Congressional Research Service

Memorandum

April 26, 2004

TO: Honorable Charles Rangel, House Committee on Ways and Means
Attention: Cybele Bjorklund

FROM: Jack Maskell
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SUBJECT: Agency Prohibiting a Federal Officer from Providing Accurate Cost Information to the United States Congress

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This memorandum addresses the question of whether officials in a federal agency may lawfully prohibit, prevent and/or restrain another agency official from providing cost information to the United States Congress, or to a committee or a requesting Member of the Congress. The specific facts in question concern the allegations that the Chief Actuary for the Centers for Medicare and Medicaid Services in the Department of Health and Human Services, Richard Foster, was ordered by superiors at the Department, under the threat of disciplinary action, not to reveal to Members of Congress cost estimates for Medicare legislation being considered by Congress.[1] Department officials have reportedly admitted that they ordered Mr. Foster's withholding of the information from Congress, and have claimed to have a legal right to institute such a so-called "gag order" on a federal official in their Department to prevent the communication of truthful information to Members of the United States Congress on public policy issues within the Department's jurisdiction.[2]

While agencies of the Federal Government have a general right to choose or designate whom they wish to officially and publicly speak for and represent the views of that agency, and to have in place procedures to review information attributable to the agency,[3] executive agencies and their officers and employees do not have the right to prevent or prohibit their

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[1] Knight Ridder Tribune News Services, "Medicare cost analyst says he was ordered to provide skewed figures," March 12, 2004; The *Wall Street Journal*, "Medicare Actuary Reveals E-Mail Warnings," March 18, 2004, A4, alleging that official was instructed to respond to information requests from "House Republicans," but that the two requests for information "from Democrats, should be held ...."

[2] Knight Ridder Tribune News Services, "Medicare officials say masking cost estimates was legal," April 1, 2004.

[3] *See* 5 U.S.C. § 301, *re* general housekeeping regulations; *note* also OMB Circular A-19, as to Administration review of official *agency* testimony and presentations.

officers or employees, either individually or in association, from presenting information to the United States Congress, its Members or committees, concerning relevant public policy issues.[4] General housekeeping regulations of an agency, or so-called *Touhy* regulations, which may require certain procedures for release of agency information, do not authorize and may *not* be used to prevent or obstruct the receipt of information by the Congress.[5] Receiving accurate and truthful information from the federal agencies concerning the implementation and administration of federal laws to assist Congress in its constitutionally prescribed legislative function is one of the clear Congressional prerogatives, and is of obvious necessity if Congress is to have accurate information, data and facts upon which to effectively legislate. In fact, actions which purposefully result in the transmission of knowingly false information to the United States Congress, and actions involving the intentional and active prevention of the communication of accurate information to the Congress in derogation of Federal law or responsibilities, might in certain circumstances involve activities which constitute violations of federal criminal provisions.[6]

Congress' Right to Information. Congress' right to receive truthful information from federal agencies to assist in its legislative functions is clear and unassailable. There are no countervailing "separations of powers" indications generally, nor legitimate "executive privilege" claims specifically, to justify in this matter the withholding from the United States Congress relevant public policy information by an executive branch officer in a federal agency or department lower down in the chain of command from the President.[7] The Supreme Court has on numerous occasions expressly recognized Congress' inherent right to receive information from executive agencies in legislative oversight or investigations, so as to gather knowledge and information "concerning the administration of existing laws as well as proposed or possibly needed statutes," a process deemed to be essential to the

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[4] 5 U.S.C. § 7211; *see* specifically P.L. 108-199, Division F, "Transportation, Treasury, and Independent Agency Appropriations, 2004," Sections 618, 620, 118 Stat. 354, 355 (January 23, 2004); P.L. 108-7, Division J, "Treasury and General Governmental Appropriations, 2003," Sections 620, 622, 117 Stat. 468, 469 (February 20, 2003); *note* also the "Whistleblower Protection Act," 5 U.S.C. § 2302(b)(8).

[5] Such regulations, based in part on the court decision in *Touhy v. Ragen*, 340 U.S. 462 (1951), might in some instances go beyond the actual underlying statutory authority of the so-called "housekeeping" law (upon which *Touhy* was based), as that law now exists (*see* now 5 U.S.C. § 301). That law was specifically amended by Congress in 1958 after and in response to the *Touhy* decision, to expressly state that the section "does not authorize withholding information from the public or limiting the availability of records to the public." 5 U.S.C. § 301. In H.R. Rep. No. 1461, 85th Cong., 2d Sess. 634 (1958), the House noted that the "Housekeeping Act" had "been twisted from its original purpose as a 'housekeeping' statute into a claim of authority to keep information from the public and, even, from the Congress." One legal commentator noted: "The proposition for which Touhy is often cited – that a government agency may withhold documents or testimony at its discretion – simply is not good law and hasn't been since 1958." Gregory Coleman, "Touhy and the Housekeeping Privilege: Dead But Not Buried?", 70 Tex. L. Rev. 685, 689 (1992), *citing, e.g., Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 788, 792 (D.C. Cir. 1971).

[6] *See, e.g.*, 18 U.S.C. § 1001, false statements; 18 U.S.C. § 1505, obstructing a congressional inquiry.

[7] *In re Sealed Case*, 121 F.3d 729, 752 (D.C.Cir. 1997): executive privilege does "not extend to staff outside the White House in executive branch agencies," covering only those with "operational proximity" to the President. In this case particularly, the officer in question was not an "at will" employee of the President, was made by statute independent from the executive by requiring "for cause" removal, and was expressly intended to generate data for use by the Congress.

legislative function.[8] Clearly, as stated by the Supreme Court, "[a] legislative body cannot legislate wisely or effectively in the absence of information regarding conditions which the legislation is intended to affect or change,"[9] and thus political gamesmanship must yield to the clear public interest of providing elected representatives in the Congress with accurate and truthful information upon which to effectively fashion the laws for the Nation.

Congress' vital interest in the receipt of information from federal officials is such that the courts have found that even in so-called "non-disclosure" or "confidentiality" statutes applying to federal agencies and officials, if Congress had *not* expressly exempted itself from the restrictions on access to information in the particular statutory provision, the Congress, because of public policy interests and because of Congress' constitutional duties and oversight authority, is *still* to be considered exempt from the restrictions on the receipt or acceptance of information, and the release to Congress of such information is not to be interpreted to be in violation of such general non-disclosure provisions.[10] Similarly, even when information may be shielded from release to the public, such as under certain circumstances in the Freedom of Information Act, for example, it is recognized that "Congress must have the widest possible access to executive branch information, if it is to perform its manifold responsibilities effectively," and could not be denied such information.[11]

Right of Employee to Provide Information, and Prohibition on Obstructing Employees from Providing Information to Congress. Congress has adopted several measures in permanent statutory provisions and in yearly appropriations laws which state the specific axiom that a federal employee has the right to communicate with and to provide information to the United States Congress, or to a Member or committee of Congress, and that such right may not be interfered with or impeded. A current provision of statutory law, originally enacted as part of the Lloyd-LaFollette Act, states as follows at 5 U.S.C. § 7211:

> The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.

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[8] *Watkins v. United States*, 354 U.S. 178, 187 (1957); *McGrain v. Daugherty*, 272 U.S. 135 (1927); *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504-506 (1975); *Barenblatt v. United States*, 360 U.S. 109, 111 (1959).

[9] *McGrain v. Daugherty, supra* at 175.

[10] *F.T.C. v. Owens-Corning Fiberglass Corp.*, 626 F.2d 966, 970 (D.C. Cir. 1980); *Exxon Corp. v. F.T.C.*, 589 F.2d 582, 585-86 (D.C.Cir. 1978), *cert. denied*, 441 U.S. 943 (1979); *Ashland Oil Co., Inc. v. F.T.C.*, 548 F.2d 977, 979 (D.C. Cir. 1976); 41 Op. Atty. Gen. 221 (1955), finding that a prohibition on information release "unless otherwise authorized by law," allowed Congress to access such information since it has general oversight authority over agencies; *see* general discussion in Rosenberg, CRS Rpt.95-464, "Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry," April 7, 1995, at 20-23.

[11] *Murphy v. Department of Army*, 613 F.2d 1151, 155-58 (D.C.Cir. 1979): "Congress, whether as a body, through committees, or otherwise, must have the widest possible access to executive branch information, if it is to perform its manifold responsibilities effectively. If one consequence of the facilitation of such access is that some information will be disclosed to congressional authorities but not to private persons, that is but an incidental consequence of the need for informed and effective lawmakers." Indeed, the FOIA expressly provides that congressional access to information covered by the 9 exceptions can not be denied for those reasons. 5 U.S.C. § 553(d).

The provisions of this so-called "anti-gag rule" statute were adopted by Congress expressly to protect the rights of employees to communicate with Congress, and to ensure Congress' right to receive such information in the face of the Taft and Theodore Roosevelt Administrations' attempts to "gag" or restrain employees from speaking or providing information to the Congress without the consent of the employees' heads of Departments.[12] With such "gag rules" in place requiring departmental clearance to speak to Congress or respond to Members, Congress was specifically concerned that it would hear only one side of an issue, that is, the point of view of Cabinet officials rather than the rank-and-file experts in the Departments.[13] As noted by Representative Lloyd, if agency employees could speak to Congress only by permission of the Department heads, "there is no possible way of obtaining information excepting through the Cabinet officers, and if these officers desire to withhold information and suppress the truth ... it is within their power to do so."[14] During the Senate consideration of the measure, it was stated that "it will not do for Congress to permit the executive branch of this Government to deny to it the sources of information which ought to be free and open to it, and such an order as this, it seems to me, belongs in some other country than the United States."[15]

The provisions and the underlying policy of the "anti-gag rule" statute have been reaffirmed, strengthened, and clearly reasserted in recent appropriations laws where Congress has expressly provided that no funds appropriated in *any* act of Congress may be spent to pay the salary of one who prohibits or prevents an employee of an executive agency from providing information to the Congress, or to any Member or Committee of Congress, when such information concerns relevant official matters. Similarly, current appropriations provisions also provide that no funds may be spent to enforce any agency non-disclosure policy, or any "non-disclosure" agreement with an officer or employee, without expressly providing an exemption from such agreement or policy for information provided to the Congress, specifically citing the anti-gag rule law, at 5 U.S.C. § 7211:

> Sec. 618. No part of any appropriation contained in this or any other Act shall be available for the payment of the salary of any officer or employee of the Federal Government, who –
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> (1) prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress in connection with any matter pertaining to the employment of such other officer or employee or pertaining to the department or agency of such other officer or employee in any way, irrespective of whether such communication or contact is at the initiative of such other officer or employee or in response to the request or inquiry of such Member, committee, or subcommittee; or
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> (2) removes, suspends from duty without pay, demotes, reduces in rank, seniority, status, pay, or performance of efficiency rating, denies promotion to, relocates, reassigns,

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[12] Public Law No. 336, 62d Congress, Postal Service Appropriations Act of 1912, Section 6, 37 Stat. 539, 555 (1912). For history of the gag rules and anti-gag rule law, *see* generally, Louis Fisher, "Invoking Executive Privilege: Navigating Ticklish Political Waters," 8 *William & Mary Bill of Rights J.* 583, 623-625 (2000), and "Congressional-Executive Struggles Over Information: Secrecy Pledges," 42 *Adm. L. Rev.* 89, 98-100 (1990). For text of Taft and Roosevelt gag orders, *see* 48 *Congressional Record* 4513 (April 9, 1912).

[13] 48 *Congressional Record* 4656 - 4657 (April 12, 1912).

[14] 48 *Congressional Record* 5634 (April 30, 1912).

[15] Statement of Senator Reed, 48 *Congressional Record* 10674 (August 10, 1912).

> transfers, disciplines, or discriminates in regard to any employment right, entitlement, or benefit, or any term or condition of employment of, any other officer or employee of the Federal Government, or attempts or threatens to commit any of the foregoing actions with respect to such other officer or employee, by reason of any communication or contact of such other officer or employee with any Member, committee, or subcommittee of the Congress as described in paragraph (1).
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> Sec. 620. No funds appropriated in this or any other Act may be used to implement or enforce the agreements in Standard Forms 312 and 4414 of the Government or any other nondisclosure policy, form, or agreement if such policy, form, or agreement does not contain the following provisions: "These restrictions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by Executive Order No. 12958; section 7211 of title 5, United States Code (governing disclosures to Congress); section 1034 of title 10, United States Code, as amended by the Military Whistleblower Protection Act (governing disclosure to Congress by members of the military); section 2302(b)(8) of title 5, United States Code, as amended by the Whistleblower Protection Act (governing disclosures of illegality, waste, fraud, abuse or public health or safety threats) ...."[16]

In discussing the latter provision when first added to appropriations laws in 1987, the Conference Report stated clearly that the effect of the law was to reduce the potential that an overbroad nondisclosure agreement or agency non-disclosure policy might have to produce a "chilling effect on the first amendment rights of government employees, *including their ability to communicate directly with members of Congress*."[17]

Congress has also passed other provisions of law, such as the "Whistleblower Protection Act," to assure the free and unfettered passage of information from Federal employees in the executive agencies to, among others, the Congress, to assure the fair and honest administration of the laws of the nation.[18] The Senate Report on the legislation noted that in large bureaucracies it is not difficult to conceal evidence of waste or mismanagement "provided that no one summons the courage to disclose the truth."[19] The Whistleblower Act expressly protects employees from personnel reprisals for the disclosure of certain information regarding waste, fraud or abuse in federal programs, and while it may limit the right to disclose *publicly* certain confidential or secret information relating to national security or defense, it expressly allows the disclosure to the Congress of any and all such information: "This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress."[20] While the Whistleblowing Act is generally used as a defense to personnel actions taken against covered employees for making protected disclosures, the provisions clearly demonstrate Congress' continued policy of establishing

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[16] P.L. 108-199, Division F, "Transportation, Treasury, and Independent Agency Appropriations, 2004," Sections 618, 620, 118 Stat. 354, 355 (January 23, 2004); *see* also same language in P.L. 108-7, Division J, "Treasury and General Governmental Appropriations, 2003," Sections 620, 622, 117 Stat. 468, 469 (February 20, 2003).

[17] H.R. Rep. No. 498, 100th Cong., 1st Sess. 1179 (1987). Emphasis added.

[18] 5 U.S.C. § 2302(b)(8).

[19] S. Rep. No. 969, 95th Cong., 2d Sess. 8 (1978).

[20] 5 U.S.C. § 2302(b).

in law the principle of open communications to the Congress from federal employees, and the prohibitions on punishing an employee for any disclosures to the Congress.

Nature of the Position of the Chief Actuary for Medicare. The Chief Actuary for Medicare is intended to exercise independent professional judgment in his position, and is expressly not an "at will" employee, removable at the whim of the Administration or of the political appointees in the Department of Health and Human Services. By law, the Actuary must conduct the duties of his office "in accordance with professional standards of actuarial independence ...," and may be removed from office "only for cause."[21] The express requirement for professional independence in the performance of duties and the "for cause" removal clause in the law provide the Actuary with an intended degree of independence to make professional and reliable cost estimates unfettered by any particular partisan agenda of the political appointees in the Department.[22] Furthermore, it is apparent from the clear statements in the legislative history of the provision establishing the Chief Actuary position, that the Actuary is to cooperate with, work with and facilitate the public legislative duties of the Congress and the congressional committees with jurisdiction over Medicare by providing truthful and accurate information on the costs of programs and proposals to the Congress:

> The Conferees wish to emphasize the very important role of the Office of the Actuary in assessing the financial condition of the Medicare trust funds and in developing estimates of the financial effects of potential legislative and administrative changes in the Medicare and Medicaid programs. The Office of the Actuary has a unique role within the agency in that *it serves both the Administration and the Congress*. While the Chief Actuary is an official within the Administration, this individual and his or her office often must work with the committees of jurisdiction in the development of legislation.
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> Beginning with the appointment of the first Chief Actuary for Social Security in 1936, through the enactment of Medicare and Medicaid in 1965, and through the establishment of the Health Care Financing Administration in 1977 [now the Centers for Medicare and Medicaid Services], the tradition has been for a close and confidential working relationship between the SSA and HCFA chief actuaries and the committees of jurisdiction in the Congress – a relationship which the Committees value highly. It is important to emphasize that the Senate Committee on Finance, the House Committee on Ways and Means, and the House Committee on Commerce all rely on their ability to seek estimates and other technical assistance from the Chief Actuary, especially when developing new legislation. Similarly, the Congressional Budget Office and Congressional Research Service depend heavily on such assistance. *Thus, the independence of the office of the Actuary with respect to providing assistance to the Congress is vital*. The process of monitoring, updating, and reforming the Medicare and Medicaid programs is greatly enhanced by the free flow of actuarial information from the Office of the Actuary to the committees of jurisdiction in the Congress.[23]

Interfering with the statutory responsibilities of the Chief Actuary by instituting a "gag order" and threatening adverse personnel actions if the Actuary provides honest and truthful cost

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[21] 42 U.S.C. § 1317.

[22] *See*, for example, discussion of necessary "independence" of certain executive officers and the limitation of "at will" removal authority, in *Morrison v. Olson*, 487 U.S. 654, 689-692 (1988); *note* also *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and *Weiner v. United States*, 357 U.S. 348 (1958).

[23] H. Conf. Rpt. No. 105-217, 105th Cong., 1st Sess. 837 (July 30, 1997), *see U.S. Code Cong. & Admin. News*, Vol. 2, 105th Cong., 1st Sess. at 458 (1997). Emphasis added.

estimates to the Congress and its Members regarding the Medicare program and proposed legislation, thus not only misconceives the general ethical responsibilities of federal officials to the truth and to the promotion of the general public interest over narrow partisan interests and expediency,[24] but also ignores the *statutory* nature, obligations and intended professional independence of the position of Chief Actuary.

In the face of a direct order not to provide to Congress, or to any Member of Congress, independent cost estimates on penalty of losing his job, it would appear that the Chief Actuary did not himself violate federal rules or provisions by conforming to such order. Decisional material as well as expert commentary note that federal employees, while they are *not* required to follow an order that is illegal,[25] place themselves at risk for "insubordination" charges when they intentionally and purposefully refuse to obey, or specifically disobey, a direct order from a superior.[26] From news articles, it appears that Mr. Foster was, in fact, threatened specifically with "insubordination" disciplinary action if he provided even truthful cost information to the Congress. Employees are generally advised to follow an order, even one that they believe is without legal justification, and then to challenge the order at a later time.[27]

Criminal statutes.

The federal false statements and fraud statute provides criminal penalties for one who "(1) falsifies, conceals, or covers up by any trick, scheme or device a material fact; (2) makes

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[24] As noted by the House Judiciary Committee: "The proper operation of a democratic government requires that officials be independent and impartial; ... and that the public have confidence in the integrity of its government." H. R. Rep. No. 748, 87th Congress, 1st Session, 4-6, (1961). General and long recognized ethical standards were expressed by Congress in the 1958 "Code of Ethics for Government Service" (no longer required to be posted in every federal agency, per P.L. 104-179), including that officials should "Put loyalty to the highest moral principles and to country above loyalty to persons, party, or Government department," and that a "public office is a public trust." H.Con. Res. 175, 85th Cong., 2d Sess. (72 Stat. B12). Under the general maxim that "A public office is a public trust," a government officer is seen to hold power "in trust" for the people from whom such power derives, and must exercise that power, similar to others in a fiduciary relationship, only in the interests of the "beneficiaries" of that trust, that is, the *general* public, rather than for the benefit of personal, partisan, or narrow *special* interests. *Note* discussion in *United States v. Mississippi Valley Co.*, 364 U.S. 520, 548-550 (1958); *see* also S. Res. 266, 90th Cong., 2d Sess. (1968); 40 Op. Atty. Gen. 187, 190 (1942). *Note* also discussion by James Madison of republican principles and governmental power to pursue the general "public good," and that the object of all political constitutions is to have for officials those who "discern" and "pursue" the "common good of society" *The Federalist Papers*, Nos. XLI and LVII. *See* also general merit principles set out at 5 U.S.C. § 2301(b)(8). Media reports indicate that the official in question was permitted to answer inquiries from Republican Members of Congress, but not from Democratic Members. *See* footnote 1, *supra*.

[25] *Schmidt v. United States*, 145 Ct. Cl. 632, 636 (1969); "insubordination" is a "willful and intentional refusal to obey an authorized order of a superior, which the superior is entitled to have obeyed." *Redfearn v. Department of Labor*, 58 MSPR 307, 311 (1993), quoting *Phillips v. GSA*, 878 F.2d 370, 373 (Fed. Cir. 1989). *See* Peter Broida, *A Guide to Merit Systems Protection Board Law and Practice*, 1767 (2002).

[26] *Lewis v. Bureau of Printing and Engraving*, 29 MSPR 447, 453 (1985); *A Guide to Merit Systems Protection Board Law and Practice*, *supra* at 1768-1769.

[27] *A Guide to Merit Systems Protection Board Law and Practice*, *supra* at 1769, 1803.

any materially false fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry" in any matter "within the jurisdiction of the executive, legislative or judicial branch" of the Federal Government.[28] Depending on the particularized facts of a given situation involving the transmittal of information to the Congress, if a federal officer intentionally provided to a committee or office of Congress, "pursuant to an investigation or review" conducted by such entity, information which the official knew to be false, or caused a writing or other document to be provided containing information which the officer knew to be false, such conduct could violate the criminal provision when the information is "material" to the Congress' consideration of an issue.[29] In addition to criminalizing the giving of knowingly false information to the committees or offices of Congress, the statute also makes criminal the affirmative act of withholding by a "scheme, trick or device" from such entities, pursuant to such investigation or review, material information which one has an obligation to provide.[30]

The criminal statute at 18 U.S.C. § 1001, as it applies to Congress thus appears to require that there is being conducted some inquiry, that is, an "investigation or review" authorized by House or Senate Rules, or that a false statement is in reference to an "administrative" action or determination of a congressional office. Therefore, false information or "concealment" in reference to a mere question or request from an *individual* Member of Congress, who is not authorized to speak for a committee or subcommittee, such as a chairman is authorized, or for the House or the Senate as a whole, might not reach the statutory threshold to constitute a crime under § 1001.[31]

Similarly, the provisions of 18 U.S.C. § 1505, provide a criminal penalty for one who "corruptly," or through the use of "any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct or impede," the "due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress ...." This statute would thus appear to require for a criminal violation that the obstruction or impeding conduct be in relation to a committee inquiry, or other such inquiry of the House

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[28] 18 U.S.C. §1001.

[29] 18 U.S.C. § 1001(c) limits the application of the false statements provisions to matters before an administrative office of the Congress, or in "any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate." "Materiality" generally requires that the nature of the information is such that it may influence the agency or the Congress in its decision making.

[30] *United States v. Hernando Ospina*, 798 F.2d 1570 (11th Cir. 1986); *United States v. Larson*, 796 F.2d 244 (8th Cir. 1986); *United States v. Anzalone*, 766 F.2d 676 (1st Cir. 1985)

[31] Congress explained the amendments to the law made in 1996 expressly including Congress in §1001 (in light of the Court's ruling in *Hubbard v. United States*, 514 U.S. 695 (1995)), as follows: "The purpose of the exception is to avoid creating an atmosphere which might so discourage the submission of information to Congress that it undermines the fact-gathering process which is indispensable to the legislative process. Consequently, the exception provides that certain information provided to Congress – information which is neither furnished as part of an administrative filing, nor furnished pursuant to a duly authorized congressional investigation – is not subject to the criminal penalties of section 1001." H.R. Rep. No. 680, 104th Cong., 2d Sess. 4 (1996).

or Senate, rather than merely a request from an individual Member of the House pursuant to debate on a bill.[32]

Summary. The issuance by an officer or employee in a department or agency of the Federal Government of a "gag order" on subordinate employees, to expressly prevent and prohibit those employees from communicating directly with Members or committees of Congress, would appear to violate a specific and express prohibition of federal law. 5 U.S.C. § 7211. Such "gag orders" have been expressly prohibited by federal law since 1912, and more recent appropriations laws have reaffirmed and strengthened such provision by instituting yearly restrictions on the payment of the salary of any officer or employee of any agency or department who threatens or attempts to threaten an employee of an agency to prevent that employee from communicating relevant public policy information to the Congress, or to any Member or committee of Congress, as well as requiring that any "non-disclosure" agreements entered into with employees, or agency non-disclosure policies, not limit in any way communications by executive branch employees to the Congress, pursuant to 5 U.S.C. § 7211. *See, e.g.*, P.L. 108-199, Division F, "Transportation, Treasury, and Independent Agency Appropriations, 2004," Sections 618, 620, 118 Stat. 354, 355 (2004).

Congress has a clear right and recognized prerogative, pursuant to its constitutional authority to legislate, to receive from officers and employees of the agencies and departments of the United States accurate and truthful information regarding the federal programs and policies administered by such employees and agencies. As stated by the Supreme Court, "[a] legislative body cannot legislate wisely or effectively in the absence of information regarding conditions which the legislation is intended to affect or change" (*McGrain v. Daugherty*, 272 U.S. 135, 175 (1927)), and thus political gamesmanship must yield to the clear public interest of providing the peoples' elected representatives in the Congress with accurate and truthful information upon which to effectively fashion the laws for the Nation. There is no countervailing right or interest for a federal official in an agency or department to intentionally withhold, conceal or prevent the disclosure of truthful public policy information from the United States Congress, or members of one political party in Congress, concerning legislation affecting the programs and policies administered by that agency, when requested by a Member or a committee of the Congress. Specifically, the position of Chief Actuary itself has been intentionally given a degree of independence from direct executive control by providing in law for removal only "for cause," and by requiring in law that the Actuary exercise "professional standards of actuarial independence" in carrying out his functions. 42 U.S.C. § 1317. Furthermore, the historic and traditional close working relationship between the Chief Actuary and the committees of Congress was memorialized and plainly expressed in the legislative history of that law (H. Conf. Rpt. 105-217, 105th Cong., 1st Sess. 837 (1997)), and such "gag orders" would appear to ignore the independent statutory nature of the office, as well as to contravene the obvious legislative intent of the law that the independent analysis of the Actuary be shared with the Congress.

While an apparent violation of the federal "anti-gag order" law, as well as possible violations of the appropriations provisions, such conduct involved may not rise to the level of a criminal violation under 18 U.S.C. §§ 1001 or 1505, when information is not requested pursuant to a committee or other such House or Senate inquiry.

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[32] *Note, United States v. Mitchell*, 877 F.2d 294 (4th Cir. 1989); *United States v. Poindexter*, 725 F. Supp. 13 (D.D.C. 1989) (a committee inquiry, however, need not be formally authorized, and may be a preliminary inquiry).