
United States Government Accountability Office
Office of the General Counsel

September 2006

Procedures and Practices for Legal Decisions and Opinions



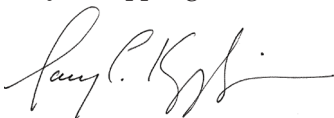
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This document contains procedures and practices for legal decisions and legal opinions of the Comptroller General of the Government Accountability Office. The Office of General Counsel (OGC) is the component of GAO responsible for providing opinions to Congress, its committees, and Members, and for providing decisions to accountable officers and heads of executive agencies.

The decisions of the Comptroller General concerning the use and obligation of appropriated funds are grounded in statute and have a well-established and recognized heritage dating back to the mid-nineteenth century. OGC strives to produce thorough, well-researched, and well-reasoned decisions and opinions, informed by agency explanation of pertinent facts and its views on the law. This document explains our approach to rendering decisions and opinions, how to request a decision or opinion, and our normal practice after we have agreed to issue a decision or opinion. These procedures and practices, in large part, reflect long-standing practices of the Office of General Counsel, across the tenures of the various Comptrollers General.

Along with the attorneys in OGC, I look forward to using these procedures and practices to continue to serve the Congress and the American people. Questions or comments about OGC's procedures and practices may be directed to Susan A. Poling, Managing Associate General Counsel, at 202-512-2667 or via e-mail at polings@gao.gov.

Gary L. Kepplinger

A handwritten signature in black ink, appearing to read "Gary L. Kepplinger". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

General Counsel

Office of General Counsel

Procedures and Practices for Legal Decisions and Opinions

The Office of General Counsel (OGC) is the component of the United States Government Accountability Office (GAO) responsible for providing legal opinions to Congress, its committees, and Members, and legal decisions to accountable officers and heads of executive agencies. *See* GAO Order No. 0130.1.10, Apr. 5, 2004. Congress has charged the Comptroller General to settle the accounts of the United States, 31 U.S.C. § 3526. Since the turn of the nineteenth century,¹ Congress has provided disbursing and certifying officers (accountable officers) and heads of agencies the right to request decisions from the Comptroller General in advance of an audit and settlement of an account. 31 U.S.C. § 3529.

In recognition of the Comptroller General's account settlement function, Congress has designated the Comptroller General as the administrative officer authorized to relieve accountable officers from liability for physical loss or losses from illegal, improper, or erroneous certifications and payments. 31 U.S.C. §§ 3527, 3528. It is these (and related)² statutes that represent the statutory foundation for Comptroller General decisions on the obligation, expenditure, and accounting of appropriated funds.

Congress also has directed the Comptroller General to investigate all matters related to the receipt, disbursement, and use of public money, 31 U.S.C. § 712(1), and to evaluate the results of programs

¹ The Dockery Act, a part of the General Appropriations Act for 1895, 28 Stat. 162, 205, among other things, codified the then-existing practice of the Comptroller of the Treasury of rendering decisions upon the request of agency heads and disbursing officers.

² *See, e.g.*, 2 U.S.C. §§ 142b, 142e, 142l, 1904; 28 U.S.C. § 613.

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and activities carried out by the government under existing law, 31 U.S.C. § 717(b). The Comptroller General evaluates and reports on compliance with laws and regulations in GAO audits and investigations.³ In addition, and independently of an audit or investigation, OGC will analyze and opine on the proper use of federal funds and properties or on the scope and exercise of authority by federal officers and employees at the request of Congress, its committees, and Members. *See* 31 U.S.C. § 717.

The decisions of the Comptroller General concerning the use and obligation of appropriated funds have a well-established and recognized heritage dating back to the mid-nineteenth century. The decisions of the Comptroller General are binding on GAO when auditing and investigating federal programs and activities and settling government accounts. 31 U.S.C. § 3526(b). Although the decisions of the Comptroller General are conclusive on the executive branch, 31 U.S.C. § 3526(d), it is for the executive agencies to implement and enforce the decisions of the Comptroller General.

Scope of Procedures and Practices

These procedures and practices cover requests for legal decisions from accountable officers and heads of agencies pursuant to 31 U.S.C. § 3529; requests for legal opinions from the Congress, its committees, and Members; and requests for informal technical

³ *See* GAO, *Government Auditing Standards*, GAO-03-673G (Washington, D.C.: June 2003), at ¶¶ 4.17–4.20 (financial audits), ¶¶ 7.17–7.27 (performance audits). Where OGC becomes aware of potential issues of compliance with laws such as those governing the obligation, expenditure, or the impoundment of public funds, among others, OGC will make inquiries that may result in the issuance of a self-initiated decision.

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assistance. GAO's protocols for audit, evaluative, and investigative work are covered in GAO's *Agency Protocols*, [GAO-05-35G](#) (Washington, D.C.: Oct. 2004) and GAO's *Congressional Protocols*, [GAO-04-310G](#) (Washington, D.C.: July 2004). The procedures governing bid protests of a solicitation for offers by a government agency or of the award of a contract are not found in this document, but in 4 C.F.R. part 21.

Approach to Rendering Legal Decisions and Opinions

When rendering legal decisions and opinions, OGC has a proud tradition of providing independent analyses and applications of the law. Importantly, through OGC decisions and opinions on the use of appropriated funds, the GAO provides the standards necessary to help ensure that taxpayers' funds are lawfully obligated and expended and faithfully accounted for according to the law. To achieve these objectives, OGC bases its decisions on its best judgment of what the law requires, not on an advocate's crafting of plausible arguments in support of a particular point of view. OGC strives to produce thorough, well-researched, and well-reasoned decisions and opinions, informed by agency explanation of pertinent facts and its views on the law, which respect the difficult judgments Congress must make concerning the use of the nation's resources, the rights and obligations of the accountable officers of the government, and the roles and responsibilities of coordinate branches of our government.

Requesting a Legal Decision or Opinion

By statute, accountable officers and heads of agencies and agency components are entitled to an advance decision of the Comptroller General concerning the obligation, expenditure, and accounting of

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appropriated funds. 31 U.S.C. § 3529. In addition, as a matter of law and long-standing practice, the Comptroller General renders opinions to committees of Congress on matters within their jurisdiction and to individual Members of Congress. 31 U.S.C. § 717(b). Requests for a legal decision or opinion should be made in writing, signed by the requestor(s), and addressed to the Comptroller General or the General Counsel. While there is no specific format for a request, the request letter should identify the issue(s); the applicable facts and circumstances giving rise to the issue(s), including any relevant documentation; the requestor's views, if any, on the legal issue(s); and, to the extent pertinent, the potential consequences of any proposed resolution or remedial action that the requestor may propose.

Acknowledgment of Receipt and Acceptance of Requests for a Decision or Opinion

Typically within 10 business days of receipt of a request for a decision or opinion, OGC will acknowledge the request in writing, will indicate whether GAO has accepted the request, and if not, the reasons therefor. If the request is accepted, the letter will explain any procedures or steps OGC will take unique to the request, identify the point of contact for the decision or opinion within OGC, and provide an anticipated completion date. In addition, the acknowledgment letter may explain and clarify, as necessary, the issues that OGC will address.

Withdrawal of a Request for a Legal Decision or Opinion

Once OGC acknowledges a request for a decision or opinion, GAO will issue its decision or opinion unless

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the matter is rendered moot by subsequent events, the request is timely withdrawn, or, for reasons discussed below, the matter is determined not susceptible to a legal review. Where the matter presented raises issues that OGC deems to be in the public interest or which implicate GAO's statutory responsibilities, even if the requestor withdraws the request for a decision or opinion, GAO may still issue a decision or opinion on the matter on its own initiative.

Development Letters

In developing its decision or opinion, OGC typically solicits agency views of the facts and the law through development letters.⁴ The development letter will specify a response date, typically from 2 to 4 weeks, depending on a variety of factors such as the urgency of the matter or the complexity of the issues. On request, and for good cause, OGC may extend the response date; however, failure to respond to a development letter will not preclude issuance of a decision or opinion. Where OGC is unable to solicit the agency's views because of unavoidable time constraints or where an agency declines or fails to respond to GAO's request for information and its views in a timely fashion, OGC will so note in the decision or opinion.

Informal Meetings and Conferences

Either on its own initiative or at the request of the requestor(s) or other interested person(s) or entity(ies), whether governmental or not, OGC may hold informal meetings or conferences to discuss and clarify the facts and issues presented by a request. Informal meetings are *ex parte* and typically neither

⁴ OGC also may solicit views of nonfederal entities, public and private, where they have a particular stake or interest in the matter under consideration.

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informal meetings nor conferences are transcribed. Unlike GAO audit products, OGC does not provide draft copies of its decisions or opinions for agency comment, nor does it provide preliminary conclusions or draft copies to the requesting accountable officers or agency heads or requesting committee or Member staff.

Matters Which OGC Will Not Address

There are several types of issues which OGC will not decide or opine on. For example, unless required by law or requested by a court or administrative forum, OGC will decline to decide or opine on an issue when it becomes aware that the issue is pending before a federal court or administrative entity.⁵ Similarly, OGC will not decide or opine on matters subject to ongoing criminal investigations. Nor will OGC decide or opine on the application of criminal statutes but instead will refer, as appropriate, such requests to appropriate law enforcement authorities.

Although relatively rare, OGC will decline to decide or opine on a matter where the issue presented is committed by law to a discretionary administrative determination typically involving political, military, international, or economic choices that are not readily susceptible to a legal review. And finally, when the validity of an act of Congress is drawn into question, OGC will indulge a heavy presumption in favor of constitutionality or, as appropriate, will adopt a construction to avoid the issue. Only in those cases where the Supreme Court has directly addressed the

⁵ To protect the integrity of GAO's statutory bid protest jurisdiction, as a matter of policy, GAO will not accept requests to review or evaluate an agency contract action where acceptance of the request would have the effect of circumventing the statutory rules, for example, rules regarding standing or timeliness, 4 C.F.R. §§ 21.1, 21.2, governing protests to GAO. *See* B-290488, May 30, 2002.

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precise issue raised by the act of Congress at issue, and avoidance of the issue is not possible, will OGC question the constitutionality of an act of Congress.

Issuance of Legal Decisions and Opinions

As a general proposition, OGC issues its decisions and opinions upon completion of its internal quality review process. Unlike audit reports and products covered by GAO's Congressional Protocols,⁶ OGC does not place holds on the release of a decision or opinion. However, OGC does not issue an opinion during a congressional recess unless the affected congressional committees and Members request otherwise. Once a decision or opinion is issued to the requestor, GAO will publicly release the decision or opinion and post a copy on our Web site. Before public dissemination of a decision or opinion, OGC will redact any proprietary data, classified information, or other information the public release of which is restricted by statute. OGC decisions and opinions can be accessed by going to the GAO Web site, www.gao.gov, and clicking on Legal Products.

Request for Reconsideration

GAO gives precedential weight to its prior decisions and opinions; however, GAO may modify or reverse a prior decision or opinion where it believes a mistake of law has been made in the past. Where a requestor or entity with a stake in a recent decision or opinion believes that GAO has made a mistake of fact or law or that GAO would have resolved the matter differently if it had had the benefit of relevant and material information not reasonably available at the time of the original decision or opinion, GAO will entertain and respond to requests for reconsideration if timely made.

⁶ See *Congressional Protocols*, GAO-04-310G (Washington, D.C.: July 2004) at 16.

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(Although timeliness for this purpose is a function of the applicable facts and circumstances, GAO will not entertain requests for reconsideration made more than a year after issuance of the disputed decision or opinion.) GAO will reconsider and revise a prior decision or opinion upon a showing of a material error of fact or law.

A request for reconsideration must be made in writing, addressed to the Comptroller General or the General Counsel, and contain an explanation of the alleged error of fact or law in the decision or opinion. If the alleged error of fact is premised on new information, the request must include the new information and the reasons why it was not previously available and presented for consideration during the development of the original decision or opinion.

Informal Technical Assistance

OGC attorneys may provide informal assistance to congressional and agency officers and employees on issues which the attorneys have developed a particular competence. Although OGC attorneys may offer insights and observations based on prior GAO decisions and opinions and their individual experience and knowledge, OGC attorneys do not, and should not be construed to, provide Comptroller General decisions and opinions informally. Any views OGC attorneys may express are personal to the attorney and do not represent the views of the Comptroller General, GAO, or OGC.

In offering technical assistance, OGC attorneys are not a substitute for agency or legal counsel. Typically, OGC attorneys provide quick turnaround, informal assistance in response to telephone or e-mail inquiries.

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Their assistance may range from explaining a law, the rationale behind a prior Comptroller General's decision or opinion, or a legal position taken in a GAO audit report; referring the officer or employee to a line of case law that may help them understand or address an issue; explaining a passage or discussion in GAO's Principles of Federal Appropriations Law (the Red Book) or a GAO audit report; advising on available options or approaches (including submission of the matter for a formal decision or opinion) to resolve a matter; or providing assistance drafting legislation on matters where OGC has developed a particular competence.

GAO's Mission

The Government Accountability Office, the audit, evaluation and investigative arm of Congress, exists to support Congress in meeting its constitutional responsibilities and to help improve the performance and accountability of the federal government for the American people. GAO examines the use of public funds; evaluates federal programs and policies; and provides analyses, recommendations, and other assistance to help Congress make informed oversight, policy, and funding decisions. GAO's commitment to good government is reflected in its core values of accountability, integrity, and reliability.

Obtaining Copies of GAO Reports, Testimony, Decisions, and Opinions

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