



Office of the Inspector General
U.S. Department of Justice



180 Day Report to Congress on the Impact of Section 218 of the Department of Justice Appropriations Act for Fiscal Year 2015

June 2015

EXECUTIVE SUMMARY

Section 218 of the Department of Justice Appropriations Act, 2015, Pub. L. No. 113-235, § 218, 128 Stat. 2130, 2200 (2014), which was passed by Congress and signed by the President on December 16, 2014, states that “[n]o funds provided in this Act shall be used to deny the Inspector General of the Department of Justice timely access to all records, documents, and other materials in the custody of the Department or to prevent or impede the Inspector General's access to such records, documents and other materials, unless in accordance with an express limitation of section 6(a) of the Inspector General Act, as amended, consistent with the plain language of the Inspector General Act, as amended.” It further requires the Inspector General to report to the Committees on Appropriations within five calendar days of any failures to comply with this requirement.

The Joint Explanatory Statement that accompanied the Consolidated and Further Continuing Appropriations Act, 2015, further provides that “[t]he Inspector General shall report to the Committees on Appropriations not later than 180 days after the date of enactment of this Act on the impact of section 218 of this Act, which is designed to improve OIG access to Department documents and information.” The Department of Justice Office of the Inspector General (OIG) submits this report in order to fulfill this reporting requirement under this section.

The OIG has found that Section 218 has had a positive impact on our ability to get timely access to records from Department components, with the exception of the Federal Bureau of Investigation (FBI). In our meetings with Department components to discuss the provision, these component officials indicated their intention to comply with the provision. Moreover, shortly after the enactment of Section 218, the DEA produced materials in two ongoing OIG reviews that it had not timely produced to the OIG prior to Section 218's enactment. The first DEA matter involved the OIG's review of the DEA's use of administrative subpoenas and DEA's objection to providing the OIG with unredacted information we had requested in mid-November 2014. Within days of DEA's leadership being informed by the Inspector General of the provisions of Section 218, the DEA agreed to produce the requested unredacted material. The second DEA matter involved the OIG's review of the DEA Confidential Source program, and DEA's failure to produce an email that the OIG had requested in mid-October 2014. Once again, within days of DEA's leadership being informed by the Inspector General of the provisions of Section 218, the DEA agreed to produce the requested email.

With regard to the FBI, however, Section 218 has not been effective since the FBI continues to maintain the position it first announced in 2010 that the OIG is not legally entitled to review certain records, including grand jury, Title III electronic surveillance, and Fair Credit Reporting Act (FCRA) information. As a result, the OIG has to date sent four letters to the Congress, as required by Section 218, to report the FBI's failure to comply with Section 218 by refusing to provide the OIG, for reasons unrelated to any express limitation in Section 6(a) of the IG Act, with timely access to certain records, thereby impeding those reviews. Since

those letters were sent, the FBI has produced documents and materials in response to the OIG request, but also has continued to withhold materials to which it believes the OIG is not entitled. The FBI has told us that it is working with the Office of the Deputy Attorney General to determine if the OIG will be given access to the redacted information but, as of June 15, 2015, the OIG still does not have complete production in any of these instances.

Moreover, as a result of the FBI's legal position, and over the OIG's repeated and consistent objection, the Department continues a process it has imposed whereby the OIG may not have access to these categories of documents unless the Attorney General (AG) or Deputy Attorney General (DAG) grants permission for the component to provide this information to the OIG, if they conclude that specific reviews will assist them in the performance of their duties. This process ignores an unbroken history of more than 20 years of cooperation and compliance by the Department and FBI with the records production requirements of the Inspector General Act. At no time before 2010 did the FBI, any Department component, or Department leadership raise any concerns over the legality of providing records to the OIG, including grand jury, wiretap, or FCRA material; prior to this time, the OIG routinely received such material from the Department.

In April 2015, the Deputy Attorney General revised and memorialized the protocol whereby the AG or DAG must grant permission in order for the OIG to obtain access to grand jury, wiretap, and FCRA information in connection with OIG audits, investigations, inspections, and reviews. The DAG indicated that the intent in revising the process was to improve the timeliness of document production to the OIG. On May 20, 2015, the OIG responded by noting that while the revised procedure may result in somewhat faster production of material to the OIG, the revised process continues to be inconsistent with the Inspector General Act and Section 218, continues to impair the OIG's independence, and fails to account for the over 20 year record of Department and FBI compliance with OIG document requests and the absence of any legal authority contradicting the Department's practice over those many years.

The Department's leadership maintains that it needs an opinion from the Office of Legal Counsel (OLC) in order to resolve these matters, and in May 2014 it asked OLC for an opinion addressing the legal objections raised by the FBI. More than one year later, we are still waiting for that opinion. In the meantime, the FBI has repeatedly failed to comply with a provision adopted by Congress in the Appropriations Act, and the existing process at the Department, which as described above essentially assumes the correctness of the FBI's legal position, continues to undermine the OIG's independence by requiring the OIG to seek permission from the Department's leadership in order to access certain records. For these reasons, it is critical that this issue be resolved promptly. It is long past time for the Department to issue its opinion about the FBI's legal position.

Finally, we note that the Department's budget request for FY 2016 seeks to have Section 218 removed from the FY 2016 appropriations law, and states that it intends to discuss with the OIG possible legislation to address the issue. The OIG

disagrees that the language of Section 218 should be removed given its significant positive impact on our ability to obtain timely access to documents from Department components, other than the FBI. Additionally, removing the provision, in the face of the FBI's failure to comply with it, could lead the FBI to believe that its conduct has been sanctioned and could cause other Department components to conclude that it is acceptable to ignore the Appropriations Act and clear requirements of the IG Act and raise legal objections to the OIG's access to certain records necessary to perform our important oversight function. Further, while the Department stated in its budget request that it intended to work to develop statutory language to address this issue, we note that in the 4 months since the Department's budget request was released the Department has made no attempt to provide the OIG with a legislative proposal that the Department believes will resolve the legal issue. The OIG stands ready to work with the Department on any such proposal.

In sum, the OIG believes that, until the Department ensures that the OIG will get full, timely, and independent access to records in its possession that are necessary for OIG audits, reviews, and investigations, Section 218 should remain as a strong and clear reaffirmation of Congress's intent that the IG Act means what it says.

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BACKGROUND

Section 218 of the Department of Justice Appropriations Act, 2015, Pub. L. No. 113-235, § 218, 128 Stat. 2130, 2200 (2014) states that “[n]o funds provided in this Act shall be used to deny the Inspector General of the Department of Justice timely access to all records, documents, and other materials in the custody of the Department or to prevent or impede the Inspector General's access to such records, documents and other materials, unless in accordance with an express limitation of section 6(a) of the Inspector General Act, as amended, consistent with the plain language of the Inspector General Act, as amended.” It further requires the Inspector General to report to the Committees on Appropriations within five calendar days of any failures to comply with this requirement.

The Joint Explanatory Statement that accompanied the Consolidated and Further Continuing Appropriations Act, 2015 further provides that “[t]he Inspector General shall report to the Committees on Appropriations not later than 180 days after the date of enactment of this Act on the impact of section 218 of this Act, which is designed to improve OIG access to Department documents and information.” The Department of Justice Office of the Inspector General (OIG) submits this report in order to fulfill this reporting requirement under this section.

In order to conduct effective oversight, an IG must have timely and complete access to documents and materials needed for its audits, reviews, and investigations. Delaying or denying access to agency documents imperils an IG's independence and impedes our ability to provide the effective and independent oversight that saves taxpayers money and improves the operations of the federal government. Actions that limit, condition, or delay access have profoundly negative consequences for our work: they make us less effective, encourage other agencies to take similar actions in the future, and erode the morale of the dedicated professionals that make up our staffs. In August 2014, 47 Inspectors General signed a letter to the Congress strongly endorsing the principle of unimpaired Inspector General access to agency records.

Beginning in 2010, the FBI and other DOJ components have objected to providing the OIG with access to certain types of records in the Department's possession that were responsive to OIG document requests, including grand jury, Title III electronic surveillance, and Fair Credit Reporting Act (FCRA) information. However, the FBI's position that Section 6(a) of the IG Act does not authorize the OIG to have access to various categories of records in its possession contradicts the plain language of the IG Act, Congress's clear intent when it created the OIG (as confirmed by the recent enactment of Section 218), the FBI's and the Department's practice prior to 2010 of frequently providing the very same categories of information to the OIG without any legal objection, court decisions by two different Federal District Judges in 1998 and 1999 stating that the OIG could receive grand jury material, and the reasoning of a 1984 decision by the Office of Legal Counsel

(OLC) concluding that grand jury material could be provided to the Department's Office of Professional Responsibility.

As a result, a number of OIG reviews have been significantly impeded, such as our continuing review of the FBI's use of bulk telephony information, and our completed reviews of the FBI's use of national security letters, the Department's use of the material witness statute, and the handling of sexual harassment and misconduct allegations by the Department's law enforcement components. The failure of Department components to provide timely and complete access to agency documents not only impeded our ability to conduct and complete our reviews but also resulted in an unnecessary waste of taxpayer money. The Department, in response to the FBI's questioning of our legal authority to review these types of records, has imposed a process whereby the Attorney General or the Deputy Attorney General (DAG) must grant permission for the OIG to access such records, and that they may do so if they conclude that the specific review will assist them in the performance of their duties. To date, they have done so in each review where the issue has arisen.

In May 2014, the Department's leadership asked the Office of Legal Counsel to issue an opinion addressing the legal objections raised by the FBI, which the Department's leadership maintains it needs in order to resolve these matters. However, over one year later, that opinion still has not been issued.

The OIG has found Section 218 of the Fiscal Year 2015 Appropriations law to have had a positive impact on our ability to get timely access to records from some Department components. In our meetings with Department components to make them aware of the provision, these component officials indicated their intention to comply with the provision. Moreover, shortly after the enactment of Section 218, the DEA produced materials to the OIG in two ongoing OIG reviews that it had not timely produced to the OIG prior to Section 218's enactment. In our review of the DEA's use of administrative subpoenas, the DEA had objected to providing the OIG with unredacted information from presentation materials without identifying any legitimate basis for doing so and refused to turn over certain responsive e-mails that the DEA deemed "sensitive." Shortly after Section 218 was enacted, the Inspector General informed DEA leadership of the provision. Within days, the DEA agreed to produce the requested unredacted material. The second DEA matter involved the OIG's review of the DEA Confidential Source program, and DEA's failure to produce an email that the OIG had requested in mid-October 2014. Once again, within days of DEA's leadership being informed by the Inspector General of the provisions of Section 218, the DEA produced the requested email.

With regard to the FBI, however, Section 218 has not been effective since the FBI continues to maintain its position that the OIG is prohibited from reviewing certain records. As a result, the OIG has sent four letters to Congress, included in Appendix I, to report that the FBI has failed to comply with Section 218 by refusing to provide the OIG, for reasons unrelated to any express limitation in Section 6(a)

of the IG Act, with timely access to certain records in ongoing OIG reviews. Those reviews are:

- Two FBI whistleblower retaliation investigations, letter dated February 3, 2015, which can be found on our OIG website [here](#);
- The FBI documents related to review of the DEA's use of administrative subpoenas, letter dated February 19, 2015, which can be found on our OIG website [here](#);
- The FBI's use of information derived from collection of telephony metadata under Section 215 of the Patriot Act, letter dated February 25, 2015, which can be found on our OIG website [here](#); and
- The FBI's security clearance adjudication process, letter dated March 4, 2015, which can be found on our OIG website [here](#).

On April 13, 2015, the OIG advised Members of Congress of the status of document production by the FBI to the OIG regarding the above-mentioned reviews. In this letter, which can be found in Appendix II, the OIG described how, in each of these instances, some documents had been produced, while others were still being withheld for reasons other than as provided in the Inspector General Act. In fact, as the OIG noted in its April 13 letter, the FBI had raised new legal objections, involving what it identified as "CHS [confidential human source] identifying information" and "bulk sensitive counterintelligence information," to providing documents to the OIG. Further, the OIG determined that the FBI was repeatedly ignoring the mandate of Section 218, the result being that the OIG continues to be prevented from getting complete and timely access to records in the Department's possession.

On April 23, 2015, the Deputy Attorney General wrote to the OIG to describe a memorandum forwarded by the DAG's office to Department leadership on the same day outlining a revised procedure governing the production to the OIG of grand jury, wiretap, and FCRA information in connection with OIG audits, investigations, inspections, and reviews. The procedure outlined in the April 23 memorandum to Department components requires the OIG to inform the Office of the Deputy Attorney General (ODAG) when it anticipates requesting Title III, grand jury, and FCRA information. ODAG will then determine whether the OIG investigation or review "qualifies for access to such information." Upon receiving approval from ODAG, the Department components are to provide the material to the OIG. Further, the memorandum establishes another process by which ODAG will review material Department components consider subject to limitations on disclosure under statutes other than the aforementioned three statutes. The DAG's letter to the OIG and the DAG's memorandum to Department components can be found in Appendix III.

The OIG responded to the DAG in a letter dated May 20, 2015. In its response, the OIG notes that while the revised procedure may result in somewhat faster production of material to the OIG by reducing instances where the FBI and other components conduct pre-production reviews, the revised process keeps in place a procedure that is inconsistent with the Inspector General Act, impairs the OIG's independence, and fails to account for the over 20 year record of Department and FBI compliance with OIG document requests and the absence of any legal authority contradicting the Department's practice over those many years. Further, the May 2015 letter describes the OIG's concern that the guidance in the DAG memorandum regarding raising legal objections other than with regard to Title III, grand jury, or FCRA information will be read by Department components to suggest that such additional objections could properly be raised in response to OIG document requests, and also that this may require a pre-production review, which is precisely what the revised process was supposed to avoid. The OIG's response to the DAG's memorandum can be found in Appendix IV.

As of June 15, 2015, the FBI still had not provided complete responses to any of these requests. The FBI has produced the outstanding documents and materials the OIG requested in four of the five reviews, but with some redactions of information that the FBI believes the OIG is not legally entitled to, such as grand jury and Title III electronic surveillance information. The FBI has told us that it is working with the ODAG to determine if the OIG will be given access to the redacted information but, in the meantime, the OIG still does not have complete production in any of these instances.

Even with the FBI's repeated failure to comply with Section 218, the Department's budget request seeks to have the provision removed from the FY 2016 appropriations law. The OIG was not provided with an opportunity by the Department to provide comments on its proposal to remove Section 218 prior to its budget's transmission to the President, as required by Section 6(f)(2) of the Inspector General Act. The OIG believes that the provisions within Section 218 have had a significant positive impact on our ability to obtain timely access to documents from Department components other than the FBI and should remain a part of the FY 2016 appropriations law. Additionally, removing the provision, in the face of the FBI's failure to comply with it, could lead the FBI to believe that its conduct has been sanctioned and could cause other Department components to conclude that it is acceptable to ignore the Appropriations Act and raise legal objections to the OIG's access to certain records despite the plain language of the IG Act. Further, while the Department stated in its budget request that it intended to work to develop statutory language to address this issue, we note that in the 4 months since the Department's budget request was released the Department has made no attempt to provide the OIG with a legislative proposal that the Department believes will resolve the legal issue. The OIG stands ready to work with the Department on any such proposal.

IMPACT OF SECTION 218 ON DOJ OIG ACCESS TO DOCUMENTS

We appreciate the strong bipartisan support we have received from Congress in trying to address these serious issues. Section 218 of the Fiscal Year 2015 Appropriations law has had a positive impact on our ability to get timely access to records with some Department components. In our meetings with Department components to make them aware of the provision, some component officials indicated their intention to comply with the provision. Moreover, as described above, shortly after its enactment, the DEA promptly produced to the OIG documents in two OIG reviews that the DEA had previously objected to providing to the OIG.

However, despite Congress's reaffirmation in Section 218 of its support for the OIG's access to records in the Department's possession, the FBI continues to take the position that the OIG is not legally entitled to review certain records in the FBI's possession, even if those materials are relevant to an OIG audit or review. As described above, the OIG has sent four letters to the Congress, as required by Section 218, to report the FBI's failure to comply with Section 218 by refusing to provide the OIG, for reasons unrelated to any express limitation in Section 6(a) of the IG Act, with timely access to certain records, thereby impeding those reviews. As set forth in the OIG's April 13, 2015 letter, the FBI thereafter provided some records, but others continued to be withheld. The FBI has told us that it is working with the Office of the Deputy Attorney General to determine if the OIG will be given access to the redacted information but, as of June 15, 2015, the OIG still does not have complete production in any of these instances. Hence, while Section 218 has had a positive impact in some cases, the OIG continues to face significant issues and challenges in obtaining timely access to records from the FBI.

The revised procedure described by the DAG in her April 23, 2015, letter to the OIG still requires the OIG to ask the Attorney General or Deputy Attorney General for permission to obtain these categories of materials, and it still requires the Attorney General or the Deputy Attorney General to make a finding, before granting the OIG permission to access such records, that the specific reviews will assist them in the performance of their duties. However, no such permission is necessary under the IG Act and such a requirement is inconsistent with Section 218. Requiring an OIG to obtain permission from agency leadership in order to review agency documents is fundamentally inconsistent with the independence of the OIG, as recognized in Section 218.

CONCLUSION

We appreciate the support of Members of Congress for the OIG's authority to receive timely and complete access to agency documents by including Section 218 in the Fiscal Year 2015 Appropriations law. DOJ officials have generally indicated their intent to comply with the provision, and we have already observed improvements in the process of receiving complete responses to document requests from certain Department components.

Yet, despite Congress's efforts, the fundamental problem remains. More than a year after the Department requested an opinion from the OLC, we are still waiting for that opinion even though, in our view, this matter is straightforward and could have been resolved by the Department's leadership without even requesting an opinion from OLC. It is extremely important that this issue be resolved promptly because the existing process at the Department, which as previously described essentially assumes the correctness of the FBI's legal position, undermines our independence and impairs the timeliness of our reviews. Should the OLC opinion not uphold the OIG's right to timely, complete access to documents, it will at least provide a starting point from which the OIG could work with Congress to develop a legislative remedy. The Department previously has stated that it would work with the OIG to make necessary legislative changes to resolve issues that may arise out of an OLC opinion, and we hope to engage with the Department and Congress should it be necessary to achieve this.



U.S. Department of Justice

Office of the Inspector General

March 4, 2015

The Honorable Hal Rogers
Chairman
Committee on Appropriations
U.S. House of Representatives
Rayburn House Office Building
Washington D.C. 20515

The Honorable Nita Lowey
Ranking Member
Committee on Appropriations
U.S. House of Representatives
Rayburn House Office Building
Washington D.C. 20515

The Honorable Thad Cochran
Chairman
Committee on Appropriations
United States Senate
Hart Senate Office Building
Washington D.C. 20510

The Honorable Barbara Mikulski
Vice Chairwoman
Committee on Appropriations
United States Senate
Hart Senate Office Building
Washington D.C. 20510

Dear Chairmen, Vice Chairwoman, and Ranking Member:

This letter is to report to the Committees on Appropriations, as required by Section 218 of the Department of Justice Appropriations Act, 2015, Pub. L. No. 113-235, § 218, 128 Stat. 2130, 2200 (2014), that the Federal Bureau of Investigation (FBI) has failed, for reasons unrelated to any express limitation in Section 6(a) of the Inspector General Act (IG Act) to provide the Department of Justice Office of the Inspector General (OIG) with timely access to certain records. The OIG requested these records in connection with a review of the FBI's security clearance adjudication process.

As you are aware, Section 218 provides:

No funds provided in this Act shall be used to deny the Inspector General of the Department of Justice timely access to all records, documents, and other materials in the custody of the Department or to prevent or impede the Inspector General's access to such records, documents and other materials, unless in accordance with an express limitation of section 6(a) of the Inspector General Act, as amended, consistent with the plain language of the Inspector General Act, as amended. The Inspector General of the Department of Justice shall report to the Committees on Appropriations within five calendar days of any failures to comply with this requirement.

Id.

The unfulfilled document request that causes the OIG to make this report was sent to the FBI on September 8, 2014. Since that time, the FBI has made partial productions in this matter, and there have been multiple discussions between the OIG and the FBI about this request, resulting in the OIG setting a final deadline for production of all material of January 30, 2015.

The FBI recently made an additional production, but informed us that additional time is still required for completing production. The reason for the FBI's inability to meet the deadline set by the OIG for production is the FBI's desire to continue its review of e-mails requested by the OIG to determine whether they contain any information which the FBI maintains the OIG is not legally entitled to access, such as grand jury, Title III electronic surveillance, and Fair Credit Reporting Act information. It has been the FBI's position in other cases that, for any such information it identified, it would need the authorization of the Attorney General or Deputy Attorney General in order to produce the information to the OIG. However, Section 6(a) of the IG Act does not contain an express limitation of the OIG's access to these categories of information. Moreover, even if the Department's leadership were to give such authorization, a process allowing the OIG access to records of the Department only when granted permission by the Department's leadership is inconsistent with Section 6(a) of the IG Act, OIG independence, and Section 218 of the Appropriations Act.

Section 218 of the Appropriations Act does not permit the use of funds appropriated to the Department of Justice to deny the OIG access to records in the custody of the Department unless in accordance with an express limitation of Section 6(a) of the IG Act. The IG Act, Section 6(a), does not expressly or otherwise limit the OIG's access to the categories of information the FBI maintains it must review before providing records to the OIG. For this reason, we are reporting this matter to the Appropriations Committees in conformity with Section 218.

We will continue to work to resolve this matter, and will keep the Committees apprised of our progress. If you have any questions, please feel free to contact me or Chief of Staff Jay Lerner at (202) 514-3435.

Sincerely,



Michael E. Horowitz
Inspector General

cc: The Honorable John Culberson
Chairman, Subcommittee on Commerce, Justice, Science and
Related Agencies
Committee on Appropriations
U.S. House of Representatives

The Honorable Chaka Fattah
Ranking Member, Subcommittee on Commerce, Justice, Science and
Related Agencies
Committee on Appropriations
U.S. House of Representatives

The Honorable Richard Shelby
Chairman, Subcommittee on Commerce, Justice, Science and
Related Agencies
Committee on Appropriations
United States Senate

The Honorable Jason Chaffetz
Chairman, Committee on Oversight and
Government Reform
U.S. House of Representatives

The Honorable Elijah Cummings
Ranking Member, Committee on Oversight and
Government Reform
U.S. House of Representatives

The Honorable Ron Johnson
Chairman, Committee on Homeland Security and
Governmental Affairs
United States Senate

The Honorable Thomas Carper
Ranking Member, Committee on Homeland Security and
Governmental Affairs
United States Senate

The Honorable Bob Goodlatte
Chairman, Committee on the Judiciary
U.S. House of Representatives

The Honorable John Conyers, Jr.
Ranking Member, Committee on the Judiciary

U.S. House of Representatives

The Honorable Charles Grassley
Chairman, Committee on the Judiciary
United States Senate

The Honorable Patrick Leahy
Ranking Member, Committee on the Judiciary
United States Senate



U.S. Department of Justice

Office of the Inspector General

February 25, 2015

The Honorable Hal Rogers
Chairman
Committee on Appropriations
U.S. House of Representatives
Rayburn House Office Building
Washington D.C. 20515

The Honorable Nita Lowey
Ranking Member
Committee on Appropriations
U.S. House of Representatives
Rayburn House Office Building
Washington D.C. 20515

The Honorable Thad Cochran
Chairman
Committee on Appropriations
United States Senate
Hart Senate Office Building
Washington D.C. 20510

The Honorable Barbara Mikulski
Vice Chairwoman
Committee on Appropriations
United States Senate
Hart Senate Office Building
Washington D.C. 20510

Dear Chairmen, Vice Chairwoman, and Ranking Member:

This letter is to report to the Committees on Appropriations, as required by Section 218 of the Department of Justice Appropriations Act, 2015, Pub. L. No. 113-235, § 218, 128 Stat. 2130, 2200 (2014), that the Federal Bureau of Investigation (FBI) has failed, for reasons unrelated to any express limitation in Section 6(a) of the Inspector General Act (IG Act), to provide the Department of Justice Office of the Inspector General (OIG) with timely access to certain records. The OIG requested these records in connection with its pending review of the FBI's use of information derived from the National Security Agency's collection of telephony metadata obtained from certain telecommunications service providers under Section 215 of the Patriot Act. The timeliness of production is particularly important given that Section 215 of the Patriot Act is set to expire in June of this year.

As you are aware, Section 218 of the Appropriations Act provides:

No funds provided in this Act shall be used to deny the Inspector General of the Department of Justice timely access to all records, documents, and other materials in the custody of the Department or to prevent or impede the Inspector General's access to such records, documents and other

materials, unless in accordance with an express limitation of section 6(a) of the Inspector General Act, as amended, consistent with the plain language of the Inspector General Act, as amended. The Inspector General of the Department of Justice shall report to the Committees on Appropriations within five calendar days of any failures to comply with this requirement.

Id.

The unfulfilled document request that causes the OIG to make this report was sent to the FBI on October 10, 2014. Since that time, the FBI has made partial productions in this matter, and there have been multiple discussions between the OIG and the FBI about this request, resulting in the OIG setting a deadline for production of all material of January 23, 2015.

On January 27, 2015, the FBI informed the OIG that it would need an extension of time for completing production, but was unable to provide an estimate of how much additional time was needed. More recently, the FBI informed the OIG that it will take several additional weeks to complete production of a portion of the outstanding material and potentially longer to complete the balance. One of the reasons for the FBI's inability to meet the deadline set by the OIG for production is the FBI's desire to continue its review of e-mails requested by the OIG to determine whether they contain any information that the FBI maintains the OIG is not legally entitled to access, such as grand jury, Title III electronic surveillance, and Fair Credit Reporting Act information. It has been the FBI's position in other cases that, for any such information it identified, it would need the authorization of the Attorney General or Deputy Attorney General in order to produce the information to the OIG. However, Section 6(a) of the IG Act does not contain an express limitation of the OIG's access to these categories of information. Moreover, even if the Department's leadership were to give such authorization, a process allowing the OIG access to records of the Department only when granted permission by the Department's leadership is inconsistent with Section 6(a) of the IG Act, OIG independence, and Section 218 of the Appropriations Act.

Section 218 of the Appropriations Act does not permit the use of funds appropriated to the Department of Justice to deny the OIG access to records in the custody of the Department unless in accordance with an express limitation of Section 6(a) of the IG Act. The IG Act, Section 6(a), does not expressly or otherwise limit the OIG's access to the categories of information the FBI maintains it must review before providing records to the OIG. For this reason, we are reporting this matter to the Appropriations Committees in conformity with Section 218 of the Appropriations Act.

We will continue to work to resolve this matter, and will keep the Committees apprised of our progress. If you have any questions, please feel free to contact me or Chief of Staff Jay Lerner at (202) 514-3435.

Sincerely,



Michael E. Horowitz
Inspector General

cc: The Honorable John Culberson
Chairman, Subcommittee on Commerce, Justice, Science, and
Related Agencies
Committee on Appropriations
United States House of Representatives

The Honorable Chaka Fattah
Ranking Member, Subcommittee on Commerce, Justice, Science, and
Related Agencies
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United States Senate

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United States House of Representatives

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Ranking Member, Committee on Oversight and
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United States House of Representatives

The Honorable Ron Johnson
Chairman, Committee on Homeland Security and
Governmental Affairs
United States Senate

The Honorable Thomas Carper
Ranking Member, Committee on Homeland Security and
Governmental Affairs
United States Senate

The Honorable Bob Goodlatte
Chairman, Committee on the Judiciary
United States House of Representatives

The Honorable John Conyers, Jr.
Ranking Member, Committee on the Judiciary
United States House of Representatives

The Honorable Charles Grassley
Chairman, Committee on the Judiciary
United States Senate

The Honorable Patrick Leahy
Ranking Member, Committee on the Judiciary
United States Senate



U.S. Department of Justice

Office of the Inspector General

February 19, 2015

The Honorable Hal Rogers
Chairman
Committee on Appropriations
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Washington D.C. 20515

The Honorable Nita Lowey
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The Honorable Thad Cochran
Chairman
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Washington D.C. 20510

The Honorable Barbara Mikulski
Vice Chairwoman
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Washington D.C. 20510

Dear Chairmen, Vice Chairwoman, and Ranking Member:

This letter is to report to the Committees on Appropriations, as required by Section 218 of the Department of Justice Appropriations Act, 2015, Pub. L. No. 113-235, § 218, 128 Stat. 2130, 2200 (2014), that the Federal Bureau of Investigation (FBI) has failed, for reasons unrelated to any express limitation in Section 6(a) of the Inspector General Act (IG Act), to provide the Department of Justice Office of the Inspector General (OIG) with timely access to certain records. The OIG requested these records in connection with an ongoing review of the Drug Enforcement Administration's use of administrative subpoenas to obtain and utilize certain bulk data collections.

As you are aware, Section 218 provides:

No funds provided in this Act shall be used to deny the Inspector General of the Department of Justice timely access to all records, documents, and other materials in the custody of the Department or to prevent or impede the Inspector General's access to such records, documents and other materials, unless in accordance with an express limitation of section 6(a) of the Inspector General Act, as amended, consistent with the plain language of the Inspector General Act, as amended. The Inspector General of the Department of Justice shall report to the Committees on Appropriations within five calendar days of any failures to comply with this requirement.

Id.

The unfulfilled information request that causes the OIG to make this report was sent to the FBI on November 20, 2014. Since that time, the FBI has made a partial production in this matter, and there have been multiple discussions between the OIG and the FBI about this request, resulting in the OIG setting a final deadline for production of all material of February 13, 2015.

On February 12, 2015, the FBI informed the OIG that it would not be able to produce the remaining records by the deadline. The FBI gave an estimate of 1-2 weeks to complete the production but did not commit to do so by a date certain. The reason for the FBI's inability to meet the prior deadline set by the OIG for production is the FBI's desire to continue its review of e-mails requested by the OIG to determine whether they contain any information which the FBI maintains the OIG is not legally entitled to access, such as grand jury, Title III electronic surveillance, and Fair Credit Reporting Act information. It has been the FBI's position in other cases that, for any such information it identified, it would need the authorization of the Attorney General or Deputy Attorney General in order to produce the information to the OIG. However, Section 6(a) of the IG Act does not contain an express limitation of the OIG's access to these categories of information. Moreover, even if the Department's leadership were to give such authorization, a process allowing the OIG access to records of the Department only when granted permission by the Department's leadership is inconsistent with Section 6(a) of the IG Act, OIG independence, and Section 218 of the Appropriations Act.

Section 218 of the Appropriations Act does not permit the use of funds appropriated to the Department of Justice to deny the OIG access to records in the custody of the Department unless in accordance with an express limitation of Section 6(a) of the IG Act. The IG Act, Section 6(a), does not expressly or otherwise limit the OIG's access to the categories of information the FBI maintains it must review before providing records to the OIG. For this reason, we are reporting this matter to the Appropriations Committees in conformity with Section 218.

We will continue to work to resolve this matter, and will keep the Committees apprised of our progress. If you have any questions, please feel free to contact me or Chief of Staff Jay Lerner at (202) 514-3435.

Sincerely,



Michael E. Horowitz
Inspector General

cc: The Honorable John Culberson
Chairman, Subcommittee on Commerce, Justice, Science and
Related Agencies
Committee on Appropriations
U.S. House of Representatives

The Honorable Chaka Fattah
Ranking Member, Subcommittee on Commerce, Justice, Science and
Related Agencies
Committee on Appropriations
U.S. House of Representatives

The Honorable Richard Shelby
Chairman, Subcommittee on Commerce, Justice, Science and
Related Agencies
Committee on Appropriations
United States Senate

The Honorable Jason Chaffetz
Chairman, Committee on Oversight and
Government Reform
U.S. House of Representatives

The Honorable Elijah Cummings
Ranking Member, Committee on Oversight and
Government Reform
U.S. House of Representatives

The Honorable Ron Johnson
Chairman, Committee on Homeland Security and
Governmental Affairs
United States Senate

The Honorable Thomas Carper
Ranking Member, Committee on Homeland Security and
Governmental Affairs
United States Senate

The Honorable Bob Goodlatte
Chairman, Committee on the Judiciary
U.S. House of Representatives

The Honorable John Conyers, Jr.
Ranking Member, Committee on the Judiciary
U.S. House of Representatives

APPENDIX I

The Honorable Charles Grassley
Chairman, Committee on the Judiciary
United States Senate

The Honorable Patrick Leahy
Ranking Member, Committee on the Judiciary
United States Senate



U.S. Department of Justice

Office of the Inspector General

February 3, 2015

The Honorable Harold Rogers
Chairman
Committee on Appropriations
U.S. House of Representatives
H-305, The Capitol
Washington D.C. 20515

The Honorable Nita Lowey
Ranking Member
Committee on Appropriations
U.S. House of Representatives
1016 Longworth House Office Building
Washington D.C. 20515

The Honorable Thad Cochran
Chairman
Committee on Appropriations
United States Senate
S128, The Capitol
Washington D.C. 20510

The Honorable Barbara Mikulski
Vice Chairwoman
Committee on Appropriations
United States Senate
142 Dirksen Senate Office Building
Washington D.C. 20510

Dear Chairmen, Vice Chairwoman, and Ranking Member:

This letter is to report to the Committees on Appropriations, as required by Section 218 of the Department of Justice Appropriations Act, 2015, Pub. L. No. 113-235, § 218, 128 Stat. 2130, 2200 (2014), that the Federal Bureau of Investigation (FBI) has failed, for reasons unrelated to any express limitation in Section 6(a) of the Inspector General Act (IG Act) to provide the Department of Justice Office of the Inspector General (OIG) with timely access to certain records. The OIG requested these records in connection with two investigations being conducted by the OIG under the Department's Whistleblower Protection Regulations for FBI Employees, 28 C.F.R. pt. 27.

As you are aware, Section 218 provides:

No funds provided in this Act shall be used to deny the Inspector General of the Department of Justice timely access to all records, documents, and other materials in the custody of the Department or to prevent or impede the Inspector General's access to such records, documents and other materials, unless in accordance with an express limitation of section 6(a) of the Inspector General Act, as amended, consistent with the plain language of the Inspector General Act, as amended. The Inspector General of the Department of Justice shall report to the Committees on Appropriations within five calendar days of any failures to comply with this requirement.

Id.

The unfulfilled document requests that cause the OIG to make this report were sent to the FBI on September 26, 2014, and October 29, 2014, respectively. Since that time, the FBI has made partial productions in both matters, and there have been multiple discussions between the OIG and the FBI about these requests, resulting in the OIG setting a final deadline for production of all material of February 2, 2015.

On February 2, 2015, the FBI informed the OIG that it would not be able to produce the remaining records by the deadline and that it would need until later this week in one of the whistleblower investigations to do so, and sometime later next week in the second whistleblower investigation to do so. The primary reason for the FBI's inability to meet the deadline set by the OIG for production is the FBI's desire to continue its review of e-mails requested by the OIG to determine whether they contain any information which the FBI maintains the OIG is not legally entitled to access, such as grand jury, Title III electronic surveillance, and Fair Credit Reporting Act information. The FBI further informed the OIG that, for any such information it identified, it would need the authorization of the Attorney General or Deputy Attorney General in order to produce the information to the OIG. However, Section 6(a) of the IG Act does not contain an express limitation of the OIG's access to these categories of information. Moreover, even if the Department's leadership were to give such authorization, which it has indicated it would do, a process allowing the OIG access to records of the Department only when granted permission by the Department's leadership is inconsistent with the OIG's independence, as reflected in Section 6(a) of the IG Act and Section 218 of the Appropriations Act.

Section 218 of the Appropriations Act does not permit the use of funds appropriated to the Department of Justice to deny the OIG access to records in the custody of the Department unless in accordance with an express limitation of Section 6(a) of the IG Act. The IG Act, Section 6(a), does not expressly or otherwise limit the OIG's access to the categories of information the FBI maintains it must review before providing records to the OIG. For this reason, we are reporting this matter to the Appropriations Committees in conformity with Section 218.

We will continue to work to resolve this matter, and will keep the Committees apprised of our progress. If you have any questions, please feel free to contact me or Chief of Staff Jay Lerner at (202) 514-3435.

Sincerely,

A handwritten signature in blue ink, appearing to read "Michael E. Horowitz".

Michael E. Horowitz
Inspector General

APPENDIX I

cc: The Honorable Jason Chaffetz
Chairman, Committee on Oversight and
Government Reform
U.S. House of Representatives

The Honorable Elijah Cummings
Ranking Member, Committee on Oversight and
Government Reform
U.S. House of Representatives

The Honorable Ron Johnson
Chairman, Committee on Homeland Security and
Governmental Affairs
United States Senate

The Honorable Thomas Carper
Ranking Member, Committee on Homeland Security and
Governmental Affairs
United States Senate

The Honorable Bob Goodlatte
Chairman, Committee on the Judiciary
U.S. House of Representatives

The Honorable John Conyers, Jr.
Ranking Member, Committee on the Judiciary
U.S. House of Representatives

The Honorable Charles Grassley
Chairman, Committee on the Judiciary
United States Senate

The Honorable Patrick Leahy
Ranking Member, Committee on the Judiciary
United States Senate

The Honorable John Culberson
Chairman, Subcommittee on Commerce, Justice, Science and
Related Agencies
Committee on Appropriations
U.S. House of Representatives

The Honorable Chaka Fattah
Ranking Member, Subcommittee on Commerce, Justice, Science
and Related Agencies
Committee on Appropriations
U.S. House of Representatives

APPENDIX I

The Honorable Richard Shelby
Chairman, Subcommittee on Commerce, Justice, Science,
and Related Agencies
Committee on Appropriations
United States Senate



U.S. Department of Justice

Office of the Inspector General

April 13, 2015

The Honorable Hal Rogers
Chairman
Committee on Appropriations
U.S. House of Representatives
Rayburn House Office Building
Washington D.C. 20515

The Honorable John Culberson
Chairman
Committee on Appropriations
Subcommittee on Commerce, Justice,
Science, and Related Agencies
U.S. House of Representatives
Rayburn House Office Building
Washington D.C. 20515

The Honorable Thad Cochran
Chairman
Committee on Appropriations
United States Senate
Hart Senate Office Building
Washington D.C. 20510

The Honorable Richard Shelby
Chairman
Committee on Appropriations
Subcommittee on Commerce, Justice,
Science, and Related Agencies
United States Senate
Hart Senate Office Building
Washington D.C. 20510

The Honorable Nita Lowey
Ranking Member
Committee on Appropriations
U.S. House of Representatives
Rayburn House Office Building
Washington D.C. 20515

The Honorable Chaka Fattah
Ranking Member
Committee on Appropriations
Subcommittee on Commerce, Justice,
Science, and Related Agencies
U.S. House of Representatives
Rayburn House Office Building
Washington D.C. 20515

The Honorable Barbara Mikulski
Vice Chairwoman
Committee on Appropriations
Subcommittee on Commerce,
Justice, Science, and Related
Agencies
United States Senate
Hart Senate Office Building
Washington D.C. 20510

Dear Chairmen, Vice Chairwoman, and Ranking Members:

This letter is to respond to several inquiries we have received from Congressional staffs regarding the status of document production by the Federal Bureau of Investigation (FBI) to the Office of the Inspector General (OIG) in those matters that have been the subject of reports by the OIG

pursuant to Section 218 of the Department of Justice Appropriations Act, 2015, Pub. L. No. 113-235, § 218, 128 Stat. 2130, 2200 (2014). The reports were made by letters to the Committees on Appropriations dated February 3, February 19, February 25, and March 4, 2015.

As described below, OIG document requests remain outstanding in every one of the reviews and investigations that were the subject of those letters, even though more than two months has passed since our first Section 218 letter and more than one month has passed since our three other Section 218 letters. Of equal concern, as further discussed below, is that in one of the reviews the FBI has raised a new legal objection, involving “CHS [confidential human source] identifying information” and “bulk sensitive counterintelligence information,” to providing documents to the OIG.

Our February 3 letter described unfulfilled document requests in two FBI whistleblower retaliation investigations being conducted by the OIG under the Department’s Whistleblower Protection Regulations for FBI Employees, 28 C.F.R. pt. 27. The document requests were originally sent to the FBI on September 26, 2014, and October 29, 2014, respectively. As we noted in our letter, the primary reason for the FBI’s inability to meet the deadline set by the OIG for production was the FBI’s desire to continue its review of e-mails to determine whether they contain any information which the FBI maintains the OIG is not legally entitled to access, such as grand jury, Title III electronic surveillance, and Fair Credit Reporting Act information. As we further noted, the FBI represented that it anticipated completing production to the OIG in mid-February. While the FBI did make productions in both matters by mid-February, we understand that the FBI continues to withhold attachments to over 100 e-mails on the ground that they contain information that the OIG is not legally entitled to access without the authorization of the Attorney General or Deputy Attorney General. The OIG has told the FBI that if the FBI believes it requires approval from the Attorney General or the Deputy Attorney General to release a particular document then it should seek such approval without waiting for further input from the OIG. The FBI has not communicated a date on which the OIG will either receive these documents or a final answer on whether they will be produced.

Our February 19 letter described unfulfilled FBI document requests in our review of the Drug Enforcement Administration’s (DEA) use of administrative subpoenas to obtain and utilize certain bulk data collections. This request was sent to the FBI on November 20, 2014. As we described in our letter, the reason for the FBI’s inability to meet the deadline set by the OIG for production was the FBI’s desire to continue its review of e-mails to determine whether they contain any information which the FBI maintains the OIG is not legally entitled to access, such as grand jury, Title III electronic surveillance, and Fair Credit Reporting Act information. As we further described, the FBI estimated it would take one to two weeks to complete the

production but did not commit to do so by a date certain. Although the FBI transmitted most of the responsive documents in this matter to the OIG by February 27, the FBI is continuing to withhold responsive attachments to a small number of e-mails on the ground that they contain grand jury information that the OIG is not legally entitled to access without the authorization of the Attorney General or Deputy Attorney General. The FBI has not communicated a date on which the OIG will receive these documents or a final answer on whether they will be produced.

Our February 25 letter described unfulfilled document requests in our pending review of the FBI's use of information derived from the National Security Agency's collection of telephony metadata obtained from certain telecommunications service providers under Section 215 of the Patriot Act. This request was sent to the FBI on October 10, 2014. As we described in our letter, one of the reasons for the FBI's inability to meet the deadline set by the OIG for production was the FBI's desire to continue its review of e-mails to determine whether they contain any information which the FBI maintains the OIG is not legally entitled to access, such as grand jury, Title III electronic surveillance, and Fair Credit Reporting Act information. As we further described, the FBI estimated it would take several additional weeks to complete a portion of the outstanding material and potentially longer to complete the balance. While the OIG has received additional productions from the FBI since our February 25 letter, we understand that a substantial volume of material responsive to our request has still not been produced by the FBI, and the FBI has not committed to a date certain for the completion of this production.

Our March 4 letter described unfulfilled document requests in our review of the FBI's security clearance adjudication process. This request was sent to the FBI on September 8, 2014. As we described in our letter, the reason for the FBI's inability to meet the deadline set by the OIG for production was the FBI's desire to continue its review of e-mails to determine whether they contain any information which the FBI maintains the OIG is not legally entitled to access, such as grand jury, Title III electronic surveillance, and Fair Credit Reporting Act information. As we further described, the FBI did not commit to complete production to the OIG by a date certain. While the FBI has recently produced most of the responsive documents to the OIG, we understand the FBI has withheld or redacted approximately 80 documents on the ground that they contain information that the OIG is not legally entitled to access without the authorization of the Attorney General or Deputy Attorney General. Significantly, the FBI has identified new categories of documents to be withheld from the OIG that the Congress has not recognized as appropriate under the Inspector General Act or Section 218, consisting of what it has characterized as "CHS [confidential human source] identifying information" and "bulk sensitive counterintelligence information." The OIG is extremely concerned about the FBI's legal position limiting our access to these records, which has no basis under Section 6(a) of the Inspector General Act. In particular, this new FBI

legal claim regarding these types of documents could have wide-ranging and important implications for the OIG's ability to continue to conduct effective oversight of the FBI's national security authorities.

We are approaching the one year anniversary of the Deputy Attorney General's request in May 2014 to the Office of Legal Counsel for an opinion on these matters, yet that opinion remains outstanding and the OIG has been given no timeline for the issuance of the completed opinion. Although the OIG has been told on occasion over the past year that the opinion is a priority for the Department, the length of time that has now passed suggests otherwise. Instead, the status quo continues, with the FBI repeatedly ignoring the mandate of Section 218 and the Department failing to issue an opinion that would resolve the matter. For the FBI, it is as if Section 218 was never enacted. The result is that the OIG continues to be prevented from getting complete and timely access to records in the Department's possession. As our recent report examining the handling by Department law enforcement components of employee sexual harassment and sexual misconduct allegations demonstrated, allowing components to impede the OIG's work by raising baseless legal objections, as the FBI and DEA did in that review, has real and serious consequences. The American public deserves and expects an OIG that is able to conduct rigorous oversight of the Department's activities. Unfortunately, our ability to conduct that oversight is being undercut every day that goes by without a resolution of this dispute.

We appreciate the Committees' continued bipartisan support of our work and our effort to gain access to records that we are entitled to receive under the Inspector General Act. If you have any questions, please feel free to contact me or Chief of Staff Jay Lerner at (202) 514-3435.

Sincerely,



Michael E. Horowitz
Inspector General

cc: The Honorable Jason Chaffetz
Chairman, Committee on Oversight and
Government Reform
United States House of Representatives

The Honorable Elijah Cummings
Ranking Member, Committee on Oversight and
Government Reform
United States House of Representatives

The Honorable Ron Johnson
Chairman, Committee on Homeland Security and
Governmental Affairs
United States Senate

The Honorable Thomas Carper
Ranking Member, Committee on Homeland Security and
Governmental Affairs
United States Senate

The Honorable Bob Goodlatte
Chairman, Committee on the Judiciary
United States House of Representatives

The Honorable John Conyers, Jr.
Ranking Member, Committee on the Judiciary
United States House of Representatives

The Honorable Charles Grassley
Chairman, Committee on the Judiciary
United States Senate

The Honorable Patrick Leahy
Ranking Member, Committee on the Judiciary
United States Senate



Office of the Deputy Attorney General
Washington, D.C. 20530

April 23, 2015

The Honorable Michael E. Horowitz
Inspector General
U.S. Department of Justice
Washington, DC 20530

Dear Mr. Horowitz:

The Office of the Inspector General plays a critical role in ensuring that the Department of Justice is run efficiently, effectively, and with integrity. Indeed, your office's audits, investigations, and reviews directly assist me in supervising the Department's components and in enforcing federal law.

For this reason, I am committed to ensuring that OIG receives, in a timely manner, documents and information that are necessary to your reviews but subject to disclosure restrictions under federal statutes or rules. As you can see from the attached memorandum, after consulting with the Office of Legal Counsel, I am implementing a new procedure that will allow Department components to disclose information protected by the Federal Wiretap Act, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. §§ 2510-2522 (2012) (Title III), Federal Rule of Criminal Procedure 6(e) (Rule 6(e)), or section 1681u of the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. (2012) (FCRA) to OIG personnel in connection with OIG investigations or reviews that the Department determines fall under the legal guidelines set forth below.

- A. Title III: *Title III information relevant to an OIG investigation or review that primarily concerns the conduct of the Department's criminal law enforcement investigations, operations, programs, policies, or practices.*

Section 2517 of Title 18, United States Code, governs an investigative or law enforcement officer's disclosure and use of Title III information. It provides in relevant part:

Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

The Honorable Michael E. Horowitz
Page 2

18 U.S.C. § 2517(1). Section 2510(7) defines “[i]nvestigative or law enforcement officer” as “any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses.”

As Acting Deputy Attorney General, I am an “investigative or law enforcement officer” as defined in 18 U.S.C. § 2510(7), and my official duties as such include supervisory responsibilities for the Department’s criminal law enforcement operations and investigations, programs, policies, and practices. OLC has previously concluded that OIG agents qualify as “investigative officers” within the meaning of this provision. *Whether Agents of the Department of Justice Office of Inspector General are ‘Investigative or Law Enforcement Officers’ Within the Meaning of 18 U.S.C. § 2510(7)*, 14 Op. O.L.C. 107, 109 (1990). Moreover, section 2517(1) provides that Title III information may be disclosed in connection with the official duties of either the officer making the disclosure or the officer receiving the disclosure. Section 2517(1) permits me to disclose Title III information to OIG agents to the extent appropriate to the proper performance of my supervisory responsibilities regarding criminal law enforcement or to the proper performance of the criminal investigative responsibilities of the OIG agents receiving the disclosure.

One of Congress’s principal purposes in establishing Inspectors General, including the Department’s OIG, was to “provide a means for keeping the head of the establishment . . . fully and currently informed about the problems and deficiencies relating to the administration of [the establishment’s] programs and operations” and to “recommend corrective action.” 5 U.S.C. App. § 2(3). Consistent with Congress’s expectation, OIG’s reports of its investigations and reviews have historically provided the Attorney General and Deputy Attorney General with critical advice, information, and insights in connection with the exercise of their supervisory responsibilities over the Department’s programs and operations. This is particularly true with respect to investigations and reviews where OIG is investigating or evaluating a particular criminal law enforcement operation or investigation, or is performing a programmatic review concerning the conduct of the Department’s criminal law enforcement programs, policies, or practices. Consequently, providing OIG with access to Title III information for its use in connection with such reviews generally will assist me in the performance of my criminal law enforcement supervisory responsibilities.¹

¹ This would not include OIG investigations and reviews that have only an attenuated connection to the conduct of the Department’s criminal law enforcement activities, such as a routine financial audit of a Department component that engages in criminal law enforcement.

The Honorable Michael E. Horowitz
Page 3

B. Rule 6(e) *Grand jury materials relevant to an OIG investigation or review that primarily concerns the conduct of the Department's criminal law enforcement investigations, operations, programs, policies, or practices.*

Federal Rule of Criminal Procedure 6(e)(3)(A)(ii) authorizes the disclosure of grand jury information to "any government personnel . . . that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law." As Acting Deputy Attorney General, I am an "attorney for the government" under Rule 6(e)(3)(A)(ii), and my "duty to enforce criminal law" includes supervisory responsibilities for the Department's programs, policies, and practices related to the enforcement of federal criminal law. Rule 6(e)(3)(A)(ii) therefore permits me to disclose grand jury information to any government personnel, including OIG personnel, that I consider necessary to assist me in performing my supervisory responsibilities regarding the Department's criminal law enforcement efforts. I may not, however, disclose information in order to assist in developing a civil case, including a civil enforcement or recovery effort against a particular third party, such as a grant recipient. *Cf. United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983).

As noted above, consistent with Congress's expectation, OIG's reports of its investigations and reviews have historically provided the Attorney General and Deputy Attorney General with critical advice, information, and insights in connection with the exercise of their supervisory responsibilities over the Department's criminal law enforcement programs, policies, and practices. Consequently, I have determined that OIG personnel conducting investigations or reviews of a particular Department criminal law enforcement investigation or operation, or programmatic reviews concerning the conduct of the Department's criminal law enforcement programs, policies, or practices, are generally necessary to assist me in supervising those investigations, operations, programs, policies, and practices.²

C. FCRA: *Section 1681u information relevant to an OIG investigation or review concerning the conduct (including the approval) of foreign counterintelligence investigations.*

Section 1681u of Title 15, United States Code, governs the disclosure and use of consumer information obtained pursuant to one type of national security letter. As relevant, it provides:

The Federal Bureau of Investigation may not disseminate information obtained pursuant to this section outside of the Federal Bureau of Investigation, except to other Federal agencies as may be necessary for the approval or conduct of a foreign counterintelligence

² This would not include OIG investigations and reviews that are primarily related to civil litigation, including civil enforcement or recovery efforts, even if the investigation or review potentially also relates to conduct that might violate federal criminal law.

The Honorable Michael E. Horowitz
Page 4

investigation, or, where the information concerns a person subject to the Uniform Code of Military Justice, to appropriate investigative authorities within the military department concerned as may be necessary for the conduct of a joint foreign counterintelligence investigation.

15 U.S.C. § 1681u(f). As Acting Deputy Attorney General, I supervise the approval and conduct of foreign counterintelligence investigations. Section 1681u(f) therefore permits the Federal Bureau of Investigation (FBI) to disclose covered information to agencies outside of the FBI as may be necessary for the discharge of my foreign counterintelligence supervisory responsibilities.

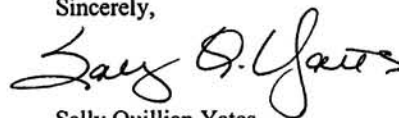
For reasons similar to those discussed above, consistent with Congress's expectation, OIG reviews concerning the conduct (including the approval) of foreign counterintelligence investigations will generally inform my decisionmaking concerning the supervision of foreign counterintelligence investigations. Consequently, providing OIG with access to FCRA information in connection with such reviews is generally necessary to the approval or conduct of such investigations.³

* * *

OIG may inform the Office of the Deputy Attorney General (ODAG) at any time, including at the initiation of a new investigation or review, that it believes a specific investigation or review may require access to information falling under Title III, Rule 6(e), or FCRA. ODAG will then determine whether the investigation or review meets the legal criteria set forth above. I have instructed all components and agencies that, once ODAG determines that an investigation or review so qualifies, OIG is to receive Title III, Rule 6(e) and/or FCRA information promptly.

I am confident that these new policies and procedures will expedite your office's access to documents and information necessary to fulfill its essential function. I look forward to our continued work together.

Sincerely,



Sally Quillian Yates
Acting Deputy Attorney General

³ This would not include OIG investigations and reviews that have only an attenuated connection to a foreign counterintelligence investigation, such as a routine financial audit of FBI components that conduct foreign counterintelligence activities.



U.S. Department of Justice

Office of the Deputy Attorney General

Washington, DC 20530

April 23, 2015

MEMORANDUM FOR HEADS OF DEPARTMENT COMPONENTS

FROM: Sally Quillian Yates *SQY*
Acting Deputy Attorney General

SUBJECT: Document Requests from the Office of the Inspector General
Concerning Information Protected by Federal Rules or Statutes

As you know, the Office of the Inspector General (OIG) serves an important function in ensuring that the Department of Justice is run efficiently, effectively, and with integrity. To enable OIG to complete its work, the Inspector General Act entitles OIG to broad access to the Department's information. *See* 5 U.S.C. App. § 6(a)(1). Consistent with that Act, OIG frequently requests documents from the Department's components, including its law enforcement agencies, to assist with audits, investigations, and reviews.

Responding to OIG's requests is of the highest priority. It is important that all Department components and agencies provide information to OIG in a prompt manner. To help achieve that goal, I have informed the Inspector General of a new procedure that will permit you to disclose information protected by the Federal Wiretap Act, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. §§ 2510-2522 (2012) (Title III), Federal Rule of Criminal Procedure 6(e) (Rule 6(e)), or section 1681u of the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. (2012) (FCRA) to OIG personnel in connection with qualifying OIG investigations or reviews.

The full analysis underlying this procedure is set forth in the attached letter to the Inspector General. In short, OIG will inform my office at any time, including at the initiation of a new investigation or review, that it believes a specific investigation or review may require access to information falling under Title III, Rule 6(e), or FCRA. ODAG will then determine whether the investigation or review primarily concerns the conduct of the Department's criminal law investigations, operations, programs, policies or practices, or, for FCRA information, whether the review concerns the conduct of foreign counterintelligence investigations.¹ My office will communicate in writing to you and OIG upon a determination that an OIG investigation or review qualifies for access to such information. Where ODAG has made such a determination, you should disclose Title III, Rule 6(e), and FCRA information to OIG without delay.

¹ OIG has a separate right of access to Title III information when it acts as the law enforcement agent in a criminal investigation, in addition to and independent from the new guidelines regarding Title III, Rule 6(e), and FCRA protected information.

When Title III, Rule 6(e) or FCRA information will be disclosed to OIG, you should contact OIG staff to discuss: the type of sensitive information that is to be disclosed; the legal requirements regarding the use and further dissemination of the information; and any steps that may be required to protect the information once it is produced to OIG. In particular, when you provide Rule 6(e) information to OIG, you must additionally advise the OIG personnel working on the review of their obligation of secrecy under Rule 6(e). Upon obtaining materials protected by Rule 6(e), OIG personnel will provide my office with a list of the names of the persons who will have access to those materials. The Department then will promptly inform the court that impaneled the grand jury or juries of the names of all persons to whom a disclosure has been made, as Rule 6(e) requires. That notice will also certify, as required by Rule 6(e)(3)(B), that OIG personnel working on the review have been advised of their obligation of secrecy under Rule 6(e).

If you identify Title III, Rule 6(e) or FCRA material in connection with an investigation or review where I have not previously notified you that OIG may receive this information, immediately notify OIG and my office that you have identified such material. My office will then notify you whether the OIG investigation or review qualifies under the new guidelines. Moreover, if you identify information subject to limitations on disclosure under statutes other than Title III, Rule 6(e), or FCRA, you should promptly notify OIG and provide a copy of that information to my office along with a description of the legal implications of disclosure.² In such circumstances, ODAG will evaluate your recommendation, any views provided by OIG, and any legal issues regarding OIG's access to the information.

I am confident that these new procedures will result in OIG getting the documents it needs in a timely manner, thus facilitating OIG's ability to fulfill its important mission. If questions arise any time during this process, please contact my office for assistance. Thank you for your attention to this important matter.

² In extraordinary circumstances, Section 8E of the Inspector General Act allows the Attorney General to withhold from OIG certain enumerated categories of information: "sensitive information concerning—(A) ongoing civil or criminal investigations or proceedings; (B) undercover operations; (C) the identity of confidential sources, including protected witnesses; (D) intelligence or counterintelligence matters; or (E) other matters the disclosure of which would constitute a serious threat to national security." 5 U.S.C. App. § 8E (a)(1). The Department has invoked Section 8E of the Inspector General Act only once since the Act was extended to the Department on October 18, 1988.



U.S. Department of Justice

Office of the Inspector General

May 20, 2015

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

FROM:

Michael E. Horowitz
MICHAEL E. HOROWITZ
INSPECTOR GENERAL

SUBJECT:

Inspector General Access to Records, Documents, or
Materials in the Custody and Possession of the Department

Thank you for your letter dated April 23, 2015, informing me of the Department of Justice's (Department) revised procedure governing the production to the Office of the Inspector General (OIG) of grand jury, wiretap, and Fair Credit Reporting Act (FCRA) information in connection with OIG audits, investigations, inspections, and reviews. I also received the memorandum you attached to the letter, dated April 23, 2015, in which you informed the heads of Department components of the revised procedure.

I appreciate your strong support for our Office's work for many years during your tenure as the U.S. Attorney for the Northern District of Georgia and before that as an Assistant U.S. Attorney and as Chief of Public Corruption Section in that Office. Consistent with your past record of working closely with the OIG, you have made it clear to me from the outset of your appointment as Deputy Attorney General that you want to try to resolve the serious issues that have arisen since the Federal Bureau of Investigation (FBI) began challenging in 2010 the legal authority of the OIG to access certain records. And I understand that in issuing the revised procedure on April 23, you were interested in improving the timeliness of document production by the FBI to the OIG. While the revised process could result in records being produced in a more timely fashion, which we would of course welcome, the revised procedure keeps in place a process that seriously impairs the OIG's independence and is not consistent with the plain language of both Section 6(a) of the IG Act and Section 218 of the Appropriations Act.

The procedure which the April 23 memorandum revised dates from 2011 and was implemented by the FBI, with the Department's concurrence, in response to the FBI's legal objections to providing the OIG with access to certain records in its possession, including but not limited to grand jury, wiretap, and FCRA information. Under this process, the FBI first determined

whether, in its opinion, it was legally prohibited from producing any records responsive to an OIG document request. If the FBI identified such records, it provided them to the Attorney General or Deputy Attorney General, who then determined whether the OIG's review was of assistance to them. Upon making such a finding, the FBI was ordered to produce the records to the OIG.

We strongly objected to this process for several reasons, which we outlined in memoranda to Attorney General Holder and Deputy Attorney General Cole in 2011 and in our memorandum to the Office of Legal Counsel (OLC) dated June 24, 2014.

First, the procedure ignored an unbroken history of more than 20 years of cooperation and compliance by the Department and FBI with the records production requirements of the Inspector General Act. At no time before 2010 did the FBI, any Department component, or Department leadership raise any concerns over the legality of providing to the OIG grand jury, wiretap, or FCRA material. The OIG routinely received such material upon the considered judgment of senior Department officials. Moreover, the Department and FBI changed its long-standing practice despite the absence of change in any laws, rules, regulations, or policy.

Second, the procedure institutionalized a process that was wholly inconsistent with the Inspector General Act, yet was fully consistent with the FBI's legal position. A requirement that the OIG seek permission of Department leadership to access information necessary to our audits, investigations, and reviews contradicts the plain language of, and Congressional intent behind, Section 6(a) of the Inspector General Act. It also undermines the OIG's independence, and thereby compromises the integrity of our work. The process also is inconsistent with Congress' unequivocal statement in Section 218 of the Department of Justice 2015 Appropriations Act prohibiting the use of any fiscal year 2015 funds to deny the OIG timely access to information "unless in accordance with an express limitation of section 6(a) of the Inspector General Act."

Finally, the procedure resulted in substantial delays in the OIG gaining access to necessary records, due to the FBI and other DOJ components raising legal objections to OIG document requests and conducting pre-production reviews so they could decide whether responsive records could not be provided to the OIG without an order of the Attorney General or Deputy Attorney General. In numerous audits and reviews, we have waited months to receive all records responsive to our requests. Additionally, on several occasions, frivolous legal objections were raised to justify refusals to produce material to the OIG. For example, in our recently completed sexual misconduct review both the FBI and Drug Enforcement Administration (DEA) objected on legal grounds to producing certain material because it contained Personally

Identifiable Information. This baseless legal objection was withdrawn only after I personally elevated the matters to FBI and DEA leadership.

Depending upon its implementation by the Department, the revised procedure announced on April 23 may result in somewhat faster production of material to the OIG by reducing instances where the FBI and other components conduct pre-production reviews. We of course would welcome that change. However, the revised process does not address our remaining concerns about the procedure, namely that it is inconsistent with the Inspector General Act, impairs the OIG's independence, and fails to account for the over 20 year record of Department and FBI compliance with OIG document requests and the absence of any legal authority contradicting the Department's practice over those many years.

Finally, we have concerns about how components will read the statement in the memorandum advising them that "[i]f you identify information subject to limitations on disclosure under statutes other than Title III, Rule 6(e), or FCRA, you should promptly notify OIG and provide a copy of that information to my office along with a description of the legal implications of disclosure." While I appreciate that the intent may have been to dissuade components from raising additional objections by making it clear your office would review such claims, our concern is that the statement will be read to suggest that additional legal objections could properly be raised in response to OIG document requests, thereby increasing the possibility of such objections and delays in the production of records. Moreover, it would seem the only means by which a component would know definitively if it had records that could be the basis for any such legal objection would be if it conducted a pre-production review, which is precisely what the revised process is designed to avoid.

As has been our view from the outset, this matter is straightforward and could be resolved by the Attorney General without an OLC opinion, given the plain language of the Inspector General Act and the Department's 20 year track record of providing the OIG with access to these materials. Nevertheless, the Department decided to seek an OLC opinion and, one year later, we are still waiting for that opinion. It is critical that the OLC issue its opinion promptly because the existing process assumes the correctness of the FBI's legal position. Moreover, given OLC was consulted in connection with the revised process, it appears OLC believes there are limitations on the OIG's legal right to access certain records. That would be consistent with what Deputy Attorney General Cole told us about OLC's views in his January 2012 memorandum to the OIG. If indeed that is OLC's opinion, then we need its decision promptly so we can work with the Congress and the Department on legislation to promptly address what would be a serious undermining of OIG independence.

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