

What Government Employees Need to Know to Avoid Going to Jail for Lying to Government Agents or Police (18 U.S.C. Section 1001) By Robert Knauer, CPCM CPPO

*Did you know that it is a crime to tell a lie to the government investigator or agent of the government? Even if, your lie is made orally, and not under oath? Even if, you have received no warnings of any kind? Even if, you are not trying to cheat the government out of money? Even if, the Government ends up not being misled by your false statements? **Too bad***

Ask yourself what do you; Martha Stewart and David Safavian all have in common? Both Martha Stewart and David Safavian were indicted, and YOU can be too under Title 18, United States Code, Section 1001, for lying to government agents. Ms. Stewart stands convicted of intentionally misleading the SEC and FBI officials who questioned her about insider trading. Mr. Safavian, former head of OFPP was one of several people charged under the Bush Administration for lying to, during his interview with investigative agents of GSA OIG, and the FBI about the his involvement with his former boss, Jack Abramoff. You might be just like them.

Well, no matter what your background, wealth, job or circumstances, you can be ensnared by 18 U.S.C., Section 1001, and a favorite of all federal prosecutors. **To be sure, Law Enforcement can and will get you!** Title 18, United States Code, Section 1001 makes it a crime to: **1)** knowingly and willfully; **2)** make any materially false, fictitious or fraudulent statement or representation; **3)** in any matter within the jurisdiction of the executive, legislative or judicial branch of the United States. (Your lie does not even have to be made directly to an employee of the U.S. government, as long as it is "within the jurisdiction" of our ever expanding federal bureaucracy). Your falsehood must be "material" but this requirement is met if the statement has the "natural tendency to influence or [is] capable of influencing, the decision of the decision-making body to which it is addressed." *United States v. Gaudin*, 515 U.S. 506, 510 (1995). So, in other words, it is *not* necessary to show that your particular lie ever really influenced anyone. Although you must know that your statement is false at the time you make it in order to be guilty of the crime, you do *not* have to

know that lying to the government is a crime, or even that the matter you are lying about is "within the jurisdiction" of a government agency. *United States v. Yermian*, 468 U.S. 63, 69 (1984). For example, if you lie to your employer on your time and attendance records and, unbeknownst to you, he submits your records, along with those of other employees, to the federal government pursuant to some regulatory duty, you could be criminally liable.

In our age of ever expanding federal power, the breadth of this statute (and the discretion it lodges in prosecutors) is overwhelming. Congress has regulated so many areas of our lives and federalized so many functions that the reach of Section 1001 is virtually boundless. This is what caused many federal courts to create an "exculpatory no" doctrine, holding that falsely answering "NO" to an inquiry from a federal agent was, standing alone, not a crime under Section 1001. In 1998, however, the United States Supreme Court rejected this doctrine (as being inconsistent with legislative intent) in *Brogan v. United States*, 522 U.S. 398, 805 (1998). Thus, the only avenue for reform with respect to Section 1001 is in Congress, where politicians seldom get brownie points for narrowing the reach of federal criminal statutes.

But why, you may ask, should law-abiding citizens be alarmed about this statute? Don't the FEDS only pick on big-league liars? Don't we trust the federal government and its law enforcement officers and assume that they are responsibly trying to ferret out crime? Besides, if we meet an FBI or other federal agent that we do not trust, can't we simply decline to speak to him?

It may be true that most federal agents and prosecutors are decent people who would not intentionally abuse Section 1001. Moreover, it is very important from a law enforcement perspective for federal agents to be able to informally question witnesses during the initial stages of an investigation. And certainly citizens are under no obligation to speak to a law enforcement agent in the first place, although, as shown below, it is essential to learn *how* to decline to speak to government officers. Power corrupts, and the potential for abuse of this statute is

very great, especially during periods of public outcry over corporate and other white-collar crimes as we have seen in late years. When we reflect upon how many petty rules and regulations get broken and how many white lies are told during the course of an average American business day, it is apparent that Section 1001 can easily be applied and also misapplied to normally upstanding Americans.

CASE IN POINT: Consider, for example, the following hypothetical. Assume you are the former government employee of a corrupt senior program manager (PM) at the U.S. Public Health Service, a part of Health and Human Services. You hated the working at the place and hated your boss, the PM, and left as soon as you could transferring to another federal agency outside of the Public Health Service, and did your best while there not to join in fraud that you saw being committed all around you by the PM and some of his co-conspirators (PhD, doctors, engineers and quality inspectors). Nevertheless, you looked the other way at what you knew was going on, knew was probably wrong, and even on some occasions somewhat aided the Program Manager's criminal behavior when he ordered you to do certain things you knew were wrong. Maybe what you did was transported false or fake contract vouchers to the U.S. mailbox in your car, or handed miscoded bills to a visiting Government auditor, or passed along a federal contractors false invoice the PM had the COTR sign off on, or knowingly took the false invoices and placed them in the United States mail system to shipment to the Department's payment office that just happened to be located across state lines. You had no idea what you did was illegal. Of course your boss also happens to be political appointee Category SES-C or maybe a GS-15 and you just happen to be a lowly little GS-5. You feel compelled to do what your PM tells you to do because you fear him or her. BUT--It is very easy under federal criminal law to passively aid another in his or her crime and *thereby subject yourself to criminal exposure*. All you need is **to know** of another's crime and perform *any* act, even a minor act that intentionally and knowingly facilitates the crime.) Assume further that you are might be a registered nurse (RN) at the USPHS in Virginia, and that your licensing state will revoke your license if they find that you were ever involved in a crime (criminal fraud). One afternoon, two years after you quit the USPHS, your local FBI District agent comes a calling to your front door. He

needs damaging information about your former employer, the Project Manager, and you certainly know enough to help out. But revealing what you know could actually expose you to revocation of your nursing license in Virginia by the state board if they found out. So, what do you do in that situation and what are the potential pitfalls? Your first instinct may very well be to feign lack of knowledge concerning the details of the former employer's behavior, particularly if, as is often the case, the agent's visit is unexpected. People often tend to panic in these unexpected encounters with investigators or federal agents at their home, and they blurt out falsehoods to cover up past misdeeds, even very small misdeeds. ***(This is known as opening mouth and inserting foot)*** Once you make that fateful choice the FBI agent and the Assistant United States Attorney who he works with may have you over a barrel. If they happen to possess enough evidence to prove that you are lying to them, they can bring or threaten to bring charges against you under 18 USC, Section 1001. *In fact some Assistant United States Attorney's specifically send agents out to conduct interviews knowing that a witness will either tell the truth and help build a case against someone else or lie and subject himself to a Section 1001 charge.* They also do this by asking you to simply come and talk to them at headquarters in an interrogation room so that your conversation and responses will be tape recorded. Whatever you do **DON'T DO IT.** In such situations, the agent is typically well-informed about the facts of the case, but plays dumb in order to instill a false sense of confidence in the interview subject and being the average citizen you tend to "trust" your public official, the FBI agent or even police investigator. And, unlike you, the agent has had time to examine all relevant documents. (It also bears noting that the FBI will usually not tape record the interview (whereas local police departments do just that) and that the only official interview report will be an 302 report, which is the agent's own dictated version of the conversation (meaning what you said did not matter). Agents usually work in pairs as well, so in any later dispute over what was said in the interview, guess whose version is likely to prevail? Your or the two FBI agents who dictated their own *302 document*? You know the answer and if you do not then you are stupid! Even if the prosecutor does not really want to indict a small fish like you (a single mother working as a nurse now for a private firm), by lying in the interview you may force him to do so. If he ultimately convinces you to tell the

truth and indicts your former employer, then he must still reveal your falsehood to the employer's attorney, under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). Now you the little nurse and the information you provided will be used by the defendant's attorney to publicly and vigorously cross-examine you at trial and break you down. Since you are now going to be a "tainted witness", because of your original falsehood, the prosecutor may feel obliged to indict you in order to show a jury (or other potential witnesses) that you have paid a price to the big old Government for lying to the FBI in the first place, thus a much more believable story to the jury.

You can see that even a generally decent person who tries to stay out of trouble can face criminal exposure under Section 1001 through a fleeting conversation with a government agent or investigator. So, what else can you do to avoid being placed in such a dilemma? Of course, you can simply tell the whole truth the very first time, like your mommy taught you to do, right? Now, wouldn't that be the easy thing to do, even if your nursing license ends up being revoked and you have no job, no money and become homeless? Perhaps, but by telling the truth, and avoiding prosecution under Section 1001, you also expose yourself to a potential indictment for *aiding and abetting* your former employer's fraud. You don't think it could happen? Well, trust me. It happens all the time, almost every week, all across this country. I know of a very ethical, loyal and patriotic Government employee that was in fact prosecuted by the Federal Prosecutor right in Washington, DC for trying to do the "right thing" during the BUSH years of fighting terrorism, but found out that in doing so (something we are all taught to do from elementary school) that trying to help out or get involved can certainly cost you, and get your family into a lot of hot water financially. You may even lose your federal job if you piss off the police, investigators, or agents! So be careful and seek counsel from your own criminal attorney.

What if you are absolutely convinced that you didn't do anything to help your former employer the "Project Manager", and that you are entirely innocent of any

wrongdoing? You might figure that since you have nothing to hide, is it safe to talk, right? Unfortunately that's not the way our justice system works.

There can still be real danger in speaking to any government agent in these circumstances. *To begin with, you are not personally qualified to know whether you are innocent of wrongdoing under federal criminal law* (only a criminal attorney knows that). Notice I did not mention civil attorney. Stay as far away from civil attorneys you can at all costs when dealing with criminal matters. As I have already noted the minimal nature of the act needed to connect you to another's crime if you have knowledge of that crime. But the danger goes beyond this. Not all federal crimes (particularly regulatory crimes) even require any criminal intent. Moreover, you and your employer may have simply engaged in some widespread practice, acceptable at one point in time, which is now under stricter scrutiny. One stupid offhand remark to the federal agent could turn into a damaging admission, and you will get hurt, the agency or organization will fall and lives can be ruined.

Assuming your absolute innocence of the wrongdoing being investigated, federal agents have the luxury of minutely studying all of the relevant paperwork surrounding that case or investigation. You, on the other hand, may not have thought about the subject matter, much less the underlying details, of his inquiry for years. You will probably not be shown any of the pertinent documents before the interview begins as their intent to purposely keep you in the dark. *You could easily make factual mistakes during your interview.* What happens? Maybe nothing, if you are dealing with an experienced agent who surmises that you are trying to tell the truth and do the best you can do. But, what if the agent is inexperienced, which was the case pointed about above, and you are unsure of your culpability in a situation? What if the agent doesn't care, or if you are not confirming "his" version of events? Your misstatements can easily be interpreted as intentional falsehoods under Section 1001.

Just Remember one thing: Police and federal agents ARE NOT your friends, but your criminal attorney is and you will need to listen to him/her at all costs and trust his/her advice to you.

So, is there an intelligent alternative to lying or telling the truth that you don't know about? Of course there is, and it is the one thing that in my 32 years with the federal government I never saw anyone do because we are simply not trained to as Americans from the day we are born, and that is (in our hypothetical interview), you can and should say politely (notice I said politely) I decline to be interviewed at this time without an attorney. Tell the agent or investigator in a very professional and courteous tone that you have an attorney and that "*my attorney will be in contact with you.*" You have **THE ABSOLUTE RIGHT** to be represented before the law in all cases. If the agent or investigator persists, say that you will not discuss anything without first consulting counsel. Now if you are a federal employee, the OIG is required to inform you of your rights, and ask you to cooperate with them. If you fail to do so, the OIG can refer you to HR for dismissal, and have you and your things removed, but you are still permitted to ask and have an attorney represent you before the OIG. Doing so, makes you cooperative, but not doing so identifies you as uncooperative, which will get you removed from your job. So, ask for the agent or investigator's card, to give to your criminal attorney. And, if you have not yet hired a lawyer, tell the agent that "*I want to consult a lawyer first*" or that "*an attorney will be in touch with you.*" The absolutely essential thing to keep in mind at all times is to say **NOTHING** of substance about the matter under investigation. It is preferable to do this by politely declining to be interviewed in the absence of counsel. If the agent asks "*why do you need an attorney* or what do you have to hide?" **Do not** take the agent's bait and directly respond to such questions. (DO NOT SAY YOU HAVE NOTHING TO HIDE). Simply state that you will not discuss the matter *at all* without first consulting your counsel and that counsel will be in touch with him. If the agent asks for a firm commitment from you to speak with him after you have consulted or retained counsel, do not oblige. Just respond that you will consult with your attorney (or "an" attorney) and that your attorney will be in touch with him. By all means, do not get bullied or panicked into making up a phony reason for refusing

to talk to the agent, or say something like, "Go F___ off asshole, I owe you nothing, because I haven't done anything." Doing this is like kicking a bull in heat! Law enforcement are the bad boys will really want to show you, the poor innocent civil servant who the real boss of your life will be. Always remember that as an American citizen, YOU are not obliged to explain your decision to anyone.

So, what if the FBI agent or a federal law enforcement officer threatens to have you subpoenaed to the grand jury if you don't talk? Simply repeat that you will not discuss the matter with him in the absence of counsel. (If you are already represented tell the agent that you authorize your attorney to accept service of the subpoena. That way you will not have to be embarrassed at your place of work by the FBI's service of a grand jury subpoena in broad daylight.) What if the agent already has a subpoena and serves you with it? Thank him and tell him that your attorney will be in touch. At that point there is literally nothing they can do to you-for the moment.

It is crucial to note that affirmatively declining to discuss the investigation in the absence of counsel is not the same thing as remaining completely silent or being uncooperative. If you are not in custody, your total silence, refusal to speak, especially in the face of an any accusation or investigation, *can* very possibly be used against you as an adoptive admission under the Federal Rules of Evidence, and thus, you are guilty even if you did nothing. So, know that your invocation of counsel cannot be used against you at trial, and that we all have the right to counsel. *United States v. McDonald*, 620 F.2d 559, 561-64 (5th Cir. 1980). On the other hand, remember, that your refusal to talk substance in the absence of counsel will force the prosecutor to decide whether your information is important enough to justify a grand jury subpoena for your testimony, or to motivate them to pursue some other charge against you. It's happened other many. For example one criminal attorney said to a client, *"If you had just kept your mouth shut to the police and federal agents, and simply stated that I will be happy to speak with you through my attorney, and only while he is present, then nothing would have happened to you. You would not have been charged with the one and only crime on the books the*

FEDS could possibly have gotten you with." That attorney was right, which proves the point and very hard lessen that cost the client \$5000 and a permanent criminal conviction for the lowest class misdemeanor possible. But remember this too, it could have been a lot worse. Thus, another reason you need an attorney to help you plea bargain- something you can't do.

So please learn from this article. If the prosecutor responds to your declination by serving you with a grand jury subpoena, this will present you with several interesting options such as: **1)** testifying; **2)** refusing to testify, by invoking the Fifth Amendment privilege against self-incrimination, which broadly applies to *anyone*, innocent or guilty, facing criminal exposure and you see this every single day with BUSH Administration officials (Carl Rove, Dick C., and Harriett Myers); **3)** testifying (talking to the government) *only* after receiving a grant of immunity; or **4)** *proffering* to the government—that is, giving them a sneak preview of what you will tell them if they agree to grant you immunity.

The important thing to remember is that declining to speak to the police or an agent in the first place buys you time in which to weigh these alternative strategies with your criminal defense attorney.

I am not suggesting that you should obstruct any investigation, or decline to answer an agent's questions. You should do that if you are certain that you have committed no crime, *and* if the agent promises you that nothing will happen to you if you tell the truth, *and* if it is crystal clear that you are nothing but a peripheral witness, it *may* be appropriate to voluntarily interview with federal law enforcement officials. Don't speak to them unless you have discussed the matter thoroughly with your attorney; your attorney has called the prosecutor to determine your status as a witness, subject or target; and, your attorney is present during the interview. Many a former federal employee and citizens wish they had been smart enough to have done this. Doing so, they would have no criminal record, and have many thousands more \$\$ in their pockets. Now, I am also not suggesting that it is

acceptable to be interviewed by federal agents as long as your attorney is present. In fact, it is usually unacceptable and is often quite risky. Just ask Martha Stewart, who did have counsel by her side when interviewed by the FBI and SEC.

A good attorney will never let a client with the slightest degree of criminal exposure submit to an interview by government agents. They must charge and then try the case against you. Do not give agents any leverage ever-ever-ever. They cannot be trusted.

There are some instances in which you may effectively be forced to interview with law enforcement agents, such as with the Office of Inspector General (OIG).

If you are a federal employee of the government and you are assured that an inquiry is administrative only and that your interview will not result in any criminal action against you, you will usually be *required*, in order to keep your job (federal), to submit to the interview. Failure to do so, getting up and walking out of the OIG can result in your immediate removal from government-thus, 20 or maybe 30 years of service and pension down the drain.

A private employer can require you to cooperate with a law enforcement or regulatory investigation as a condition of continued employment.

If you are an officer or director of a company that operates in a regulated industry (most DOD contractors) or does business with the federal government, your failure to submit to questioning by regulatory officials may result in significant economic sanctions against you or your company by the United States. But even in the above situations, you should avoid substantive conversations when law enforcement agents make surprise visits. If you have to submit to an interview, it is far better to do so after careful consultation with your attorney.

If all of this sounds complicated, scary, upsetting, and it is. Whether you speak, what you say and how and when you say it can have a profound effect on your future when you find yourself involved in a criminal investigation or other criminal investigation. I remind you-it is a terrible thing to be innocent of a crime, and to have the Government you have worked for and loved since you were born

come after you! Being charged with a crime or threat of will affect your family, and friends simply for paying that awful price for being naive or plan stupid in the eyes of the law.

The time to know what to do is when the police or FEDS come knocking at your door! Do the right thing, and hire an experienced criminal defense attorney and develop a plan. It only takes a phone call and \$200-500 on retainer. If anything you will learn that what you were told in childhood about the police and law enforcement being your friend is all in the past. The local police, law enforcement agent, FBI, etc...are not to be trusted. They do not care about you or your family, but your criminal defense attorney does, and will be your very best friend in times when you may be brought into an investigation-not your employer, not the FEDS and never law enforcement. Never, ever, forget this and you'll be glad someday.