



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

OFFICE OF
INSPECTOR GENERAL

December 10, 2019

MEMORANDUM

SUBJECT: Despite Requirements of Inspector General Act, Chief of Staff Refuses to Provide Agency Information for OIG Evaluation; Required Whistleblower Training Does Not Address Interference with or Intimidation of Congressional Witnesses
Report No. 20-E-0053

FROM: Charles J. Sheehan, Acting Inspector General

A handwritten signature in blue ink that reads "Charles J. Sheehan".

TO: Douglas Benevento, Associate Deputy Administrator

Donna Vizian, Principal Deputy Assistant Administrator
Office of Mission Support

The Office of Inspector General (OIG) of the U.S. Environmental Protection Agency (EPA) initiated an assignment based on a congressional request that we review matters regarding the EPA's advance access to testimony given before the U.S. House of Representatives Committee on Science, Space and Technology on May 23, 2017, by an environmental science and policy expert. The project number for this assignment was OA&E-FY19-0313. Our objectives were to determine:

1. How a senior political appointee obtained a copy of the witness's testimony prior to the congressional hearing.
2. Whether employees in the Office of the Administrator received whistleblower training on federal prohibitions against interfering with or intimidating individuals who testify before Congress.

The purpose of this memorandum is to notify the agency of our results.

Background

On June 26, 2017, the OIG received a letter from Congress (Attachment 1) alleging that senior EPA officials, particularly the EPA's Chief of Staff, may have sought to interfere with the testimony of the then-Chair of the EPA's Board of Scientific Counselors. The letter said that the Chief of Staff sent the witness a copy of her "embargoed" testimony, which had already been sent to the committee, specifically referencing a portion of her testimony. The letter requested that the OIG review three matters. In its response to the congressional request (Attachment 2), the OIG said that it had referred one of these matters to the agency's Senior Counsel for Ethics in the Office of General Counsel to be addressed as an ethics issue. The OIG agreed to review the other two matters.

Scope and Methodology

We conducted this assignment from August through November 2019. The assignment was conducted in accordance with *Quality Standards for Inspection and Evaluation* issued by the Council of the Inspectors General on Integrity and Efficiency. We planned and performed the assignment to obtain sufficient and appropriate evidence to provide a reasonable basis for our observations and conclusions, based on our objectives.

To determine how a senior political appointee obtained a copy of the witness’s testimony prior to the congressional hearing, we interviewed the agency’s Chief of Staff and reviewed emails and other correspondence related to this matter.

To determine whether employees in the Office of the Administrator received whistleblower training on federal prohibitions against interfering with or intimidating individuals who testify before Congress, and specifically whether the Ethics Office has a role in overseeing such training, we interviewed the Alternate Agency Ethics Official. In addition, we communicated via email with the Deputy Assistant Administrator for Administration and Resources Management, within the Office of Mission Support, regarding whistleblower protection training. We also reviewed information and documents—provided by the Office of Human Resources, within the Office of Mission Support, and the Chief of Staff—that pertained to executive-level training requirements.

What We Found

By Refusing to Provide Requested Information to the OIG, the Chief of Staff Is Not Complying with the Inspector General Act and the Administrator’s Memorandum on Cooperating with the OIG

We confirmed with the Chief of Staff that he received a copy of the witness testimony prior to the congressional hearing; however, he refused, both verbally and in writing, to disclose from whom he received the testimony. This refusal prevented us from being able to answer Objective 1.

The OIG interviewed the Chief of Staff on October 3, 2019. During the interview, he refused to disclose how he received the testimony, which was supposed to be “embargoed.” On October 7, 2019, the OIG sent an email to the Chief of Staff asking him to confirm that he would not disclose from whom he received the testimony. The Chief of Staff did not respond to the email. On October 16, 2019, the OIG sent an email to the Associate Deputy Administrator, the Chief of Staff’s supervisor, requesting that he direct the Chief of Staff to fully cooperate with the OIG and provide the requested information. The email also stated that the OIG could, consistent with the Inspector General Act of 1978 (IG Act), as amended, in cases of noncooperation, report the circumstance to the head of the agency, thereby initiating the “Seven-Day Letter” process.¹

¹ Section 5(d) of the Inspector General Act of 1978, as amended, 5 U.S.C. App., requires an Inspector General to report to the head of the agency “whenever the Inspector General becomes aware of particularly serious or flagrant problems, abuses, or deficiencies relating to the administration of programs and operations of such establishment. The head of the establishment shall transmit any such report to the appropriate committees or subcommittees of Congress within seven calendar days, together with a report by the head of the establishment containing any comments such head deems appropriate.” This report is commonly called the “Seven-Day Letter.”

On October 17, 2019, the acting Inspector General met with the Associate Deputy Administrator and General Counsel to urge the now exceedingly delayed cooperation of the Chief of Staff. On October 21, 2019, at the request of the Associate Deputy Administrator, the Chief of Staff responded to the OIG via email, but merely reaffirmed his continuing refusal to cooperate. He wrote, “I am not going to involve others or point fingers ... whoever agrees or not ... Welcome to Washington.”

Issuance of Seven-Day Letter

After these failed attempts to obtain the requested information, the OIG sent a draft Seven-Day Letter to the Administrator and Associate Deputy Administrator on October 24, 2019 (with a deadline of October 28, 2019, for full cooperation with the OIG), but no response or cooperation was received by October 28, 2019. Accordingly, on October 29, 2019, the OIG issued a signed Seven-Day Letter to the EPA Administrator describing the Chief of Staff’s continued refusal to fully cooperate and provide the information requested (Attachment 3). The letter addressed the Chief of Staff’s lack of cooperation in this matter and in a separate matter pertaining to the OIG’s Office of Investigations. The Administrator transmitted the Seven-Day Letter to the appropriate committees on November 5, 2019 (Attachment 4).

The OIG issued a Seven-Day Letter to the EPA Administrator, citing a lack of cooperation by the agency’s Chief of Staff.

Required Training, Some of Which Is Prepared by the Office of Special Counsel, Does Not Address Interfering with or Intimidating Individuals Who Communicate with or Testify Before Congress

For Objective 2, we found that all EPA employees, including political appointees, are required to complete whistleblower protection training and review other materials that relate to prohibited personnel practices.² The agency correctly asserts that whistleblower training is provided directly from the Office of Special Counsel (OSC), and that the agency does not have the authority or ability to deviate from the OSC training. The training and materials do not specifically address interfering with or intimidating individuals who seek to communicate with or testify before Congress. The Office of Mission Support said that it is not aware of any other training that addresses this matter, nor is any other training planned. We also determined that the Ethics Office has no role in whistleblower training.

Informational Documents and Training Requirements

In October 2018 and again in November 2019 after the issuance of our draft report, the EPA Administrator emailed to all employees a message that addressed prohibited personnel practices and the whistleblower protections available to federal employees. An excerpt from both messages states:

Whistleblowing is defined as the disclosure of information that an employee reasonably believes evidences: a violation of any law, rule or regulation; gross mismanagement; gross waste of funds; an abuse of authority; a substantial and specific danger to public health or safety; or censorship related to scientific research or analysis.

² Prohibited personnel practices are 14 employment-related activities that are banned in the federal workforce because they violate the merit system through employment discrimination; retaliation; improper hiring practices; or failure to adhere to laws, rules or regulations that directly concern the merit system principles. See 5 U.S.C. § 2302(b)(1)–(14). The Office of Special Counsel has the authority to investigate and prosecute violations of these 14 prohibited personnel practices.

The 2018 and 2019 messages further discuss the various acts that provide all covered federal employees the right to make whistleblower disclosures and protection from whistleblower retaliation.

All EPA employees are required to take the *Notification and Federal Employee Antidiscrimination and Retaliation Act*—also known as *No FEAR Act*—training, which includes the topic of whistleblower protection, at least once every 2 years. The training must be completed by new political appointees within their first 90 days. In addition, political appointees are required within their first 30 days to review information on whistleblowing and prohibited personnel practices found on the OSC’s website.

On September 27, 2019, the Office of Mission Support announced a new mandatory training for executives, managers and supervisors on whistleblower protection. The course, *Responding to Employees Alleging Violations of Whistleblower Protection*, must be completed by December 31, 2019. The Office of Mission Support said that this training is provided directly from the OSC, and the Office of Mission Support does not have the authority or ability to deviate from the training.

Our review of the training materials and the information found on the OSC’s website did not identify any information that addresses interfering with or intimidating individuals who communicate with or testify before Congress.

Agency Response and OIG Evaluation

We issued a draft report to the agency on November 21, 2019. The agency provided a response on November 27, 2019. For Objective 1, the agency response did not address or disclose the source of the witness testimony, focusing only on matters identified in the Seven-Day Letter. Those matters are discussed by the acting Inspector General below.

For Objective 2, the agency asserted that it complies with the OSC’s whistleblower training requirements. The agency stated that the draft report identified its whistleblower training as “deficient.” However, we did not reach that conclusion. Nonetheless, we modified our report to clarify that the required OSC training did not specifically address interfering with or intimidating individuals who seek to communicate with or testify before Congress.

The agency’s response is included in Attachment 5.

Acting Inspector General Reply to the Associate Deputy Administrator’s Response to the Draft Report

The Associate Deputy Administrator’s response to the draft report repeats General Counsel opinions addressed by the OIG following the recent Seven-Day Letter. There is recklessness in such views. Should they take root, they convert the IG Act into a no man’s land whereby agency staff—under the borderless banner of “constitutional concerns”—may create wholesale exemptions from providing information to the OIG. Specific General Counsel statements and the OIG’s response follow:

- “To the extent OIG is acting on behalf of Congress to obtain information that is the subject of a Congressional inquiry, separation of powers between the executive and legislative branches support the Agency, not OIG”

- In this audit, the OIG is not “acting on behalf of Congress to obtain information.” The only circumstances in which the OIG acts “on behalf of Congress to obtain information” is when Congress, by statute, mandates the OIG to conduct a particular audit. (The OIG conducts some 13 such statutorily mandated audits each year.) The current audit is not statutorily mandated. Although a request came from three congressional members, the audit was undertaken wholly on the independent “judgment” of the former Inspector General, as he deemed “necessary or desirable” (5 U.S.C. App. (IG Act) § 6(a)(2)).
 - The General Counsel’s position that “the Agency, not OIG [has] ultimate control of how to accommodate information requests by Congress” has wide and pernicious effects. If true, even for information requested by the OIG during statutorily mandated audits incontestably undertaken “on behalf of Congress,” the agency may refuse—at its “Constitutional” caprice—to provide information to the OIG.
 - When the former Inspector General made the decision to undertake this review, he copied then-Administrator Scott Pruitt on his correspondence with Congress dated November 2, 2017 (see Attachment 2) and received no objection at that time that such a review would infringe on separation of powers. When the OIG initiated this assignment in August 2019 and notified the agency, again the agency made no objection. Later still, when the OIG sought to interview the Chief of Staff, no objection was made; and lastly, when the acting Inspector General met personally with the Associate Deputy Administrator and the General Counsel to press the Chief of Staff’s cooperation, no such objection was made.
 - Only 2 years later, after the agency’s hand is forced by the Seven-Day Letter, does the General Counsel conjure a hitherto hidden—and novel—theory of such large constitutional dimensions as to virtually void the IG Act.
- “How Congress takes testimony ... is not a proper area of inquiry for OIG.”
 - This audit has nothing to do with how Congress conducts itself. It has everything to do with how the agency conducts itself, a fact as plain as the audit objective: “How a senior political appointee obtained a copy of the witness’s testimony.”
 - In admonishing the OIG to confine itself to “a proper area for inquiry,” the General Counsel sweeps the IG Act aside. If the act means anything, it means that what is a “proper” inquiry is exclusively committed to OIG “judgment,” 5 U.S.C. App. (IG Act) § 6(a)(2), as long as any such audit “relat[es] to the programs and operations of [EPA].” Id. at § 4(a)(1).
 - The General Counsel is unable to identify what provision of the IG Act confers agency authority to set subject matter perimeters beyond which the OIG may not venture.
 - “The OIG can only operate within its statutory limits and not occupy the policy role given to the Administrator”
 - This diminution of the OIG’s authority by current agency leadership is fallacious, factually and legally.
 - First, how the Chief of Staff obtained congressional testimony is a pure question of fact, with no color of “policy” about it.
 - Second, the IG Act is replete with direction that the OIG play a substantial “policy role.” In Section 2, the Inspector General is directed to “recommend policies” for the agency (5 U.S.C. App. (IG Act) § 2(2)) (emphasis added). In Section 4, among “Duties and Responsibilities,” the Inspector General is:

- “to provide policy direction ... relating to the programs and operations” Id. at § 4(a)(1).
- “to recommend policies for ... promoting economy and efficiency in the administration of ... its programs and operations” Id. at § 4(a)(3).
- “to recommend policies for ... promotion of economy and efficiency in the administration of ... programs and operations administered ... by such establishment Id. at § 4(a)(4) (emphasis added).

“Neither the head of the [agency] nor the officer next in rank ... shall prevent or prohibit the Inspector General from ... carrying out, or completing any audit” states the IG Act. Id. at § 3(a).

The wonder is how Administrator Wheeler’s all-agency memorandum in 2018³ (“One of the ways we ensure accountability deserving of the public’s trust is through the review and oversight carried out by the OIG. The OIG... requires information and assistance from EPA managers and staff ... It is imperative and expected that agency personnel provide the OIG with access to ... information”)—and with it the IG Act—survives the “officer next in rank” Associate Deputy Administrator and General Counsel position in 2019: “But a right to *request* does not equate to the right to *receive* all information requested” (emphasis in original).

If the Associate Deputy Administrator and General Counsel position of 2019 stands, the IG Act falls.

cc: Andrew Wheeler, Administrator
 Henry Darwin, Assistant Deputy Administrator
 Ryan Jackson, Chief of Staff
 Michael Molina, Deputy Chief of Staff
 Kevin DeBell, Acting Deputy Chief of Staff
 Michael Benton, Audit Follow-Up Coordinator, Office of the Administrator
 David Bloom, Acting Chief Financial Officer
 Joseph Brazauskas, Acting Associate Administrator for Congressional and Intergovernmental Relations
 Corry Schiermeyer, Associate Administrator for Public Affairs
 Annette Morant, Agency Follow-Up Coordinator
 Matthew Leopold, General Counsel
 David Fotouhi, Principal Deputy General Counsel
 Stefan Martiyan, Director, Office of Continuous Improvement, Office of the Administrator
 Justina Fugh, Senior Counsel for Ethics/Alternate Agency Ethics Official, Office of General Counsel
 David Zeckman, Associate Deputy Assistant Administrator for Mission Support
 Wesley Carpenter, Deputy Assistant Administrator for Administration and Resources Management, Office of Mission Support
 Dan Coogan, Acting Director, Office of Resources and Business Operations, Office of Mission Support
 Mara Kamen, Director, Office of Human Resources, Office of Mission Support
 Marilyn Armstrong, Audit Follow-Up Coordinator, Office of Mission Support

³ Cooperating with the Office of Inspector General to Ensure the U.S. Environmental Protection Agency is Fulfilling the Public’s Trust, dated August 8, 2018.

Attachments (5)

Letter from Congress

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY

2321 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6301

(202) 225-6371
www.science.house.gov

June 26, 2017

The Honorable Arthur A. Elkins, Jr.
Inspector General (IG)
Office of Inspector General (OIG)
U.S. Environmental Protection Agency (EPA)
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear IG Elkins:

We are writing to you out of deep concern that senior EPA officials, particularly the EPA Chief of Staff Ryan T. Jackson, may have sought to interfere with the testimony of a Democratic witness at a hearing before the House Committee on Science, Space & Technology on Tuesday, May 23, 2017.¹ We contend that Mr. Jackson's actions were inappropriate and may have violated federal regulations. The right to communicate with Congress is guaranteed, and intentionally interfering with these rights may constitute a violation of federal law. Several federal laws may be germane to this issue, including 5 U.S. Code § 2302 (Prohibited personnel practices), 5 U.S. Code § 7211 (Employees' right to petition Congress), 18 U.S. Code § 1512 (Tampering with a witness, victim, or an informant), and 18 U.S. Code § 1505 (Obstruction of proceedings before departments, agencies, and committees). Attempting to interfere with or obstruct the testimony of any individual to the U.S. Congress is a matter that should be taken extremely seriously and we trust that you will conduct a thorough investigation of the matter outlined below.

On May 23, 2017, Dr. Deborah L. Swackhamer, the current Chair of the EPA's Board of Scientific Counselors (BOSC) and a Professor Emerita of Science, Technology, and Public Policy in the School of Public Affairs and a Professor Emerita of Environmental Health Sciences in the School of Public Health at the University of Minnesota testified as a Democratic witness before the House Committee on Science, Space & Technology. Dr. Swackhamer is also the Co-Director of the University's Water Resources Center and the former Chair of the EPA's Science Advisory Board (SAB).² She testified before the Science Committee's Subcommittee on Environment at a hearing titled, "*Expanding the Role of States in EPA Rulemaking.*" She

¹ Subcommittee on Environment hearing, "Expanding the Role of States in EPA Rulemaking," House Committee on Science, Space & Technology, Tuesday, May 23, 2017, available here: <http://democrats.science.house.gov/hearing/expanding-role-states-epa-rulemaking>

² Biography, Dr. Deborah Swackhamer, Humphrey School of Public Affairs, University of Minnesota, available here: <https://www.hhh.umn.edu/directory/deborah-swackhamer>

appeared before the Committee as an independent environmental scientist and was not representing EPA, BOSC or any other EPA advisory committee.³ Dr. Swackhamer made this point very clear in her written and oral testimony to the Committee. “I speak to you today as an environmental sciences and policy expert, and not on behalf of the U.S. EPA or the State of Minnesota,” she said in her statement.⁴

Both private citizens and federal employees have the right to freely communicate with Congress. However, Mr. Jackson appears to have attempted to shape Dr. Swackhamer’s testimony to the Committee even after he was informed by both Dr. Swackhamer and the Acting Assistant Administrator for the Office of Research and Development (ORD), Dr. Robert Kavlock, that she was testifying in her personal capacity as an independent environmental scientist. Mr. Jackson, for instance, provided Dr. Swackhamer with a list of EPA’s internal talking points on EPA Administrator Scott Pruitt’s decision not to renew the terms of nine BOSC members. It seems clear that Mr. Jackson was seeking to influence Dr. Swackhamer’s testimony to Congress.

Mr. Jackson also sent Dr. Swackhamer a copy of her embargoed testimony to the Science Committee the day before the hearing and specifically referenced a portion of her testimony he claimed was not accurate. He asked Dr. Swackhamer to state in her testimony that the decision not to renew the nine BOSC members’ positions had “not yet been made.” However, in reality, the Assistant Administrator of ORD had been informed two weeks earlier, apparently by EPA Administrator Pruitt’s office, that a decision had been made and that the appointments of these nine BOSC members were “not being renewed.” It seems Mr. Jackson wanted Dr. Swackhamer to reiterate a public relations message that was not factually accurate.

It is unclear whether Mr. Jackson took these actions knowingly. Regardless, his actions were inappropriate. We are also deeply troubled by the fact that Mr. Jackson somehow obtained the embargoed testimony of a Democratic witness prior to that testimony being officially released by the Science Committee. It is especially disturbing that Mr. Jackson then used that testimony in an attempt to intimidate and interfere with this witness’s testimony before the Science Committee.

We have written to Administrator Pruitt about these concerns and informed him that we would be asking your office to investigate these matters. A copy of that letter is attached for your review. Among the questions we suggest that your office address in reviewing this matter:

- Did EPA Chief of Staff Ryan Jackson or any other EPA officials attempt to interfere with the testimony of Dr. Deborah Swackhamer to the Science Committee and were they in violation of any federal regulations or laws as a result?
- How did Mr. Jackson obtain an embargoed copy of Dr. Swackhamer’s testimony to the Science Committee?

³ Subcommittee on Environment hearing, “Expanding the Role of States in EPA Rulemaking,” House Committee on Science, Space & Technology, Tuesday, May 23, 2017, available here:

<http://democrats.science.house.gov/hearing/expanding-role-states-epa-rulemaking>

⁴ Written Testimony submitted by Deborah L. Swackhamer, Ph.D. Professor Emerita, University of Minnesota, Subcommittee on Environment hearing titled: “Expanding the Role of States in EPA Rulemaking,” House Committee on Science, Space & Technology, May 23, 2017, available here:

<http://democrats.science.house.gov/sites/democrats.science.house.gov/files/documents/Swackhamer.pdf>

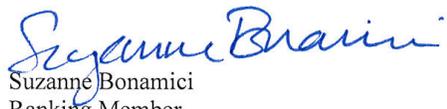
- Has the staff in the EPA's Office of the Administrator received whistleblower rights or other training to ensure they are well aware of federal prohibitions on interfering with or seeking to intimidate individuals who seek to communicate with or testify before Congress? If not, is any such training planned for the future?
- Does the OIG have any recommendations regarding the findings in this investigation?

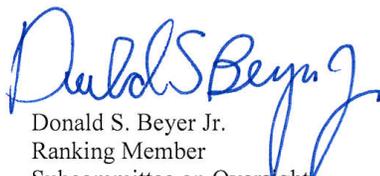
The ability of both federal officials and private citizens to freely communicate with Congress without fear of intimidation, interference, or reprisal is a bipartisan issue that is critical to ensuring good governance and uncovering issues of potential waste, fraud, abuse, or mismanagement. Ensuring that both private and federally-funded scientists are able to speak freely about the scientific merits of their research, as well as management issues within their agencies, programs, or organizations, is also critical to Congress's ability to carry out our oversight responsibilities. We appreciate your role as the EPA's watchdog to ensure that federal scientists are not silenced, and we trust that you will keep a close eye on these issues.

If your staff has any questions regarding this request they may contact Doug Pasternak on the Minority staff at (202) 226-8892. Thank you very much for your prompt attention to this important matter.

Sincerely,


Eddie Bernice Johnson
Ranking Member
Committee on Science, Space & Technology


Suzanne Bonamici
Ranking Member
Subcommittee on Environment


Donald S. Beyer Jr.
Ranking Member
Subcommittee on Oversight

OIG Response to Congress



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

NOV - 2 2017

THE INSPECTOR GENERAL

The Honorable Eddie Bernice Johnson
Ranking Member
Committee on Science, Space, and Technology
House of Representatives
Washington, D.C. 20515

Dear Ranking Member Johnson:

Thank you for your June 26, 2017, letter requesting that the U.S. Environmental Protection Agency's (EPA's) Office of Inspector General (OIG) review allegations that senior EPA official Ryan Jackson may have sought to interfere with the testimony of a witness, Dr. Deborah Swackhamer, at a hearing before the House Committee on Science, Space, and Technology on May 23, 2017.

As we noted previously, we forwarded this matter to the EPA's Office of General Counsel (OGC) Senior Counsel for Ethics, Justina Fugh, as an ethics issue, for whatever action OGC-Ethics deemed appropriate. While the OIG can refer such a matter to OGC-Ethics for consideration by that office, the OIG has no authority to demand any action or prescribe the scope of action to OGC-Ethics.

Regarding your first question, during her review of this matter, Ms. Fugh confirmed that she gave ethics advice to Dr. Swackhamer about her testimony. The crux of that advice was as follows: Dr. Swackhamer could, in her personal capacity, speak on topics, even those that directly affected the EPA; however, she could not indicate that she was speaking on behalf of the EPA and could not be listed only by her EPA affiliation. If Dr. Swackhamer mentioned the EPA, she needed to include at least two other significant biographical details with the EPA not having any undue influence. Additionally, Ms. Fugh advised Dr. Swackhamer that she could not share nonpublic information. The information in the congressional testimony indicated to Ms. Fugh that Dr. Swackhamer complied with that ethics advice. With that context, Ms. Fugh examined potential bases for ethical violations by Mr. Jackson but concluded that there was no ethical violation to pursue further.

Regarding your other questions 2, 3, and 4, the OIG did not previously initiate a review of how Mr. Jackson obtained the embargoed testimony from your committee or a review of the Office of the Administrator's access to training about whistleblower rights and the ability of EPA scientists to communicate with Congress without fear or intimidation.

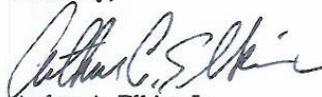
In determining whether the OIG can undertake requested work, initially we have to find that the matter is within our jurisdiction. But, beyond that threshold question, we have to determine whether we have sufficient resources—people, time and funds—to do a project in a timely fashion, and whether it would preclude our doing other crucial work. The fact is that the OIG has been funded at less than the levels we deem adequate to do all of the work that should be done, and we therefore have to make difficult decisions about whether to accept any given potential undertaking. Many of our projects are statutorily mandated work, with Congress regularly adding new mandates. Further, our annual work plan, which is

also statutorily mandated, uses a risk-based analysis that identifies dozens of additional high-impact projects. All of this means that for every discretionary review that the OIG decides to undertake, there will be others we cannot.

However, after analyzing your request in light of these constraints, we have decided that we will accept this additional request to address questions 2, 3 and 4 in the June 26, 2017, letter, and begin the work as staff become available for the project. We will provide you with the results and any recommendations when the project is completed.

Thank you for your interest in the work of the OIG. A similar letter was sent to Representative Donald S. Beyer Jr. and Representative Suzanne Bonamici. If you have any questions about this or any other matter, please contact Alan Larsen, Counsel to the Inspector General, at (202) 566-2391.

Sincerely,



Arthur A. Elkins Jr.

cc: Scott Pruitt, Administrator, U.S. Environmental Protection Agency

Seven-Day Letter

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



OCT 29 2019

OFFICE OF
INSPECTOR GENERAL

Via Hand Delivery and Email

The Honorable Andrew R. Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Seven Day Letter -- Refusals to Fully Cooperate and Provide Information for Audit and Investigation

Dear Administrator Wheeler:

I write pursuant to Section 5(d) of the Inspector General (IG) Act of 1978, as amended, which requires an Inspector General to report to the head of the agency "whenever the Inspector General becomes aware of particularly serious or flagrant problems, abuses, or deficiencies relating to the administration of programs and operations of such [agency]." 5 U.S.C. App. 3, § 5(d). This report is commonly called the "Seven Day Letter."

The particularly serious or flagrant problem I am reporting concerns two instances of refusal to fully cooperate and provide information to the IG, one during an audit and one during an administrative investigation. They center on a single employee -- Chief of Staff Ryan Jackson.

BACKGROUND

The IG Act gives the Office of the Inspector General (OIG) unqualified "timely access to all records ... or other materials" relating to agency programs or operations. 5 U.S.C. App. 3, § 6 (a)(1)(A). No "information" requested by the IG may be "unreasonably refused or not provided." *Id.* at § 6 (c)(2). The IG Act is unambiguous, as is your August 8, 2018, message to all EPA employees, *Cooperating with the Office of Inspector General to Ensure the U.S. Environmental Protection Agency is Fulfilling the Public's Trust* (Attachment A). There you echo the Act's explicit mandate of full agency cooperation: "It is imperative and expected that agency personnel provide the OIG with access to personnel ... or other information ... needed by the OIG to accomplish its mission."

Your message particularly recognizes OIG's investigation practices: "For investigations ... the OIG follows generally accepted protocols for questioning employees and gathering evidence." Protocols observed by our investigative agents -- such as those taught to all federal OIG agents at the Federal Law Enforcement Training Center -- do not allow agency employees to set conditions for interviews. As the IG Act reinforces, in the sphere of gathering information during an investigation, the IG, not an agency employee, makes the "judgment" as to reasonableness. 5 U.S.C. App. 3, § 6 (c)(2). Terms and

conditions for an interview dictated by an employee do not, in our judgment, satisfy investigative protocols.

Two courts of appeals agree. “Congress intended that the Inspector General’s investigatory authority include the power to determine when and how to investigate.” *Department of Homeland Security, Customs and Border Patrol v. Federal Labor Relations Authority*, 751 F.3d 665, 672 (D.C. Cir. 2014), quoting *U.S. Nuclear Regulatory Comm’n v. Federal Labor Relations Authority*, 25 F.3d 229, 235 (4th Cir. 1994).

As outlined more thoroughly below, Mr. Jackson’s cooperation has been patiently sought multiple times over protracted periods by OIG auditors and investigators. Auditors asked of him merely a brief email reply. Investigators requested to interview him. Both matters, after Mr. Jackson’s repeated delays and refusals, were elevated, in writing, to you and/or other senior agency leaders in a final hope for cooperation with the OIG, and to warn of the possibility of a Seven Day Letter. On both matters I personally met with the Associate Deputy Administrator and General Counsel (October 18, 2019) to press the grave character of failure to fully cooperate with audits and investigations and offer some minor accommodations to Mr. Jackson.

On October 24, 2019, I emailed you and the Associate Deputy Administrator the full contents of this letter in draft (subject line: “Draft Seven Day letter for refusal to fully cooperate ... for immediate attention”) requesting that Mr. Jackson have “fully cooperated” with the audit and investigation by COB October 28, 2019, or I could send this final letter as early as today. As of COB October 28, 2019, Mr. Jackson has still refused to cooperate. Since October 21, 2019, neither you nor any agency official has contacted OIG on this urgent matter.

REFUSAL TO COOPERATE

Audit: Refusal to provide requested information

- September 11, 2019, Mr. Jackson to auditors: “When would you like to talk to me about this? I’m eager.” (Attachment B)
- October 7, 2019, Angela Bennett (Lead Auditor) to Mr. Jackson: Asking Mr. Jackson to “confirm” his answer to question from October 3rd interview of Mr. Jackson -- “From whom did you receive a copy of the testimony?’ ... your [October 3rd] answer was: ‘Will I say where I got it from? No.’” (Attachment C)
- October 16, 2019, John Trefry (Audit Director) to Douglas Benevento (Associate Deputy Administrator): Alerting Mr. Benevento of Mr. Jackson’s continuing lack of cooperation by refusing to answer auditor question, and giving Mr. Benevento “opportunity to direct Mr. Jackson to fully cooperate ... and provide the requested information.” (Attachment D)
- October 21, 2019, Mr. Jackson to Mr. Benevento and auditors: Regarding October 7th question from Lead Auditor to identify from whom Mr. Jackson received copy of testimony, “I am not going to involve others or point fingers ... whoever agrees or not ... Welcome to Washington.” (Attachment D)

Administrative Investigation: Refusal to submit to interview

- October 8, 2019 (11:35 AM), Deputy Assistant Inspector General for Investigations Craig Ulmer to Mr. Jackson: Seeks date for interview “pertaining to an ongoing administrative investigation

- ... my office spoke to your scheduler ... on September 25th, to arrange a meeting, but since that time the OIG has not heard back about your availability.” (Attachment E)
- October 8, 2019 (12:04 PM), Mr. Jackson to Mr. Ulmer: “If you would like to tell me specifically what it is about, I’ll be glad to schedule it ... [my scheduler] has asked the subject of the matter and until I receive it ... I’m not meeting with you or your staff.” (Attachment E)
 - October 9, 2019 (4:23 PM), Mr. Ulmer to Mr. Jackson: “[O]n July 24, 2019, you were interviewed by OIG Special Agents ... and you terminated that interview before it could be completed ... This second interview is necessary ... you are not entitled to advance notice of the purpose of the interview or the topics ... That said, you may reasonably expect that the same or similar topic(s) discussed during the interview of July 24, 2019 will be covered ... We have communicated with your scheduler on multiple dates, including on September 25, October 1, and October 2 ... we have yet to receive a date and time ... I should note that you were given the opportunity to follow up with any clarification you believed necessary ... At any time, should you feel that you need to clarify or provide additional documents or information regarding any of the matters discussed at the July 24 interview or any other future interview, you are permitted to do so.” (Attachment E)
 - October 9, 2019 (4:40 PM), Mr. Jackson to Mr. Ulmer: “Well, then I am not meeting with you or your staff if you will not tell me the subject of the conversation so that I may prepare for it. The fact that you cannot and will not provide the subject of what you want to meet with me about is unprofessional, and I’m not participating. Unless you have further substantive information, do not contact me further.” (Attachment E)
 - October 15, 2019: Helina Wong (Assistant Inspector General for Investigations) to Administrator Wheeler and Mr. Benevento: Alerting them to Mr. Jackson’s continuing lack of cooperation by refusing to submit to an interview, and “request[ing] that you direct Mr. Jackson to make himself immediately available to be interviewed and to henceforth fully cooperate with OIG investigations.” (Attachment F)
 - October 21, 2019, Mr. Jackson to Mr. Ulmer: “I have already met with your staff for an hour. If you would like a second interview send me your questions in writing, and I will respond in writing.” (Attachment G).

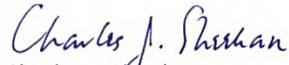
ACTION

Section 5(d) of the IG Act requires you to transmit this letter to appropriate committees or subcommittees of Congress within seven calendar days -- by November 5, 2019 -- together with your report containing any comments you wish to provide. The appropriate congressional committees (whether for issues arising under the IG Act or oversight responsibilities for the agency) are the House Committee on Oversight and Reform, House Committee on Science, Space and Technology, House Committee on Energy and Commerce, Senate Committee on Environment and Public Works and Senate Committee on Homeland Security and Government Affairs. Please inform me simultaneously with your notification to Congress that you have provided my report to those committees.

CONCLUSION

As it is for the agency itself, information is the oxygen for the Inspector General's office. If information is choked off, we cannot fulfill our congressional charter and produce work of the rigor and quality expected by the American public. You reaffirmed in your message to all agency employees that Inspector General access to all information is "imperative" in "Fulfilling the Public's Trust." To countenance open defiance even in one instance -- much less two, both by a senior official setting precedent for himself and all agency staff -- is ruinous.

Sincerely,



Charles J. Sheehan
Acting Inspector General

Attachments

[Link to Seven-Day Letter Attachments](#)

EPA Response to Seven-Day Letter



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

NOV 05 2019

THE ADMINISTRATOR

Hon. Carolyn Maloney
Acting Chair
Committee on Oversight and Reform
U.S. House of Representatives
Washington, D.C. 20515

Hon. Eddie Bernice Johnson
Chair
Committee on Science, Space and
Technology
U.S. House of Representatives
Washington, D.C. 20515

Hon. Frank Pallone
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

Hon. John Barrasso
Chairman
Committee on Environment & Public Works
U.S. Senate
Washington, D.C. 20510

Hon. Ron Johnson
Chairman
Committee on Homeland Security and
Government Affairs
U.S. Senate
Washington, D.C. 20510

Hon. Jim Jordan
Ranking Member
Committee on Oversight and Reform
U.S. House of Representatives
Washington, D.C. 20515

Hon. Frank Lucas
Ranking Member
Committee on Science, Space and
Technology
U.S. House of Representatives
Washington, D.C. 20515

Hon. Greg Walden
Ranking Member
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

Hon. Tom Carper
Ranking Member
Committee on Environment & Public Works
U.S. Senate
Washington, D.C. 20510

Hon. Gary C. Peters
Ranking Member
Committee on Homeland Security and
Government Affairs
U.S. Senate
Washington, D.C. 20510

Dear Chairs and Ranking Members:

On October 29, 2019, I received a letter from the Acting Inspector General of the Environmental Protection Agency ("EPA") pursuant to Section 5(d) of the Inspector General Act of 1978 ("the IG Act"), which is more commonly known as a "Seven Day Letter." I am required by the Act to

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transmit to the appropriate Congressional committees this letter within seven calendar days of receipt. *See* 5 U.S.C. App. 3 § 5(d). This transmittal fulfills this statutory obligation.

Along with this letter, I am authorized by the Act to provide “any comments” that I deem appropriate. *Id.* As such, I am providing this transmittal letter along with two additional attachments: a memorandum that I received from EPA’s General Counsel regarding the Agency’s compliance with the Act and a written response from Ryan Jackson, EPA’s Chief of Staff, to the allegations made about him in the Seven Day Letter.

The Seven Day Letter alleges that Mr. Jackson has refused to cooperate with OIG regarding its ongoing work. I first learned about OIG’s concerns in detail on October 15, 2019, when the Assistant Inspector General sent an email to me seeking assistance from the Agency for Mr. Jackson to comply fully with a request to appear for a second interview as part of an OIG investigation. Since that time, the Agency has attempted to provide reasonable accommodations to OIG: first in a meeting on October 18, 2019 between the Acting Inspector General, Doug Benevento, Associate Deputy Administrator, and the Agency’s General Counsel Matt Leopold. At that meeting Mr. Benevento discussed the parameters of Mr. Jackson’s participation that would be acceptable to the OIG. On October 21, 2019, I understand Mr. Jackson provided an additional offer of accommodation by offering to respond to questions in writing. I understand OIG refused these offered accommodations and instead chose to send the Seven Day Letter. Since I received the Seven Day Letter, I discussed the issue with Mr. Jackson and he has now agreed to a second interview with the Acting Inspector General to attempt to resolve the impasse. However, when I informed the Acting Inspector General of Mr. Jackson’s decision to appear for a second interview, he nonetheless refused to withdraw the attached Seven Day Letter. This decision is troubling and undermines the cooperative and iterative relationship that EPA has shared with its OIG.

Additionally, the IG has also requested that Mr. Jackson identify the person that provided him the testimony of a member of an EPA federal advisory committee prior to a congressional hearing. Mr. Jackson refused to identify the source that provided him that testimony. As explained in the General Counsel memorandum, that implicates constitutional concerns that are ultimately for the Agency and OIG to resolve.

Since the day I joined the Agency, it has been my intent to provide OIG with assistance and access to Agency information necessary for it to complete its important work, in a manner consistent with the Constitution and applicable law. I believe the Agency has provided such assistance in this instance.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew Wheeler", with a long horizontal flourish extending to the right.

Andrew R. Wheeler

[Link to Seven-Day Letter Response Attachments](#)

Agency Response to Draft Report

MEMORANDUM

SUBJECT: Agency Response on the OIG Draft Report, “*Despite Requirements of Inspector General Act, Chief of Staff Refuses to Provide Agency Information for OIG Evaluations; EPA Whistleblower Training Does Not Address Interference with or Intimidation of Congressional Witnesses,*” Project No. OA&E-FY19-0313, dated November 21, 2019

FROM: Doug Benevento, Associate Deputy Administrator Donna Vizian, Principal Deputy Assistant Administrator, Office of Mission Support

TO: Charles J. Sheehan, Acting Inspector General

This responds to your November 21, 2019 draft memorandum (“memo”). We appreciate the opportunity to review the memo to ensure the record on this matter is complete and accurately reflects the Agency’s position. We request that you review the information below and make the suggested corrections.

The memo makes two assertions with which we disagree, and we believe need to be corrected. First, it claims that Chief of Staff Ryan Jackson “Is not Complying with [the] Inspector General Act and [the] Administrator’s Memorandum on Cooperating with the IG,” by not disclosing the identity of the person(s) that provided him with testimony of an EPA advisory board member prior to that testimony being publicly released. In doing so, the memo makes no reference to the November 8, 2019 legal opinion from the EPA General Counsel to the Administrator (attached) addressing the Agency’s obligations in this regard. Second, the memo asserts that the Agency whistleblower training is deficient because it does not “specifically address interfering with or intimidating individuals who seek to communicate with or testify before Congress.” The memo’s finding ignores the fact that EPA provides its employees training approved by the Office of Special Counsel (“OSC”) that is in fact the same training used by the Inspector General’s Office at EPA. The Administrator has also communicated directly with Agency employees their rights and responsibilities regarding prohibited personnel activities and whistleblower protections, see the attached Message from the Administrator. Accordingly, the Agency disputes the memo’s findings and submits the following information to supplement the memo. If OIG chooses to not to incorporate this information, the factual assertions in the memo would be inaccurate and potentially misleading.

With respect to the assertion that Mr. Jackson is violating the IG Act and the Administrator’s guidance to employees, the memo should refer to the legal advice provided to the Administrator in the November 8, 2019 legal opinion from the EPA General Counsel.

To the extent OIG is acting on behalf of Congress to obtain information that is the subject of a Congressional inquiry, separation of powers between the executive and legislative branches support the Agency, not OIG, as having ultimate control of how to accommodate information requests by Congress.

OIG's domain is objective inquiry into waste, fraud, abuse, and mismanagement at the Agency, but it is not authorized, for example, to investigate the Congress itself. This testimony pertains to a hearing being conducted by the legislative branch, and additional Constitutional concerns are implicated given the broad protections for legislative activities defined in the Speech or Debate Clause (Article I, Section 6, Clause 1). How Congress takes testimony or from whom it receives final testimony is not a proper area of inquiry for OIG. Moreover, while I do not purport to create a new legal test here for relevance of the information to OIG in order for it to be obtained, this piece of information does not appear to be even necessary to conduct an "audit" to improve EPA operations. The OIG can only operate within its statutory limits and not occupy the policy role given to the Administrator in EPA's statutes or upend EPA's right to manage its communications to Congress.

While OIG may not concur with this legal opinion, failing to refer to it leaves the impression that the Agency has no basis for this position, which could mislead the public and Congress when the memo becomes public. As you know, we have previously pointed OIG to the process that EPA established for reviewing and approving testimony of its employees, including for special governmental employees that serve on federal advisory committees. My understanding is that the review of this testimony was consistent with that process. In fact, my understanding is that Mr. Jackson conveyed to OIG during an interview that he undertook review of the testimony to ensure that it described accurately the reappointments process to the Agency's Board of Scientific Counselors. These facts should be included in the memo.

Finally, the memo notes that the Agency's whistleblower training does not include training or material related to intimidation or threats to witnesses providing congressional testimony. While this is accurate, it is not complete and therefore may be misleading. The EPA currently utilizes the OSC's 2302(c) Certification Program, the same certification relied upon by OIG. As you know, a 2302(c) Certification Program allows federal agencies to meet the statutory obligation to inform their workforces about the rights and remedies available to them under the Whistleblower Protection Act (WPA), the Whistleblower Protection and Enhancement Act (WPEA), and related civil service laws. 5 U.S.C. § 2302(c). Under the 2302(c) Certification Program, OSC certifies an agency's compliance if the agency meets the following five requirements:

1. Placing informational posters at agency facilities;
2. Providing information to new employees about the WPA/WPEA as part of the orientation process;
3. Providing information to current employees on an annual basis about the WPA/WPEA;
4. Training supervisors every three years on the WPA/WPEA; and
5. Training supervisors annually on how to respond to complaints involving whistleblower protections.

EPA has previously met these requirements and has been received certification from the OSC. Further, because the report properly notes that the whistleblower training provided by the OSC cannot be deviated from a more appropriate finding is: "The Agency complies with the OSC's whistleblower training requirements." However, the Agency would agree to support the OIG in communicating to OSC that certain additional information should be added to future OSC- approved training.