UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
INSPECTOR GENERAL

November 7, 2019

REPLY OF ACTING EPA INSPECTOR GENERAL TO GENERAL COUNSEL MEMORANDUM – SEVEN DAY LETTER

The Inspector General Act of 1978 (IG Act), as amended, is unambiguous. Without qualification it requires "timely access to all records … or other materials …" 5 U.S.C. App. 3, § 6 (a)(1)(A). No "information" requested by the Inspector General (IG) may be "unreasonably refused," nor may requested information be "not provided." Id. at § 6 (c)(2). So Administrator Wheeler appropriately affirmed, carrying forward the direction of multiple preceding Administrators, in his August 2018 all-hands memorandum: "It is imperative and expected that agency personnel provide the [Office of Inspector General (OIG)] with access to personnel … or other information … needed by the OIG to accomplish its mission." To this day, Mr. Jackson, agency Chief of Staff, continues to fail to fully cooperate with an OIG audit and an OIG investigation.

However, onto such IG Act and Administrator clarity as to full OIG access to agency information, General Counsel Leopold grafts wide and wholesale evasions. He offers free rein to agency staff to refuse OIG requests for information. He arrogates to the agency the prerogative to decide the bounds of the IG Act, without stated bounds on the agency's limitless exercise of that prerogative. For example (all citations to page numbers of Mr. Leopold's memorandum to the Administrator, dated November 5, 2019):

- "It is ultimately the Administrator that maintains control of the [IG] information sought and decides what constitutes an adequate accommodation by the Agency …". (1)
- The agency need provide information to the OIG "only to the extent" that "Constitutional concerns" allow. (2)
- The IG Act "does not authorize the OIG to take oral interviews …". (3)

The General Counsel's other legal claims, with OIG responses:

- "The [Seven Day Letter] is obviously inaccurate when it refers to '§ 6 (c)(2),' as that section does not exist in the statute." (1, n. 1)
    - It is the General Counsel who is "inaccurate," for that subsection manifestly does exist in the IG Act, as amended by the Inspector General Empowerment Act of 2016. The General Counsel apparently employed the former, not current, statute in rendering his legal advice.
- "The IG Act is written against [a] Constitutional backdrop and it must be interpreted according to these fundamental Constitutional limits." (2)
    - Citing 1977 Department of Justice, Office of Legal Counsel (OLC), opinion on "predecessor legislation to the IG Act." In fact, the Inspector General Empowerment Act of 2016 rejected a more recent 2015 OLC opinion that restricted IG access to agency information.
- "The IG Act and case law are clear that 'Inspectors General do not have the statutory authority to compel an employee's attendance at an interview.'" (2)
    - Citing the "authority" of dicta in a single, dissenting judicial opinion.

- "[T]he IG Act … does not require … the head of an agency to compel participation by an agency employee in an interview with the OIG." (3)
    - Citing the "authority" of a legal brief.
- "… I called Acting [IG] Sheehan [to] request that the Seven Day Letter be tolled." (4)
    - Despite Section 5(d) of the IG Act withholding IG authority to "toll" the mandate that the agency "shall transmit" a Seven Day Letter to Congress within 7 days.
- "[I]t is unclear why [OIG audit request] information sought would be relevant …". (5)
    - Despite the absence in Section 6(a)(3) of the IG Act of an agency-determined "relevance" threshold for OIG access to information, and the IG Act leaving to IG judgment what "information [is] necessary." (5)

The General Counsel misconstrues facts:

- "The accommodation process to OIG was still in progress when the Seven Day Letter was transmitted." (1)

    - There was no agency accommodation "progress" whatsoever—quite the opposite—by the time the Seven Day Letter was issued. As detailed in the Seven Day Letter, the OIG made repeated, fruitless attempts over weeks and months, including OIG elevation to the Administrator, Associate Deputy Administrator and General Counsel, in writing and in person, to produce Mr. Jackson's audit and investigation cooperation.
    - October 18, 2019: The acting Inspector General met with the Associate Deputy Administrator and General Counsel to impress on them the urgent need for Mr. Jackson's long-delayed audit and investigation cooperation. No cooperation from Mr. Jackson was ever forthcoming.
    - October 21, 2019: (Audit) -- Mr. Jackson pointedly refused to answer the single question; (Investigation) -- Mr. Jackson, refusing an oral interview, merely agreed to respond to "questions in writing."
    - October 24, 2019: The acting Inspector General sent the Administrator and Associate Deputy Administrator a draft Seven Day Letter, requesting that Mr. Jackson "fully cooperate" by October 28, 2019, without interview or other preconditions, and stating that a signed Seven Day Letter could immediately be issued thereafter if cooperation was not immediately forthcoming.
    - October 29, 2019: Neither official had responded, nor had Mr. Jackson yet cooperated. Accordingly, the OIG having exhausted all efforts to obtain Mr. Jackson's full cooperation, the Seven Day Letter was sent.

- "[T]he Agency attempted to accommodate the OIG." (4). <u>To this day</u>,

    - There have been only unfulfilled pledges of attempting to secure Mr. Jackson's cooperation, not his actual cooperation.
    - (Audit) -- Mr. Jackson has never answered the central question of the audit objective—to identify an individual—put to him by auditors on October 3, 2019. Indeed, on October 21, 2019, he affirmatively refused to answer: "I am not going to involve others … Welcome to Washington." (Seven Day Letter, Attachment D)
    - (Investigation) -- Mr. Jackson has never responded to the OIG's Office of Investigations attempts to arrange a second interview despite (1) numerous efforts by investigators, since September, 2019, to schedule it (Seven Day Letter, Attachment E), and (2) the Assistant Inspector General

for Investigations (AIGI) elevating this long-ignored request by memorandum to the Administrator and Associate Deputy Administrator on October 15, 2019, and directing them that Mr. Jackson should contact the Deputy AIGI to arrange an interview. (Seven Day Letter, Attachment F)

- On November 5, 2019, the acting Inspector General, in discussions with the Administrator, Associate Deputy Administrator and General Counsel, never refused this second investigative interview, but actually encouraged it – and reiterated earlier direction that Mr. Jackson contact the Deputy AIGI to do so. On November 5, 2019, the acting Inspector General alerted the Deputy AIGI to expect such a contact from Mr. Jackson.
- Mr. Jackson has yet to contact the Deputy AIGI, or any other OIG official, to schedule an interview.

The first line of the IG Act is our pillar. We are "independent." Id. at § 2. The interpretation of the General Counsel subverts our independence. It would render us fundamentally dependent on an agency that "maintains control" of information sought by the IG. It constricts our right to agency information to an agency-determined "relevant" test. It altogether extinguishes the heretofore absolute right of the IG to conduct audit or investigative interviews.

Perhaps the most unvarnished repudiation of the IG Act is the General Counsel's declaration that "a right to *request* does not equate to the [IG] right to *receive* all information requested …" (italics in original, at 4). Were this interpretation to govern in its unbridled range, the IG Act is hollowed out and the Administrator's all-hands memorandum on cooperation with the IG nullified.