



Office of the Inspector General
United States Department of Justice

Statement of Michael E. Horowitz
Inspector General, U.S. Department of Justice

before the

U.S. Senate
Committee on the Judiciary

concerning

"Inspector General Access to All Records
Needed For Independent Oversight"

August 5, 2015

Mr. Chairman, Senator Leahy, and Members of the Committee:

Thank you for inviting me to testify today about the critical importance of Inspector General access to all records and information that we need to conduct our independent oversight.

On July 20, the Office of Legal Counsel (OLC) at the Department of Justice (Department or DOJ) issued an opinion that restricts the DOJ Office of the Inspector General's (DOJ-OIG) independent access to records in the Department's possession that are necessary to carry out our oversight responsibilities. The legal underpinning of the OLC opinion, that the Inspector General Act (IG Act) does not give the DOJ-OIG independent access to all records in the DOJ's possession despite the IG Act's express authorization that an Inspector General have access to "all records" within its agency's possession, represents a serious threat to the independence of not only the DOJ-OIG, but to all Inspectors General. Indeed, recently, Inspectors General at the Peace Corps and the Environmental Protection Agency (EPA) faced similar problems gaining access to records from the agencies they oversee. And, currently, the Inspector General at the Department of Commerce is facing a challenge obtaining access to records in that agency's possession.

Independent oversight by Inspectors General helps make our government more effective and efficient, and Inspectors General have saved the taxpayers hundreds of billions of dollars in wasteful spending since the IG Act was passed in 1978. Refusing, restricting, or delaying an Inspector General's independent access to records and information may lead to incomplete, inaccurate, or significantly delayed findings and recommendations, which in turn may prevent the agency from promptly correcting serious problems and pursuing recoveries that benefit taxpayers, and deprive Congress of timely information regarding the agency's activities. It also may impede or otherwise inhibit investigations and prosecutions related to agency programs and operations.

I appreciate the strong bipartisan support the DOJ-OIG has received from Members of this Committee on this issue, as well as from many other Members of Congress as well. I also want to express my appreciation for the Committee's strong bipartisan support on behalf of the entire Federal Inspector General community, represented by the Council of the Inspectors General on Integrity and Efficiency (Council of IGs), which I have the honor of chairing.

The Council of IGs, as detailed in our attached letter to Congress dated August 3, 2015, urges Congress to swiftly enact legislation that affirms the

authority of an Inspector General under the IG Act to independently access all information and data in an agency's possession that the Inspector General deems necessary to conduct its oversight functions. The legislation must further make clear that no law or provision restricting access to information applies to Inspectors General unless that law or provision expressly so states, and that such unrestricted Inspector General access extends to all records available to the agency, regardless of location or form. In my position as CIGIE chair, I am presently engaged in substantive discussions with the DOJ about a possible joint legislative proposal to address these concerns.

Background on Access Issues

Let me provide some historical context for the challenge we at the DOJ-OIG have faced with respect to access issues over the past five years. Prior to 2010, DOJ never questioned our legal authority to access documents in its possession that were necessary for our independent oversight. Indeed, Attorney General Reno expanded the DOJ-OIG's jurisdiction to include oversight of two of the Department's law enforcement components. And Attorney General Ashcroft further expanded our oversight authority to all DOJ law enforcement components, including the Federal Bureau of Investigation (FBI) and the Drug Enforcement Administration (DEA). The Congress codified this expansion of DOJ-OIG jurisdiction in 2003. Surely, in expanding our oversight responsibilities over the Department's law enforcement components, the Attorneys General and Congress recognized that the DOJ-OIG would require access to relevant law enforcement documents and records, including grand jury and wiretap information.

That is why it is not surprising that, following this expansion of DOJ-OIG oversight responsibilities, the DOJ-OIG frequently obtained from Department components – including the FBI – the exact same categories of records that the FBI began claiming in 2010 it did not have legal authority to provide to us. Indeed, over the course of the past 26 years, we have been provided access by the Department to some of the most sensitive information available to the Department, including information that allowed us to conduct reviews related to the Robert Hanssen matter, the Aldrich Ames matter, the September 11 attacks, the post-September 11 surveillance program initiated by President Bush, and the FBI's use of its authorities under the Patriot Act and the FISA Amendments Act. And, without exception, we have handled this information properly, in accordance with all legal requirements and restrictions, and with appropriate security measures.

However, in 2010 and 2011, FBI lawyers opined that the DOJ-OIG should not have access to certain categories of information, namely grand jury, wiretap, and credit information. FBI lawyers also identified about ten other categories of information which its lawyers believed the DOJ-OIG was not entitled to access. Since that time, the DOJ-OIG has faced challenges to our authority to receive timely and complete access to Department records in a number of our reviews. Among the reviews and investigations where we faced challenges to access were: two FBI whistleblower retaliation investigations, the Department's use of the material witness statute, the FBI's use of National Security Letters, ATF's Operation Fast and Furious, the U.S. Government's sharing of information prior to the Boston Marathon Bombing, the Department's handling of sexual harassment and sexual misconduct allegations, the DEA's handling of confidential sources, and the DEA's use of administrative subpoenas.

While, in each of these instances, the DOJ-OIG was ultimately provided access to the necessary records, the initial refusal resulted in lengthy delays to our work, sometimes months on end, and usually required me to personally elevate the matter to the Component's leadership, or to the Attorney General or Deputy Attorney General. Moreover, the process that the Department put in place required the Attorney General or Deputy Attorney General to grant the DOJ-OIG permission to access grand jury, wiretap, and credit information, but they could do so only after determining that the DOJ-OIG's review would be of assistance to them in managing the Department. Requiring an Inspector General to obtain agency leadership permission to access agency records that are necessary for the Inspector General to conduct effective oversight wholly undercuts the Inspector General's independence, which is a central principle of the IG Act.

In May 2014, the then-Deputy Attorney General decided to ask OLC for an opinion on the legal objections raised by the FBI to providing the DOJ-OIG access to grand jury, Title III electronic wiretap, and Fair Credit Reporting Act (FCRA) information.

In December 2014, in response to both concerns that I expressed in testimony before our Appropriations Subcommittees and numerous other Congressional Committees, and that 47 Inspectors General expressed in a letter sent to Congress in August 2014, the Appropriations Committees included a provision (Section 218) in the Department of Justice Fiscal Year 2015 appropriation that was "designed to improve OIG access to Department documents and information." Section 218 states clearly that:

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.

Despite Congress's unequivocal support for the OIG's access to documents, as restated in Section 218, the FBI nevertheless continued to maintain its legal position that the OIG was not legally entitled to review certain records. Therefore, the OIG was obligated under Section 218 to report four instances where the FBI had failed to provide the OIG with timely access to information, including two involving FBI whistleblower retaliation investigations.

OLC Opinion

On July 20, 2015, the OLC issued its opinion, which concludes that Section 6(a) of the IG Act does not entitle the DOJ-OIG to obtain independent access to grand jury, wiretap, and credit information in the Department's possession that is necessary for us to perform oversight of the FBI and other Department components. Indeed, the OLC opinion concludes that such records can only be obtained by the OIG in certain – but not all – circumstances through disclosure exceptions in specific laws related to those records. As a result, the OLC opinion provides that, in all instances, Department employees will decide whether access by the DOJ-OIG is warranted – placing agency staff in the position of deciding whether to grant the Inspector General access to information necessary to conduct our oversight. Requiring an Inspector General to obtain permission from agency staff in order to access agency information turns the principle of independent oversight that is contained within the IG Act on its head.

In the opinion, OLC argues that the IG Act's language authorizing an Inspector General to have "access to all records" does not override the disclosure provisions of the governing statutes of grand jury, Title III, and FCRA information. The OLC's opinion concluded that "neither the text of the IG Act, nor its legislative history, nor its general purpose offers a clear indication that Congress intended to override the separate statutory confidentiality requirements applicable to" Title III, GJ Rule, and FCRA information. As a result, the OLC opinion concluded that the DOJ-OIG's access to records and documents within the Department remains subject to the limitations imposed by Title III, GJ Rule, and FCRA.

With respect to the grand jury information, the OLC opinion held that, in addition to not being authorized to obtain grand jury information under Section 6(a) of the IG Act, we are not authorized to access the information under the grand jury law because OIG attorneys are not “attorneys for the government” under Rule 6(e) of the Federal Rules of Criminal Procedures. In so doing, the opinion distinguishes between DOJ-OIG lawyers and Office of Professional Responsibility (OPR) attorneys, who are entitled under a 1984 OLC opinion to obtain access to grand jury information to conduct oversight over alleged attorney misconduct (and who we understand are also able to access wiretap information when conducting attorney misconduct oversight). The OLC opinion reasons that DOJ-OIG attorneys are unlike OPR attorneys in that OPR attorneys may “in principle” be delegated the Attorney General’s authority to conduct criminal proceedings for the Department, even though to our knowledge OPR attorneys have not conducted criminal proceedings in their roles within OPR. In addition, the OLC opinion found unpersuasive the fact that two Federal District Judges had concluded in 1998 and 1999, at the Department of Justice’s urging, that DOJ-OIG lawyers were “attorneys for the government” under Rule 6(e).

Finally, the OLC opinion concluded that Section 218 of the Department’s FY 2015 appropriation “does not abrogate” the specific disclosure limitations found in the grand jury, wiretap, and credit laws. The OLC’s opinion finds that, because Section 218 did not expressly “repeal” these non-disclosure provisions, the appropriators did not “provide a clear statement that the IG Act should be interpreted to override the limitations on disclosure.” The OLC’s opinion therefore concluded that, while our position that Section 218 was intended to prohibit DOJ from withholding grand jury, wiretap, and credit information was “plausible,” the OLC believed that Section 218 “was best read to permit adherence to the disclosure restrictions” in those three laws.

Impact of the OLC Opinion

As the attached Council of IGs letter makes clear, the OLC opinion will not only negatively impact the oversight work of the DOJ-OIG, but has the potential to adversely affect the entire Inspector General community. A hallmark of the IG Act – independent access by Inspectors General to all information in an agency’s possession that is necessary for our oversight work – has been pierced. For the first time since the IG Act was passed in 1978, the lawyers for the Executive Branch have concluded that “all” in Section 6(a) of the IG Act does not mean “all.” As a result, the Inspector General community is concerned that the OLC opinion could lead to agencies objecting to the production to Inspectors General of other categories of records that are subject to non-disclosure provisions. Indeed, we

understand that preliminary research has found that there are over 1,000 laws that contain disclosure restrictions in them.

As noted above, the FBI has already identified at least ten other categories of information that it has stated it may not be able to produce to the DOJ-OIG because of access restrictions in those laws. These include: FISA Information, Attorney-Client Information, Patient Medical Information, Bank Secrecy Act Information, Federal Juvenile Court Records, Information Subject to Non-Disclosure Agreements and Memoranda of Understanding, and Source Information. Moreover, as noted previously, Inspectors General at the Peace Corps, EPA, and Commerce have recently dealt with or are dealing with similar issues.

Additionally, the OLC opinion creates potential ambiguity and uncertainty as to what information witnesses and agency personnel can provide to Inspectors General conducting oversight, possibly resulting in their becoming less forthcoming and fearful of being accused of improperly divulging information. Such a shift in mindset could deter whistleblowers from directly providing information to Inspectors General about waste, fraud, abuse, or mismanagement because of concern that the agency may later claim that the disclosure was improper and use that decision to retaliate against the whistleblower.

As the Council of IGs describes in its letter, actions that limit, condition, or delay access to all agency information have profoundly negative consequences for our work: they make us less effective and erode the morale of the dedicated professionals who make up our staffs and are committed to the difficult task of government oversight. Such limitations are inconsistent with the IG Act, at odds with the independence of Inspectors General, and risk insulating agencies from independent scrutiny – the very issues that our offices were established to review and that the American people expect us to be able to address.

Need for Legislative Remedy

The only means to address this serious threat to Inspector General independence is for Congress to promptly pass legislation that affirms the independent authority of Inspectors General to access without delay all information and data in an agency's possession that an Inspector General deems necessary to execute its oversight functions under the law. The legislation should unambiguously state and provide what we in the Inspector General community have long understood – that no law or provision restricting access to information applies to Inspectors General unless that law or provision expressly so states, and that such unrestricted Inspector

General access extends to all records available to the agency, regardless of location or form. In my view, only this kind of definitive legislation can ensure and promote an Inspector General's independent and unimpeded access to information as envisioned by the IG Act.

On behalf of the Council of IGs, we look forward to working closely with this Committee and the Congress over the next few weeks on a legislative solution that will ensure Inspectors General can continue to provide the kind of independent and objective oversight for which we are known, and which the taxpayers expect and deserve. This concludes my prepared statement, and I am pleased to answer any questions the Committee may have.

ATTACHMENT



August 3, 2015

The Honorable Ron Johnson
Chairman
Committee on Homeland Security and
Governmental Affairs
United States Senate
344 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Jason Chaffetz
Chairman
Committee on Oversight and
Government Reform
United States House of Representatives
2157 Rayburn House Office Building
Washington, DC 20515

The Honorable Thomas R. Carper
Ranking Member
Committee on Homeland Security and
Governmental Affairs
United States Senate
340 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Elijah E. Cummings
Ranking Member
Committee on Oversight and Government
Reform
United States House of Representatives
2471 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairmen and Ranking Members:

On July 20, 2015, the Department of Justice (DOJ) Office of Legal Counsel (OLC) issued an opinion that sharply curtails the authority of the Inspector General for the Department of Justice (DOJ-IG) to independently access all records necessary to carry out its oversight responsibilities. The legal underpinning of this OLC opinion – that Section 6(a) of the Inspector General Act (IG Act) does not give the DOJ-IG independent access to all records in the DOJ’s possession that it needs to perform its oversight work – represents a serious threat to the independent authority of not only the DOJ-IG but to all Inspectors General. The Council of the Inspectors General on Integrity and Efficiency (CIGIE), representing 72 Federal Inspectors General, urges Congress to immediately pass legislation affirming the authority of an Inspector General under IG Act Section 6(a) to access, independently and without delay, all information and data in an agency’s possession that the Inspector General deems necessary to conduct its oversight functions.¹ The legislation must further make clear that no law or provision restricting access to information applies to Inspectors General unless that law or provision expressly so states, and that such unrestricted Inspector General access extends to all records available to the agency, regardless of location or form. The CIGIE Chair is presently engaged in substantive discussions with the DOJ about a possible joint legislative proposal to address these concerns.

¹ As noted in the OLC opinion, CIGIE made two submissions to OLC in connection with this matter, one dated October 7, 2011, and another dated June 24, 2014. Those submissions are attached to this letter.

Despite the unequivocal language of Section 6(a) of the IG Act, the OLC opinion concludes that it does not entitle the DOJ-IG to obtain independent access to grand jury, wiretap, and credit information in the DOJ's possession that is necessary for the DOJ-IG to perform its work. Indeed, the OLC opinion concludes that such records cannot be obtained by the DOJ-IG pursuant to the IG Act, and can only be obtained in certain – but not all – circumstances through provisions in the specific laws related to those records. Further, the opinion provides that only the Department of Justice itself decides whether access by the DOJ-IG is warranted – placing the agency that the DOJ-IG oversees in the position of deciding whether to grant the Inspector General access to information necessary to conduct effective and independent oversight. Requiring an Inspector General to obtain permission from agency staff in order to access agency information turns the principle of independent oversight that is enshrined in the IG Act on its head.

The OLC opinion's restrictive reading of the IG Act represents a potentially serious challenge to the authority of every Inspector General and our collective ability to conduct our work thoroughly, independently, and in a timely manner. Our concern is that, as a result of the OLC opinion, agencies other than DOJ may likewise withhold crucial records from their Inspectors General, adversely impacting their work. Even absent this opinion, agencies such as the Peace Corps and the U.S. Chemical Safety and Hazard Investigation Board (CSB) have restricted or denied their OIGs access to agency records on claims of common law privileges or assertions that other laws prohibit access. Similarly, the Department of Commerce denied its Inspector General (Commerce-IG) access to agency records that were needed for the Commerce-IG to complete an audit of agency operations because agency counsel had concluded, based on guidance that agency counsel said came from OLC, that it might be a violation of another federal statute to make the records available to its Inspector General. As a result, the Commerce-IG could not complete its audit.

Without timely and unfettered access to all necessary information, Inspectors General cannot ensure that all government programs and operations are subject to exacting and independent scrutiny. Refusing, restricting, or delaying an Inspector General's independent access may lead to incomplete, inaccurate, or significantly delayed findings and recommendations, which in turn may prevent the agency from promptly correcting serious problems and pursuing recoveries that benefit taxpayers, and deprive Congress of timely information regarding the agency's activities. It also may impede or otherwise inhibit investigations and prosecutions related to agency programs and operations.

Uncertainty about the legal authority of Inspectors General to access all information in an agency's possession could also negatively affect interactions between the staffs of the Offices of Inspector General and the agencies they oversee. Prior to this opinion, agency personnel could be confident, given the clear language of Section 6(a) of the IG Act, that they were required to and should share information openly with Inspector General staff, and typically they did so without reservation or delay. This led to increased candor during interviews, greater efficiency of investigations and other reviews, and earlier and more effective detection and resolution of

waste, fraud, and abuse within Federal agencies. We are concerned that witnesses and other agency personnel, faced with uncertainty regarding the applicability of the OLC opinion to other records and situations, may now be less forthcoming and fearful of being accused of improperly divulging information. Such a shift in mindset also could deter whistleblowers from directly providing information about waste, fraud, abuse, or mismanagement to Inspectors General because of concern that the agency may later claim that the disclosure was improper and use that decision to retaliate against the whistleblower.

In the over three decades since the IG Act's passage, Inspectors General have saved taxpayers hundreds of billions of dollars and improved the programs and operations of the Federal government through their independent oversight. Actions that limit, condition, or delay access to all agency information have profoundly negative consequences for our work: they make us less effective and erode the morale of the dedicated professionals who make up our staffs and are committed to the difficult task of government oversight. Such limitations are inconsistent with the IG Act, at odds with the independence of Inspectors General, and risk insulating agencies from independent scrutiny – the very issues that our offices were established to review and that the American people expect us to be able to address.

The only means to address this serious threat to Inspector General independence is for Congress to promptly pass legislation that affirms the independent authority of Inspectors General to access without delay all information and data in an agency's possession that an Inspector General deems necessary to execute its oversight functions under the law. The legislation should unambiguously state and provide what we in the Inspector General community have long understood – that no law or provision restricting access to information applies to Inspectors General unless that law or provision expressly so states, and that such unrestricted Inspector General access extends to all records available to the agency, regardless of location or form. In our view, only this kind of definitive legislation can ensure and promote an Inspector General's independent and unimpeded access to information as envisioned by the IG Act. We look forward to working with the Committees on this most important matter.

Sincerely,



Michael E. Horowitz
Chairperson



Allison C. Lerner
Vice Chairperson



Kathy A. Buller
Chairperson, Legislation Committee



Steve A. Linick
Vice Chairperson, Legislation Committee

Enclosures

The Honorable Ron Johnson
The Honorable Jason Chaffetz
The Honorable Thomas R. Carper
The Honorable Elijah E. Cummings

Additional Signatories:

Catherine Trujillo, Acting Inspector
General, Agency for International
Development
The Honorable Phyllis Fong, Inspector
General, Department of Agriculture
Tom Howard, Inspector General,
Amtrak
Hubert Sparks, Inspector General,
Appalachian Regional Commission
Kevin Mulshine, Inspector General,
Architect of the Capitol
Mark Bialek, Inspector General,
Board of Governors of the Federal
Reserve System/Consumer Financial
Protection Bureau
Christopher Sharpley, Acting Inspector
General, Central Intelligence Agency
David Smith, Acting Inspector General,
Department of Commerce
A. Roy Lavik, Inspector General,
Commodity Futures Trading Commission
Christopher W. Dentel, Inspector General,
Consumer Product Safety Commission
The Honorable Deborah Jeffrey, Inspector
General, Corporation for National and
Community Service
Mary Mitchelson, Inspector General,
Corporation for Public Broadcasting
The Honorable Jon T. Rymer, Inspector
General, Department of Defense
Kristi M. Waschull, Inspector General,
Defense Intelligence Agency
David Sheppard, Acting Inspector General,
The Denali Commission
The Honorable Kathleen Tighe, Inspector
General, Department of Education
Curtis Crider, Inspector General,
U.S. Election Assistance Commission
The Honorable Gregory H. Friedman,
Inspector General, Department of Energy

The Honorable Arthur A. Elkins, Jr.,
Inspector General, Environmental
Protection Agency
Milton Mayo, Inspector General,
Equal Employment Opportunity
Commission
Michael T. McCarthy, Deputy Inspector
General, Export-Import Bank of the
United States
Elizabeth Dean, Inspector General,
Farm Credit Administration
David L. Hunt, Inspector General,
Federal Communication Commission
Fred W. Gibson, Acting Inspector General,
Federal Deposit Insurance Corporation
Lynne A. McFarland, Inspector General,
Federal Election Commission
The Honorable Laura S. Wertheimer,
Inspector General, Federal Housing
Finance Agency
Dana Rooney, Inspector General,
Federal Labor Relations Authority
Jon Hatfield, Inspector General,
Federal Maritime Commission
Roslyn A. Mazer, Inspector General,
Federal Trade Commission
Carol F. Ochoa, Inspector
General, General Services Administration
Adam Trzeciak, Inspector General,
Government Accountability Office
The Honorable Daniel Levinson, Inspector
General, Department of Health and
Human Services
The Honorable John Roth, Inspector
General, Department of Homeland
Security
The Honorable David A. Montoya,
Inspector General, Department of Housing
and Urban Development
Mary L. Kendall, Acting Inspector General,
Department of Interior

The Honorable Ron Johnson
The Honorable Jason Chaffetz
The Honorable Thomas R. Carper
The Honorable Elijah E. Cummings

Philip M. Heneghan, Inspector General,
U.S. International Trade Commission
The Honorable Scott Dahl, Inspector
General, Department of Labor
Jeffrey E. Schanz, Inspector General,
Legal Services Corporation
Kurt W. Hyde, Inspector General,
Library of Congress
The Honorable Paul K. Martin, Inspector
General, National Aeronautics and Space
Administration
James Springs, Acting Inspector General,
National Archives and Records
Administration
James Hagen, Inspector General,
National Credit Union Administration
Tonie Jones, Inspector General,
National Endowment for the Arts
Laura Davis, Inspector General,
National Endowment for the Humanities
Joseph Composto, Inspector General,
National Geospatial-Intelligence Agency
David Berry, Inspector General,
National Labor Relations Board
Adam G. Harris, Inspector General,
National Reconnaissance Office
Dr. George Ellard, Inspector General,
National Security Agency
The Honorable Hubert T. Bell, Inspector
General, Nuclear Regulatory Commission
The Honorable I. Charles McCullough, III,
Inspector General, Office of the Inspector
General of the Intelligence Community

The Honorable Patrick E. McFarland,
Inspector General, Office of Personnel
Management
Jack Callender, Inspector General,
Postal Regulatory Commission
David Williams, Inspector General,
U.S. Postal Service
The Honorable Martin J. Dickman,
Inspector General, Railroad Retirement
Board
Carl W. Hoecker, Inspector General,
Securities and Exchange Commission
The Honorable Peggy E. Gustafson,
Inspector General, Small Business
Administration
Cathy Helm, Inspector General,
Smithsonian Institution
The Honorable Patrick P. O'Carroll,
Inspector General, Social Security
Administration
John F. Sopko, Special Inspector General,
Special Inspector General for Afghanistan
Reconstruction
The Honorable Christy Romero, Special
Inspector General, Special Inspector
General for the Troubled Asset Relief
Program
The Honorable Richard Moore, Inspector
General, Tennessee Valley Authority
The Honorable Calvin L. Scovel, III,
Inspector General,
Department of Transportation
The Honorable Eric M. Thorson, Inspector
General, Department of Treasury
Linda Halliday, Deputy Inspector General,
Department of Veterans Affairs



Council of the
INSPECTORS GENERAL
on INTEGRITY and EFFICIENCY

October 7, 2011

Mr. John E. Bies
Deputy Assistant Attorney General
Office of Legal Counsel
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Mr. Bies:

This is in response to your invitation to the Council of the Inspectors General on Integrity and Efficiency (CIGIE) to provide our views on a matter involving the Department of Justice Office of Inspector General's (DOJ OIG) access to certain grand jury records under Federal Rule of Criminal Procedure 6(e) (Rule 6(e)) in connection with a DOJ OIG review of the Federal Bureau of Investigation's (FBI) use of material witness warrants. This letter transmits the CIGIE Executive Council's (EC) views on this matter.¹

DOJ OIG's Access to Rule 6(e) Material

The issue that the Office of Legal Counsel (OLC) has been asked to resolve is whether Rule 6(e) (regarding grand jury secrecy) restricts DOJ OIG's access to grand jury material in the FBI's possession, or whether DOJ OIG is authorized to access such material either as "attorneys for the government" under Rule 6(e)(3)(A)(i), or pursuant to Rule 6(e)(3)(D), which authorizes disclosure of grand jury material involving foreign intelligence to a "federal law enforcement . . . official to assist the official . . . in the performance of that official's duties."² DOJ OIG is

¹ CIGIE was statutorily established as an independent entity within the executive branch to address integrity, economy, and effectiveness issues that transcend individual Government agencies, and to increase the professionalism and effectiveness of OIG personnel. See The Inspector General Reform Act of 2008, P.L. 110-409; 5 U.S.C. app. 3 § 11(a). The Executive Council assists the CIGIE Chairperson in governance of CIGIE, and is primarily composed of the standing committee chairs elected by CIGIE's full membership.

² As a threshold matter, we question the FBI's ability to control access to grand jury material. Rather, we believe the authority to control access to such material is largely vested in other DOJ officials as "attorneys for the government" under Rule 6(e)(3)(A). For example, prosecutors control access to investigative agencies by adding individuals to the Rule 6(e) list when they consider it necessary to assist the investigation. Additionally, courts, to some extent, also control grand jury material by virtue of deciding Rule 6(e) disclosure motions. We also note that the responsible DOJ officials (various USAO prosecutors), in fact, gave DOJ OIG approval to access certain grand jury materials in this dispute.

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somewhat uniquely positioned in the OIG community, in that it routinely seeks grand jury information in the possession of DOJ agencies to perform its oversight duties.³

We strongly urge that the current dispute be resolved on as narrow a legal basis as possible, based specifically upon application of Rule 6(e) provisions to DOJ OIG's performance of its current review. We do not believe that OLC needs to reach the Inspector General (IG) Act's access provisions, which are applicable to the entire Federal OIG community, in order to resolve the narrow legal dispute at issue here. The IG Act's well settled broad access provisions at § 6(a)(1) have been in place and have been effective tools for fighting fraud, waste, and abuse for over three decades.⁴ The EC strongly believes that OLC need not disturb well settled legal authorities and practice in this area in order to resolve this narrow dispute. However, to the extent that we take issue with certain FBI statements and apparent positions, referenced in the FBI's and DOJ OIG's submissions, we have taken the opportunity to address those discrete issues, as set forth below.

The FBI's Interpretation of IG Act Access Provisions is Unsupportable

The FBI's interpretation of IG access provisions, and its view of its role vis-à-vis DOJ OIG's oversight process, are unsupportable. As set forth below, we are deeply concerned about, and strongly oppose, the FBI's apparent position that it has the ability to withhold many different types of information from DOJ OIG; that there is a statutory right, embodied in the IG Act, to refuse IG information requests; and that it is entitled to prescreen for relevance information that DOJ OIG seeks for its review.

The FBI Cannot Withhold Various Types of Specialized Information from DOJ OIG

It is our understanding that the FBI is refusing to provide DOJ OIG with a wide range of documents and information other than Rule 6(e) material, including, but not limited to Title III materials; Federal taxpayer information; credit reports; and information subject to nondisclosure agreements, memoranda of understanding, or court orders. By withholding such information, the

³ CIGIE's mission is to address Inspector General (IG) issues that transcend individual Government agencies. To the extent that a determination with respect to DOJ OIG's access to the relevant information can be controlled by applying the above-referenced Rule 6(e) provisions, the EC takes no position specifically addressing the application of those provisions, as they specifically and uniquely relate to DOJ OIG and the particular dispute at issue.

⁴ The IG Act's access provisions at § 6(a)(1) are very broad and strong. See 5 U.S.C. app 3, § 6(a)(1). These provisions afford OIGs access to all "records, reports, audits, reviews, documents, papers, recommendations, or other material" available to the agency, and there are no explicit statutory exceptions. Broad access is vital in order for OIGs to perform effective oversight, and to fulfill Congress' intent to prevent waste, fraud, abuse, and inefficiencies within the Federal Government. Without such access, the statutory mandate that Inspectors General may "make such investigations and reports" as are in their judgment "necessary or desirable," would be largely meaningless since agencies would have undue control over OIG investigations, audits, and reviews. See *id.* at § 6(a)(2). We note that Federal case law has repeatedly confirmed the breadth and strength of IGs' underlying investigative authority. See e.g., *University of Medicine and Dentistry of New Jersey et al. v. Corrigan*, 347 F.3d 57 (3rd Cir. 2003); *U.S. v. Westinghouse Electric*, 788 F.2d 164 (3rd Cir. 1986).

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FBI is effectively limiting DOJ OIG's discretion and ability to provide oversight regarding the matters under review.

Although the FBI's stated basis for this withholding is not clear, we would note that the IG has wide discretion to audit and investigate agency matters. Section 3(a) of the IG Act provides that "[n]either the head of the establishment nor the officer next in rank below such head shall prevent or prohibit the IG from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation." The only limitation to this broad authority specific to DOJ OIG is within Section 8E(a)(1) of the IG Act. That section allows the Attorney General to restrict DOJ OIG from conducting certain audits or investigations only if the Attorney General determines that such restriction is necessary to prevent the disclosure of certain information regarding investigative proceedings, intelligence matters, or threats to national security. See id.

Apart from this explicit statutory limitation, we are aware of no other limitations specifically impacting the authority of DOJ OIG to access DOJ materials. Therefore, we believe that the FBI's attempt to restrict DOJ OIG's access to the requested materials is impermissible.

The FBI's Interpretation of the IG Act To Allow for "Reasonable Refusal" Is In Error

The FBI's argument that Section 6(b)(2) of the IG Act provides an implied right to refuse DOJ OIG access to FBI records and information is without basis. Specifically, the FBI notes that the IG Act at § 6(b)(2) requires IGs to report to the head of the establishment instances where information is "unreasonably refused." Because Congress used the modifier "unreasonable" before "refusal," the FBI infers that refusals of IG information requests can also be reasonable, and that the FBI is engaging in such a reasonable refusal in withholding grand jury materials from DOJ OIG. See the FBI's January 13, 2011 submission at page 2. We believe this is an incorrect and strained interpretation of the section.

This section, which serves as the key enforcement remedy for information denials is intended to provide discretion to the IG to elevate only those denials that are significant in the IG's view. Section 6(b)(2)'s language provides that when information is "**in the judgment of an Inspector General** unreasonably refused or not provided," (emphasis added) the IG has recourse to report that incident to the head of the establishment. A commonsense statutory reading reflects that the section is a key enforcement mechanism in situations where the IG is denied access. In our view, it is in error to conclude that because the statute specifically provides an IG recourse with respect to what the IG determines to be unreasonable refusals, the statute then provides an implied basis for agencies to refuse an IG access to information.

This provision is meant to provide a remedy to IGs where information requests have been denied, without mandating that every single denial (including de minimis or minor ones in the IG's judgment) be reported to the agency head. A straightforward reading of this provision is that the IG has the discretion to report refusals to provide information in those instances that merit, in the IG's judgment, elevation of the dispute. It cannot be fairly read as a limitation on the access to records granted by the IG Act.

The FBI's Practice of Screening Information Before Providing It to OIG Would Undermine the IG Act's Central Purpose of Effective Oversight

It is our understanding that the FBI may be reviewing information for relevance before providing it to DOJ OIG. This practice would undermine the central purpose of the IG Act and leaves the FBI without any effective oversight.

The cornerstone of the IG function is independence from other organizations within a department or agency. Accordingly, an essential component of an IG's independence is unobstructed access to documents and information.⁵ Relevancy reviews or piece-by-piece reviews conducted by the subject organization not only impede the independent exercise of an IG's objective professional judgment, but are also unnecessary, time consuming, and wasteful of DOJ (FBI) resources.

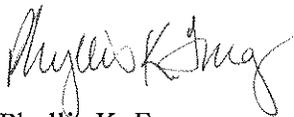
Additionally, there are certain potential risks to the oversight process itself, should agency officials be in a position to determine what information is relevant to an IG's review. Also, premature disclosure to agency officials of an underlying review could lead to the disappearance or destruction of records and the alienation of potential witnesses, and could even endanger informants and whistleblowers.

Caveats and exceptions to overseeing, reviewing, and reporting on matters identified by the IG are the domain and decision of the IG and not that of the reviewed department. Again, the IG Act provides that the IG can make such investigations and reports as are "in the judgment of the Inspector General, necessary or desirable." 5 U.S.C. app 3 § 6(a)(2).

Conclusion

We appreciate OLC's willingness to solicit and consider the views of the EC with respect to this issue. As set forth above, we believe that the specific legal dispute between DOJ OIG and the FBI can and should be decided on the narrow grounds of Rule 6(e) and whether DOJ OIG would be entitled to access under its provisions. IGs have been functioning effectively for over 30 years; we would urge you not to disturb settled legal authority or longstanding practice, with respect to their common authorities under the IG Act.

Sincerely,



Phyllis K. Fong
Chair



Carl Clinefelter
Vice Chair

⁵ 5 U.S.C. app. 3 § 6(a)(1); See e.g., U.S. Government Accountability Office Report, *Inspectors General: Independent Oversight of Financial Regulatory Agencies*, GAO-09-524T, at 5-6 (March 25, 2009)



Council of the
INSPECTORS GENERAL
ON INTEGRITY and EFFICIENCY

June 24, 2014

Mr. John E. Bies
Deputy Assistant Attorney General
Office of Legal Counsel
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Mr. Bies:

On June 3, 2014, you advised that the Deputy Attorney General (DAG) had recently asked the Office of Legal Counsel (OLC) to address the Department of Justice (DOJ) Office of Inspector General's (OIG) authority to access certain materials and information during the course of carrying out its oversight responsibilities under the Inspector General Act of 1978, as amended (IG Act).¹ You invited CIGIE to provide its views regarding these matters; accordingly, this letter provides the CIGIE Executive Council's (EC) response.²

It is our understanding that OLC has been asked to consider the narrow question of DOJ OIG's access to materials and information covered by: Rule 6(e) of the Federal Rules of Criminal Procedure; Section 1681u of the Fair Credit Reporting Act (FCRA);³ and the Federal Wiretap Act, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Title III)⁴ in connection with DOJ OIG's oversight of DOJ activities. We also understand that DOJ OIG, as the affected entity, is providing detailed analysis concerning access to such materials and information. CIGIE's response, therefore, focuses on the application of the access provisions of the IG Act; should OLC determine to broaden the scope of its review, we would request an opportunity to provide further comment.

At the outset, we note that DOJ and the Inspector General (IG) community have had a mutually supportive and productive relationship during the 35 years since the passage of the IG Act. Thousands of IG special agents, auditors, and evaluators work daily with DOJ prosecutors to bring wrongdoers to justice and to pursue criminal and civil remedies. The outstanding results we have obtained together would not be possible without a clear understanding of our respective roles and responsibilities, as developed over the years within the architecture of Federal statutes and day-to-day practice. And critical to an understanding of the IG role is one basic principle: the value of IG oversight lies in its

¹ 5 U.S.C. app 3.

² The EC of CIGIE assists the CIGIE Chair in governance of CIGIE, and is primarily composed of standing CIGIE committee chairs elected by CIGIE's full membership.

³ 15 U.S.C. §1681.

⁴ 18 U.S.C. §§ 2510-2522.

objectivity, and that independent perspective cannot exist if IG access to necessary information is constrained.

You have advised that you will consider the views previously expressed by CIGIE in our October 7, 2011, letter (see enclosure), as you respond to the questions raised by the DAG's current request. We reaffirm our earlier position and supplement those views, as set forth below.

DOJ's Obligations Under the IG Act

The IG Act clearly and explicitly affords IGs access to all "records, reports, audits, reviews, documents, papers, recommendations, or other material" available to an agency.⁵ No explicit exceptions are provided for materials or information covered by other statutes. As noted in our October 7, 2011, letter, the only limitations to this broad authority specific to DOJ OIG are found within Section 8E of the IG Act. That section allows the Attorney General to restrict DOJ OIG from conducting certain audits or investigations only if the Attorney General determines that such restriction is necessary to prevent the disclosure of certain information regarding investigative proceedings, intelligence matters, or threats to national security.⁶ When exercising such authority, the Attorney General must notify the DOJ IG in writing of the reason for the exercise of any such authority,⁷ and DOJ IG must notify Congress.⁸ This mechanism has been carefully constructed to ensure Congressional oversight of any limitations on DOJ OIG's independent oversight authority. Since it is our understanding that the Attorney General has not specifically cited or exercised his authority under Section 8E in the particular situations under review, we believe that Section 6(a)(1) applies and would authorize DOJ IG access to the materials and information in question.

Recent Congressional Actions and Statements on IG Access

Congress continues to demonstrate its understanding of and broad support for the principle that IGs require access to all agency records to carry out effective oversight of agency operations, and that IGs have this authority under a plain reading of Section 6(a)(1). We would draw your attention to the following recent Congressional actions and statements, which demonstrate support for the interpretation of broad and strong IG access rights:

- On January 15, 2014, during a House Oversight and Government Reform Committee hearing on IG oversight, Chairman Issa noted several cases of agencies restricting IG access to documents and witnesses, and called such restrictions ". . . a growing trend that we need to reverse."⁹
- At a May 21, 2014, Senate Judiciary Committee hearing on oversight of the Federal Bureau of Investigation (FBI), Senator Grassley raised DOJ OIG access issues, calling the FBI's lack of

⁵ 5 U.S.C. app. 3, § 6(a)(1).

⁶ 5 U.S.C. app. 3, § 8E(a)(2).

⁷ 5 U.S.C. app. 3, § 8E(a)(3).

⁸ *Id.*

⁹ Empowering Agency Oversight: Views from the Inspectors General Community: Hearing Before the H. Comm. on Oversight and Gov't Reform, 113th Cong. 3 (2014) (statement of Darrell Issa, Chairman, H. Comm. on Oversight and Gov't Reform).

cooperation with the DOJ IG “troubling”, noting that the IG Act authorizes the DOJ IG access to grand jury and wiretap information.¹⁰

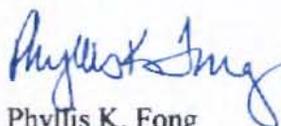
- In an April 23, 2014, letter, seven members of Congress, including Senators Grassley, Manchin, Ayotte, Murkowski; and Representatives Black, Petri, and Bishop, all signed a letter to the Peace Corps acting director, noting IGs’ “. . . statutory right of access to agency records to avoid interference with their independence.”¹¹
- On June 5, 2014, Senate Appropriations language was passed out of Committee, stating that no funds shall be used to deny the DOJ IG timely access to DOJ “records, documents, and other materials” or to “prevent or impede” such access; and that DOJ “shall report to the Committee on Appropriations within five calendar days any failures to comply with this requirement.”¹²
- On June 4, 2014, Ranking Member Coburn sent a letter to Minority Leader McConnell, in response to a 7-day letter issued by the EPA IG, noting “the plain language of Section 6(a)(1), along with the omission of any statutory exception, is dispositive in this matter, especially given Congress’s expressed intent in enacting the Inspector General Act.”¹³

This is just a sampling of recent statements that evidence Congressional intent to ensure prompt and full access by IGs to agency materials and information. Should OLC take the contrary view - that the IG Act does not give IGs the full access to agency materials and information necessary to carry out our statutory mission - CIGIE stands ready to assist Congress in addressing this matter.

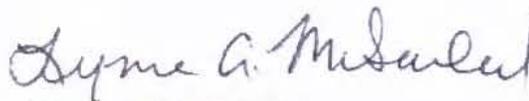
Conclusion

Thank you for the opportunity to provide our views with respect to these important issues. As noted in our October 7, 2011, letter, the IGs have been functioning effectively for over 35 years with the broad and strong access provisions of the IG Act. We urge that this settled legal authority and longstanding practice, supported by recent clear statements of Congressional intent with respect to access authorities granted under the IG Act, not be disturbed.

Sincerely,



Phyllis K. Fong
Chair



Lynne A. McFarland
Vice Chair

Enclosure

cc: James M. Cole, Deputy Attorney General
Beth Cobert, CIGIE Executive Chair

¹⁰ Hearing on Oversight of the FBI Before the S. Comm. on the Judiciary, 113th Cong. 2 (2014) (statement of Charles Grassley, Ranking Member, S. Comm. on the Judiciary).

¹¹ Letter from Charles Grassley, Ranking Member, S. Comm. on the Judiciary, et al. to Carolyn Hessler-Radelet, Acting Director, Peace Corps (Apr. 23, 2014).

¹² Commerce, Justice, Science, and Related Agencies Appropriations Act of 2015, S. 2437, 113th Cong. § 217 (2014).

¹³ Letter from Tom Coburn, Ranking Member, S. Comm. on Homeland Sec. and Gov’t Affairs, to Mitch McConnell, Minority Leader, U.S. Senate (June 4, 2014).