

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).

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
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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

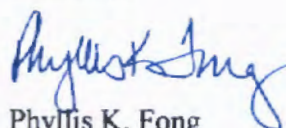
- In an April 23, 2014, letter, seven members of Congress, including Senators Grassley, Manchin, Ayotte, Murkowski; and Representatives Black, Petri, and Bishop, all signed a letter to the Peace Corps acting director, noting IGs’ “. . . statutory right of access to agency records to avoid interference 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.

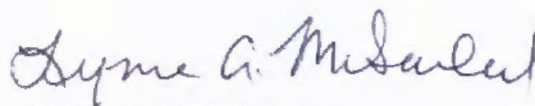
Conclusion

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).