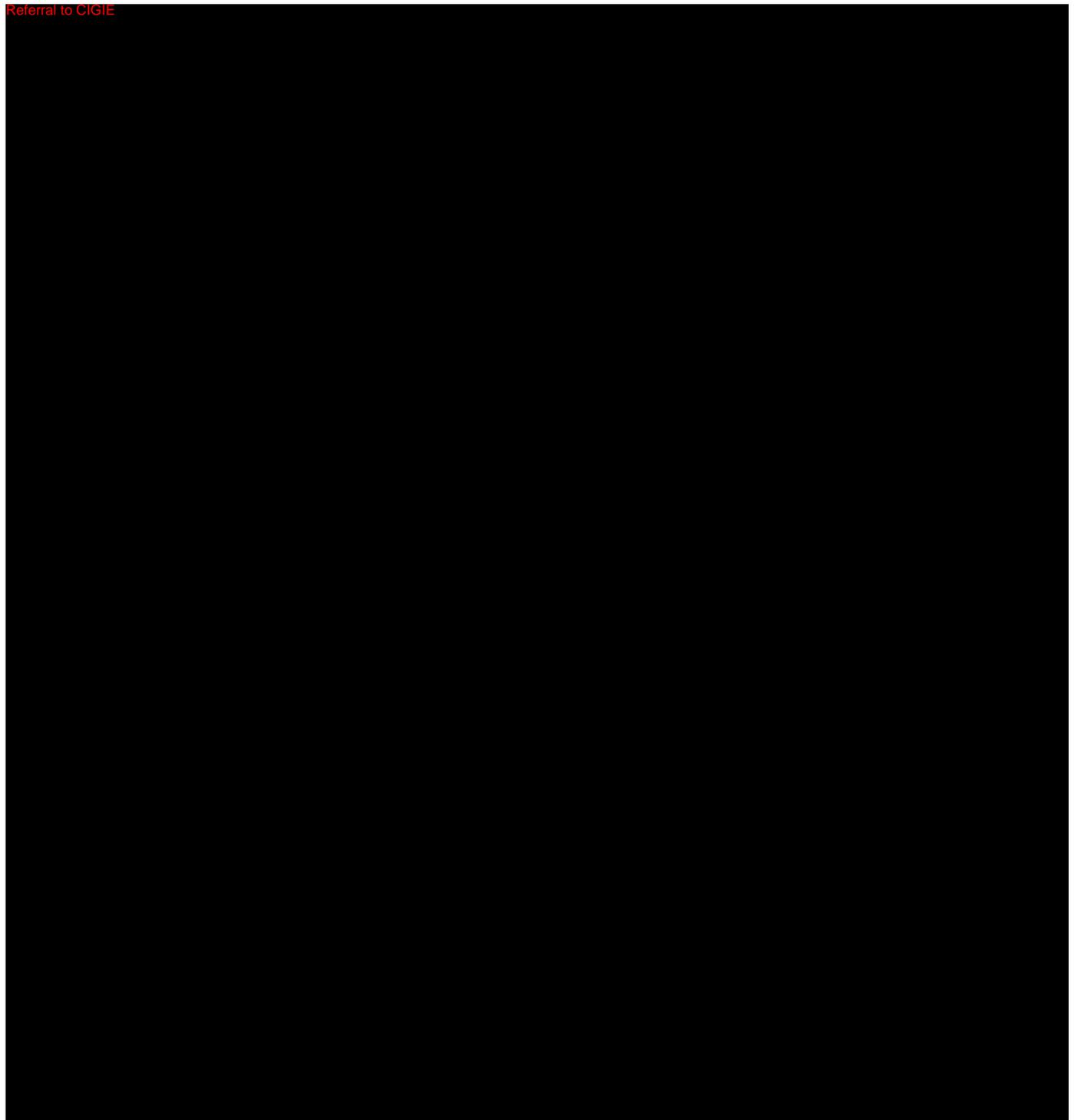
Thanks,

Patrick D. Shepherd
Lead Instructor

(e) patrick.shepherd@oge.gov
(p) 202-482-9206

Legal, External Affairs, and Performance Branch
Program Counsel Division
[U.S. Office of Government Ethics](#)
[@OfficeGovEthics](#)
[Youtube](#)





From: [Director of OGE](#)
To: "Dan Koffsky (b) (6)"
Subject: FW: Response from OGE Director Walter M. Shaub, Jr.
Date: Friday, May 26, 2017 3:18:44 PM
Attachments: [Letter to OGE 5-26-17.pdf](#)

Attachment released below

Dan,

Please see the attached letter. (b)(5)

Thanks!

Walt

From: Miller, Julie L. EOP/OMB [mailto:(b) (6)]
Sent: Friday, May 26, 2017 2:31 PM
To: Director of OGE
Subject: RE: Response from OGE Director Walter M. Shaub, Jr.

Attachment released below

Please find attached a letter from OMB Director Mick Mulvaney in response to Director Shaub's May 22 letter.

Julie Miller
Executive Secretary
Office of Management and Budget

From: Director of OGE [<mailto:director@oge.gov>]
Sent: Monday, May 22, 2017 6:20 PM
To: Miller, Julie L. EOP/OMB <(b) (6)>
Subject: Response from OGE Director Walter M. Shaub, Jr.

Attachment released below

Enclosed please find a letter from OGE's Director, Walter M. Shaub, Jr. The attachments to this letter are too large to send via email, but they can be accessed online at the following address: <https://goo.gl/OTFAib>.

Thank You,

Matthew Marinec, M.P.P.
Confidential Assistant to the Director
U.S. Office of Government Ethics

1201 New York Ave., NW, Suite 500
Washington, DC 20005-3917
Tel. 202.482.9286

Visit OGE's website: www.oge.gov
Follow OGE on Twitter: @OfficeGovEthics

From: Walter M. Shaub
Sent: Monday, May 22, 2017 6:04 PM
To: Director of OGE
Subject: FW: Letter from Director Mulvaney re: Data Call

From: Miller, Julie L. EOP/OMB [mailto:[\(b\) \(6\)](#)]
Sent: Wednesday, May 17, 2017 6:22 PM
To: Walter M. Shaub
Subject: Letter from Director Mulvaney re: Data Call

Attachment released below

Director Shaub,

Please see the attached letter from OMB Director Mulvaney regarding the Office of Government Ethics data call.

Julie Miller
Executive Secretary
Office of Management and Budget

OGE Confidential Notice: This message contains Controlled Unclassified Information (CUI) that requires safeguarding or dissemination control under applicable law, regulation, or Government-wide policy. This email, including all attachments, may constitute a Federal record or other Government property that is intended only for the use of the individual or entity to which it is addressed. If you are not the intended recipient or the employee or agent responsible for delivering the transmission to the intended recipient, you are hereby notified that any dissemination, distribution, copying or use of this email or its contents is strictly prohibited. If you have received this email in error, please notify the sender by responding to the email and then immediately delete the email.



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

THE DIRECTOR

May 17, 2017

Walter Shaub
Director
Office of Government Ethics
1201 New York Avenue N.W. Suite 500
Washington, D.C. 20005

Dear Director Shaub:

On April 28, 2017, pursuant to a Program Advisory, the Office of Government Ethics (“OGE”) requested copies of certain waivers and authorizations of appointees in Federal agencies and the White House.¹ Agencies have made inquiries to the Executive Office of the President regarding this request, and the Office of Management and Budget is seeking to provide them with appropriate guidance on the matter. In particular, this data call appears to raise legal questions regarding the scope of OGE’s authorities.

Due to the uniqueness of OGE’s request and potential legal questions that may exist, the Office of Legal Counsel at the Department of Justice may need to be consulted pursuant to 28 U.S.C. § 512 on the scope of the authorities underlying OGE’s data call.

I therefore request that you stay the data call until these questions are resolved.

Sincerely,

Mick Mulvaney
Director

cc: Agency General Counsels and Designated Agency Ethics Officials

¹ U.S. Office of Government Ethics, PA-17-02, Memorandum, Walter M. Shaub, Jr., Director, to Chief of Staff to the President, Agency Heads, Designated Agency Ethics Officials, Inspectors General, and Appointees, Re: Data Call for Certain Waivers and Authorizations (Apr. 28, 2017), <https://goo.gl/XzMWN6>.



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

THE DIRECTOR

May 26, 2017

Walter Shaub
Director
Office of Government Ethics
1201 New York Avenue N.W. Suite 500
Washington, D.C. 20005

Dear Director Shaub:

Thank you for your May 22, 2017, letter regarding the Office of Management and Budget's (OMB) request that the Office of Government Ethics (OGE) stay its data call seeking copies of certain waivers and authorizations of appointees in Federal agencies and the White House.

OMB shares the belief that the Executive Branch must uphold the highest ethical standards in accordance with the law. Your letter, however, does not appropriately characterize OMB's request for a stay, nor our intentions in sending the letter. Contrary to your assertions, OMB has never sought to impede OGE nor to prevent others, including agencies, from acting as required by law. OMB merely requested that OGE temporarily delay the return date of the data call to ensure sufficient consideration was given to legal questions, including the most appropriate manner in which to handle data of the type requested. OMB will continue to explore these questions with your staff and, as necessary, the Department of Justice's Office of Legal Counsel.

Put another way, our concern was, and is, protecting the process related to the data call. We have no objection to the substance of the call. Accordingly, OMB is voluntarily providing the information you requested: OMB did not issue or approve any waivers or authorizations requested by the OGE data call.

Sincerely,

A handwritten signature in blue ink that reads "Mick Mulvaney" with "OMB" written below it.

Mick Mulvaney
Director

cc: Curtis E. Gannon, Acting Assistant Attorney General
Office of Legal Counsel, U.S. Department of Justice
Agency General Counsels and Designated Agency Ethics Officials

UNITED STATES OFFICE OF
GOVERNMENT ETHICS



May 22, 2017

The Honorable John M. Mulvaney
Director
Office of Management and Budget
Executive Office of the President
725 17th Street, NW
Washington, DC 20503

Dear Director Mulvaney:

I am in receipt of your May 16, 2017, letter¹ requesting that the U.S. Office of Government Ethics (OGE) suspend its inquiry into the practices of agency ethics programs and, separately, the activities of individual appointees.² Specifically, you ask OGE to stay a directive issued in an April 28, 2017, Program Advisory requiring executive branch officials to produce information and records pertaining to ethics waivers and authorizations.³

Despite the highly unusual nature and distribution of your letter,⁴ I have provided for your convenience the following discussion of OGE's plenary authority to collect the information and records sought, as well as evidence of the longstanding history of compliance with such collections, which obviate any need to request an opinion from the Department of Justice's Office of Legal Counsel (OLC). The unusual nature of your letter highlights OGE's responsibility to lead the executive branch ethics program with independence, free from political pressure. Accordingly, OGE declines your request to suspend its ethics inquiry and reiterates its expectation that agencies will fully comply with its directive by June 1, 2017. Public confidence in the integrity of government decisionmaking demands no less.

By law, OGE is the "supervising ethics office" for the executive branch.⁵ Under the Ethics in Government Act of 1978 (EIGA), as amended, OGE has plenary authority to collect all information and records that "the Director may determine to be necessary for the performance of his duties," as well as such reports "as the Director deems necessary," except to the extent prohibited by law.⁶

¹ See Attachment 13.

² Recent news reports, which OGE has neither validated nor conclusively invalidated, raise questions as to whether some appointees are participating in matters from which they may be required to recuse if they have not received waivers. See Eric Lipton, Ben Protess & Andrew Lehen, *With Trump Appointees, a Raft of Potential Conflicts and 'No Transparency,'* N.Y. TIMES, Apr. 15, 2017, <https://goo.gl/pq2V5Z>; Editorial Board, *Trump is Issuing Secret Waivers to his Own Ethics Rules. So Much for Draining the Swamp,* WASH. POST, May 6, 2017, <https://goo.gl/hdcTXA>.

³ See Attachment 14.

⁴ You sent copies of your letter to hundreds of General Counsels and Designated Agency Ethics Officials.

⁵ 5 U.S.C. app. § 109(18).

⁶ 5 U.S.C. app. §§ 402(b)(10), 403(a)(2).



Congress has firmly articulated the need for OGE to have access to needed information and records, as the report of one House committee clearly states:

The Committee believes that it is not possible for OGE to ensure the effective and efficient operation of the executive branch ethics program as a whole without having up-to-date information on how agency programs are structured and without having important management data. This data would indicate, for example, the number of individuals who have and haven't filed SF-278s; the number and type of corrective actions required of agency employees (divestitures, **waivers**, disqualifications); and the number of employees alleged or found to have violated employees' standards of conduct or conflict of interest laws, rules, and regulations.⁷

A Senate committee report similarly observes that, “[F]or purposes of performing his responsibilities, [OGE’s Director] will require access to relevant files and records of agency ethics counselors and other agency materials, information, and documentation necessary to monitor compliance with this statute and related conflict of interest laws and regulations.”⁸

Agency ethics officials are well aware of their legal obligation to produce information and records subject to OGE’s directives.⁹ In fact, dozens of agencies have already complied with OGE’s current directive well in advance of the June 1, 2017, deadline. In addition, your own agency has a solid record of compliance with OGE’s information and records production directives. OMB recently complied with a directive to produce an extensive array of information and records that OGE needed for a thorough evaluation of OMB’s ethics program.¹⁰ OMB regularly responds to other OGE directives to produce information and records.¹¹ Most recently, OMB provided OGE with notice¹² of your own efforts to comply with the ethics agreement that you signed on January 10, 2017.¹³

Additional examples of agency compliance with OGE directives to produce information and records are abundant. Among other items, the most obvious examples include: notifications filed by Inspectors General and agency ethics officials related to criminal referrals for prosecution;¹⁴ criminal conflict of interest waivers;¹⁵ responses to executive branch-wide

⁷ See H.R. REP. NO. 100-1017, at 19-20 (1988) (emphasis added).

⁸ See S. REP. NO. 95-170, at 150 (1977).

⁹ See 5 U.S.C. app. §§ 402(b)(10), 403(a)(2); 5 C.F.R. §§ 2638.104(c)(3), 2638.202.

¹⁰ See Attachment 6.

¹¹ See, e.g., Office of Mgmt. and Budget, *Response to Annual Agency Ethics Program Questionnaire for CY 2015*, U.S. OFF. GOV’T ETHICS, <https://goo.gl/Vg4neA> (last visited May 22, 2017).

¹² Attachment 10.

¹³ Ethics Agreement of John M. Mulvaney (Jan. 10, 2017), <https://goo.gl/5v8ZWI>.

¹⁴ See 5 C.F.R. § 2638.206; see also OGE Form 202, <https://goo.gl/SflA23>.

¹⁵ See Exec. Order No. 12,731, § 301(d) (Oct. 17, 1990); 5 C.F.R. § 2640.303.

directives for information and records;¹⁶ responses to directives to produce information and records in connection with multi-agency special issue reviews;¹⁷ responses to agency-specific directives in connection with oversight of individual agency ethics programs;¹⁸ directives to produce annually designations of separate agency components;¹⁹ responses to a standing directive to produce delegations of authority to Designated Agency Ethics Officials;²⁰ reports of agencies' acceptance of outside reimbursement for official travel;²¹ responses to requests for information regarding conflict of interest prosecutions;²² and responses to the annual Agency Ethics Program Questionnaire.²³

Just last year, the Government Accountability Office issued a report recommending that the Director of OGE collect data from Designated Agency Ethics Officials and determine whether executive branch agencies are experiencing challenges related to the reliability of data on the executive branch's use of special government employees.²⁴ GAO's report followed an inquiry that it conducted at the request of Senate Judiciary Committee Chairman Charles E. Grassley.²⁵ Thereafter, OGE issued an executive branch-wide directive requiring production of information through a "compulsory survey" of 135 agencies, including OMB, and achieved a 100% response rate.²⁶

Compliance on the part of agencies with these OGE directives to produce information and records is entirely commonplace;²⁷ however, I am aware of the views of the White House's current Designated Agency Ethics Official. In a letter dated February 28, 2017, he asserted that Presidential appointees serving in the White House Office are beyond the reach of basic ethics requirements universally applicable to millions of executive branch employees.²⁸ As I explained

¹⁶ See, e.g., OGE Program Advisory PA-15-01 (2015), <https://goo.gl/hcg9lz>; Memo from Dale Christopher, Assoc. Dir., Program Servs. Div., U.S. Office of Gov't Ethics, to Designated Agency Ethics Officials, *Notifying the United States Office of Government Ethics of Filing Extensions*, DO-10-011 (2010), <https://goo.gl/AjjGmi>.

¹⁷ *Post-Election Readiness Review*, U.S. OFF. GOV'T ETHICS, (Sept. 1, 2012), <https://goo.gl/qR4h9L>.

¹⁸ See Attachment 5.

¹⁹ See 5 C.F.R. § 2641.302(e)(2)(ii).

²⁰ See Attachment 9.

²¹ WHITE HOUSE OFFICE, SEMI-ANNUAL REPORT OF PAYMENTS ACCEPTED FROM A NON-FEDERAL SOURCE (Sept. 30, 2016), <https://goo.gl/oMI1PA>.

²² See *Conflict of Interest Prosecution Surveys Index (by Statute)*, U.S. OFF. GOV'T ETHICS, <https://goo.gl/rMgtA8> (last visited May 22, 2017); see also Attachment 12.

²³ *Annual Agency Ethics Program Questionnaire Responses (CY14)*, U.S. OFF. GOV'T ETHICS (Jul. 1, 2015), <https://goo.gl/dQYpHP>.

²⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-548, FEDERAL WORKFORCE: OPPORTUNITIES EXIST TO IMPROVE DATA ON SELECTED GROUPS OF SPECIAL GOVERNMENT EMPLOYEES (2016), <https://goo.gl/1cqA0y>.

²⁵ See Press Release, Sen. Charles E. Grassley, Special Government Employee Report Released, Outlines Problems Managing Designation (Aug. 15, 2016), <https://goo.gl/Ps15A4> ("Grassley asked the Government Accountability Office (GAO) to study the Special Government Employee designation to see whether it works as intended to serve taxpayers.").

²⁶ U.S. OFFICE OF GOV'T ETHICS, SPECIAL GOVERNMENT EMPLOYEES NOT SERVING ON FEDERAL BOARDS (2017), <https://goo.gl/Neg03V>.

²⁷ See, e.g., Attachments 3, 5-6, 8-12.

²⁸ See Letter from Stefan C. Passantino, Designated Agency Ethics Official, White House Office, to Walter M. Shaub, Jr., Director, U.S. Office of Gov't Ethics (Feb. 28, 2017), <https://goo.gl/JozVpS>. Note, however, that Mr. Passantino's letter also stands as an example of the White House Office's compliance with exercises of OGE's

in my response, the theory underlying his position has not been applied in the context of government ethics.²⁹ Contrary to the Designated Agency Ethics Official's assertion, the White House Office has routinely complied with OGE's directives to produce information and records.³⁰ For your edification, I have enclosed a sampling of materials that illustrate the exercise of OGE's authority to collect information and records from the White House Office during every Presidential administration since the enactment of the Ethics in Government Act in 1978, including the Obama, Bush, Clinton, Bush, Reagan, and Carter Administrations.³¹ As you will observe when you review these materials, the compliance of the White House Office has not previously been in doubt.³²

Irrespective of the views expressed by the White House's Designated Agency Ethics Official, OGE's authority is sufficiently clear that consultation with OLC is unnecessary. Nevertheless, you may find it helpful to know that OLC recently approved OGE's issuance of a regulation that establishes the following mandate:³³

Acting directly or through other officials, the DAEO is responsible for taking actions authorized or required under this subchapter, including the following: . . . Promptly and timely furnishing the Office of Government Ethics with all documents and information requested or required under subpart B of this part

statutory authority to compel the production of information and records because, notwithstanding his stated objection, the letter includes the information OGE required him to produce.

²⁹ The underlying theory is that the White House Office is not an "executive agency" for certain limited purposes under 5 U.S.C. § 105, which is referenced in OGE's organic statute. For example, the White House has been found not to be an "executive agency" for purposes of a certain employment discrimination law. *See Haddon v. Walters*, 43 F.3d 1488 (D.C. Cir. 1995) (per curiam). In contrast, the White House has been found to be an "executive agency" for purposes of 18 U.S.C. § 603. *Application of 18 U.S.C. § 603 to Contributions to the President's Re-Election Committee*, 27 Op. O.L.C. 118, 119 (2003) (Office of Legal Counsel opinion finding that, under the statutory scheme of the Hatch Act Reform Amendments, the White House Office should be treated as an "executive agency" under title 5, notwithstanding *Haddon*). In addition, the White House has routinely relied on a certain statutory authority available only to an "executive agency" that authorizes acceptance of outside reimbursements for official travel. *See* 31 U.S.C. § 1353(c)(1) (restricting authority to accept such reimbursements only to an "executive agency" as defined under 5 U.S.C. § 105); *see also* WHITE HOUSE OFFICE, SEMIANNUAL REPORT OF PAYMENTS ACCEPTED FROM A NON-FEDERAL SOURCE (Sept. 30, 2016), <https://goo.gl/BTUpBw>. Thus, the White House is an "executive agency" for some purposes and arguably not for others. However, its status as an "executive agency" for purposes of the Ethics in Government Act is not in doubt. To the contrary, the attached materials include examples of the successful exercise of OGE's authority to require the White House Office to produce information and records over the years since enactment of the Ethics in Government Act. *See* Attachment 8; *see also Office of Government Ethics Jurisdiction Over the Smithsonian Institution*, 32 Op. O.L.C. 56, 63-64 (2008) (OLC opinion finding historical practice relevant to its analysis of the scope of OGE's authority).

³⁰ As part of the current White House's unusual assertions with regard to ethics compliance, I note that a White House official contacted a staff-level OGE employee a few hours before I received your letter in order to challenge an OGE directive to produce information and records that OGE issues every year. In connection with this challenge, the caller demanded that the employee certify that his statement that the Bush Administration had complied with the directive was a "true and correct statement." The White House caller also asked several questions about the collection of information from the National Security Council. *See* Attachment 1.

³¹ *See* Attachment 8.

³² *See id.*

³³ *See* Attachment 7.

The agency head is responsible for, and will exercise personal leadership in, establishing and maintaining an effective agency ethics program and fostering an ethical culture in the agency. The agency head is also responsible for: . . . Requiring agency officials to provide the DAEO with the information, support, and cooperation necessary for the accomplishment of the DAEO's responsibilities

Consistent with sections 402 and 403 of the Act, each agency must furnish to the Director all information and records in its possession which the Director deems necessary to the performance of the Director's duties, except to the extent prohibited by law. All such information and records must be provided to the Office of Government Ethics in a complete and timely manner.³⁴

OLC approved the promulgation of this regulation pursuant to a statutory requirement that OGE coordinate with the Department of Justice before issuing certain regulations.³⁵ In addition to this statutorily required consultation with OLC, OGE consulted with OMB and a broad range of other stakeholders through the ordinary regulatory process.³⁶

The recent issuance of this regulation did not significantly change the regulatory framework for requiring the submission of information and records in the executive branch to OGE. The above-quoted language is similar to the language of an earlier regulation that OGE issued 27 years ago in consultation with the Department of Justice.³⁷ A former OGE Director, who was appointed by President Bush and later reappointed by President Clinton, emphasized that compliance with the regulation has never been optional:

The first point to remember is that every executive agency has a statutory obligation to furnish OGE with “all information and records in its possession which the Director may determine to be necessary for the performance of his duties.” 5 U.S.C. app. § 403(a). This statutory obligation is independent of, and serves many purposes in addition to,

³⁴ Executive Branch Ethics Program Amendments, 81 Fed. Reg. 76,271, 76,274, 76,276-77 (Nov. 2, 2016) (codified at 5 C.F.R. §§ 2638.104, 2638.107, 2638.202).

³⁵ 5 U.S.C. app. § 402(b)(1).

³⁶ See Executive Branch Ethics Program Amendments, 81 Fed. Reg. at 76,271 (“These amendments, which are described in the preamble to the proposed rule, draw upon the collective experience of agency ethics officials across the executive branch and OGE as the supervising ethics office. They reflect extensive input from the executive branch ethics community and the inspector general community, as well as OGE’s consultation with the Department of Justice (DOJ) and the Office of Personnel Management pursuant to 5 U.S.C. app. 402(b)(1). In short, they present a comprehensive picture of the executive branch ethics program, its responsibilities and its procedures, as reflected through nearly 40 years of interpreting and implementing the Ethics in Government Act of 1978, as amended (the Act), as well as other applicable statutes, regulations, Executive orders, and authorities.”).

³⁷ Implementation of the Office of Government Ethics Reauthorization Act of 1988, 55 Fed. Reg. 1665 (1990); Corrective Action and Reporting Requirements Relating to Executive Agency Ethics Programs: Implementation of the Office of Government Ethics Reauthorization Act of 1988, 55 Fed. Reg. 21,845 (1990); see also 5 U.S.C. app. § 402(b)(1).

the scheme for agency review and OGE certification of certain financial disclosure statements. *See* 5 U.S.C. app. § 402 (listing broad range of statutory authorities and functions)... Furthermore, as [the Designated Agency Ethics Official (DAEO)] acknowledges, OGE’s implementing regulations provide that the DAEO “shall ensure” that information requested by OGE “is provided in a complete and timely manner.” 5 C.F.R. § 2638.203(a)(14).

...

By statute, OGE is charged with providing “overall direction of executive branch policies related to preventing conflicts of interest.” 5 U.S.C. app. § 402(a). Among other things, OGE is given specific statutory authority to promulgate rules, interpret those rules, and monitor compliance with financial disclosure requirements. 5 U.S.C. app. § 402(b).

...

Unless and until OGE’s interpretation had been overruled by a judicial opinion or otherwise modified by OGE through the usual process of executive branch deliberations, the DAEO had no ground to hold out a contrary interpretation as a lawful option for the filer. Should any future disagreements arise between the DAEO and OGE as to legal issues within OGE’s primary jurisdiction, we expect that the DAEO will be careful not to make any statements that might reasonably be construed by [agency] employees as giving them the option to disregard the interpretation of OGE in favor of a contrary interpretation rendered by the DAEO.³⁸

The Director’s opinion accurately reflects the common understanding in the executive branch that compliance is mandatory.³⁹

In light of OGE’s clear authority and the long history of agencies’ compliance, your letter requesting a stay of OGE’s pending directive for production of information and records copied to hundreds of other executive branch officials is highly unusual. For OGE to fulfill its mission of

³⁸ OGE Informal Advisory Opinion 00 x 2 at 1-4 (2000).

³⁹ *See Reauthorization of the Office of Government Ethics: Hearing Before the Subcomm. on the Fed. Workforce and Agency Org. of the H. Comm. on Gov’t Reform*, 109th Cong. 109-211, at 19 (2006) (statement of Marilyn Glynn, Acting Director, Office of Government Ethics), <https://goo.gl/22vffk> (“We do have currently so-called corrective action authority that allows us to actually hold a hearing if an agency or an individual at an agency refuses to comply on an ongoing basis with some direction in effect that we have given them, and we have never had to use it. I think we have a little bit of the power of the bully pulpit. We can call very high level folks at the agency, all the way up to a Secretary’s office or an Administrator’s office, and say, so and so on your staff is doing thus and such and it needs to stop. And it stops immediately. We do not find pushback from agencies. So I am not sure that there is a need to particularly strengthen our role.”).

preventing conflicts of interest and monitoring compliance with the ethics laws by agencies and officials, the Director must be able to act independently and free from political pressure. Congress created OGE as an institutional check to monitor the ethics program and to prevent conflicts of interest in the executive branch. OGE can effectively perform this role only if it can act objectively and without fear of reprisal.⁴⁰

In this context, it bears emphasizing that OGE has the authority to institute corrective action proceedings against agencies that fail to comply, or against individuals who improperly prevent agency ethics officials from complying, with the Ethics in Government Act.⁴¹ Likewise the Inspectors General and the U.S. Office of Special Counsel have authority to investigate allegations of retaliation against ethics officials for complying with the legal requirement to provide OGE with the information and records subject to this directive.⁴²

OGE is exercising its authority and independence appropriately. OGE's April 28, 2017, directive is supported by ample legal authority and compliant with applicable procedures. Consistent with the applicable legal standard, the directive includes a determination of necessity.⁴³ Although not required to do so, OGE has also limited the scope of the directive to information and records that lie at the heart of the executive branch ethics program.⁴⁴ OGE has also afforded executive branch officials a full month to produce information and records that are routinely maintained and readily accessible by any well-run agency ethics program.

This directive supports a key aspect of OGE's mission, which is to ensure public confidence in the integrity of executive branch-wide decisionmaking. The vital national interest in disclosure of such information and records was most eloquently expressed in a letter that Chairman of the Senate Committee on the Judiciary Charles E. Grassley sent to OGE:

⁴⁰ See S. REP. NO. 98-59 at 20 (1983) ("A major issue discussed at the Oversight Subcommittee's hearing was the independence of the OGE. In many instances, the Office must rule on sensitive issues involving political appointees and other high-ranking officials. For the OGE to perform its role of preventing conflicts of interest and monitoring compliance with the ethics laws by agencies and officials, it is crucial that the Director act independently and free from political pressure. . . . The Congress created the OGE as an institutional check to monitor the ethics program and to prevent conflicts of interest in the Executive Branch. This institutional check is effective only when the Office can act objectively and without fear of reprisal."); see also Attachment 4 (Senate Homeland Security and Government Affairs Committee Questionnaire for Walter M. Shaub, Jr., Question 26: "Some believe that the Director of OGE must be insulated from political pressure, to ensure the Director is not forced to compromise on necessary action or encouraged to deviate from the normal application of ethical requirements with respect to a particular individual. Do you agree that the Director of OGE must act independently and free from political pressure? If so, how would you, if confirmed, maintain this independence and freedom from pressure?").

⁴¹ 5 U.S.C. app. § 402(b)(9), (f); 5 C.F.R. pt. 2638, subpts. D, E.

⁴² See 5 U.S.C. app. §§ 2(1), 4(a)(1) (Inspector General Act of 1978, as amended); see also 5 U.S.C. §§ 2302(b)(9)(D), (b)(12).

⁴³ See OGE Program Advisory PA-17-02 at 1 (2017); see also 5 U.S.C. app. §§ 402(b)(10), 403; 5 C.F.R. §§ 2638.104(c)(3), 2638.202.

⁴⁴ In your letter, you refer to what you characterize as the "uniqueness" of this directive to produce information and records, but there is nothing unique about OGE collecting records central to the program it oversees. As the enclosed samples illustrate, OGE's staff has engaged in either the collection or review of agency ethics program records on each working day since OGE's establishment in 1978. See, e.g., Attachments 3, 5-6, 8-12.

The work of the Government is the work of the people and it should be public and available for all to see. It has been said that sunlight is the best disinfectant and that opening up the business of the Government will ensure that the public trust is not lost. As a senior member of the United States Senate, I have consistently worked to ensure that the business of the Government is done in as open and transparent manner as possible.

...

I am concerned that Section 3 could be used to gut the ethical heart of the [Executive] Order. Each day, new nominees to key Government positions are reported. Many of these nominees have been nominated despite the fact that they have previously served as lobbyists or in a manner that would preclude their participation under the Order absent a Section 3 waiver.

...

[T]he Ethics in Government Act provides the Director of OGE a number of authorities to bring sunlight upon Section 3 waivers issued by DAEOs. Specifically, the Act explicitly provides the Director of OGE the authority to, among other things, “interpret rules and regulations issued by the President or the Director governing conflict of interest and ethical problems and the filing of financial statements.” The Act also provides the Director of OGE the authority to require “such reports from executive agencies as the Director deems necessary.” Further, the Act authorizes the Director to prescribe regulations that require each executive agency to submit to OGE a report containing “any other information that the Director may require in order to carry out the responsibilities of the Director under this title.” Finally, the Act is clear that when the Director makes a request to an executive agency, the agency shall furnish “all information and records in its possession which the Director may determine to be necessary for the performance of his duties.”

Based upon these existing statutory authorities you have the authority to require each DAEO to provide OGE with an accounting of all waivers and recusals issued.

...

The American people deserve a full accounting of all waivers and recusals to better understand who is running the government and whether the Administration is adhering to its promise to be open,

The Honorable John M. Mulvaney
Director
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transparent, and accountable. I urge you to take immediate action to make any waivers and recusals public⁴⁵

Following its receipt of Chairman Grassley's letter and the development of the necessary technological means, OGE began posting ethics pledge waivers on its official website.⁴⁶ However, the current Administration has not been complying with this established practice.

In closing, I want to assure you that a request from the Director of the Office of Management and Budget is not something that I decline lightly. For the foregoing reasons, however, OGE is not granting your request to stay the pending directive to produce information and records. Please take all necessary steps to ensure that OMB's response is submitted by the June 1, 2017, deadline.⁴⁷

Sincerely,

A handwritten signature in blue ink, appearing to read "Walter M. Shaub, Jr.", written in a cursive style.

Walter M. Shaub, Jr.
Director

Attachments (15)

⁴⁵ See Attachment 2.

⁴⁶ *Executive Branch Agency Ethics Pledge Waivers*, U.S. OFF. GOV'T ETHICS, <https://goo.gl/Yw16wQ> (last visited May 22, 2017).

⁴⁷ See Attachment 15.

cc. Designated Agency Ethics Officials

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Inspectors General

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From: [Walter M. Shaub](#)
To: [Jennifer Matis](#)
Subject: thanks
Date: Friday, May 26, 2017 3:19:13 PM
Attachments: [FW Response from OGE Director Walter M. Shaub Jr..msg](#)

Attachment released above from page
115-116 & page 118

Walter M. Shaub, Jr.
Director
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1201 New York Avenue, NW, Suite 500
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Telephone: 202.482.9292
Email: walter.shaub@oge.gov

From: [Walter M. Shaub](#)
To: ["Lipton, Eric"](#)
Date: Friday, May 26, 2017 5:57:06 PM

I appreciated Director Mulvaney's letter today. I'm glad OMB responded to the data call, and I fully anticipate that all other executive branch agencies will do the same. This really is routine stuff, and I'm glad we're on track again.

Referral to CIGIE

