



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, 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,

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, reading "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

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