

**From:** (b)(6) [mailto:(b)(6)]  
**Sent:** Monday, November 05, 2012 6:00 PM  
**To:** Herms, Kevin W.  
**Subject:** OGE Form 201 - Public Comment

How about asking WHY the person making the request is making it? Then your office can decide if its a legitmate request. As it is, its way too easy to violate our privacy.

(b)(6)



**From:** (b)(6) [mailto:(b)(6)]  
**Sent:** Thursday, November 01, 2012 4:48 PM  
**To:** Herms, Kevin W.; [paul.ledvina@oge.gov](mailto:paul.ledvina@oge.gov)  
**Cc:** (b)(6)  
**Subject:** Comments on Office of Government Ethics proposed emergency information collection

Good evening,

I would like to offer my personal comments on OGE's emergency Proposal for a Form 201-A Ethics in Government Act Access Form, as described in their Federal Register notice (FRN) at 77 Fed. Reg. 66075 (Nov. 1, 2012). I will follow the order suggested in the FRN, which listed specific areas where public comments are requested. (I also regret that OGE only offers five days for initial public comments, when the underlying statutes have been on the books now for many months... any "emergency" is man-made.)

**1. The need for this information collection:**

OGE's FRN states that the proposed Form 201-A will collect information from persons requesting access to public financial disclosure reports "posted on the Internet in accordance with section 11(a) of Public Law 112-105." Section 11(a) of Public Law 112-105 (the STOCK Act) requires that "financial disclosure forms filed pursuant to title I of the Ethics in Government Act in calendar year 2012 and in subsequent years, by executive branch employees specified in section 101 of that Act" be "made available to the public on the official websites of the respective executive branch agencies." In addition, OGE's FRN lists "5 U.S.C. appendix section 402(b)(1) and 5 CFR 2634.603(c) and (f)" as its source of legal authority for undertaking this information collection, which would "collect the following information from any requesting person seeking access to such [Internet-posted public financial disclosure] reports: the person's name and the person's city, state, and country of residence." However, neither that law nor that regulation authorize this proposed information collection.

As background, section 105(b)(2) of the Ethics in Government Act of 1978 states that in general, public financial disclosure reports "may not be made available under this section to any person nor may any copy thereof be provided under this section to any person except upon a written application by such person stating—

(A) that person's name, occupation and address;

(B) the name and address of any other person or organization on whose behalf the inspection or copy is requested; and

(C) that such person is aware of the prohibitions on the obtaining or use of the report.

[Section 105(c)(1) lists these prohibitions, making it 'unlawful for any person to obtain or use a report for any unlawful purpose; for any commercial purpose, other than by news and communications media for dissemination to the general public; for determining or establishing the credit rating of any individual; or for use, directly or indirectly, in the solicitation of money for any political, charitable, or other purpose.']

Any such application shall be made available to the public throughout the period during which the report is made available to the public."

But limiting language in section 11 of the STOCK Act, Public Law 112-105, specifically states that “For purposes of filings under this section, section 105(b)(2) of the Ethics in Government Act of 1978 does not apply.” By its plain language then, the STOCK Act says that the information collection generally authorized by section 105(b)(2) does not apply to “filings under *this section*” – section 11 of the STOCK Act, referencing internet publication of current and future public financial disclosure reports. Presumably, OGE is aware of this key limiting language, because they did not cite it in their FRN proposing this information collection of requester names and addresses – a collection normally specifically authorized (but not in this case) by section 105(b)(2)(A) of the Ethics in Government Act.

Instead, OGE cites a much more generic authority, section 402(b)(1) of the Ethics in Government Act, which gives OGE general power to “develop[]...rules and regulations establishing procedures for the filing, review, and public availability of financial statements filed by officers and employees in the executive branch as required by title II of this Act.” But OGE cannot interpret this general authority to override the specific limiting language in section 11 of the STOCK Act, which, if it means *anything*, must mean that agencies cannot force people seeking to view the *public* financial disclosure reports published on the Internet under section 11 to first provide any of the information otherwise required by section 105(b)(2) of the Ethics in Government Act. In essence, OGE is implicitly pretending that this proposed information collection is different from the collection specifically prohibited by section 11 because it doesn’t request *all* of the information that would normally be required under section 105(b)(2). But again, that interpretation would still essentially render the limiting language in section 11 meaningless, despite the Supreme Court’s repeated reference to the rule that “statutes should be read to avoid making any provision ‘superfluous, void, or insignificant.’” *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1841 (2012). If section 402(b)(1) allows agencies to collect information when such collections would otherwise be barred under section 11 of the STOCK Act, then that portion of section 11 is essentially meaningless, which cannot be correct. Instead, the proper interpretation of section 11 must be to permit essentially anonymous public access to public financial reports posted on the Internet under that section.

There is no essential statutory conflict between section 11 and sections 402(b)(1) or section 105(b)(2), because the latter two sections may still allow collection of requesters’ identifying information when requesters submit (OGE Form 201) requests for access to paper reports, rather than Internet requests as discussed under section 11 of the STOCK Act. Moreover, while the Privacy Act, 5 USC 552a(c), may generally be interpreted to require agencies to record the date, name, and address of requesters accessing Privacy Act records (like public financial disclosure reports), this provision if applied literally would also negate the limiting language in section 11 of the STOCK Act. If there is a conflict, “the more recent of two irreconcilably conflicting statutes governs,” *Watt v. Alaska*, 451 U.S. 259, 267 (1981), and “the specific governs the general.” *Long Island Care at Home v. Coke*, 551 U.S. 158, 170 (2007). Here, the limiting language in section 11 of the STOCK Act is both much more recent and much more specific than any of the general provisions enacted in the Ethics in Government Act or the Privacy

Act, dating from the 1970s. [OMB should ask itself: Under OGE's interpretation of those laws, what would be the practical effect of the limiting language in section 11 of the STOCK Act? If they can assign no significant, independent meaning to it, then that interpretation must be erroneous.] Therefore, section 11 must control.

Finally, to the extent that OGE's FRN cites 5 CFR 2634.603 as authority for this proposed information collection, this explanation also must fail. 5 CFR 2634.603 simply repeats the language of section 105(b)(2) of the Ethics in Government Act, which specifically does not apply to internet postings of public financial disclosure reports, as stated in section 11 of the STOCK Act. OGE simply cannot overrule the STOCK Act by regulation. They may wish to collect this information, but they have no legal authority that would override the plain language of section 11: "For purposes of filings under this section, section 105(b)(2) of the Ethics in Government Act of 1978 does not apply." The law is clear, and it does not authorize this information collection by OGE or by any agency posting public financial disclosure reports under section 11(a) of the STOCK Act. Therefore, there is no need for it, and OMB should not authorize it.

### **2. The practical utility of this information collection:**

Besides the fact that there is no legal authority for this proposed information collection, its utility is also extremely dubious. For example, unlike mailed requests for access to paper public financial disclosure reports using OGE's Form 201, where a requester's identity and address can be plausibly verified because of the need for a return name/address to mail those reports, there is no such certainty using the Internet. There is no way to stop requesters from providing fake names and addresses, because they are not being physically mailed any paper records. Rather, they will access reports virtually and instantaneously, through the Internet. Because of the transparent ease of avoiding verification, there is simply no point in using government resources to collect a long list of fake names and addresses from people who will inevitably be requesting online access to records filed by their neighbors, supervisors, ex-spouses, and other sensitive individuals. Even a collection of requesters' IP addresses would be meaningless, because requesters could simply access records from the computers at their local public library. All of this simply underscores the obvious point of the limiting language in section 11 – Internet access inevitably means anonymous access. There is no reason to waste taxpayer money attempting to avoid this basic fact of life in the 21<sup>st</sup> Century.

### **3. The accuracy of OGE's burden estimate:**

I suspect that OGE is understating the number of potential requesters who may be more interested in the detailed financial records of ex-spouses, neighbors, etc. than in Presidential candidates, as used to formulate the burden estimate in OGE's FRN.

### **4. The enhancement of quality, utility, and clarity of the information collected:**

Other than my general comments above, I have nothing substantive to add regarding this issue.

### **5. The minimization of burden (including the use of information technology):**

I have nothing substantive to add regarding this issue.

Thank you for your time.



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Arthur B. Spitzer  
Legal Director

November 6, 2012

Office of Information and Regulatory Affairs  
Office of Management and Budget  
Attn: Mr. Kevin Herms  
OMB Desk Officer for the Office of Government Ethics  
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Office of Government Ethics  
Attn: Mr. Paul Ledvina  
Agency Clearance Officer  
By e-mail and fax: [usoge@oge.gov](mailto:usoge@oge.gov); [paul.ledvina@oge.gov](mailto:paul.ledvina@oge.gov); 202-482-9237

Re: Comments on proposed OGE Form 201-A (Ethics in Government Act Access Form), 77 Fed. Reg. 66075 (November 1, 2012)

Dear Mr. Herms and Mr. Ledvina:

The proposed OGE Form 201-A should not receive temporary approval because it serves no useful purpose whatsoever, and therefore the burden it imposes, while small, is unjustified.

The proposed form would be used in connection with Internet websites on which the personal financial information of federal employees will be posted for public access. The form would require people accessing the website to provide their name and their city, state and country of residence.

However, there is nothing to prevent a person who accesses the website from providing a false or fictitious name and/or location. And, as explained in the attached statement of Christopher Soghoian, there is no way that the true identity or location of a person accessing the website can be obtained if the person wishes to conceal his or her true identity and location. Proposed Form 201-A therefore provides no useful information at all.

ACLU comments on proposed OGE Form 201-A  
November 6, 2012  
Page two

Additionally, use of the proposed form would provide a *false* sense of security to government employees whose personal financial information will be posted on the Internet, perhaps leading them to believe that only identified individuals can access their information, while in fact anyone in the world with access to the Internet will be able to access their information quite anonymously. As Mr. Soghoian points out, the use of Form 201-A would be a form of “security theater” — *i.e.*, make-believe security. Approval should not be granted for a form whose use will be positively deceptive.

The Federal Register notice solicits comments specifically “on the need for, and practical utility of, this information collection” and on the “quality, utility and clarity of the information collected.” 77 Fed. Reg. at 66076. For the reasons given above and in the attached statement of Christopher Soghoian, it is clear that the information collected by the proposed form will have zero utility, and that the quality of the information collected will be nugatory, because there will be no way to know which of the names and locations provided by persons accessing the information are real and which are imaginary, and no way to ascertain the true identities and locations of persons who accesses the website by providing false names and/or locations.

For these reasons, proposed OGE Form 201-A should not be approved for use.

Sincerely,



Arthur B. Spitzer

My name is Christopher Soghoian. I am the principal technologist and a senior policy analyst with the Speech, Privacy and Technology Project at the American Civil Liberties Union. I completed my Ph.D. in Informatics at Indiana University in 2012, my M.S. in Security Informatics at The Johns Hopkins University in 2004, and my B.S. in Computer Science at Johns Hopkins University in 2002. Between 2009 and 2010, I was the first in-house technologist in the Federal Trade Commission's Division of Privacy and Identity protection. In that role, I assisted with several FTC investigations including Facebook, Twitter, MySpace and Netflix.

I have reviewed the emergency clearance notice and request for agency and public comments published by the Office of Government Ethics at 77 Fed. Reg. 66075 on November 1, 2012, and I have accessed the automated, Web-based application with which the Office of Government Ethics currently provides public access to OGE Form 201 financial disclosure reports of a small number of presidential appointees confirmed by the Senate.<sup>1</sup> As part of this process, visitors to the OGE website seeking Form 201 disclosure reports are required to enter their name, city, state, country and occupation. It appears that the online distribution of Form 201-A for which OGE now seeks emergency clearance would be the same as, or similar to, the system already in place on its website.

The form and process that OGE seeks permission to use could not reliably obtain accurate information about or determine the identity or location of a person accessing the website. It would be easy for a requester seeking anonymity to supply either a fictitious name or the name of an actual, random third party found by flipping through a telephone book. The latter technique would likely defeat any attempt to verify, in real time, that the requester was a real person.

In the event that someone wished to download records from the OGE website in a manner that shielded their true identity and location it would be easy for them to hide their computer's actual IP address, and thus thwart any later investigation by the authorities. Even individuals lacking technical skills can do this simply by connecting to the OGE website from an open wireless network, such as at a coffee shop or public library. More technically savvy users can achieve anonymity even from their home or office by using an anonymizing networking service, such as the Tor Project,<sup>2</sup> or one of many commercial Virtual Private Network (VPN) providers that do not maintain logs.

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<sup>1</sup> See <http://www.oge.gov/Open-Government/Access-Records/Current-Executive-Branch-Nominations-and-Appointments/>

<sup>2</sup> The Tor Project is an anonymizing network that provides censorship and surveillance resistant internet connectivity to activists, journalists, researchers and privacy advocates around the world. There are an estimated 500,000 users of Tor.<sup>2</sup> These include law enforcement and intelligence agencies in the United States, which was the intention of the US Naval Research Lab, which invented the underlying technology and funded the early development of the project. Tor is also used by activists, journalists and the general public in Iran, Syria, China and other countries with authoritarian governments, which has led to significant funding for Tor from the US State Department and the Broadcasting Board of Governors. However, Tor is also used by many people in the United States – it is estimated that approximately 15% of the users of Tor are located in the United States.

When someone browses the web using Tor or another VPN, their Internet traffic appears to originate at the Tor or VPN server, rather than from their home connection.<sup>3</sup> Thus, a U.S. citizen located in Chicago who uses a Tor exit server in France will appear to be a user in France. Likewise, someone in Iran connecting to the web via a Tor exit server located in San Francisco will appear to be a web surfer from San Francisco.

On November 6, 2012, I used the OGE website to request the Public Financial Disclosure Report (Form 278) for James Clapper, the Director of National Intelligence. During the automated, Web-based download process, I entered valid, true information in the name, city, state, country and occupation fields. However, I used a privacy-preserving VPN service (Riseup.net), which keeps no logs about its users' activities. Therefore, even if OGE retains the IP addresses of visitors requesting financial disclosure forms, the IP address in the logs associated with that particular download of Director Clapper's financial disclosure forms will be an IP address associated with Riseup's VPN server in New York, and not the ACLU office in Washington, DC. Thus, if I had entered false information about myself, OGE would have no way of determining who or where I was.

The OGE Web-based application is security theatre. There is nothing in it that could stop a criminal or other malicious party from entering false information, hiding their tracks, and downloading whatever forms they desire.

November 6, 2012

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<sup>3</sup> See: Marketa Trimble, *The Future of Cybertravel: Legal Implications of the Evasion of Geolocation*, 22 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 567 (2012).

**DoD Comments on  
OGE Emergency clearance notice and request for agency and public comment.  
Proposed OGE Form 201-A**

**OGE Form 201-A:**

The U.S. Office of Government Ethics (OGE) previously stated that public financial disclosure reports were exempt from release under the Freedom of Information Act of 1967 (5 U.S.C. § 552)(FOIA), pursuant to 5 C.F.R., Part 2604. However, in the proposed OGE Form 201-A, OGE affirmatively notes that “[t]hese records are available under [FOIA] ....” Please explain this change in legal interpretation and impact on OGE’s administration of the Government-wide OGE system of records. Since public financial disclosure reports are releasable under FOIA, what is the need for the OGE Form 201-A and its additional requirements beyond a regular FOIA request?

The form fails to discuss filing extensions, which are to be made publically available by section 8(a)(2) of the Stop Trading on Congressional Knowledge (STOCK) Act. While OGE informally encouraged ethics programs to annotate extensions on the face of the public financial disclosure or periodic transaction reports (OGE Form 278/278-Ts), OGE did not mandate the practice. Therefore, the OGE Form 201-A needs to include reference to the publicly available extensions posted online in MAX.GOV. If not, please confirm that extensions not annotated on OGE Form 278/278-Ts will be searchable but may not be downloaded without a request pursuant to OGE Form 201 for Other Covered Records.

**Warning:**

Please consider rephrasing this provision. For example, consider replacing the current warning language with: “**WARNING:** *Any intentionally false or misleading statement, certification, or response you provide in this form is a violation of law punishable by a fine of not more than \$10,000 or imprisonment of not more than 5 years, or both. (18 U.S.C. § 1001).*” This is the more traditional and succinct warning for section 1001 violations and is a better risk mitigation strategy since it affirmatively enunciates the applicable penalties. Minimally, please replace “official government form” to specify that by “government” OGE means United States Federal government, such as “official U.S. Government form.”

**Privacy Act Statement:**

We recommend that the Privacy Act statement explicitly provide notice to the requester that the filer may seek disclosure of the information gathered on the OGE Form 201-A, in compliance with the existing OGE Form 278 Privacy Act statement. For example, consider including the statement: “*A filer may inspect applications for access to and disclosure of his or her own form upon request.*” Our recommendation is that OGE amend its System of Records Notice, OGE/GOVT-1, to add this disclosure as a new routine use.

The reason for this recommendation is the Stop Trading on Congressional Knowledge Act amendments to the Ethics in Government Act (EIGA) do not alter the last sentence in section 105(b) of EIGA, which states: “*Any such application shall be made available to the public throughout the period during which the report is available to the public.*” This sentence requires that requests for information, whether through the OGE Form 201 or electronic proposed OGE

Form 201-A, be made publically available for the same length of time that the reports they are requesting are publically available. Public posting of the OGE Form 278/278-Ts creates a heightened potential for misuse of the filer's financial and personal information. Filers now have a more compelling interest in knowing the identity of the individuals who gain access to their forms so that they can closely and regularly monitor their financial assets and accounts. It is now far more likely that filers will request this information. Accordingly, we strongly recommend that OGE make disclosure to filers and agency ethics officials a routine use. This is consistent with existing OGE regulations, Privacy Act statements, and customary practice.

*See OGE Form 201 Privacy Act Statement (“The information on this form itself may be publicly disclosed pursuant to proper request under section 105(b) of the Ethics in Government Act or as otherwise authorized by law.”); OGE Form 278 Privacy Act Statement (“You may inspect applications for public access of your own form upon request.”); and 5 C.F.R. § 2634.603(d)(“Applications for the inspection of or copies of public reports shall also be made available to the public throughout the period during which the report itself is made available, utilizing the procedures in paragraph (c) of this section.”).*

**Requests for Other Related Records:**

What will OGE's response be for requests on an existing OGE Form 201 for reports filed on or after January 1, 2012. Will the requester be denied access or a copy except through the OGE Form 201-A?

## **U.S. Department of Commerce Comments**

**Title of the Information Collection Activity:** Request to Inspect or Receive Electronic Copies of Executive Branch Personnel Public Financial Disclosure Reports, including Periodic Transaction Reports, filed on or after January 1, 2012.

**Agency Form Number:** OGE Form 201-A.

**OMB Control Number:** 3209-0002.

### **U.S. Department of Commerce Comments:**

Regarding the new OGE Form 201-A proposed by the Office of Government Ethics (OGE), 77 Fed. Reg. 66,075 (November 1, 2012), the Department of Commerce strongly recommends that more information be required from a requester seeking access to a report than just the requester's name, city, state, and country of residence in order to provide enough information to adequately identify the person seeking access to a public report. Requiring additional information, as is collected under the current OGE Form 201, is a means to minimize the possibility of use of the information on a report for identity theft or other illegal means. There are considerable safety and security concerns regarding the widespread release of information, which will be somewhat mitigated by requiring adequate identification of those seeking the information.

The current OGE Form 201 requests the applicant's name, address, office telephone number, occupation, and the type of applicant, e.g., news media, private citizen, public interest group, etc. If the application for the information is on behalf of another person or organization, the form requests the name and address of the other person or organization. Requiring such information from a requesting party is reasonable and will discourage, if not entirely eliminate, improper and illegal uses of the information gathered by providing a means to identify the individual, and organization, collecting the information.

Lastly, the additional information collected would strengthen grounds for prosecution if there is later evidence that someone received a report through submission of a false identification in violation of 18 U.S.C. § 1001, which we recommend be referenced on the proposed OGE Form 201-A that we understand will be used solely as an automated, Web-based application.

Questions regarding these comments may be directed to Michael Cannon of my staff at 202-482-5397.



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November 6, 2012

Office of Information and Regulatory Affairs  
Attn: Mr. Kevin Herms  
OMB Desk Officer for the Office of Government Ethics

Office of Government Ethics  
Attn: Mr. Paul Ledvina  
Agency Clearance Officer

Re: Emergency clearance notice and request for agency and public comments – 66FR 66075

Dear Mr. Herms and Mr. Ledvina:

The Senior Executives Association (SEA) represents the interests of career federal executives in the Senior Executive Service (SES), and those in Senior Level (SL), Scientific and Professional (ST), and equivalent positions. On behalf of the association we are submitting comments regarding the emergency clearance notice and request for comments on proposed OGE Form 201-A.

SEA has raised, and continues to have, strong opposition to the underlying law necessitating Form 201-A. P.L. 112-105, section 11(a) requires the Office of Government Ethics (OGE) to create a searchable database of the financial disclosure forms of certain federal employees, which includes Senior Executives and other senior level employees. SEA has raised concerns that making this information so readily available to the public will harm the personal security of federal employees (many of whom hold sensitive positions) and national security, as well as harming government operations.

The 1978 Ethics in Government Act provided a framework for ensuring transparency among government officials and high-level career federal employees. With the addition of the Privacy Act, safeguards were put in place so that sensitive financial information was not used for nefarious purposes and so federal employees would know who was requesting their information. Both laws were enacted well before the internet was in use and did not envision the safeguards needed, or the risks involved, with making this information easily accessible on the internet.

As the process for requesting financial disclosure forms currently stands, an individual requesting a Form 278 must fill out Form 201. This includes providing identifying information, designating the purpose of the request, specifying up to six individuals whose financial disclosure forms are being requested, and designating how the requestor would like to receive the information (by mail or picking it up in person). The requestor must also certify via signature that they understand the applicable laws and penalties governing usage or misuse of the information.

The current process has inherent safeguards built into it that are not available on the internet. First, a person must furnish a legitimate address to which the Form 278s can be sent or they must appear at OGE in person to receive the forms. This largely prevents a foreign entity from securing the information. Because the Form 201 is either mailed or emailed to an agency, and only six individual

financial disclosure reports can be requested at a time, this provides a de facto waiting period for the information, further providing another layer of security. It is unclear that the proposed Form 201-A would have these inherent safeguards.

Additionally, prior to OGE's modification of routine use that went into effect on August 30, 2012 (F.R. vo. 77, no. 147), release of financial disclosure forms to public requestors was not considered to be a routine use. The practice prior to the publication of the routine use was that requests for form 278s were subject to a written request and that the federal employee to whom the request applied could also request to know who had asked for their financial information. This is another safeguard and a long-standing practice in regard to finding a balance between public disclosure and a right to privacy. What remains for the prior practice after the publication of the routine use is unclear.

Although we understand the reason behind the proposed Form 201-A, we believe that it will do little to address the concerns mentioned above or safeguard the sensitive information contained in financial disclosure reports. Furthermore, the current notice in the Federal Register gives little information or specifics and raises many questions on what information would change from the current form and how it would interface with the internet database.

The STOCK Act requires OGE to create a searchable database of the financial disclosure forms of the federal employees specified in the legislation. This means an individual searching through the database would not have to specify which records they are looking at, as currently required. Would Form 201-A request the names of individuals that are being searched as form 201 currently does? If not, how does OGE propose to comply with the prior practice where federal employees may learn if their information has been requested and who has requested it?

Another issue that SEA believes must be addressed before OGE moves forward with the proposed form is how requestors will certify that they understand the rules and penalties associated with use of financial disclosure information. Currently this is required by a signature – not available on an internet form. Furthermore, the Federal Register notice does not provide a process for reviewing the 201-A forms that are submitted on the internet to ensure information has been filled out completely and that no questions arise from the information submitted.

It is important to also consider that Congress has approved delays to the internet posting deadline and is likely to consider a further delay during the lame-duck session. This should provide OGE with additional time to solicit comments that inform decisions regarding Form 201-A. Furthermore, prior to authorizing the use of a new form, SEA requests that a draft Form 201-A and specifics on processes and information contained in the form be provided. Absent such a framework, it is difficult to gauge the practical utility of the information that OGE highlights in its request for comments.

Given the importance of the information at the center of the issue and the national and personal security implications, SEA urges OGE to delay requesting the authority to use Form 201-A until the questions and issues raised above have been addressed.

Sincerely,



CAROL A. BONOSARO  
President



WILLIAM L. BRANSFORD  
General Counsel



November 6, 2012

Mr. Kevin Herms  
Desk Officer for the Office of Government Ethics  
Office of Management and Budget  
*via email to kherms@omb.eop.gov*

Mr. Paul Ledvina  
Agency Clearance Officer  
Office of Government Ethics  
*via email to usoge@oge.gov*

**Re: Agency Information Collection Activities; Emergency Clearance Submission for Expedited OMB Review; Proposed Information Collection; Comment Request for a Proposed OGE Form 201-A Ethics in Government Act Access Form (77 FR 66075)**

Dear Mr. Herms and Mr. Ledvina:

OMB Watch and Public Citizen welcome the opportunity to comment on the Office of Government Ethics' (OGE) proposed information collection. As nonprofit organizations dedicated to open government, accountability, and citizen participation, OMB Watch and Public Citizen have long worked for effective government information collection practices and ready access to public ethics information.

The Stop Trading on Congressional Knowledge Act of 2012 (STOCK Act) clarifies for the first time that members of Congress and their staff are subject to the same laws against insider trading that apply to everyone else.<sup>1</sup> In addition to specifying that it is against the law for Congress to trade on non-public information gleaned through the course of official business, the STOCK Act also creates an important system of real-time transparency of stock trading activity by members and staff, as well as executive branch officials. These transparency provisions are an integral part of the legislation that provide enforcement authorities and the public the means to monitor compliance with the law.

Our organizations are concerned that the proposed information collection could result in diminished public access to information about federal officials' potential conflicts of interest, contrary to the intent of the STOCK Act. Requiring individuals to complete a form before being able to access financial disclosure reports could impede users browsing the system, prevent the reports from appearing in search results on search engines such as Google and Bing, and preclude the system from developing advanced features such as comparisons and visualizations.

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<sup>1</sup> P.L. 112-105.

OGE should ensure that the proposed information collection, if approved, does not unduly impede transparency.

### **Concerns with the Proposed Information Collection**

*OGE has not explained the need for, or utility of, the proposed information collection.* In its notice, OGE cites its statutory and regulatory authority to require agencies to collect this information.<sup>2</sup> We note that these authorities predate the STOCK Act, which does not require agencies to collect this information. However, OGE does not explain the need for the agency to collect this information or how OGE proposes to use the information.

The House of Representatives has posted online the financial disclosure reports of its members and candidates since 2008 without requiring individuals requesting access to the reports to submit personal information. In addition, several states, including Arkansas and Tennessee, provide online access to public officials' financial disclosure reports without requiring the submission of such information.<sup>3</sup> OGE should fully explain why it cannot similarly post financial disclosure data without a request form for users.

*OGE should take steps to minimize the burden on respondents.* If the proposed information collection system is pursued, OGE should create a system that minimizes the burden on users and prevents the information collection from becoming an impediment to robust use of the financial disclosure data.

In its current approach, OGE's automated Form 201 (OMB Control Number 3209-0002) allows individuals to request access to up to five reports on a single form. If the same individual wished to request access to more than five reports, they would have to complete the form again.

We encourage OGE to take a minimal burden approach to the proposed information collection, if approved. An individual should not have to file the proposed Form 201-A more than once in order to access OGE's data tools and retrieve reports, including data from multiple reports. For example, Kansas's online access to Statements of Substantial Interests requires users to fill out a form to gain access. But once filed, applicants receive a username and password that allow full access to all online data.<sup>4</sup> OGE should not let the requirement for individuals to complete proposed Form 201-A to impede the functionality or user experience of the system.

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<sup>2</sup> 5 U.S.C. appendix section 402(b)(1); 5 CFR 2634.603(c) and (f).

<sup>3</sup> OMB Watch, *Upholding the Public's Trust: Key Features for Effective State Accountability Websites*, March 19, 2012, available at <http://www.ombwatch.org/upholdingpublictrustreport>.

<sup>4</sup> Kansas Secretary of State, "View Statement of Substantial Interests," available at [https://www.kssos.org/elections/ssi/secure/ssi\\_examiner\\_entry.asp](https://www.kssos.org/elections/ssi/secure/ssi_examiner_entry.asp).

*OGE's burden estimate is likely to underestimate the annual number of respondents.* OGE's estimated annual number of respondents for the proposed information collection uses as its baseline the annualized number of respondents to its current Form 201 to request access to financial disclosure reports. However, the STOCK Act will make financial disclosure reports more accessible by making them publicly available and searchable online.

As more reports are made available online, and as the functionality for searching reports improves, we expect that the number of individuals seeking access to the reports will increase. Generally, the usage of a database increases as more information is included in the database and users are provided with improved tools for using the database. Therefore, we expect that the annual number of respondents for the proposed Form 201-A will increase from the baseline as the STOCK Act is implemented.

### Conclusion

OMB Watch and Public Citizen appreciate the opportunity to comment on OGE's proposed information collection. The proposed information collection form appears unnecessary, but under any conditions the form should not impose undue burdens. We hope you take our recommendations into consideration. If you have questions about our comments or want to discuss the issues further, please feel free to contact us.

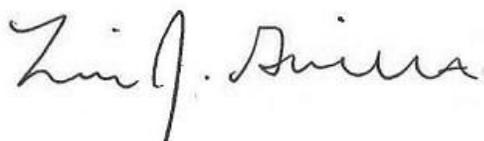
Sincerely,



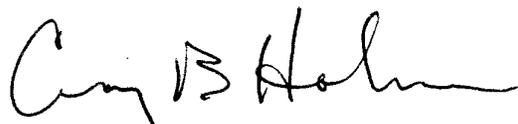
Sean Moulton  
Director, Federal Information Policy  
OMB Watch



Gavin R. Baker  
Federal Information Policy Analyst  
OMB Watch



Lisa Gilbert  
Director, Congress Watch  
Public Citizen



Craig Holman, Ph.D.  
Government Affairs Lobbyist  
Public Citizen

**From:** (b)(6) [mailto:(b)(6)]  
**Sent:** Tuesday, November 06, 2012 6:27 PM  
**To:** USOGE; [kherms@omb.eop.gov](mailto:kherms@omb.eop.gov)  
**Subject:** Information Collection Activity

Dear Mr. Herms and Mr. Ledvina:

As a member of the Senior Executive Service, I am submitting comments regarding the Federal Register Notice (Vol. 77, No. 212, 11/01/2012) on emergency clearance notice and the proposed OGE Form 201-A. I support fully the position of the Senior Executive Association (SEA) regarding this matter and reiterate this position below.

SEA has raised, and continues to have, strong opposition to the underlying law necessitating Form 201-A. P.L. 112-105, section 11(a) which requires the Office of Government Ethics (OGE) to create a searchable database of the financial disclosure forms of certain federal employees, which includes Senior Executives and other senior level employees. SEA has raised concerns that making this information so readily available to the public will harm the personal security of federal employees (many of whom hold sensitive positions) and national security, as well as harming government operations. In addition to those Federal employees impacted, a greater number of US citizens - the spouses and dependant children whose financial information is also required to be disclosed as part of this process - may have their personal security jeopardized.

The 1978 Ethics in Government Act provided a framework for ensuring transparency among government officials and high-level career federal employees. With the addition of the Privacy Act, safeguards were put in place so that sensitive financial information was not used for nefarious purposes and so federal employees would know who was requesting their information. Both laws were enacted well before the internet was in use and did not envision the safeguards needed, or the risks involved, with making this information easily accessible on the internet. I support fully the role of the Ethics Offices within the Bureaus and Agencies of the Federal Government where Ethics Officers ensure compliance with Federal laws and requirements and screen employees for potential conflicts of interest. This existing practice works well.

As the process for requesting financial disclosure forms currently stands, an individual requesting a Form 278 must fill out Form 201. This includes providing identifying information, designating the purpose of the request, specifying up to six individuals whose financial disclosure forms are being requested, and designating how the requestor would like to receive the information (by mail or picking it up in person). The requestor must also certify via signature that they understand the applicable laws and penalties governing usage or misuse of the information.

The current process has inherent safeguards built into it that are not available on the internet. First, a person must furnish a legitimate address to which the Form 278s can be sent or they must appear at OGE in person to receive the forms. This largely prevents a foreign entity from securing the information. Because the Form 201 is either mailed or emailed to an agency, and

only six individual financial disclosure reports can be requested at a time, this provides a de facto waiting period for the information, further providing another layer of security. It is unclear that the proposed Form 201-A would have these inherent safeguards.

Additionally, prior to OGE's modification of routine use that went into effect on August 30, 2012 (F.R. vo. 77, no. 147), release of financial disclosure forms to public requestors was not considered to be a routine use. The practice prior to the publication of the routine use was that requests for form 278s were subject to a written request and that the federal employee to whom the request applied could also request to know who had asked for their financial information. This is another safeguard and a long-standing practice in regard to finding a balance between public disclosure and a right to privacy. What remains for the prior practice after the publication of the routine use is unclear.

The proposed Form 201-A, will do little to address the concerns mentioned above or safeguard the sensitive information contained in financial disclosure reports. Furthermore, the current notice in the Federal Register gives little information or specifics and raises many questions on what information would change from the current form and how it would interface with the internet database.

The STOCK Act requires OGE to create a searchable database of the financial disclosure forms of the federal employees specified in the legislation. This means an individual searching through the database would not have to specify which records they are looking at, as currently required. Would Form 201-A request the names of individuals that are being searched as form 201 currently does? If not, how does OGE propose to comply with the prior practice where federal employees may learn if their information has been requested and who has requested it? How will requesters certify that they understand the rules and penalties associated with use of financial disclosure information? Currently this is required by a signature – not available on an internet form. Furthermore, the Federal Register notice does not provide a process for reviewing the 201-A forms that are submitted on the internet to ensure information has been filled out completely and that no questions arise from the information submitted. Prior to authorizing the use of a new form, a draft Form 201-A and specifics on processes and information contained in the form should be provided. Absent such a framework, it is difficult to gauge the practical utility of the information that OGE highlights in its request for comments.

Given the importance of the information at the center of the issue and the national and personal security implications, OGE should delay requesting the authority to use Form 201-A until the questions and issues raised above have been addressed.

Thank you for the opportunity to provide input on this important issue.

Respectfully submitted,

(b)(6)