



G A O

Accountability * Integrity * Reliability

United States Government Accountability Office
Washington, DC 20548

B-316443

July 21, 2009

The Honorable Nancy Pelosi
Speaker of the U.S. House of Representatives

The Honorable Robert C. Byrd
President *Pro Tempore*
United States Senate

The Honorable Carl Levin
Chairman
The Honorable John McCain
Ranking Member
Committee on Armed Services
United States Senate

The Honorable Ike Skelton
Chairman
The Honorable John M. McHugh
Ranking Member
Committee on Armed Services
U.S. House of Representatives

The Honorable Russell D. Feingold
United States Senate

Subject: *Department of Defense—Retired Military Officers as Media Analysts*

Section 1056 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 directs the Comptroller General to issue a legal opinion to Congress on whether the Department of Defense violated appropriations prohibitions on publicity or propaganda activities by offering special access to prominent persons in the private sector who serve as media analysts. Pub. L. No. 110-417, § 1056(c), 122 Stat. 4356, 4610–11 (Oct. 14, 2008). Department of Defense (DOD) appropriations acts for fiscal years 2002 through 2008 provide, “No part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not authorized by the

Congress.” *See, e.g.*, Pub. L. No. 110-116, § 8001, 121 Stat. 1295, 1313 (Nov. 13, 2007).¹ This opinion addresses whether DOD’s funding of public affairs activities involving retired military officers (RMO) who served as media analysts violated the prohibition.²

Among other things, the prohibition restricts agency communications that are covert as to their source, that is, when an agency disseminates information, or pays someone else to disseminate information for the agency, without disclosing that the agency paid for the communications. B-302504, Mar. 10, 2004. Application of the prohibition is necessarily balanced against an agency’s responsibility to inform the public about its activities and programs, explain its policies and priorities, and defend its policies, priorities, and point of view. B-302992, Sept. 10, 2004. In our efforts to strike the right balance, our decisions have set out a clear standard for agencies to apply: unless otherwise authorized by law, an agency may not use appropriations to fund any communication, or to contract with someone else to communicate on behalf of the agency, unless the communication clearly identifies the agency as the source of the communication.

Clearly, DOD attempted to favorably influence public opinion with respect to the Administration’s war policies in Iraq and Afghanistan through the RMOs. However, as we discuss below, and based on the record before us in this case, we conclude that DOD’s public affairs outreach program to RMOs did not violate the prohibition. We found no evidence that DOD attempted to conceal from the public its outreach to RMOs or its role in providing RMOs with information, materials, access to department officials, travel, and luncheons. Moreover, we found no evidence that DOD contracted with or paid RMOs for positive commentary or analysis. Consequently, DOD’s public affairs activities involving RMOs, in our opinion, did not violate the publicity or propaganda prohibition.

This opinion does not examine whether the RMO outreach program resulted in a competitive advantage for RMOs or compromised DOD procurement with RMO-affiliated defense contractors. In April 2008, the *New York Times* reported that DOD used RMOs who had relationships with DOD contractors to generate favorable news coverage of the Bush administration’s wartime performance.³ David Barstow,

¹ The prohibition is now permanently applicable to all DOD appropriations. Pub. L. No. 110-417, § 1056(a), *reprinted at* 10 U.S.C. § 2241 note.

² Prior to enactment of the National Defense Authorization Act, Senator Feingold had requested our legal views on whether DOD’s RMO program violated the prohibition. Letter from the Honorable Russell D. Feingold, U.S. Senate, to Gene L. Dodaro, Acting Comptroller General, GAO, May 1, 2008.

³ Subsequently, 41 members of Congress asked the DOD Inspector General to investigate whether the outreach program resulted in a competitive advantage for RMO-affiliated contractors. Letter from the Honorable Rosa L. DeLauro, *et al.*, U.S.

(continued . . .)

Message Machine: Behind TV Analysts, Pentagon's Hidden Hand, N.Y. Times, Apr. 20, 2008, at A-1. While the *New York Times*' allegations generated legitimate scrutiny of the relationship between RMOs and DOD and raised questions about potential competitive advantage, compromised procurement processes, and the RMOs' commercial ties, those questions do not, in our view, implicate the prohibition on the use of appropriations for publicity or propaganda purposes and they are therefore outside the scope of this opinion. For similar reasons, this opinion also does not examine whether the RMOs disclosed to the viewing public or the networks whether they had commercial ties to DOD contractors or other possible conflicts of interests.⁴

Our practice when rendering legal opinions is to obtain the views of the relevant agency to establish a factual record and to elicit the agency's legal position in the

(continued . . .)

House of Representatives, to the Honorable Claude M. Kicklighter, Inspector General, Department of Defense, May 2, 2008 (DeLauro Letter), *available at* www.delauero.house.gov/release.cfm?id=568 (last visited July 16, 2009). In October 2008, the National Defense Authorization Act directed the Inspector General to report to Congress on his investigation of the RMO program. Pub. L. No. 110-417, § 1056(b). The Office of the Inspector General (OIG) issued a report on January 14, 2009 that found no competitive advantage for RMO-affiliated contractors. The *New York Times*, however, questioned the number of RMOs identified in the report as having no affiliations with defense contractors. David Barstow, *Inspector General Sees No Misdeeds in Pentagon's Effort to Make Use of TV Analysts*, N.Y. Times, Jan. 16, 2009, at A-15. On May 5, 2009, OIG withdrew its report, stating that its conclusions should not be relied on. Department of Defense, Inspector General, Memorandum for Distribution from Donald M. Horstman, Deputy Inspector General for Policy and Oversight, *Inspector General of the Department of Defense Report No. IE-2009-004, "Examination of Allegations Involving DOD Office of Public Affairs Outreach Program, January 14, 2009* (May 5, 2009). The Deputy Inspector General explained that the methodology OIG used to examine the RMOs' relationships with DOD contractors would not reasonably yield evidence needed to address whether participation in the outreach program conveyed a financial advantage to those who participated. *Id.* The Deputy Inspector General stated that OIG would not undertake additional investigative work on the matter because DOD had terminated the RMO outreach program and senior officials responsible for the program were no longer employed by DOD. *Id.*

⁴ We have been advised that the Enforcement Bureau of the Federal Communications Commission (FCC) is reviewing potential violations of the Communications Act of 1934, specifically whether analysts broadcasted information without proper disclosure, 47 U.S.C. §§ 317, 508. Telephone Conversation between Matthew B. Berry, then-General Counsel, FCC, and Pedro E. Briones, Senior Attorney, GAO, Feb. 10, 2009.

matter.⁵ In this case, we wrote to the then-Acting General Counsel of DOD to solicit DOD's legal views and additional facts related to allegations raised by the *New York Times* article, and we asked the Acting General Counsel to respond to those allegations.⁶ The Office of the General Counsel, instead, directed us to the Office of the Assistant Secretary of Defense for Public Affairs (OASD-PA) and to the Office of the Under Secretary of Defense-Comptroller to obtain documents and the factual information we requested. Although DOD did not provide us with its legal views, the publicly available record,⁷ as well as additional information that we learned in meetings with DOD staff, provide a basis for us to opine on whether DOD violated the publicity or propaganda prohibition.

BACKGROUND

The publicly available record indicates that DOD's RMO outreach program began in October 2002 with a roundtable meeting with the Secretary of Defense.⁸ The Assistant Secretary of Defense for Public Affairs (ASD-PA) had explained to the Secretary of Defense that RMOs were active within national politics and policy-making institutions, and their stature within senior levels of government and commerce ensured a broad distribution of information regarding DOD's war on

⁵ GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), at 7, available at www.gao.gov/legal/resources.html.

⁶ Letter from Gary L. Kepplinger, General Counsel, GAO, to Daniel J. Dell'Orto, Acting General Counsel, Department of Defense, *Department of Defense—Retired Military Officers as Media Analysts*, May 30, 2008. We provided copies of the letter to the DOD Inspector General, the Office of the Assistant Secretary of Defense for Public Affairs and the Office of the Under Secretary of Defense (Comptroller).

⁷ The publicly available record consists of approximately 12,000 pages of documents and electronic audio and pictorial files that DOD released in response to a suit brought by the *New York Times* pursuant to the Freedom of Information Act (FOIA), *New York Times Co. v. United States Department of Defense*, Civ. A. No. 07 Civ 7481 (RJS) (S.D.N.Y. Aug. 23, 2007). The various FOIA documents are available at www.dod.mil/pubs/foi/milanalysts/ (last visited July 16, 2009). DOD provided us with copies of these same documents. Because OIG withdrew its report, neither the report nor its supporting documents and work papers are part of the public record, and we do not rely on them in this opinion.

⁸ E-mail from [REDACTED], to [OASD-PA staff member], *Subject: di rita/[RMO] request*, Mar. 20, 2006, available at www.dod.mil/pubs/foi/milanalysts/28Dec07/28Dec07E-mailRelease_Barstow.pdf, at 69–70 (overview of the RMO outreach program) (last visited July 16, 2009) (Mar. 20, 2006 E-mail). DOD redacted names of certain individuals in its release of documents under FOIA, and in this opinion we omit names of DOD staff below the level of Assistant Secretary of Defense and insert in brackets either their title or “staff member.” We also generally omit names of individuals outside of the government, but insert “RMO” in brackets.

terrorism.⁹ Their input on key issues, the ASD-PA explained, would provide the Secretary with additional insight into ensuring effective outreach to communities around the nation. Clarke Memo.

A 2006 document explains that DOD hosted monthly, sometimes weekly, conference calls, and at least 16 roundtable meetings for RMOs with senior defense officials. Mar. 20, 2006 E-mail. Topics included the wars in Iraq and Afghanistan and the war on terrorism; the Defense Base Closure and Realignment Commission; operations at the Guantanamo Detention Facility; veterans health care; DOD budget requests and requests for supplemental appropriations; body armor for service members; the insurgency and counter-insurgency in Iraq; the civilian Iraqi leadership; the status of Iraqi security forces; improvised explosive devices; and the 2006 so-called “Generals’ Revolt,” where former military leaders called publicly for the Secretary of Defense to resign.¹⁰

A “trip schedule” that DOD included in its FOIA release identified nine trips that DOD arranged for RMOs, often accompanied by OASD-PA staff. The trip schedule lists four trips to Iraq: January 9–12, 2005; October 5–10, 2005; December 6–11, 2005; and September 16–18, 2006; and five to Guantanamo Bay, Cuba: June 12, 2005; June 24, 2005; September 29, 2005; June 21, 2006; and June 28, 2006.¹¹ In some documents, OASD-PA staff described these trips as paying “huge dividends” with regard to media access, and suggested that future planned travel be limited to those RMOs with the greatest ability to serve as “message force multipliers.”¹²

⁹ Action Memo for Secretary of Defense, from Torie Clarke, ASD-PA, Mar. 7, 2002, *available at* www.dod.mil/pubs/foi/milanalysts/29Nov07/BarstowRelease11-29-07.pdf, at 97 (last visited July 16, 2009) (Clarke Memo).

¹⁰ *See* www.dod.mil/pubs/foi/milanalysts/, Apr. 13, 2007 FOIA release to the *New York Times*, Document Nos. 01-23 (transcripts of RMO conference calls from January 25, 2005 to July 1, 2006); Apr. 23, 2008 release (audio files of RMO meetings) (last visited July 16, 2009).

¹¹ *See* Mar. 22, 2007 FOIA release to the *New York Times*, 06-F-1532 Trip Vol. 1, *available at* www.dod.mil/pubs/foi/milanalysts/22Mar07/06-F-1532TripVoll.pdf (last visited July 16, 2009). OASD-PA staff also provided us with this same list of nine trips in response to our request for information on RMO travel, but could not confirm whether this was a complete list of DOD-sponsored travel for RMOs. Interview of Director of Administration and Management, OASD-PA, and Program Support Specialist, OASD-PA, with Susan A. Poling, GAO, Managing Associate General Counsel, Thomas H. Armstrong, Assistant General Counsel, and Pedro E. Briones, Senior Attorney, July 23, 2008, at 2.

¹² E-mail from [Director, Office of Community Relations and Public Liaison] to Col. [REDACTED], *Subject: Media Analyst Trip to Afghanistan*, Aug. 11, 2005, *available at* www.dod.mil/pubs/foi/milanalysts/23Apr08/BarstowRelease23Apr08/7138-7263.pdf,
(continued . . .)

OASD-PA staff planned RMO conference calls, meetings, and travel to coincide with significant events. For example, OASD-PA staff scheduled conference calls with RMOs to coincide with the release of the President's budget request to Congress, and DOD reports to Congress on Iraq, and to coincide with congressional hearings on troop readiness.¹³ These conference calls were variously scheduled before or after regular DOD press briefings or in advance of an upcoming evening news cycle.¹⁴

Also, DOD hired Omnitec Solutions, Inc., to provide reports on media coverage of DOD.¹⁵ Omnitec's media reports were derived from publicly available sources,

(continued . . .)

at 83–84; Memorandum from [OASD-PA staff member] to Dorrance Smith, ASD-PA, *Proposal for Analyst Trip to Iraq*, May 25, 2006, available at www.dod.mil/pubs/foi/milanalysts/22Mar07/06-F-1532TripVolII.pdf, at 109. See also E-mail from [REDACTED], CIV OASD-PA, to [OASD-PA staff members], *Subject: Dillon op-ed on Gitmo in National Review Online*, July 1, 2005, available at www.dod.mil/pubs/foi/milanalysts/23Apr08/BarstowRelease23Apr08/7388-7512.pdf, at 22–23 (Internet sites last visited July 16, 2009).

¹³ See, e.g., E-mail from [OASD-PA staff member] to Gordon England, Secretary of the Navy, *et al.*, *Subject: FY06 budget roll out*, Jan. 25, 2005, available at www.dod.mil/pubs/foi/milanalysts/30Apr08/BarstowReleaseof30Apr08.pdf, at 10; see E-mail from [OASD-PA staff member] to [OASD-PA staff member], *Subject: readiness hearing*, Dec. 29, 2006, available at www.dod.mil/pubs/foi/milanalysts/14Apr08/BarstowRelease4702-4868.pdf, at 85; Transcript of Military Analysts Call, Jan. 12, 2006, available at www.dod.mil/pubs/foi/milanalysts/13Apr07/06-F-01532doc20.pdf; *Strategic Communication Plan, 5th Stability and Security Report to Congress*, as of Aug. 29, 2006, available at www.dod.mil/pubs/foi/milanalysts/25Jan08/TaraJonesE-mails1200-1700.pdf, at 427, 430 (Internet sites last visited July 16, 2009).

¹⁴ E-mail from [REDACTED], LTC, MNC-I V CORPS PAO, to [REDACTED], OASD-PA, *Subject: conference call with mil analysts*, Dec. 7, 2006, available at www.dod.mil/pubs/foi/milanalysts/16Jan08/TaraJonesE-mails200-699.pdf, at 297; E-mail from [Defense Press Officer, OASD-PA], to [REDACTED], CIV OASD-PA, *Subject: Military Analysts*, Sept. 18, 2006, available at www.dod.mil/pubs/foi/milanalysts/16Jan08/TaraJonesE-mails700-1199.pdf, at 425; E-mail from [REDACTED], CIV OASD-PA, to [Defense Press Officer, OASD-PA], *Subject: MG Durbin's Media Event*, July 5, 2006, available at www.dod.mil/pubs/foi/milanalysts/1Feb08/JonesE-mailRelease_1701-2841.pdf, at 661; E-mail from [Director, Office of Community Relations and Public Liaison], to [OASD-PA staff members], *Subject: military analysts*, May 16, 2006, available at www.dod.mil/pubs/foi/milanalysts/13Feb08/BarstowE-mailRelease3154-3777.pdf, at 453 (Internet sites last visited July 16, 2009).

¹⁵ See Solicitation for Commercial Items, Contract No. GS-06F-0267Z, Sept. 27, 2004, (continued . . .)

such as print newspapers, television, radio, online news sources, blogs, and media coverage of public opinion polls. *See* Omnitec Contract at 15–16. The contract provided that Omnitec would report how coverage reflected, or failed to reflect, DOD’s stated policies or views. *Id.* Typical Omnitec reports list names of RMOs who provided commentary during a given period of time, summarize the commentary, and provide excerpts of transcripts of the RMOs’ comments.¹⁶

We learned from DOD Comptroller’s office that between November 2004 and October 2007, DOD paid Omnitec Solutions \$1,837,989. We also identified 19 civilian public affairs staff and 3 active military personnel involved in the RMO outreach program at various times between fiscal years 2002 and 2008, including two assistant secretaries and one Deputy Assistant Secretary of Defense for Public Affairs. The Comptroller’s Office, however, advised us that it did not have information permitting it to calculate the total cost to DOD of the RMO outreach program, including total RMO travel costs. Although DOD did not formally respond to our letter requesting additional information, in our discussions with the Comptroller’s Office, OASD-PA, and the Office of the General Counsel, we were advised that DOD did not have contracts with RMOs for their commentary. Also, the documents released under court order in the FOIA litigation did not include any such contracts. *See supra* n. 7.

ANALYSIS

The question before us is whether DOD’s use of appropriations for its RMO outreach program violated prohibitions on the use of appropriated funds for publicity or propaganda activities. As mentioned above, DOD Appropriations Acts for fiscal years 2002 through 2008 provide, “No part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not authorized by the Congress.” *See, e.g.,* Pub. L. No. 110-116, § 8001; Pub. L. No. 107-117, § 8001, 115 Stat. 2230, 2247 (Jan. 10, 2002). DOD, and OASD-PA in particular, restate the prohibition in an internal directive. DOD Directive No. 5122.05, Enclosure 2, *Principles of Information*, § e (“[P]ropaganda has no place in DOD public affairs programs.”). The prohibition applies to appropriations for Operation and Maintenance, Defense-Wide, which funds OASD-PA and its outreach programs. *See* DOD Directive No. 5410.18, § 4.2.1.

Although the prohibition on the use of appropriated funds for publicity or propaganda has been in effect, in one form or another, for decades, we have rarely found violations of the prohibition.¹⁷ This reflects the wide discretion that we have

(continued . . .)

available at www.dod.mil/pubs/foi/milanalysts/Omnitec/20Nov07LetterandRelease.pdf (last visited July 16, 2009) (Omnitec Contract).

¹⁶ *See, e.g.,* OSD Public Affairs Research and Analysis, Retired Military Analysts in the Media, Feb. 9–16, *available at* www.dod.mil/pubs/foi/milanalysts/6Aug07/06-F-1532PAResearchandAnalysis.pdf, at 242 (last visited July 16, 2009).

¹⁷ For more about the history of this prohibition, see B-302504, Mar. 10, 2004.

historically recognized agencies have in their informational activities and defense of their policies. *See* B-302504, Mar. 10, 2004 (HHS flyer and print and television advertisements did not violate the prohibition); B-212069, Oct. 6, 1983 (OPM press releases did not violate the prohibition); B-147578, Nov. 8, 1962 (White House regional conferences did not violate the prohibition). Federal agencies have a responsibility to inform the public about their activities and programs, explain their policies, and disseminate information in defense of those policies or an administration's point of view. B-302992, Sept. 10, 2004. Moreover, federal agencies may wish to explain the basis for, or even the philosophical underpinnings of, policies advanced by elected officials and their staff in order for the public to evaluate and form opinions on those policies. B-302504, Mar. 10, 2004. Thus, activities such as meetings, conference calls, luncheons with agency leadership, and travel do not implicate the publicity or propaganda prohibition where those activities are reasonably related to the agency's duty to inform the public of agency actions, programs, and policies, or justify and rebut attacks upon its policies. B-302992, Sept. 10, 2004; B-302504, Mar. 10, 2004; B-212069, Oct. 6, 1983; B-147578, Nov. 8, 1962.

We have identified three categories of agency communications or agency-disseminated materials that are restricted by the prohibition: (1) covert; (2) purely partisan;¹⁸ and (3) those constituting self-aggrandizement. We have found violations when agency communications or agency-disseminated materials are (1) covert as to their source or (2) purely partisan in nature. *See, e.g.*, B-304228, Sept. 30, 2005, at 9 (purely partisan); B-302710, May 19, 2004 (covert as to source). Referring to the legislative history of the first prohibition enacted in 1951, we have stated that a third target of the prohibition is "self-aggrandizement" or "puffery." B-302504, Mar. 10, 2004, at 6-7. For example, materials that emphasize the importance of the agency or one of its officials may be considered puffery and constitute self-aggrandizement in violation of the prohibition. *Id.* Our review of the record available to us here found no evidence that the RMO outreach program was purely partisan in nature or self-aggrandizing. In this opinion, therefore, we focus on whether DOD engaged in communications that were covert as to their source.

Agency communications are considered covert and violate the prohibition if they are misleading as to their origin, B-302504, Mar. 10, 2004; B-223098, B-223098.2, Oct. 10, 1986, or if the agency conceals its role in sponsoring the materials, B-302710, May 19, 2004; B-229257, June 10, 1988. Concealing the agency's role in a communication goes beyond the range of acceptable agency public information activities. B-223098, B-223098.2, Oct. 10, 1986. To avoid violating the prohibition, an agency must identify itself as the source of the information it distributes. *Id.* We view the failure to do so, that is, the covert nature of the agency's communication, as indicating a "publicity or propaganda purpose" as that phrase is used in the prohibition. Otherwise, to the public it may appear that an independent party endorses the agency's position. Hence, materials prepared by an agency or agency contractors and circulated by

¹⁸ Materials are considered to be purely partisan in nature if they were designed to aid a political party or candidate. B-304228, Sept. 30, 2005, at 9.

them as the ostensible position of parties outside the agency constitute covert propaganda and violate the prohibition.

In 1987, for example, the State Department engaged in a public relations campaign to influence the public and Congress to support increased funding for the administration's Central American policy. 66 Comp. Gen. 707 (1987). As part of that campaign, the Department contracted with consultants and writers to publish articles, editorials, and op-ed pieces in support of the administration's position. *Id.* Those articles and editorials, however, did not acknowledge that the State Department had paid for them and they appeared to have been prepared by writers not associated with the government. *Id.* We concluded that the State Department violated the publicity or propaganda prohibition.

In 2004, the Centers for Medicare & Medicaid Services (CMS), an agency in the Department of Health and Human Services (HHS), contracted with a public relations firm to produce prepackaged news stories that appeared to be actual television news stories for stations to use to disseminate information regarding changes to Medicare. B-302710, May 19, 2004. As part of the prepackaged news stories, CMS provided anchor lead-in scripts to facilitate television stations' unaltered use of the news stories. *Id.* CMS violated the prohibition because neither the stories nor scripts identified HHS or CMS as the source of the communication to the targeted television audience, and the content of the news reports was attributed to individuals purporting to be reporters, but who were actually hired by an HHS subcontractor. *Id.* See also B-304228, Sept. 30, 2005 (Department of Education prepackaged news story); B-303495, Jan. 4, 2005 (Office of National Drug Control Policy prepackaged news stories).

The prohibition applies not just to agency-prepared materials but to agency communication efforts generally, including communications prepared by contractors at the behest of the agency. For example, the Department of Education violated the prohibition when it contracted with a syndicated columnist and television and radio commentator to provide positive commentary on the No Child Left Behind program without requiring him to disclose to his audience that the Education Department had retained him specifically to provide positive comments on the program. B-305368, Sept. 30, 2005.

Our case law establishes that an agency is engaging in covert communications and thus violating the publicity or propaganda prohibition when it uses its appropriations to fund communications that do not disclose that the agency paid for those communications. Here, unlike the State Department's contracts for articles and commentary and the contract between the Education Department and the syndicated columnist, we found no evidence, nor was it alleged, that DOD contracted with, or otherwise paid, RMOs for positive commentary. (We discuss below the travel, luncheons, and access to senior DOD officials that DOD provided to RMOs.) While DOD did provide talking points and other information to RMOs, and some DOD staff

referred to the RMOs as “surrogates,”¹⁹ RMOs clearly were not paid by DOD to be news readers or otherwise to deliver text provided to them by DOD. Moreover, we found no evidence that DOD concealed from the public its outreach to RMOs or its role in providing them with information and materials. Indeed, it appears that the public was aware of the program. *See, e.g.*, Mark Mazzetti and Jim Rutenberg, *Pentagon Memo Aims to Counter Rumsfeld Critics*, N.Y. Times, Apr. 16, 2006, at A-1. Materials that OASD-PA made available to RMOs were clearly identified as DOD products.²⁰ We also found no evidence that DOD asked RMOs to conceal the outreach program or the source of their information. The only restriction we found that DOD imposed on RMOs was that they not identify by name any particular individual as a source.²¹

Further, DOD’s contract with Omnitec, Inc., to track RMO commentary and report on the media appearances does not violate the publicity or propaganda prohibition. As a

¹⁹ It is unclear from the record who introduced the term “surrogates” to OASD-PA activities or when the term was introduced. An early use of that term that we were able to identify appears in a memorandum from ASD-PA Dorrance Smith. Memorandum for all OASD-PA Personnel, from Dorrance Smith, ASD, *Subject: Public Affairs Transformation*, Oct. 3, 2006. That memorandum informs OASD-PA staff of a reorganization “to better communicate in this new age.” *Id.* The ASD explained that the reorganization would focus on four initial areas, listing one area as the “surrogate community,” but not explaining that term. *Id.* At various times, OASD-PA staff also referred to RMOs in e-mails as “surrogates.” *See, e.g.*, E-mail from Commander [REDACTED], Public Affairs Officer, U.S. European Command, to [REDACTED], *Subject: OSD media experts visit proposal*, Nov. 1, 2006, available at www.dod.mil/pubs/foi/milanalysts/16Jan08/TaraJonesE-mails200-699.pdf, at 351. E-mail from [REDACTED], CIV MNFI STRATEFF COMMS DIV, to [REDACTED], LTC MNC-I V CORPS PAO, *Subject: Surrogates Program*, Nov. 28, 2006, available at www.dod.mil/pubs/foi/milanalysts/14Apr08/BarstowReleased4702-4868.pdf, at 99 (Internet sites last visited July 16, 2009).

²⁰ *See* www.dod.mil/pubs/foi/milanalysts/, October 19, 2006 release, Documents 2–4 (last visited July 16, 2009) (examples of informational materials such as talking points, Pentagon briefings, and other DOD-prepared public affairs documents).

²¹ *See, e.g.*, Office of the Secretary of Defense, Public Affairs, Secretary of Defense Donald Rumsfeld Interview Transcript, 2007, available at www.dod.mil/pubs/foi/milanalysts/5Nov07/2007RumsfeldInterview.pdf; Conference Call Transcripts, available at www.dod.mil/pubs/foi/milanalysts/, April 13, 2007 FOIA release, Documents 01–23. *See also* E-mail from [REDACTED], CIV, OASD-PA, to [OASD-PA staff member], *Subject: [OASD-PA staff member] wants military analyst transcript posted, routed to reporters*, June 19, 2006, available at www.dod.mil/pubs/foi/milanalysts/28Dec07/28Dec07E-mailRelease Barstow.pdf, at 319 (instructing OASD-PA staff to post transcript of RMO conference call on the Internet and release to reporters) (Internet sites last visited July 16, 2009).

general matter, an agency may use appropriations to engage in information gathering and related activities such as analyzing media reports of agency programs, policies, and positions to further its legitimate interest in providing information to the public. B-305349, Dec. 20, 2005 (Social Security Administration contract with the Gallup Organization to survey the public on the Social Security program).

There is no doubt that DOD attempted to favorably influence public opinion with respect to the Administration's war policies in Iraq and Afghanistan through the RMOs with conference calls, meetings, travel, and access to senior DOD officials. For the reasons set out above, however, we conclude that these activities did not violate the publicity or propaganda prohibition. Nevertheless, we believe that legitimate questions were raised by Members of Congress and the press regarding the intersection of DOD's public affairs activities and the possibility of compromised procurements resulting from potential competitive advantages for defense contractors with commercial ties to RMOs. DOD apparently had no policies specific to RMO outreach, even though it has guidance with regard to outreach to other groups and guidance regarding credentialed media representatives.²² Moreover, there is no indication that DOD recognized the multiple roles of RMOs, or the potential implications of those multiple roles, as media representatives, members of an outreach group, and affiliates of defense contractors. While DOD understandably values its ties with retired military officers, we believe that, before undertaking anything along the lines of the now-terminated program at issue in this decision, DOD should consider whether it needs to have additional policies and procedures in place to protect the integrity of, and public confidence in, its public affairs efforts and to ensure the transparency of its public relations activities. To that end, we are sending copies of this opinion to the Assistant Secretary of Defense for Public Affairs and DOD's General Counsel.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'D. Gordon', with a long horizontal flourish extending to the right.

Daniel I. Gordon
Acting General Counsel

²² Compare Directive No. 5122.05, *Assistant Secretary of Defense for Public Affairs (ASD(PA))*, (Sept. 5, 2008) with Department of Defense Directive No. 5410.18, *Public Affairs Community Relations Policy* (Nov. 20, 2001). See also Joint Civilian Orientation Conference at www.jcoc.dod.mil/home.jsf (last visited July 16, 2009).