



Office of the Inspector General
United States Department of Justice

Statement of Michael E. Horowitz
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before the

U.S. House of Representatives
Committee on the Judiciary

concerning

“Access to Justice?: Does DOJ’s Office of the Inspector General Have Access to
Information Needed to Conduct Proper Oversight?”

September 9, 2014

Mr. Chairman, Congressman Conyers, and Members of the Committee:

Thank you for inviting me to testify about the issues that the Department of Justice (Department or DOJ) Office of the Inspector General (OIG) has faced in obtaining access to documents and materials needed for its audits and reviews. This is an issue of utmost importance, as evidenced by the 47 Inspectors General who signed a letter last month to the Congress strongly endorsing the principle of unimpaired Inspector General access to agency records. I want to thank the Members of Congress for their bipartisan support in response to our letter. I also want to acknowledge the provision included by the Senate Committee on Appropriations in the Department's fiscal year 2015 appropriations bill, S. 2437, which prohibits the Department from using appropriated funds to deny the OIG timely access to information.

Access by Inspectors General to information in agency files goes to the heart of our mission to provide independent and non-partisan oversight. It is very clear to me – just as it is to the Inspectors General community – that the Inspector General Act of 1978 (IG Act) entitles Inspectors General to access all documents and records within the agency's possession. Each of us firmly believes that Congress meant what it said in Section 6(a) of the IG Act: that Inspectors General must be given complete, timely, and unfiltered access to agency records.

However, as reflected in the recent Inspectors General letter and in my prior testimony before Congress, since 2010 and 2011, the FBI and some other Department components have not read Section 6(a) of the IG Act as giving my Office access to all records in their possession and therefore have refused our requests for various types of Department records. As a result, a number of our reviews have been significantly impeded. For example, the report we issued last week examining the Department's use of the federal material witness statute in international terrorism investigations experienced significant delays resulting from the FBI's objections to providing us with access to both grand jury and Title III electronic surveillance material. Additionally, in connection with our report last month on the FBI's use of national security letters, the FBI had previously objected to providing us with access to information it had collected using Section 1681u of the Fair Credit Reporting Act. We experienced similar objections from Department components that resulted in significant delays in gaining access to important information in other reviews as well, including during the review that culminated in our 2012 report on ATF's Operation Fast and Furious.

In response to each of these objections to providing us with access to information, the Attorney General or the Deputy Attorney General granted us permission to access the records we sought by making the finding that our reviews were of assistance to them. They also have stated to us, as well as publicly, that it is their intent to continue to grant us permission to access records in future audits and reviews. We appreciate their support and commitment to continue to issue to Department components whatever orders are necessary to ensure that we can access agency records in order to perform our oversight responsibilities. However,

as I have publicly testified previously, I have several significant concerns with this process.

First and foremost, this process is inconsistent with the clear mandate of Section 6(a) of the IG Act. The Attorney General and Deputy Attorney General should not have to order Department components to provide us with access to records that the Congress has already made it clear in the IG Act that we are entitled to review. Second, requiring the OIG to have to obtain the permission of Department leadership in order to review agency records compromises our independence. The IG Act expressly provides that an independent Inspector General should decide whether documents are relevant to an OIG's work; however, the current process at the Department instead places that decision and authority in the leadership of the agency that is being subjected to our oversight. Third, the need for the OIG to elevate matters such as these to the Department's leadership results in delays to our audits and reviews, consumes an inordinate amount of OIG staff time and my time, as well as time from the Attorney General's and Deputy Attorney General's busy schedules. Finally, while current Department leadership has supported our ability to access the records we have requested, agency leadership changes over time and an independent Inspector General's access to records surely should not depend on whether future occupants of these leadership positions support such access.

Moreover, the process that the OIG is being required to follow is inconsistent with how the Department treats other DOJ components that exercise oversight over Department programs and personnel, but that are not statutorily independent like the OIG and have not been granted an express statutory right of access by Congress like the OIG. For example, to our knowledge, the Department's Office of Professional Responsibility (OPR) continues to be given access to grand jury and wiretap information without objection, and no questions have been raised about providing OPR with the information it needs to investigate alleged misconduct by Department attorneys, which the IG Act grants OPR the exclusive jurisdiction to handle. This disparate treatment – requiring the OIG to obtain permission from Department leadership to gain access to these records, but not requiring OPR to do the same – is unjustifiable, and results in the Department being less willing to provide materials to the OIG, presumably because the OIG is statutorily independent, while OPR is not. Such a distinction subverts the very purpose of that statutory independence, and fails to take into account the clear access language in Section 6(a) of the IG Act. The disparate treatment, however, does highlight once again OPR's lack of independence from the Department's leadership. This lack of independent oversight of alleged attorney misconduct at the Department can only be addressed by granting the statutorily-independent OIG with jurisdiction to investigate all alleged misconduct at the Department, including by Department attorneys, as we have advocated for many years. Indeed, the independent, non-partisan Project on Government Oversight (POGO) made the same recommendation in a report issued in March of this year. Bipartisan legislation introduced in the Senate at the same time, the Inspector General Empowerment Act of 2014 (S.2127), would do just that.

This past May, the Department's leadership asked the Office of Legal Counsel (OLC) to issue an opinion addressing the legal objections raised by the FBI to the OIG gaining access to certain records. We did not then believe, nor have we ever believed, that a legal opinion from OLC was necessary to decide such a straightforward legal matter regarding the meaning of Section 6(a) of the IG Act. However, we did not object to the Department's decision to seek an OLC opinion, in part because we hoped that OLC would quickly provide the assurance that our Office is indeed entitled to access all agency records that the OIG deems necessary for its audits and reviews. We have attached to my written statement the legal views of the OIG regarding these issues, which summarizes the views we previously shared with the Department.

We also have emphasized to the Department's leadership the importance of a prompt OLC opinion, given that the existing practice, even though it has enabled us to get materials through an order of the Attorney General or Deputy Attorney General, seriously impairs our independence for the reasons I just described. It remains critical that OLC issue its opinion promptly.

Meanwhile, in the absence of a resolution of this dispute, our struggles to access information relevant to our reviews in a timely manner continue to cause delays to our work and consume resources. They also have a substantial impact on the morale of the auditors, analysts, agents, and lawyers who work extraordinarily hard every day to do the difficult oversight work that is expected of them. Far too often, they face challenges getting timely access to information from some Department components. Indeed, even routine requests can sometimes become a challenge. For example, in two ongoing audits, we even had trouble getting organizational charts in a timely manner.

We remain hopeful that this matter will be resolved promptly with a legal opinion concluding that the IG Act entitles the OIG to independent access to the records and information that we seek. Indeed, a contrary opinion, which interpreted the IG Act in a manner that resulted in limitations on the OIG's access to documents, would be unprecedented and would be contrary to over 20 years of policy, practice, and experience within the Department. As we discuss in our attached legal summary, for the OIG's first 22 years of existence, until the FBI raised legal objections in 2010 and 2011, the OIG received without controversy or question grand jury, Title III, and FCRA information in connection with reviews in which the information was relevant, including from the FBI. Should an OLC legal opinion interpret the IG Act in a manner that results in limits on our ability to access information pursuant to the IG Act, we will request a prompt legislative remedy, which the Department has said it will work with us on.

For the past 25 years, my Office has demonstrated that effective and independent oversight saves taxpayers money and improves the Department's operations. Actions that limit, condition, or delay access to information have substantial consequences for our work and lead to incomplete, inaccurate, or significantly delayed findings or recommendations. In order to avoid these consequences, the pending access issues need to be resolved promptly, hopefully

through a legal opinion from OLC finding that Section 6(a) of the IG Act means what it says, namely that the OIG is entitled “to have access to all records . . . or other material available to the” Department, which must be construed as timely, complete, and independent access to information in the Department’s possession.

This concludes my prepared statement. I would be pleased to answer any questions that you may have.