

**Response to Criticism by Committee on Standards of Official Conduct
Regarding the Investigation Conducted by the Office of Congressional Ethics
in the Matter of Representative Sam Graves**

**Adopted Unanimously by the Board of the Office of Congressional Ethics
November 20, 2009**

On October 29, 2009, the Committee on Standards of Official Conduct (hereafter “SOOC”) issued a report entitled, “In the Matter of Representative Sam Graves.”¹ In addition to describing the SOOC’s action in the matter, approximately half of the report asserted six argumentative criticisms of the Office of Congressional Ethics’ (hereafter “OCE”) investigative process and internal rules. At its next regularly scheduled meeting, the Board of OCE adopted the following response. The Board of the OCE finds the SOOC’s criticisms in error legally and factually.

A. Introduction

As a general matter the Board finds no authority under which the SOOC may interpose its judgment on the validity of a referral from the OCE based on its evaluation of the adequacy of the OCE’s procedures.² Under the new ethics framework established by House Resolution 895 of the 110th Congress, as amended (hereafter the “Resolution”) the OCE is to be independent of and not subject to oversight by the SOOC. The SOOC has jurisdiction over the Code of Official Conduct; the OCE Board has jurisdiction over the OCE investigative process.

The Board also notes that the Resolution grants no discretion to the SOOC to permanently withhold publication of an OCE report and findings when the OCE Board has recommended further review. Contrary to its statement that “the Standards Committee concluded that, on balance, the public interest was served by publication of OCE’s Report and Findings in this case, and thus the Standards Committee declined to withhold publication of OCE’s Report and Findings,”³ the SOOC has no authority to “balance” interests in determining whether to permanently withhold the OCE’s reports and findings.

B. The OCE Met All Applicable Deadlines

The SOOC claims that the OCE, “failed to meet certain deadlines mandated by OCE’s authorizing resolution and OCE’s rules.”⁴ The OCE did not fail to meet any deadlines in the Representative Graves matter. The SOOC is counting the wrong day as the first day in the OCE investigation, and as a result, all of the subsequent dates in the SOOC’s calculation are incorrect. Specifically, the Committee incorrectly asserted that the 30-day preliminary review “began at the

¹ H.R. Rpt. 111-320 (2009).

² See e.g., *Id.* at 31 (finding that “the OCE’s review was fundamentally flawed”); *Id.* at 34 (“It is with great regret that the Standards Committee determines that it can only conclude that OCE violated both its authorizing resolution and its own rules when it . . .”).

³ *Id.* at 23.

⁴ *Id.* at 32.

request of two members of OCE's Board on March 26, 2009. . . ."⁵ However, the Resolution provides that the 30-day preliminary review period runs from the date of "receipt" of a preliminary review request, not the date on which at least two Board members agree to make a request.⁶ While the *request* in this matter occurred on March 26, 2009, the preliminary review commenced on the date of receipt of the request—April 2, 2009.⁷

Starting from the correct date, the preliminary review ended 30 days later on May 2, 2009. The Board voted on April 24, 2009, before the preliminary review ended on May 2, 2009, for a second-phase review in this matter. Therefore, the second-phase review vote occurred within the required time period, which the SOOC acknowledged.⁸ The 45-day second phase review began on May 2, 2009, at the conclusion of the preliminary review. The 45-day second-phase review was scheduled to end on June 17, 2009. Prior to that date, on June 12, 2009, the Board voted to extend the second-phase review by 14 days. The 14-day extension ended on July 1, 2009. Therefore, all required actions by the OCE Board occurred within the time limits prescribed in the Resolution. Although the OCE had informed the SOOC of its error prior to the publication of its report, the Committee persisted in miscalculating the 30-day preliminary review period as beginning with the date of a request rather than the date of receipt.

The SOOC also argues that an interview conducted by the OCE after the end of the second-phase is "outside of OCE's legal authority."⁹ The OCE requested an interview from this individual before the end of the second-phase review period, but due to the interviewee's schedule, the interview could not occur until after the end of the second-phase review.¹⁰

The OCE's primary concern is accuracy. The OCE has allowed witness interviews after the end of the second-phase on the principle that such interviews increase the accuracy of the OCE's findings which, in all but one limited set of circumstances, become public. In several cases, a Member who is the subject of an OCE review has asked to schedule an interview after the end of the second-phase, even though an interview had been requested by OCE during the preliminary review period. Members offer a variety of reasons for delaying interviews (*e.g.*, Congressional recesses, official foreign travel, and unavailability of counsel). The Board is confident that the single interview that occurred after the end of the second-phase neither delayed the Board's action nor prejudiced the rights of Representative Graves.

⁵ *Id.* at 32.

⁶ H.R. Res. 895. 110th Congress § 1(c)(1)(B) (2008) (hereafter "the Resolution") (the board is authorized and directed to, "within 30 calendar days or 5 legislative days, whichever is later, after *receipt* of a request under subparagraph (A), complete a preliminary review." (emphasis added)). Oddly, in another section of its report, the SOOC accurately quotes this section. H.R. Rpt. 111-320 at 23 (2009).

⁷ H.R. Review No. 09-7000 *Report and Findings* at ¶ 9 (2009).

⁸ H.R. Rpt. 111-320 at 21 (2009).

⁹ *Id.* at 26.

¹⁰ Assuming *arguendo* that there might be a question, the interviewee waived any objection by agreeing to the interview.

C. The OCE Has Never Disclosed the Name of a Cooperating Witness

The SOOC claims that the “OCE’s findings unfortunately revealed the names and other identifying information of several cooperating witnesses in contravention of OCE’s authorizing resolution.”¹¹ The OCE has never identified a cooperating witness by name.¹²

The Resolution directs the OCE only to withhold the “names” of cooperating witnesses from public release, not “identifying information.” The term “identifying information” appears nowhere in the Resolution. The OCE includes “identifying information” in findings of fact to enable the reader to assess the credibility and weight of testimonial evidence.¹³ The SOOC’s criticism of the OCE for revealing “identifying information” is without legal basis. It is ironic that in its report the SOOC made no effort to protect the identity of witnesses it interviewed in the course of its investigation.¹⁴

In a footnote in this portion of their report, the SOOC states, “[n]ot only did OCE deem unredacted documents, which identify cooperating witnesses, to be part of its Findings, OCE also incorporated and pasted into various sections of the narratives summary of its Findings images of emails and other documents provided by cooperating witnesses.”¹⁵ The OCE does not redact or otherwise alter documentary evidence, except in rare cases such as to redact personal telephone numbers, personal e-mail addresses, direct dial extensions, social security numbers or bank account information. The Resolution does not require redaction of names from documents where the individual named, in some fashion, also happens to have consented to an interview with the OCE.

All of the OCE findings of fact contain evidence; otherwise they would be unsupported accusations. Findings of fact by courts and administrative agencies routinely include direct quotes from evidence. The OCE Board believes it is important to cite to or include such original evidence in its findings of fact whenever possible. This allows the reader to assess the credibility of the findings.

D. The OCE Found a Substantial Reason to Believe that Representative Graves Violated House Standards of Conduct

The SOOC claims that the OCE “forwarded the matter to the Standards Committee for further review without finding a ‘substantial reason to believe’ that there was a violation of any relevant, substantive rule or other standard of conduct applicable to Representative Graves.”¹⁶

¹¹ *Id.* 22.

¹² Notwithstanding its assertion, the SOOC provides no examples where the OCE revealed the *name* of a cooperating witness.

¹³ For example, identifying a witness as “Representative X’s Chief of Staff” allows the reader to assess whether the witness was in a position to know certain information and to give appropriate weight to the testimony. If the OCE used only the label, “staff,” the reader would have no way to know whether the staff person was an intern in a district office, with little access to certain information, rather than the Chief of Staff, likely to have full access.

¹⁴ *See e.g. Id.* at 1-14, 17-20.

¹⁵ *Id.* at 33 fn. 263.

¹⁶ *Id.* at 22.

The OCE found that “there was a substantial reason to believe that an appearance of conflict of interest was created when Representative Graves invited Witness A, a friend of the Representative’s who was invested in the same ethanol and biodiesel cooperative as his wife, to testify before the Committee on Small Business.”¹⁷ The OCE identified the relevant standard of conduct, by citing the Ethics Manual produced by the Standards Committee. It provides guidance to Members that “sponsoring legislation, advocating or participating in an action by a House committee or contacting an executive branch agency . . . entails a degree of advocacy above and beyond that involved in voting, and thus a Member’s decision on whether to take any such action on a matter that may affect his or her personal financial interests require added circumspection.”¹⁸ The OCE also cited in its findings at least 14 instances where the appearance of conflict is addressed in the Ethics Manual.

The SOOC has never defined what constitutes a “standard of conduct.” The Board reasonably concluded, based on a reading of the plain text of the Ethics Manual, that the admonition to apply “added circumspection” when “participating in an action by a House committee” was a standard of conduct. Based on the state of the law at the time the Board made its decision, such a conclusion was reasonable. In fact, the SOOC publicly acknowledged and imposed a similar standard in its admonishment of Representative Tom DeLay in its letter to the Congressman dated October 6, 2004.¹⁹

E. OCE Properly Made Findings as to Witness Credibility

The SOOC claims that the “OCE’s findings improperly made conclusions regarding the truth of statements made by cooperating witnesses, including Representative Graves.”²⁰

The SOOC cites an inapposite provision of the Resolution that directs the OCE to refrain from making “any conclusions regarding the *validity of the allegations*” as the basis for its claim (emphasis added).²¹ The OCE referral contains no conclusion as to the “validity of the allegations,” *i.e.*, whether an appearance of conflict of interest was in fact created by Representative Graves’ witness selection. But the Resolution does not proscribe findings about witness credibility; and as a finder of fact, the OCE must make appropriate findings as to credibility. Otherwise, the OCE will be providing incomplete and inaccurate information to the House and the public.

Further, there is no authority for the SOOC to assert that only OCE Board members may assess credibility through its own in-person interview.²² That is not the case. Had the House intended the Board to conduct interviews, it would not have provided for a part-time Board

¹⁷ H.R. Review No. 09-7000 *Report and Findings* ¶ 2 (2009).

¹⁸ *Id.* at ¶ 17 (quoting House Ethics Manual at 237 (2008)).

¹⁹ In the Memorandum of the Chairman and Ranking Minority Member, the SOOC found that Representative Delay’s actions “raise an appearance of impropriety under House Standards of Conduct.”

²⁰ H.R. Rpt. 111-320 at 22 (2009).

²¹ *Id.* at 24.

²² *Id.* at 35 (since “no member of OCE’s Board was present at the interview of Representative Graves” the Board could make no findings as to the credibility of his statements).

comprised of individuals who live in various parts of the United States. Representative Graves' statements, in the Board's view, were contradicted at various points by documentary evidence. The Board was able to compare the substance of Representative Graves' statements, as memorialized by the OCE staff, with the documentary evidence the OCE collected and find that Representative Graves lacked candor in his interview. The OCE Board invited Representative Graves to appear before the Board, prior to the Board voting on his matter, and he declined.

F. The Document the SOOC Claims Was “Relevant Evidence Ignored by the OCE” Was Neither Relevant Nor Evidence

The SOOC claims that the OCE “ignored relevant evidence provided by Representative Graves.”²³ In support of its argument, the SOOC cites as “directly relevant” a memorandum prepared by “Barry Pineles, Chief Counsel to the Republican Staff of the Small Business Committee.” According to the SOOC, the memorandum was “directly relevant to central issues in this matter” because it “provided OCE with information about the jurisdiction of the Small Business Committee, the typical procedures for announcing hearing topics for the Small Business Committee, the typical procedures for identifying witnesses for Small Business Committee hearings, and the witness disclosure requirements for witnesses at Small Business Committee hearings.”²⁴

This memorandum was prepared months after the conduct in question by a lawyer for the Committee who had no personal knowledge of Representative Graves' conduct.²⁵ The memorandum itself is not evidence and is duplicative of witness testimony that is in fact evidence, and speaks to a number of issues, like procedures for announcing hearing topics, that are not relevant.²⁶

G. The OCE Did Not Withhold Exculpatory Evidence from Representative Graves

The SOOC claims that it “discovered material within OCE's Report and Findings that was potentially favorable or exculpatory to Representative Graves, but which OCE did not provide to Representative Graves.”²⁷

The OCE did not withhold exculpatory information. When the SOOC first made this charge it identified what, in its opinion, were the documents and witness statements containing exculpatory evidence that should have been provided to Representative Graves. All of the documents the SOOC cited were in Representative Graves's possession and in many instances had been given to the OCE by him. In its report dismissing the Graves matter, the SOOC offered a new list of documents it claims contain exculpatory information and changed its standard to

²³ *Id.* at 22.

²⁴ *Id.* at 36.

²⁵ *Id.* at Appendix A ¶ 126.

²⁶ In any event, the Small Business Committee rules *for witnesses* are not relevant. The OCE did not investigate allegations that the witness invited by Representative Graves violated these rules. The OCE has no jurisdiction over this witness.

²⁷ *Id.* at 22.

include information deemed “potentially favorable.”²⁸ The Board of the OCE has adopted the standard set out in *Brady v. Maryland*, 373 U. S. 83 (1963), and subsequent cases, which does not require the OCE to give a subject “potentially favorable” evidence nor information already in his possession.²⁹ In fact, the SOOC’s criticism that the OCE did not provide “potentially favorable” materials appears to depart from the SOOC’s own standard which defines exculpatory information as “substantially favorable.”

H. Other Issues Raised by SOOC

In addition, the SOOC at other points in its report took “note” of certain OCE internal policies and other aspects of the OCE investigation in the Representative Graves matter.

First, in a footnote, the SOOC stated that it was “surprised” to note the resources expended to conduct this investigation and cites as an example that the “OCE sent two attorneys to Kansas City, who stayed overnight, to interview witnesses.”³⁰ Although the OCE asked to interview him and his relevant staff in Washington, D.C., Representative Graves requested that OCE investigators travel to Kansas City, Missouri, as a convenience to him. Further, his lawyers scheduled the witness interviews over two days necessitating an overnight stay.

Second, the SOOC’s states that it was “disappointed when Representative Graves’ counsel informed the Standards Committee that Representative Graves was not provided a copy of OCE’s findings. . . .”³¹ Under the Resolution, the OCE is to provide the SOOC with its report and findings, but to provide the subject of a review only its report.³² The “Report” that is provided to the subject at the conclusion of an OCE review may contain only the following elements: (1) a recommendation that the [Standards] committee should dismiss the matter that was the subject of such review; a statement that the matter requires further review; or a statement that the matter is unresolved because of a tie vote; (2) the number of members voting in the affirmative and in the negative; (3) a statement of the nature of the review; and (4) the individual who is the subject of the review.”³³

Third, the SOOC in a footnote questions whether the OCE was required to disclose to Representative Graves that it had “missed deadlines” and “conducted portions of its investigation outside of the time permitted.”³⁴ As described above, the OCE did not miss any deadlines, and even if it had, such information is not exculpatory.³⁵ The SOOC does not explain how deadlines in April and July 2009 could relate to the conduct of Representative Graves in March 2009.

²⁸ Rules of the Committee on Standards of Official Conduct, 111th Congress (June 2009) (“[f]or purposes of this rule, exculpatory evidence shall be any evidence or information that is *substantially favorable* to the respondent with respect to the allegations or charges before an investigative or adjudicatory subcommittee.” (emphasis added)).

²⁹ The SOOC may apply its different standard for what constitutes exculpatory material without the need to question the standard adopted the OCE that is consistent with the Resolution.

³⁰ H.R. Rpt. 111-320 at 34 fn. 269 (2009).

³¹ *Id.* at 37.

³² Resolution § 1(c)(2)(C)(i-ii).

³³ Resolution § 1(c)(1)(C) and (2)(C)(ii).

³⁴ H.R. Rpt. 111-320 at 26 fn. 197 (2009).

³⁵ Exculpatory information, by definition, relates to the conduct of an individual who is a subject.

Fourth, the SOOC noted that the, “OCE’s witness interviews are neither transcribed nor video-taped. Instead, the only record of OCE’s witness interviews is found in memoranda of interviews reflecting OCE’s staff impressions of the interviews.”³⁶ The OCE memoranda of interviews summarize interviews using the same procedure as numerous law enforcement agencies to memorialize the substance of interviews; the OCE memoranda of interview do not consist of “staff impressions.”

I. Conclusion

In conclusion, the Board believes the interests of the House and the public will be better served if both the SOOC and the OCE each focus on their own internal rules.

³⁶ *Id.* at 26 fn. 200.